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Protecting Trafficked Persons through Refugee Protection

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Abstract: This paper critically engages with the long-term protection of trafficked persons. In particular, it assesses whether, and the conditions under which, trafficked persons can be considered as refugees under Article 1A of the Geneva Refugee Convention. The importance of international refugee law in this context is highlighted both by the number of trafficked persons seeking international protection and by its suitability to overcome the shortcomings of existing protection provisions in anti-trafficking instruments, which remain discretionary, conditional, and limited in scope. The paper begins by discussing the relevance of refugee protection for trafficked persons. It then applies the various components of the refugee definition to trafficked persons, focusing on the concepts of persecution and membership of a particular social group. Within these, it focuses on aspects of the debate that are currently missing from the broader literature. This includes the question of whether trafficking qua trafficking meets the threshold of persecution and the value of developments in international law in that regard, the merit of using race as a convention ground in cases of trafficked persons, and the contribution of legislative developments recognizing former victims of trafficked persons as members of a particular social group. It then concludes by highlighting the benefits of refugee protection for trafficked persons and indicating the challenges on the road to that protection.

Keywords: human trafficking; modern slavery; asylum; forced migration; refugee protection



Citation: Gauci, Jean-Pierre. 2022. Protecting Trafficked Persons through Refugee Protection. *Social Sciences* 11: 294. <https://doi.org/10.3390/socsci11070294>

Academic Editors: Patricia Hynes and Hannah Lewis

Received: 3 April 2022

Accepted: 20 June 2022

Published: 8 July 2022

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1. Introduction

Whilst many people emerging from situations of trafficking will be able to go back to their families and society and receive protection from their State of origin, some will be unable or unwilling to do so. Some would face serious risk of harm, even persecution, were they to return to their previous circumstances, including (but not limited to) risks of re-trafficking, violence, and threats and ostracism by their communities. This paper considers whether and how refugee law offers prospects for the long-term protection of trafficked persons. It argues that refugee protection forms a necessary and viable channel for protecting trafficked persons and explores some of the factors that ought to be considered to ensure access to and enjoyment of such protection by trafficked persons.

Increasingly, trafficked persons have sought and received asylum based on risks associated with their experiences of having been trafficked or being at risk of trafficking in the future. This paper focuses on trafficked persons within the meaning of trafficking provided by the Trafficking Protocol¹ and later replicated by the Council of Europe, European Union, and ASEAN instruments. Article 3 of the Protocol provides that:

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

This paper is therefore not focused on any specific subset of trafficked persons (such as trafficked women) or on forms of exploitation (such as sexual exploitation). This is

partly in recognition of the harms experienced by men in the trafficking context and a challenge to what Magugliani describes as ‘the broader issue of misidentification, or non-identification of trafficked persons amongst the *non-ideal victims*’ of trafficking (Magugliani 2022). Trafficking must be clearly distinguished from migrant smuggling, albeit the two concepts do intersect and can in some contexts be seen as different points on a continuum of coercion and exploitation (Buckland 2009). Smuggled migrants per se are not discussed here except to the extent that they become trafficked persons in situations where a smuggling situation transforms into a situation of trafficking.

Moreover, this paper is not intended as an overview of all protection opportunities for trafficked persons under international law.² It focuses on the recognition of trafficked persons as refugees, as defined under Article 1A of the Geneva Refugee Convention, namely:³

Any person who, owing to a 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.

Other forms of protection, including subsidiary protection and other complementary forms of protection, are not discussed here. The lack of emphasis on these avenues should not be read as suggesting that they do not offer viable protection options for trafficked persons.⁴ Refugee protection is considered desirable because of the status and rights that it carries with it, and its global applicability (as opposed to, for instance, subsidiary protection, which is limited to European Union Member States). Status of being a victim of trafficking is discussed briefly, notably to differentiate such persons from refugee protection.

This paper asks whether and the conditions under which trafficked persons meet the definition of refugee as set out in Article 1A of the Refugee Convention. It is structured as follows: Part I contextualises the issue by outlining the legal instruments that will frame the discussion. Part II maps some of the overlaps between trafficking and asylum and outlines the added value of asylum as a channel for the protection of trafficked persons. Part III addresses the issue of persecution, focusing on the recognition of trafficking qua trafficking as persecution and highlighting some issues, particularly the place of persecution, that make trafficked persons a specific subset within asylum seekers. Part IV focuses on convention ground nexus, critically engaging with the legislative development in Norway that explicitly recognises ‘former victims of human trafficking’ as ‘members of a particular social group’ and with race as an under-utilised convention ground in trafficking-based claims. Part V provides some concluding remarks.

