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Stoyanova, Vladislava

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LUND UNIVERSITY

PO Box 117
221 00 Lund
+46 46-222 00 00

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1. MAIN POINTS OF INTERACTION BETWEEN THE LAW ON HUMAN TRAFFICKING AND REFUGEE LAW

For the last decade and a half the problem of human trafficking has become a focal point for a political debate and an object of law-making. This has resulted in the adoption of various anti-trafficking instruments at global and regional levels. These operate in parallel with international refugee law and other human rights norms that protect individuals from *refoulement*. It is thus important to investigate how the two regimes, i.e., the anti-trafficking regime and the protection regime, relate to each other. There are certainly many ways in which refugee law and the law on human trafficking interact with and influence each other. Here I will outline the points of interaction; in the following sections I will elaborate upon them.

First, victims of human trafficking may qualify for refugee status or forms of complementary protection.¹ Importantly, their qualification for international protection may or may not be connected with their trafficking experience.² Second, in the context of the EU legislation, victims

¹ Human trafficking is defined in 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 (UN Trafficking Protocol) as:

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

The definition also adds that the consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means have been used. This definition has been reproduced in the Council of Europe Convention on Action against Trafficking in Human Beings, ETS No. 197 (Coe Trafficking Convention). With some additions, this definition has been also reproduced in the EU 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims [2011] OJ L 101/1 (the EU Trafficking Directive).

² For application of the principle of *non-refoulement* to victims of human trafficking see *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 in Risk of Being Trafficked*, UNHCR Guidelines on International Protection (2006) (UNHCR Trafficking Guidelines); V Stoyanova, 'Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights', 3(2) *Göttingen Journal of International Law* (2011) 777; R Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' 24 *Australian Yearbook of International Law* (2005)

of human trafficking have been designated as vulnerable persons and as applicants for international protection with special reception needs or in need of special procedural guarantees, as these concepts are defined in the EU Reception Conditions Directive (recast)³ and in the EU Procedures Directive (recast).⁴ This designation is important because asylum seekers are often particularly vulnerable to human trafficking and to the related crime of human smuggling.⁵

Third, in a way similar to refugee law, the regional European law on human trafficking⁶ has challenged states' immigration control prerogatives. As a consequence, victims of human trafficking might avert deportation not only due to risk of *refoulement*,⁷ but also due to conferral of recovery and reflection period or due to granting of a residence permit linked with their status as victims of human trafficking.⁸ It is of significance that both possibilities for averting deportation, i.e., the operation of the principle of *non-refoulement* and the possibilities offered by the human trafficking legal framework, are used in parallel and in a non-conflictual way.⁹ The specific circumstances of children need to be distinguished in this context for various reasons. An important one is that those identified as victims of human trafficking cannot be deported prior to risk assessment initiated by the responsible state authorities.

Fourth, similarly to asylum seekers, victims of human trafficking are eligible to certain assistance measures. If an asylum seeker is also determined to be a victim of human trafficking, these assistance measures should complement those available in the course of the refugee status determination procedure. Fifth and related to the assistance measures mentioned above, asylum seekers who are victims of human trafficking are entitled to non-punishment not only on account of their illegal entry or presence on the territory of the host state.¹⁰ They are also entitled not to be punished in relation to any other unlawful activity, including breach of immigration rules, related

159; A Dorevitch and M Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australian's Migration and Refugee Law' 9 *Melbourne Journal of International Law* (2008) 1.

³ Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96 (EU Qualification Directive (recast)).

⁴ Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (EU Asylum Procedures Directive (recast)).

⁵ Human smuggling is defined as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'; art 3(a), Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2241 UNTS 480.

⁶ In particular, the CoE Trafficking Convention and the relevant EU law, i.e., Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 262/19 (the EU Residence Permit Directive).

⁷ See art 33(1), Convention relating to the Status of Refugees, 189 UNTS 150, entered into force 22 April 1954 (Refugee Convention); art 3, Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.005 (ECHR). See also Guiding Principles on Human Rights in the Return of Trafficked Persons (Organization for Security and Cooperation in Europe, 2014) <http://www.osce.org/odihr/124268?download=true> accessed

⁸ States might be also prohibited from deporting migrants since deportation might be contrary to the migrants' right to private and family life. See D Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' 57(1) *International and Comparative Law Quarterly* (2008) 87. This scenario, i.e., prevention of deportation due to breach of private and family life, is not further discussed in this chapter.

⁹ A conflict might arise, e.g., if the initiation of the procedure for being recognized as a victim of human trafficking is considered not compatible with initiation of a refugee status determination procedure. See, e.g., *Asylum Seeking Victims of Human Trafficking in Ireland: Legal and Practical Challenges* (Immigrant Council of Ireland, 2011);

¹⁰ Art 31(1), Refugee Convention.

to the trafficking which they were compelled to do.¹¹ It is essential that asylum seekers who are victims of human trafficking benefit from both non-punishment provisions

Another way in which the two regimes interact concerns procedural issues. For an asylum seeker to benefit from the protection and assistance measures under the human trafficking legal framework, he/she should be identified as a victim. Therefore, it is crucial that in the course of the refugee status determination procedure, victims are identified and referred to the national authorities mandated to assist victims of human trafficking. At the same time, the national authorities responsible for identification and assistance of victims of human trafficking (very likely these are the police, crime investigation authorities or prosecutors) should refer to the asylum procedures those victims who wish to submit claims for international protection.

The above outlined examples reflect ways in which the law on human trafficking and refugee law positively complement and reinforce each other so that migrants who fall within the two regimes can benefit from both at the same time. However, there are also ways in which the two regimes might conflict. An example to this effect is the application of the ‘safe third country’ rule or the Dublin mechanism¹² to applicants for international protection who might be presumed victims of human trafficking and/or who might be conclusively identified as victims of human trafficking.¹³ The application of the ‘safe third country’ rule might demand their transfer to another state, while the law on human trafficking might prevent such transfers.

Another much more disturbing way in which the two regimes might clash relates to the issue of access to territory by asylum seekers. In particular, the law on human trafficking in its global and regional manifestations is a regime whose main objective is enhancement of border control and repressive criminal law measures.¹⁴ This carries the risk of hampering access to the territory of potential countries of protection and thus frustrating access to international protection.¹⁵ This also carries the risk of diversion of refugee movements to more precarious routes, exposing refugees to the mercy of smugglers and transforming smuggling from a service provided against a fee into an exploitative situation amounting to trafficking.¹⁶ Respectively, efforts to combat human trafficking and human smuggling might exacerbate the plight of refugees who do not have safe and regular pathways to international protection.¹⁷ Their only alternative might be human smuggling.