2. Context and Legal Mapping

The international legal framework for addressing the issue of human trafficking cuts across a broad range of instruments at the universal, regional, and sub-regional level, involving hard (binding) and soft law (guidance) instruments. It also cuts across a spectrum of areas of international law including human rights, transnational and international criminal law, humanitarian law, and international labour law. It reflects legal intersectionality. The core instrument for the modern understanding of trafficking is the 2001 Trafficking Protocol,⁵ adopted under the aegis of the United Nations Office on Drugs and Crime, which provides the internationally agreed definition of trafficking (outlined above). It also provides a basic set of obligations for States with respect to the criminalisation of trafficking, and cooperation in its prevention and the protection of trafficked persons. The Protocol is adopted as a Protocol to the Convention on Transnational Organised Crime,⁶ explaining the law enforcement priority that is clearly evident in the Protocol. The Protocol underpins regional and sub-regional instruments such as the 2005 Council of Europe Convention on action against trafficking in human beings,⁷ the European Union 2011 Trafficking Directive⁸ and the ASEAN Convention Against Trafficking in Persons adopted in 2015.⁹

Beyond the specific anti-trafficking instruments, one finds direct references to trafficking as a human rights concern in a range of instruments including the European Union Charter of Fundamental Rights,¹⁰ the Arab Charter of Human Rights¹¹ and the American Convention on Human Rights.¹² These provisions support the argument for recognising trafficking qua trafficking as persecution. We return to that point later. Moreover, as will also be discussed later, regional courts have also placed trafficking squarely within the framework of the prohibition on slavery, servitude, and forced labour as enshrined in Article 8 of the International Covenant on Civil and Political Rights¹³ and Article 4 of the European Convention on Human Rights.¹⁴ More specific human rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁵ the Istanbul Convention on Violence Against Women¹⁶ and the Convention on the Rights of the Child all include provisions prohibiting human trafficking.¹⁷ Other rights enshrined in international human rights instruments are also relevant to anti-trafficking, including, inter alia: the prohibition of torture, cruel and inhumane treatment,¹⁸ the right to the enjoyment of just and favourable conditions of work,¹⁹ the prohibition of arbitrary detention, the right to life, liberty, and security of person, the right to an effective remedy, freedom of movement, prohibition of the arbitrary deprivation of property, and the right to rest and leisure.²⁰

Furthermore, trafficking (or specific elements thereof) is also a concern for international labour law, most notably under the ILO Convention No. 29 concerning Forced or Compulsory Labour,²¹ Convention No. 105 concerning the abolition of forced labour,²² and Convention No. 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour.²³ It is also a concern in the migrants' rights instruments, most notably the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families²⁴ and referred to international criminal law in the Rome Statute of the International Criminal Court (William 2010; Gauci and Farias 2021).²⁵ Several soft law instruments are also relevant to the present discussion, including the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking,²⁶ the Sustainable Development Goals, and the UN Global Compact on Safe, Orderly Migration.

In the context of refugee law, the most relevant instruments include the Geneva Refugee Convention and its 1967 New York Protocol, as well as a series of regional and subregional instruments including the Cartagena Declaration, the OAU Convention on the Status of Refugees in Africa, and the EU Qualification Directive. Specifically on trafficking-based asylum claims, the UNHCR Guidelines relating to 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,²⁷ and the GRETA Guidance on Trafficking and International Protection (issued in 2020) are particularly relevant. Whilst not legally binding, these guidelines build on State practice and carry persuasive weight especially as they are adopted by international bodies entrusted with overseeing the interpretation and application of the relevant instruments. The range of sources of law relating to human trafficking, as well as to refugee protection, reflects the intersectionality inherent in trafficking-based asylum claims. Before we address these issues, however, it is worth highlighting why refugee protection is required for protecting trafficked persons.

3. Overlaps between Trafficking and Asylum

Asylum and human trafficking intersect and overlap in multiple ways. Overlaps include causes and push factors, shared means of transport and overlapping criminal enterprises, the vulnerability of refugees and other displaced persons to trafficking, the use of asylum as a means of legitimising the stay of trafficked persons, the opportunities of refugee status determination for the identification of and to raise awareness of trafficking with potentially trafficked persons, the impact of border closures on vulnerability to trafficking, the way asylum policy can cause destitution heightening vulnerability to trafficking, the impact of the non-punishment principle in anti-trafficking law on the application of the

exclusion and cessation clauses under the Refugee Convention, and the involvement of refugees as perpetrators of trafficking in some cases. Decisions by trafficking-status bodies are often a consideration for refugee status determination bodies (even when they should not be).