True, it is a problem inherent in international refugee law that it does not address the crucial question of how refugees can have access to the territory of countries where they can find protection.¹⁸ However, it is not only the failure to provide safe routes to asylum countries that

¹¹ Art 26, CoE Trafficking Convention; art 8, EU Trafficking Directive.

¹² Regulation No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31 (the Dublin III Regulation (recast)).

¹³ For the distinction between the two categories (presumed victims and individuals conclusively identified as victims of human trafficking), see V Stoyanova *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, 2017) 101.

¹⁴ See arts 11 and 12, UN Trafficking Protocol; arts 7 and 8, CoE Trafficking Convention.

¹⁵ J Hathaway, ‘The Human Rights Quagmire of “Human Trafficking”’ 49(1) *Virginia Journal of International Law* (2008) 1.

¹⁶ On the distinction between human smuggling and human trafficking see J Bhabha ‘Border Rights and Rites: Generalisations, Stereotypes and Gendered Migration’ in S van Walsum and T Spijkerboer (eds), *Women and Immigration Law. New Variations on Classical Feminist Themes* (Routledge, 2007) 15, 27.

¹⁷ See G Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ 17(3) *International Journal of Refugee Law* (2005) 542.

¹⁸ Even worse states of destination try to prevent the arrival of asylum seekers. T Gammeltoft-Hansen and J Hathaway, ‘Non-refoulement in a World of Cooperative Deterrence’ 53(1) *Columbia Journal of Transnational Law* (2015).

exposes refugees to the risk of human trafficking. Failures and deficiencies in the refugee status determination procedure and in the access to basic reception conditions might also make asylum seekers more vulnerable to trafficking and to exploitation. Failures to register migrants as asylum seekers and absence of basic subsistence can push refugees underground.¹⁹ Therefore, it is crucial that the international protection regime operates efficiently in terms of reception conditions and procedures, so that asylum seekers do not become victims of human trafficking.

Finally, a comparison between the two regimes must not avoid the observation that human trafficking is a criminal law regime underpinned by the assumption that victims will be repatriated. This is reflected in Article 8(1) of the UN Trafficking Protocol and Article 16(1) of the CoE Trafficking Convention that are repatriation provisions. These have the effect of an readmission agreement between the state parties.²⁰ Involuntary return of victims of human trafficking is thus not prevented. It needs to be acknowledged here that CoE Trafficking Convention and the EU law on human trafficking have built a protection regime for victims of human trafficking, which demands their identification, provision of immediate assistance and granting of a recovery and reflection period. However, eventually if the victim is not useful for the criminal proceedings, he/she might be deported.²¹ In contrast, the refugee regime is a protection framework underpinned by the assumption that those eligible for protection under its precepts are allowed to stay and certain rights attach to their status as protected persons.²² Very importantly in this context, the UN Trafficking Protocol and the CoE Trafficking Convention contain saving clauses to the effect that these treaties do not

*affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.*²³

The repatriation dimension of the anti-trafficking framework cannot therefore affect the protection afforded by international refugee law and human rights law. The binding obligation not to return

¹⁹ Perhaps children are the most vulnerable in the context. The EUROPOL has reported that at least 10 000 unaccompanied child refugees have disappeared after arriving in Europe. Many are feared to have fallen into the hands of organized trafficking syndicates. See <https://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees> accessed

²⁰ Stoyanova (n 12) 132.

²¹ Thus Piotrowicz has correctly evaluated the regime as a ‘witness inducement scheme’ and explained that the residence permit is meant to induce the victim to cooperate with the competent authorities in the criminal proceedings. R Piotrowicz, ‘European Initiatives in the Protection of Victims of Trafficking who Give Evidence against Their Traffickers’ 14 *International Journal of Refugee Law* (2002) 263, 267; see also J Vernier, ‘French Criminal and Administrative Law concerning Smuggling of Migrants and Trafficking in Human Beings: Punishing Trafficked People for their Protection?’ in E Guild and P Minderhoud (eds), *Immigration and Criminal Law in the European Union, The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (Martinus Nijhoff Publishers, 2006) 7, 35.

²² See generally J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005). Once the country of origin is able and willing to protect and there is no reason for the refugees to fear persecution, they can be repatriated. J Hathaway, ‘The Meaning of Repatriation’ 9(4) *International Journal of Refugee Law* (1997) 551.

²³ Art 14(1), UN Trafficking Protocol; Art 40(4), CoE Trafficking Convention.

accrues to trafficking persons when they become eligible for refugee status or other forms of complementary protection.

2. VICTIMS OF HUMAN TRAFFICKING AS PERSONS ELIGIBLE FOR INTERNATIONAL PROTECTION

2.1 Refugee Status

When could victims of human trafficking be eligible for refugee status? Certainly, refugee law does not provide protection to every victim simply because he or she has been a victim or is at risk of being re-trafficked. All the elements of the refugee definition as indicated in Article 1A of the 1951 Refugee Convention have to be fulfilled:

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Prior to considering the requirements inherent to this definition,²⁴ the types of claims that victims of human trafficking might raise can be outlined. Danger of re-trafficking, fear of retaliation by the members of the trafficking organizations, fear of being found by the trafficking organization since the victim has not earned the targeted amount of money, lack of social and/or medical assistance in the country of origin, rejection and stigmatization by the local community and/or by the victim's family in the destination state are some examples.²⁵ Another possible type of claim might involve circumstances when the person has not suffered harm in the form of human trafficking, but submits a claim that upon return he/she faces the danger of human trafficking. As required by the refugee definition, in addition to demonstrating prospective risk of harm,²⁶ certain severity threshold needs to be demonstrated so that the harm can be regarded as persecution.²⁷ When the risk is one of trafficking or re-trafficking and given the ambiguity of the definition of human trafficking²⁸ and the uncertainty surrounding the meaning of such terms as 'exploitation' and 'abuse of power or position of vulnerability',²⁹ the severity threshold might

²⁴ The issues of exclusion from refugee status (art 1(F), the Refugee Convention) and exceptions from *refoulement* (art 33(2), the Refugee Convention) are not likely to arise. Even if victims of human trafficking commit crimes (e.g., soliciting for the purposes of prostitution, cannabis production or other criminal activities for which they have been trafficked) the threshold of exclusion might not be met. In addition, under the CoE Trafficking Convention and the EU Trafficking Directive victims are entitled to non-punishment under certain circumstances, which should also be taken note of in this context. See section 6 below.

²⁵ *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 in Risk of Being Trafficked*, UNHCR Guidelines on International Protection (2006), paras 17 and 18.