These overlaps are also acknowledged in the legal frameworks, not least through the requirement in anti-trafficking instruments that measures implemented in combatting trafficking do not impinge on the right of individuals to seek asylum.²⁸ For example, Article 14 of the Trafficking Protocol provides that:

Nothing in this Protocol shall 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.

The provision is replicated verbatim in Article 40(4) of the Council of Europe Convention. The other instruments require an active role, such as a duty of States to inform trafficked persons of their right to seek international protection. Article 11(6) of the EU Trafficking Directive, for instance, refers to, *inter alia*, ‘information on the possibility of granting international protection’. The following sections untangle one of the various points of overlap, namely the possibility of trafficked persons receiving long-term protection through refugee law.

Why Asylum?

The dominance of law enforcement priorities in the Trafficking Protocol and other anti-trafficking instruments has resulted in relatively weak protection for trafficked persons. The protection provisions in these instruments have a number of fundamental weaknesses whether by virtue of the nature of the provision or the conditionality of the protection provided. For instance, the protection provisions in the Trafficking Protocol are drafted in discretionary, non-obligatory terms. They refer to ‘shall consider implementing’ and ‘shall endeavour to provide’, justifying the criticism echoed by [Hathaway \(2008\)](#); [Gallagher \(2001, 2009\)](#); [McClellan \(2007\)](#); and [Fitzpatrick \(2002\)](#), amongst others, that the Protocol is ‘content to recommend, rather than to require remedies for victims’ ([Hathaway 2008](#)). This is particularly the case in the context of long-term protection where (migration) status becomes a factor of consideration. The EU’s anti-trafficking framework, on the other hand, includes obligatory provisions but makes protection conditional on one’s ability to support the criminal justice process ([Gauci 2015](#)). The Council of Europe Convention, often hailed as the gold standard for the protection of trafficked persons, provides in Article 14:

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

- (a) the competent authority considers that their stay is necessary owing to their personal situation;
- (b) the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings.

States Party therefore enjoy the discretion of whether to only grant such residence permits to individuals who are cooperating with the authorities. As the explanatory report clearly notes, ‘the aim of these requirements is to allow Parties to choose between granting a residence permit in exchange for cooperation with the law enforcement authorities and granting a residence permit on account of the victim’s needs, or indeed to adopt both simultaneously’ ([CoE 2005](#)). These limitations notwithstanding, it is worth noting that domestic legislation has in many cases gone further than these requirements and offers unconditional protection such as that provided under Italian national law.

Beyond addressing the discretionary nature of protection provisions and the conditionality in the requirement of offering residence, asylum expands the availability of protection both in terms of which States would be responsible for its provision and with regard to

who might be entitled thereto. With regard to the geographical scope, the obligations under the trafficking instrument refer, explicitly or implicitly, to countries of origin, transit and destination as reflected in the preamble to the Protocol.²⁹ Asylum, on the other hand, also places obligations on third countries, that is, countries with no connection to the trafficking experience. Moreover, it extends the scope of protection beyond trafficked persons themselves and can also be used to protect persons at risk of being trafficked, as well as other persons associated with trafficked persons including family members, whistle-blowers and anti-trafficking activists who may also face harm as a result of that association.

The inclusion of trafficked persons within the refugee definition is, however, not without question or concerns. Having considered the reasons why asylum is a viable and necessary avenue for the protection of trafficked persons, we now move to discussing a number of specific provisions in the refugee definition and how they can be, and have been, applied to trafficked persons. In particular, this paper will focus on issues of persecution (including the recognition of trafficking qua trafficking as persecution and the location of persecution) and the convention ground nexus (focusing on membership of a particular social group and race).

4. Well-Founded Fear of Being Persecuted

Despite being the cornerstone of the refugee definition, the term persecution is not defined in the Geneva Refugee Convention. Grahl-Madsen explained this as an attempt by the drafters to introduce a flexible concept that might be applied to circumstances as they might arise (Hathaway and Foster 2014). Regional instruments also do not provide a definition. The EU Qualification Directive provides a backhanded interpretation in providing that ‘in order to be regarded as an act of persecution within the meaning of Article 1A of the Geneva Convention, an act must:

- (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

Hathaway and Foster refer to the ‘well-accepted formulation’ of persecution as ‘the sustained or systemic denial of basic human rights demonstrative of a failure of state protection’ (Hathaway 1991). This human rights approach is consistent with the obligation, under the Vienna Convention on the Law of Treaties, to interpret treaty provisions ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Other commentators seek guidance for the definition in other areas of international law, including under international criminal law.