²⁶ J Hathaway and M Foster, *The Law of Refugee Status* (Cambridge University Press, 2014) 110.

²⁷ *Ibid.*, 182.

²⁸ Stoyanova (n 12) 32–72.

²⁹ See G Noll, '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) 343; J Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' 7 *Albany Governmental Law Review* (2014) 111. See also *Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons* (UN

cause some controversies. However, generally human trafficking is perceived as a serious crime, which means that the threshold of harm could be met for the purposes of the refugee definition. When the risk concerns other of the above mentioned circumstances, e.g., stigmatization by the community in the country of origin, assessment has to be made in light of the particular claim for the purpose of determining whether the severity threshold has been met.

To qualify for a refugee status, it has to be demonstrated that the country of origin will fail to protect the individual. There might be cases when the country of origin is involved in human trafficking through its state agents; however, generally, as the above outlined claims reveal, the prospective harm will emanate from non-state actors of persecution. This necessitates consideration of whether failure of state protection can be demonstrated.³⁰ It has to be established that the state is unable or unwilling to provide protection. In light of the difficulties faced by many countries of origin to tackle human trafficking and to protect victims, evidence demonstrating inability to protect might not be difficult to advance. The protection measures envisioned by the human trafficking legal instruments can be used as guidance when evaluating the adequacy of state protection. Essentially, these measures are not limited to criminalization and effective application of the criminal law.³¹ Rather, states have more far-reaching obligations to protect and assist victim.³² In addition, these measures have to be also viewed in light of states' positive obligations under human rights law.³³

The most likely ground substantiating a claim for refugee status by victims of human trafficking is membership of a particular social group.³⁴ This raises the challenging question of how to apply the concept of particular social group to victims of human trafficking.³⁵ Former victims may be considered a social group based on the unchangeable, common and historic characteristic of having been trafficked.³⁶ A challenge also arises when it has to be determined whether the risk of harm is

Office on Drug and Crime Issue Paper, 2013); *The concept of 'exploitation' in the Trafficking in Persons Protocol* (UN Office on Drug and Crime Issue Paper, 2015).

³⁰ Hathaway and Foster (n 26) 288; see also art 6, EU Directive 2011/95/EU of 13 December 2011 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 (recast) [2011] OJ L 337/9 (EU Qualification Directive (recast)).

³¹ See V Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' 3(2) *Cambridge Journal of International and Comparative Law* (2014) 407.

³² In the context of the UN Trafficking Protocol the provisions concerning victim protection and assistance are hortatory (see arts 6 and 7). See A Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 276.

³³ For further elaboration on this argument see Stoyanova (n 2), 807. For the positive human rights obligations corresponding to the right not to be held in slavery, servitude and forced labour see Stoyanova (n 12) 319–424 and V Stoyanova, 'United Nations against Slavery. Unravelling Concepts, Institutions and Obligations' *Michigan Journal of International Law* (2017, forthcoming).

³⁴ National courts have accepted that 'former victims of human trafficking' could comprise a particular social group in the sense of the refugee definition. *SB (PSG/Protection Regulations – Regulation 6) Moldova CG* [2008] UKAIT 00002; *AZ (Trafficking Women) Thailand CG* [2010] UKUT 118.

³⁵ There is a wealth of literature on the meaning of particular social group. See, e.g., *UNHCR Guidelines on International Protection: 'Membership of a particular social group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to Status of Refugees* (2002).

³⁶ *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 in Risk of Being Trafficked*, UNHCR Guidelines on International Protection (2006), para. 39. For a deeper discussion about how victims of human trafficking can constitute a particular social group and about the challenges raised by the requirements under the EU Qualification Directive, see S Juss, 'Recognizing Refugee Status for Victims of Trafficking and the Myth of Progress' 34 *Refugee Survey Quarterly* (2015) 107.

‘for reasons of’ membership in the group.³⁷ Here it has to be emphasized that the Convention ground need only be a relevant factor contributing to the risk, not the sole or the dominant cause for the risk.³⁸ As Hathaway has suggested, the nexus requirement can be fulfilled even where the persecutor is not motivated to harm by a Convention ground or even where the state of origin is not motivated to withhold protection by a Convention ground, because the risk may still be for reasons of a Convention ground ‘where the Convention characteristic – sex, age, class – puts the victim in harm’s way’. The refugee definition is thus satisfied ‘where sex, age, or class made the applicant vulnerable to trafficking’.³⁹

2.2 Complementary Protection

As opposed to refugee status, for a person to be eligible to complementary protection no nexus requirement needs to be met and no Convention ground need to be demonstrated.⁴⁰ Rather the issue here is whether upon return the person faces a real risk of ill-treatment.⁴¹ Thus the *non-refoulement* guarantee has been extended,⁴² in particular by Article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁴³ and Article 3 of the European Convention on Human Rights (ECHR).⁴⁴ Importantly, ill-treatment caused by private actors could still trigger complementary protection, if the authorities of the receiving state are not able to obviate the risk by providing adequate protection.⁴⁵ As mentioned in the previous section, the positive obligations which states have undertaken regarding victims of human trafficking, who can be designated as a vulnerable group,⁴⁶ could be taken into account in the assessment whether state protection is adequate.⁴⁷

The EU Qualification Directive (recast) has established the separate status of subsidiary protection that while in some respects converges with the protection against *refoulement* under Article 3 of the ECHR, in other respects diverges. A divergence of particular relevance to victims of human trafficking relates to cases where applicants argue that deportation to their country of origin will place them in conditions of severe socio-economic deprivation amounting to inhuman and degrading treatment (i.e., absence of health care, shelter or more generally assistance measures supporting the recovery of the victim). The ECtHR has ruled that under exceptional circumstances

³⁷ J Hathaway, ‘Are Trafficked Persons Convention Refugees?’ in *Forced Migration and the Advancement of International Protection* (International Association of Refugee Law Judges, 2006) 97 <http://www.iarjl.org/general/images/stories/WorldConferences/7-2006-mexico.pdf>

³⁸ Michigan Nexus Guidelines, para 13; UNHCR Trafficking Guidelines, para 29. See also art 9(3), EU Qualification Directive (recast) which only demands a connection between the Convention grounds and the persecution.

³⁹ Hathaway (n 37) 101.

⁴⁰ See J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007).

⁴¹ For a comprehensive analysis how victim of human trafficking could qualify for complementary protection see Stoyanova (n 2) 777.

⁴² For the key contrasts between the Refugee Convention and the protection against *refoulement* offered by art 3 of the ECHR, see C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016) 176–80.

⁴³ Human Rights Committee, General Comment No.20, para 9.

⁴⁴ E Lauterpacht and D Bethlehem, ‘The Scope and Content of the Principle of Non-*Reofulement*’ in E Feller, V Türk, and F Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 78.

⁴⁵ *H.L.R. v. France*, App.No. 24573/94; *Salah Sheekh v. the Netherlands*, App.No. 1948/04, 11 January 2007, para 136; *Auad v. Bulgaria*, App.No.46390/10, 11 October 2011, para 96.

⁴⁶ L Peroni and A Timmer, Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law 11(4) *International Journal of Constitutional Law* (2013) 1056.

⁴⁷ Costello (n 42) 184.

such cases fall within the protective scope of Article 3 of the ECHR in its extraterritorial effect, i.e., the prohibition on *refoulement*.⁴⁸ As opposed to the ECHR, Article 15(b) of the EU Qualification Directive (recast) appears to exclude such types of claims.⁴⁹ Therefore, it is less likely that victims of human trafficking who fear ` form of socio-economic deprivation upon return will be eligible to subsidiary protection as circumscribed under EU law.

Another clarification in relation to the scope of complementary protection pertinent to victims of human trafficking is that Article 4 of the ECHR can also trigger the obligation not to *refouler*. The case of *Ould Barar v. Sweden* shows that the ECtHR can rule that Article 4 of the ECHR that enshrines the right not to be held in slavery, servitude or forced labour, can imply prohibition on deportation upon risk of treatment contrary to Article 4.⁵⁰ Importantly, in *Rantsev v. Cyprus and Russia*, the ECtHR ruled that human trafficking falls within the material scope of Article 4 of the ECHR.⁵¹ Therefore, not only Article 3, but Article 4 of the ECHR can be invoked for the purpose of averting deportation when there is a real risk that the person will experience harm in the form of trafficking or re-trafficking.

3. RECEPTION AND PROCEDURAL GUARANTEES FOR VICTIMS OF HUMAN TRAFFICKING DURING THE INTERNATIONAL PROTECTION PROCEDURE

It is important that the asylum applications submitted by victims of human trafficking are given due consideration with regard to the specificities of their claims as outlined above. It is as much important that victims are afforded certain procedural guarantees and reception conditions that might facilitate the assessment of their asylum applications. The objective of this section is thus to describe what specific guarantees victims of human trafficking are entitled to in the course of the procedure for determining their international protection needs. The focus of the enquiry will be placed on the EU Reception Conditions Directive (recast) and the EU Procedures Directive (recast) since these instruments distinguish the situation of victims of human trafficking who are also applicants for international protection.⁵² More specifically, the first of the above mentioned instruments defines victims of human trafficking as vulnerable persons⁵³ and requires EU member states to assess whether they are applicants ‘with special reception needs’. The nature of these

⁴⁸ *N. v. United Kingdom*, [GC] App.No. 26565/05, 17 May 2008; *Poposhvili v. Belgium*, [GC] App.No. 41738/10, 17 April 2014, 13 December 2016. See K Greenman, ‘A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law’ 27(2) *International Journal of Refugee Law* (2015) 264.

⁴⁹ H Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006) 235–6, where he explains that ‘[t]he requirement in Article 15(b) QD that the ill-treatment occur “in the country of origin however excludes “humanitarian grounds” cases from the scope of [subsidiary protection]’’. This has been confirmed by the CJEU in Case C-542/13 *M’Bodj* [2015] OJ C 65/12, para 35, where it was stated that ‘such harm must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin.’ See see C Bauloz, ‘Foreigners: Wanted Dead or Alive? Medical Cases before European Courts and the Need for an Integrated Approach to Non-Refoulement’ 18 *European Journal of Migration and Law* (2016) 409, 427.

⁵⁰ *Ould Barar v. Sweden*, App.No.42367/98, 19 January 1999. In the particular case, the Court found no risk of ill-treatment contrary to art 4 of the ECHR.

⁵¹ *Rantsev v. Cyprus and Russia*, App.No. 25965/04, 7 January 2010. For an assessment of this extension of the material scope of art 4 see V Stoyanova, ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev case’ 30(2) *Netherlands Quarterly of Human Rights* (2012) 163.

⁵² For a detailed analysis see V. Stoyanova, ‘Victims of Human Trafficking, A Legal Analysis of the Guarantees for ‘Vulnerable Persons’ under the Second Phase of the EU Asylum Legislation’ in C. Bauloz, M. Ineli-Ciger, S. Singer and V. Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Martinus Nijhoff Publishers, 2015) 58–108.

⁵³ Art 21, EU Reception Conditions Directive (recast).

needs should be also determined.⁵⁴ The support provided to applicants with special reception needs has to take into account these needs.⁵⁵ In parallel with the reception conditions required under the EU Reception Conditions Directive (recast), the EU Trafficking Directive imposes obligations upon the EU Member States to assist victims of human trafficking.⁵⁶ It is important that these two assistance frameworks are applied simultaneously and conjunctively to the benefit of victims. It is as much important that victims of human trafficking, who are also applicants for international protection, are afforded specific procedural guarantees. The EU Procedures Directive (recast) has introduced the category of ‘applicant in need of special procedural guarantees’, defined as ‘an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances’.⁵⁷ Human trafficking is not explicitly mentioned as a factor in the assessment of whether an applicant has special procedural guarantees. Rather, Recital 29 of the preamble of the EU Asylum Procedures Directive (recast) simply states that:

Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.

As individuals who have undergone ‘serious forms of psychological, physical or sexual violence’, victims of human trafficking can be identified as applicants for international protection in need of special procedural guarantees. Pursuant to Article 24(3) of the EU Asylum Procedures Directive (recast), the benefit from this identification is that victims have to be provided with ‘adequate support in order to allow them to benefit from the rights and comply with the obligations’ in the directive during the asylum procedure.⁵⁸

Since the EU Reception Conditions Directive (recast) and the EU Asylum Procedures Directive (recast) oblige member states to assess whether applicants for international protection belong to the categories of applicants with special reception needs or are in need of special procedural guarantees, it is important that there is a structured coordination between the asylum procedure and the procedure for identifying migrants as victims of human trafficking.⁵⁹ To this effect, the EU Trafficking Directive ensures that victims of human trafficking are provided with information about the possibility to apply for international protection.⁶⁰ The EU asylum legislation does not contain a provision requiring the national authorities responsible for refugee status determination to refer potential victims of human trafficking to the national body responsible for victim

⁵⁴ Art 22(1), EU Reception Conditions Directive (recast).

⁵⁵ Ibid.