There are several clusters of ‘persecution’ that are feared and/or experienced by trafficked persons including: trafficking itself and its exploitative components, re-trafficking by the same or other traffickers, retribution by traffickers or traffickers’ associates, and ostracism by their family and/or community. A review of case law from across a range of jurisdictions clearly shows that trafficking, re-trafficking, and reprisals could amount to persecution (Saito 2007). They also fulfil the qualitative criteria set out by Aleinikoff of unacceptable, unjustified and abhorrent infliction of harm (Aleinikoff 1991). Critically, particular issues, such as ostracism, may simultaneously be persecutory themselves and heighten the vulnerability of a trafficked person to trafficking and other related forms of persecution.

These concerns must be understood in light of the various contextual factors that heighten vulnerability to trafficking and the reluctance or inability of various States to prevent human trafficking and protect trafficked persons. Such vulnerability may be exacerbated by a series and combination of personal factors including one’s age, gender, and health condition, and one’s family background. Speaking of vulnerability generally,

Fineman notes that although ‘undeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command’ (Fineman 2008). Similarly, vulnerability to trafficking will be experienced differently by different people, impacted by a range of factors. Abuse of a position of vulnerability is in turn recognised as one of the ‘means’ of trafficking.

Moreover, the harm of human trafficking relates to a variety of harms across a time and severity spectrum, requiring informed status determination processes that can capture that process as it relates to the persecution element in the refugee definition.

This section will focus on two aspects of this discussion: first, whether trafficking as defined by the Protocol is ‘persecution’ as required by the Refugee Convention, and second the location of persecution, namely, that trafficked persons often seek protection in a country directly implicated in their trafficking experience.

4.1. Trafficking as Persecution

Human trafficking constitutes persecution for the purposes of the Geneva Refugee Convention. Acknowledging this is critical in at least three ways. First, it provides a basis for ‘preventive asylum’ (i.e., when one’s protection is based on the risk of future trafficking rather than an actual experience of trafficking). Second, the discussion is directly applicable to re-trafficking. Third, the rights violations inherent in past experiences of trafficking might have lasting effects on the individual. These considerations will therefore inform the determination as to whether the applicant’s fear of future persecution is well-founded.

The Australian Refugee Review Tribunal (RRT), while focusing on trafficking for the purposes of sexual exploitation, has accepted that the severity of abuse endured by trafficked women is tantamount to persecution. In RRTA 799, for instance, the court held that:

[The tribunal] accepts that Albanian women who are trafficked and forced into prostitution do suffer harm or mistreatment of sufficient severity such as to constitute persecution.³⁰

This focus on specific subsets of trafficked persons and trafficking experiences is not uncommon. However, a principled analysis can push the conversation forward, as have a number of decisions by courts in various countries. The French Asylum Court in Case N°11026228,³¹ for instance, held that:

Trafficking in persons, as is defined internationally by the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime of 15 November 2000, constitutes persecution in the sense of Article 1A(2) of the Geneva Convention.³²

This determination is consistent with the jurisprudence of the European Court of Human Rights, which places trafficking in persons as defined under the Trafficking Protocol squarely within the purview of Article 4 of the European Convention on Human Rights, that is the prohibition of slavery, servitude, and forced labour,³³ thus bringing it within the scope of persecution as described by the Qualification Directive.³⁴

Through a review of case law, Hathaway and Foster note how ‘in cases involving the risk of being trafficking or re-trafficked or of being subjected to forced prostitution or other forms of forced labour or domestic servitude, the seriousness of the harm alleged is rarely contested’ (Hathaway and Foster 2014). The value of cases similar to Case N°11026228 quoted above, vests partly in the broadened scope that it covers, which includes all forms of exploitation, by focusing on the Protocol definition of trafficking. This is notable considering that the case revolved around sexual exploitation, and yet the court adopted a broader overarching statement covering human trafficking as defined under the Protocol. This reflects an understanding of human trafficking that moves away from reliance on hierarchies of harm between different forms of trafficking and with regards to the victims assumed to experience those forms of trafficking. As Vandenberg identifies:

Whether a person is trafficked into a sweatshop or trafficked into a brothel, the human rights violations that he or she experiences are fundamentally the same (Vandenberg 2002).