⁵⁶ Art 11, EU Trafficking Directive. See also art 12, CoE Trafficking Convention.

⁵⁷ Art 2(d), EU Procedures Directive (recast).

⁵⁸ Overall, the actual meaning and significance of this provision and the meaning of ‘adequate support’ is hard to determine Stoyanova in Bauloz et al. (n 52) 58, 95; See also C Costello and E Hancox, ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee’ in V Chetail, P De Bruycker and F Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff, 2015).

⁵⁹ See Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures, European Migration Network Study (2014) http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_synthesis_identification_victims_trafficking_final_13march2014.pdf

⁶⁰ Art 11(6), EU Trafficking Directive. There is, however, a qualifier in this provision since it says that such information shall be provided ‘where relevant’.

identification. The failure to make such referrals could result in failures to assist and protect victims, as exposed by the ECtHR judgment of *L.E. v. Greece*.⁶¹ The case was about a Nigerian woman born in 1982 who was trafficked in Greece. Without going into any further detail into the factual substratum of the case, it is important to note for present purposes that she submitted asylum applications. Despite the suspicious circumstances surrounding her case, the national authorities responsible for reviewing these applications never referred her to other national bodies that could have assisted her as a victim of human trafficking.⁶² This exposes the importance of effective referral mechanisms between the different national procedures, i.e., refugee status determination procedure and victim identification procedure.

4. VICTIMS OF HUMAN TRAFFICKING AND THE SAFE THIRD COUNTRY CONCEPT
Victims of human trafficking who seek asylum can be negatively affected not only by deficient procedural guarantees and inadequate reception conditions, but also by the operation of certain rules intended to prevent the substantive determination of their international protection needs. More specifically, domestic and regional rules have emerged to the effect that asylum seekers might be required to seek protection in some country other than that to which they have travelled and applied for asylum. These are usually framed as ‘safe third country’ or ‘protection elsewhere’ rules.⁶³ The Dublin mechanism established with the Dublin Regulation which operates within the EU is also an expression of these rules. Its objective is to lay down the criteria and the mechanism for determining the member state responsible for examining an application for international protection lodged in one of the member states.⁶⁴ The objective of this section is to examine whether there are any specificities concerning the application of the ‘safe third country’ rules in the context of applicants for international protection who are also victims of human trafficking. Such specificities might be expected because despite the operation of the ‘safe third country’ rule, states might have adopted separate obligations concerning victims of human trafficking. These obligations might prevent the transfer of victims.

At global level, no obligations accrue to states in terms of not deporting victims. Article 7(1) of the UN Trafficking Protocol stipulates that ‘[...] each State Party *shall consider* adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporary or permanently, *in appropriate cases* [emphasis added]’. This is a provision which expresses nothing more than a recommendation. Thus, it is not likely that the UN Trafficking Protocol has any transformative potential to positive influence the general standards under international refugee law as to the deportation of victims, including in the context of their return to ‘safe third countries’.⁶⁵

The situation is, however, materially different in the context of Council of Europe and EU law. The CoE Trafficking Convention is quite clear to the effect that ‘upon reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory’ until the identification process is completed.⁶⁶ The Convention also adds that upon reasonable grounds to believe that the person is a victim, he or she is to be granted a recovery and reflection period of at least 30 days. During this period removal shall be

⁶¹ *L.E. v. Greece*, App.No.71545/12, 21 January 2016.

⁶² V Stoyanova, ‘L.E. v. Greece: Human Trafficking and the Scope of States’ Positive Obligations under the ECHR’ 3 *European Human Rights Law Review* (2016) 290, 297.

⁶³ Hathaway and Foster (n 26) 30.

⁶⁴ Art 1, Dublin III Regulation (recast).

⁶⁵ For such standards, see Hathaway and Foster (n 26) 30.

⁶⁶ Art 10(2), CoE Trafficking Convention.

prevented.⁶⁷ Finally, victims of human trafficking are entitled to a residence permit when their stay is necessary ‘owing to their personal situation’ or ‘for the purpose of their co-operation with the competent authorities in investigation and criminal proceedings’.⁶⁸ Although with some nuanced differences, the EU law contains similar provisions.⁶⁹ These can certainly come in conflict with the ‘safe third country’ rule, including the Dublin mechanism.⁷⁰ One can imagine a scenario where a person has entered the EU through, say, Greece, and then been trafficked and subjected to exploitation in, say Germany. Under the Dublin mechanism Greece might be responsible for reviewing that person’s application for international protection. However, any transfer from Germany will have to be subjected to the above outlined rules from the European human trafficking law, including non-removal until completion of the identification process and extension of a reflection period.⁷¹

Even if it is eventually determined that the victim of human trafficking shall not to be granted a residence permit since he or she is not useful in the course of any criminal proceedings and there are not particular individual circumstances that warrant non-removal,⁷² Dublin transfers might be averted for further reasons. In *M.S.S. v. Belgium and France*, a case involving a Dublin transfer of an asylum seeker from Belgium back to Greece, the ECtHR had to address the question whether Belgium was responsible under Article 3 of the ECHR for exposing the applicant to degrading living conditions by sending him back to Greece.⁷³ The Court answered in the affirmative by emphasizing that Belgium had knowledge about the conditions in Greece, which were assessed as degrading for inter alia the following reasons: the applicant’s status as ‘an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection’; the existence of a broad consensus concerning the special protection for asylum-seekers;⁷⁴ the insecurity and vulnerability of asylum-seekers⁷⁵ and the fact that he was in circumstances wholly dependent on state support.⁷⁶ By way of an analogy with this reasoning, the assessment whether there is a risk of exposing the applicant to degrading conditions, as described above, upon return has to be influenced by his or her status as a victim of human trafficking. This implies an assessment of whether there is sufficient support in the country tailored to the specific situation and needs of victims of human trafficking. The ECtHR judgment in *Tarakhel v. Switzerland* further supports this line of reasoning.⁷⁷ In *Tarakhel v. Switzerland*, the Strasbourg

⁶⁷ Art 13, CoE Trafficking Convention.

⁶⁸ The state parties to the CoE Trafficking Convention are also under the obligation to issue residence permits when the competent authorities considers that victims’ stay is necessary owing to their personal situation (art 14(1)(a)). The ambiguity of the term ‘personal situation’ leaves wide scope of discretion to states in terms of determining the circumstances when victims are to be granted permits under this limb.

⁶⁹ Arts 6 and 8, EU Residence Permit Directive. For the differences between the CoE and the EU legal regimes for protection of victims of human trafficking see Stoyanova (n 2) 448.

⁷⁰ Importantly, the Dublin III Regulation (recast) has increased the possibility of detecting and potentially identifying victim of human trafficking with its provision requiring the conduction of a person interview with the applicant (see art 5 of the regulation).

⁷¹ For a detailed analysis see Stoyanova in Bauloz et al. (n 52) 58, 100–107.

⁷² Art 14(1), CoE Trafficking Convention; art 8, EU Residence Permit Directive.

⁷³ *M.S.S.v. Belgium and Greece*, [GC] App.No. 30696/09, 21 January 2011, paras 365–368; See also

⁷⁴ *Ibid.*, para.251.

⁷⁵ *Ibid.*, para. 259.

⁷⁶ *Ibid.*, para.253.

⁷⁷ *Tarakhel v. Switzerland*, [GC] App.No.29217/12, 4 November 2014.

court took into account the specific situation of the applicant and held that in light of their particular circumstances their transfer back to Italy could be in violation of Article 3 of the ECHR.⁷⁸

6. NON-PUNISHMENT

The 1951 Refugee Convention contains a catalogue of rights that attach to the refugee status.⁷⁹ One of these is the right not to be punished for certain activities under certain circumstances. In particular, Article 31(1) of the Refugee Convention stipulates that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Victims of human trafficking who apply for international protection can benefit from the above quoted provision provided that the necessary requirements are met (coming directly from the territory where their life or freedom was threatened, present themselves to the authorities without delay, etc.).⁸⁰ Importantly, victims can also benefit from non-punishment concerning other crimes related to the harm that they have suffered as victims of human trafficking. It is essential that asylum seekers who are victims of human trafficking benefit from both non-punishment provisions.

Although at global level there has been a general agreement that victims should not be punished for crimes that they might have committed in relation to their trafficking (breaches of immigration control rules, use of false passport or other documents, soliciting for the purposes of prostitution if criminalized at national level, etc.),⁸¹ the UN Trafficking Protocol does not contain a legally binding provision to this effect.⁸² In contrast, the CoE Trafficking Convention and the EU Trafficking Directive contain relevant provisions. Article 26 of the CoE treaty stipulates that

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their

⁷⁸ Ibid., para 122:

[...] were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family will be kept together, there would be violation of Article 3 of the Convention.

⁷⁹ See generally Hathaway (n 22).

⁸⁰ For a detailed analysis see G Noll, 'Article 31(Refugees Unlawful in the Country of Refuge)' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol A Commentary* (Oxford University Press, 2011) 1243.

⁸¹ Guideline 4, Recommended Principles and Guidelines on Human Rights and Human Trafficking, UN Office of the High Commissioners for Human Rights, E/2002/68/Add.1.

⁸² Creative arguments might be developed to the effect that punishing victims for crimes related to the trafficking is contrary victims' rights under human rights law. For example, subjecting victims to criminal punishment for crime which they were coerced to commit in relation to their victimization, could be in violation to the right to private and family life and/or to the right not to be subjected to inhuman or degrading treatment. There have, e.g., been unsuccessful attempts to argue that prosecuting an asylum seeker for possession of a false document constitutes an unjustified interference with private life. See *SXH v. Crown Prosecution Service* [2014] EWCA Civ 90, 6 February 2014.

*involvement in unlawful activities, to the extent that they have been compelled to do so.*⁸³

Article 8 of the EU Trafficking Directive resembles the above quoted provision from the CoE treaty.

For asylum seekers who are also victims of human trafficking to benefit from the two legal frameworks which require non-punishment, it is essential to take note of the differences between Article 31(1) of the Refugee Convention and Article 26 of the CoE Trafficking Convention.⁸⁴ The first one is limited to specific crimes, i.e., illegal entry or presence. The second of the above mentioned provisions can be also applied to the crimes of illegal entry or presence; at the same time, however, it has wider application since it could be of relevance to any crime related to the fact that the person has been a victim of human trafficking. Such a crime could be, for example, cannabis production (when the person has been trafficked for the purpose of cannabis production). Another point of diversion between the two norms is that Article 31(1) of the Refugee Convention does not require coercion. It is, in fact, acknowledged that refugees flee their countries and breach other countries' immigration rules related to entry and presence to escape persecution.⁸⁵ In comparison, Article 26 of the CoE Trafficking Convention does require coercion so that the person concerned can benefit from non-punishment.⁸⁶ Accordingly, depending on the particular circumstances of the case, the specific requirements of each norm need to be carefully considered.

7. CHILDREN VICTIMS OF HUMAN TRAFFICKING

So far the analysis was focused generally on victims of human trafficking who apply for international protection. This analysis is certainly relevant to children; at the same time, however, it has to be observed that international law confers special protection to children. This is manifested in the UN Convention on the Rights of the Child.⁸⁷ The EU asylum law also confers special protection to children, including unaccompanied children.⁸⁸ The anti-trafficking legal framework also takes note of the special circumstances of children. There is a separate definition of trafficking of children in international law⁸⁹ and specific provisions addressing children, including unaccompanied children.⁹⁰ Moreover, there are separate instruments at global and regional levels addressing the exploitation of children more generally.⁹¹ At this junction it should be also added

⁸³ See R Piotowicz and L Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle' 16 *Human Rights Law Review* (2016) 669.

⁸⁴ For detailed analysis see Stoyanova (n 2) 158.

⁸⁵ *R. v. Uxbridge Magistrates Court & Another, ex parte Adimi* [1999] EWHC Admin 765.

⁸⁶ For interpretation of the meaning of coercion in this context see Explanatory Report to the CoE Trafficking Convention, para 273

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3812> accessed

⁸⁷ Art 22(1), Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990. See J Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, 2017).

⁸⁸ Art 20(3), EU Qualification Directive (recast); arts 14, 21, 23, 24, EU Reception Conditions Directive (recast); arts 10(3)(d), 15(3)(e), 25, EU Asylum Procedures Directive (recast); arts 6, 8, 16, EU Dublin Regulation III (recast).

⁸⁹ Art 3(c), UN Trafficking Protocol; art 4(c), CoE Trafficking Convention; art 2(5), EU Trafficking Directive.

⁹⁰ Art 6(4), UN Trafficking Protocol; art 10(3) and (4), art 14(2), art 16(7), CoE Trafficking Convention; arts 13, 14, 15, 16, EU Trafficking Directive.

⁹¹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, GA Res A/Res/54/263 of 25 May 2000, entered into force 18 January 2002; CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No.201, entered into force 1 July

that the International Labour Organization has adopted specific instruments addressing exploitation of child labour.⁹² Space does not permit an elaborate discussion of all these instruments and their interactions. It suffices to mention that the European anti-trafficking legal framework contains a robust provision to the effect that when the age of the victim of human trafficking is uncertain and there are reasons to believe that the victim is a child, ‘he or she shall be presumed to be a child and shall be accorded special protection pending verification of his/her age’.⁹³ Similar automatic presumption does not operate in the EU asylum legislation,⁹⁴ which might result in the following paradoxical situation. A person is presumed as a child for the purposes of his assistance and protection as a victim of human trafficking; and, at the same time, not necessary presumed as a child in the course of determination of his or her international protection needs.

The CoE Trafficking Convention is also very clear to the effect that ‘[c]hild victims shall not be returned to a state, if there is indication, following a risk and security assessment, that such return would not be in the best interest of the child’.⁹⁵ The significance of this provision lies in the requirement upon states for conducting automatic risk and security assessment prior to any return. It is the national authorities that have to initiate such an assessment in relation to children victims of human trafficking.

8. ANTI-TRAFFICKING MEASURES IN CONFLICT WITH REFUGEE RIGHTS?

In contrast to the previous sections that primarily aimed at reading of the pertinent legal norms in a way that steers away from practices that lock migrants into one regime, i.e., refugee law or human trafficking law, denying them benefits potentially available in the other, the objective of this section is to look at the frictions between the regimes. In particular, a source of clash is that efforts to combat human trafficking and human smuggling might exacerbate the plight of refugees who do not have safe and regular pathways to international protection.⁹⁶ In addition, countries of origin are under pressure to control the irregular movement of their own nationals.⁹⁷ More specifically, it has been reported that countries of origin and transit use anti-trafficking as a pretext to hamper departure and on-ward travel of individuals.⁹⁸ As a consequence, concerns have arisen that ‘the antitrafficking campaign has [...] resulted in significant collateral human rights damage by providing a context for developed states to pursue a border control agenda under the cover of

2010; Directive 2011/92 of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography [2011] OJ L 335/1.

⁹² Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182) entry into force 19 November 2000.

⁹³ Art 13(3), CoE Trafficking Convention; see also art 13(2), EU Trafficking Directive. See also art 8(2) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which is framed in much weaker way.

⁹⁴ Art 15(5), EU Asylum Procedures Directive (recast). For an analysis see G Noll, ‘Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum’ 28(2) *International Journal of Refugee Law* (2016) 234.

⁹⁵ Art 16(7), CoE Trafficking Convention.

⁹⁶ See Security Council Resolution 2240 (2015), 9 October 2015, which authorizes states to exercise exceptional powers with respect to ships suspected of being engaged in human trafficking and migrant smuggling on the high seas off the coasts of Libya.

⁹⁷ *The Right to Leave*, Commissioner for Human Rights Issue Paper (Council of Europe, 2013) 53 (‘[...] the authorities of third states change their rules, regulations and practices in order to assist the EU in its objectives regarding controls on persons.’).

⁹⁸ See K Kampadoo (ed), *Trafficking and Prostitution Reconsidered. New Perspectives on Migration, Sex Work, and Human Rights* (Paradigm Publishers, 2005); L Augustin, *Sex at the Margins* (Zed Books, 2007).

promoting human rights'.⁹⁹ These concerns are ever so poignant in the light of what has been framed as a world of 'cooperative deterrence' in which refugees are prevented from reaching safe heaven.¹⁰⁰

The UN Trafficking Protocol and the UN Smuggling Protocol criminalize certain forms of migration and have prominent migration control agendas. Both protocols impose obligations upon the state parties to 'strengthen, to the extent possible, such border controls as may be necessary to prevent and detect' respectively the smuggling of migrants and the trafficking in persons.¹⁰¹ The question thus arises whether these measures are compatible with refugee law and with international human rights law. The discussion in this section will focus on the right to leave as enshrined in Article 12(2) of the ICCPR and regional human rights instruments.¹⁰² Could the anti-trafficking and the anti-smuggling measures be contrary to the right to leave? My engagement with this question is without prejudice to other rights that might be at stake (e.g., the right not to be subjected to *refoulement*). However, to make the analysis manageable I will limit it to the right to leave under human rights law.

The right to leave is not framed in absolute terms. It can be restricted when the restriction is provided by law, serves some of the purposes indicated in Article 12(3) of the ICCPR and is necessary and proportionate. The purposes for which limitations can be imposed are framed very vaguely (national security, public order, etc.) and it can be easily argued that any limitation achieves some of these purposes.¹⁰³ Although the purpose of preventing human smuggling and human trafficking is not explicitly indicated in the text of Article 12(3), this purpose could be read into 'public order'. The core of the analysis thus is on the proportionately of any limitation on the right to leave. This allows a wide scope for qualitative reasoning since whether a limitation is proportionate depends on the particular factual circumstances. The Human Rights Committee (HRC) has not been helpful in terms of elucidating us as to what might weight in the proportionality assessment in the specific context that is of interest for this chapter.¹⁰⁴ However, in its General Comment No.27: Article 12 (Freedom of Movement) the HRC has used very strong words. Not only any restriction on the right to leave has to be proportionate, but states have to use the '*least intrusive instrument* amongst those which might achieve the desired result'.¹⁰⁵ As a consequence, any limitations have to be construed very strictly and in a way that does not

⁹⁹ Hathaway (n 15), 26. For a response see A Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' 49(4) *Virginia Journal of International Law* (2009) 789.

¹⁰⁰ Gammeltoft-Hansen and Hathaway (n 18).

¹⁰¹ Art 11(1) of both protocols.

¹⁰² See, e.g., Art 2, Protocol 4 of the European Convention on Human Rights.

¹⁰³ D Kochenov, 'The Right to Leave any Country' in R Pender (ed) *International Migration Law* (Martinus Nijhoff, 2012).

¹⁰⁴ See General Comment 27 Freedom of movement (art 12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 11-18, where some general guidelines as to the application of the restrictions are provided.

¹⁰⁵ General Comment 27, para.14. An important caveat has to be acknowledged here. Despite the strong language used in text of General Comment 27, in its communications the HRC does not apply the 'least intrusive' test. For example, in *Lauri Peltonen v. Finland*, Communication No.492/1992, U.N. Doc. CCPR/C/51/D/492/1992 (1994), the HRC simply held that the state could 'impose reasonable restrictions on the rights of individuals who have not yet performed such [mandatory national] service to leave the country until service is completed'. In *Ismet Celepli v. Sweden*, Communication No.456/1991, U.N. Doc. CCPR/C/51/D/456/1991 (1994), the HRC did not expressly engage in a balancing between the significance of the person's right to freedom of movement and the security concern of the government. In *Mrs Samira Karker on Behalf of her Husband Mr. Salah Karker v. France*, Communication No.833/1998, UN Doc CCPR/C/70/D/833/1998 (2000), para 9.2, at no point did the HRC ask the question whether any less intrusive measures could have been applied by the government.

undermine the essence of the right. In other words, ‘the relation between right and restriction, between norm and exception, must not be reversed’.¹⁰⁶

Do the UN Trafficking and Smuggling Protocols modify the above analysis by making it easier for countries justify measures designed to prevent leaving? In other words, do these protocols shift the proportionality analysis in favour of states interests? In alternative, are these protocols inherently suspect in light of the above proposed analysis. The protocols have two objectives that are relevant to the present discussion: (i) criminalization of human smuggling and trafficking and enablement of inter-state cooperation for the suppression of these two crimes by ensuring double criminality;¹⁰⁷ (ii) strengthening of border control measures. How does each one of these affect the right to leave?

The Smuggling Protocol permits and even requires from states to prevent leaving when this involves smuggling.¹⁰⁸ Although on face value it targets the smugglers, it has real and serious implications for the right to leave for those, including refugees, who use the services of smugglers. In relation to the UN Trafficking Protocol, arguments that countries of origin have to protect their nationals from trafficking and thus from migrating towards future ‘exploitation’ (whatever ‘exploitation’ might mean),¹⁰⁹ can weight in the proportionality assessment and eventually more easily justify limiting the right to leave.¹¹⁰

At this juncture, we should remind ourselves of the saving clauses in the protocols.¹¹¹ These suggest that human rights law, including the right to leave, trump the UN Smuggling Protocol and the UN Trafficking Protocol. Does this mean that states cannot impose restrictions on the right to leave even if leaving implies using smugglers and traffickers? The answer to this question is not necessary positive. The issue comes down to whether the requirements, including the proportionality and necessity test, for legitimate restrictions on the right to leave are met. In this proportionality assessment, factors favoring anti-smuggling and anti-trafficking measures might have to be balanced against other factors.

Finally, how do the above mentioned saving clauses interact with the 1951 Refugee Convention?¹¹² Although the convention does not address the issue of how refugees leave their countries of origin and come within the jurisdiction of countries of surrogate protection,¹¹³ Article 31(1) of the Refugee Convention clearly recognizes that refugees can resort to illegal entry, which can be interpreted as an acknowledgment that refugees can use human smuggling. However, Article 31(1) of the Refugee Convention does not refer to smuggling; it rather refers to illegal entry. Therefore, this provision is not concerned with the organization of the refugees’ illegal entry by third parties (i.e., the smugglers). In this sense, on a textual interpretation, the Smuggling Protocol appears to be in harmony with the text of Article 31(1) of the Refugee Convention.

¹⁰⁶ General Comment 27, para 13.

¹⁰⁷ N Boister, *Introduction to Transnational Criminal Law*, (Oxford University Press, 2012), 14.

¹⁰⁸ See, e.g., art 11(1), UN Smuggling Protocol.

¹⁰⁹ On the ambiguity of the definition of human trafficking and the term ‘exploitation’ in international law see Noll (n 29), 343, 347–9; J O’Connell Davidson and B Anderson, ‘The Trouble with Trafficking’ in C van den Anker and J Doomernik (eds), *Trafficking and Women’s Rights*, (Palgrave MacMillan, 2006) 11, 17.

¹¹⁰ See *Rantsev v. Cyprus and Russia* (n 51), para 260, where one of the respondent governments, i.e., Russia, argued that any system of preventing measures to protect citizens going abroad from human trafficking, could come into conflict with art 2 of Protocol 4 of the ECHR, which enshrines the right to leave any country. Russia argued that there has to be a fair balance between any measures aimed at protection of individuals from potential trafficking and the right to leave any country. Unfortunately, the ECtHR did not address the issue raised by Russia.

¹¹¹ Art 14(1), UN Trafficking Protocol; art 19, UN Smuggling Protocol.

¹¹² Convention relating to the Status of Refugees, 189 UNTS 150, *entered into force* April 22, 1954.

¹¹³ Hathaway (n 22).

Importantly, the Smuggling Protocol does not aim to target the migrants who use the services of smugglers, but rather the smugglers.

In conclusion, international law does not give us easy answers to the question posed in the beginning of this section. The Smuggling and the Trafficking Protocols have conscripted countries of origin and transit to control irregular movement. By virtue of the safeguarding clauses in the protocols, human rights law trumps. However, human rights law does not provide us with hard rules when it comes to the parameters of the right to leave. Limitations on the right are allowed provided that they comply with certain requirements. The most salient of these is that any limitation has to be necessary and proportionate. It is doubtful whether sweeping measures of preventing people from leaving, as those envisioned by the protocols, with severe consequence for refugees, who are in fact allowed to use illegal means of migration, can be regarded as proportionate.

9. CONCLUSION

In many respects, the law on human trafficking and refugee law converge in terms of enhancing the protection standards. Victims of human trafficking can qualify for refugee status and other forms of protection against *refoulement*, which complements the possibilities offered under the human trafficking regime for averting deportation. Victims of human trafficking who have applied for international protection might be eligible for special reception and procedural guarantees due to their particular vulnerabilities. In the context of determining their international protection needs, victims of human trafficking might be shielded from the application of such restrictive rules as the ‘safe third country’ rule. They might be also shielded from punishment not only on account of their illegal entry or presence, a guarantee provided by refugee law, but also in relation to crimes correlated with their trafficking. Finally, special consideration is due to asylum-seeking children who are victims of human trafficking. Both refugee law and the law on human trafficking acknowledge their special situation and contain norms to this effect.

As this chapter has demonstrated, however, many of the protection measures emerging from the human trafficking legal framework are limited to its regional, i.e., Council of Europe and EU, manifestation. It is the European anti-trafficking framework that contains binding obligations to assist and protection victims of human trafficking. In contrast, the universal framework is very weak in this respect, which is a reason for concern. There are further reasons for concerns related to the disturbing effects of the anti-trafficking regime on the rights of refugees. In particular, the anti-trafficking and the interrelated anti-smuggling measures adopted by states have a negative impact on the refugees in terms of their possibilities to leave countries of origin and to access the territory of countries of asylum. As my short analysis had demonstrated, there are no secure, easy and unqualified arguments that in this respect the international law on human trafficking and smuggling is necessary contrary to refugee law and human rights law. Ultimately, however, all the protection and assistance measures discussed in sections 1–7 of this chapter will be almost meaningless, if individuals in need of protection cannot reach safe shores.