The recognition of trafficking as a human rights violation (and linked to that, as persecution), is not limited to case law. As Weissbrodt and Meili highlight, 'one of the most important developments regarding the human rights of trafficked persons is 'that human trafficking is increasingly viewed around the world as a violation of human rights in and of itself, rather than as a practice or series of events whose consequences may affect the human rights of those it victimises' (Weissbrodt and Meili 2012). Indeed, that human trafficking is a human rights violation is now well-accepted both in human rights instruments and in anti-trafficking instruments. The explicit mention of human trafficking in the European Charter of Fundamental Rights,³⁵ the Arab Charter of Human Rights,³⁶ and the American Convention on Human Rights³⁷ are examples of this recognition. Similar provisions are also made by the Convention on the Elimination of All Forms of Discrimination Against Women,³⁸ the Convention on the Rights of the Child,³⁹ and the Council of Europe Istanbul Convention on Violence Against Women.⁴⁰ Moreover, the Preamble to the Council of Europe Trafficking Convention acknowledges that 'trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being'.⁴¹ Similarly, the preamble to the 2011 EU Anti-Trafficking Directive highlights at the outset that 'trafficking in human beings is (. . .) a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union'.⁴² The ASEAN Convention preamble starts with 'recognising that trafficking in persons constitutes a violation of human rights and an offence to the dignity of human beings'. It deserves mention however, that the human rights violation nature of trafficking is not uncontested. Some commentators have firmly argued against this position, with some describing trafficking as a crime with human rights implications rather than a human rights violation in and of itself (Piotrowicz 2009)⁴³.

The recognition of trafficking per se as persecution moves beyond the position of the UNHCR Guidelines, which consider specific human rights violations within the trafficking experience. There is no explicit mention within the UNHCR Guidelines that trafficking in and of itself is a human rights violation and/or tantamount to persecution. The Guidelines rather err on the side of caution, noting that 'the evolution of international law in criminalising trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking.'⁴⁴ This focuses on the specific components of the act. This approach carries a considerable advantage in that it does not require the specific crime of trafficking to be made out in order for the persecution element to be met. However, it also appears, at least at face value, to grant leeway to differentiate between different forms of exploitation in terms of the persecutory nature thereof. Moreover, considering trafficking as persecutory in and of itself does not impede the possibility of also considering specific manifestations or elements of trafficking as persecutory when considered individually. Seeing human trafficking qua trafficking as persecution reflects a recognition and understanding of the considerable violence inherent in the relationship between the trafficker and the trafficked person. The UNHCR Trafficking Guidelines provision appears to contradict the UNHCR Gender Guidelines, which provide that 'There is no doubt that (. . .) other forms of gender-related violence, such as (. . .) trafficking, are acts which inflict severe pain and suffering—both mental and physical—and which have been used as forms of persecution, whether perpetrated by State or private actors.'

Beyond the recognition of trafficking itself as a human rights violation and persecution, there are other issues linked to trafficking that might amount to persecution. One is the threat of or actual violence (physical, psychological, sexual) that may be experienced by trafficked persons (or people associated therewith) at the hands of their former traffickers or their associates. This coupled with the unwillingness or inability of the State to offer effective protection may rise to the level of persecution. The availability and effectiveness of measures aimed at protecting, supporting, and 'rehabilitating' trafficked persons upon return are therefore necessary components to the determination of whether the individual applicant has a well-founded fear of being persecuted.

Moreover, ostracism by family and society might also amount to persecution, including when such ostracism is coupled with violence (such as so-called honour crimes inflicted upon persons who were engaged in the sex industry) or when it results in heightened vulnerability to re-trafficking or harm by traffickers or exploiters. In some situations, rejection by one's family might be sufficient to make one's existence in the original community untenable (Piotrowicz 2008). The UNHCR Trafficking Guidelines note that:

In the individual case, severe ostracism, discrimination or punishment may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process.⁴⁵

In case number V0618399, the Australian RRT recognised the possibility of harm at the hands of society at large, including stigmatisation and the denial of social and economic resources. It further acknowledged:

In a context where the applicant would be unable to rely on family support . . . such treatment would amount to serious harm.⁴⁶

Whilst this is not uncontested, there is clear authority in the case law (and through a reading of the legal framework) to consider trafficking, as defined in the Trafficking Protocol, to amount to persecution for the purpose of the Geneva Refugee Convention.

4.2. Location of Persecution: Trafficking as a Process

A corollary to the question of what constitutes persecution is the question of where that persecution must be feared for refugee protection to be warranted. Refugee protection is granted against persecution feared in the country of origin. However, the dichotomy of 'country of persecution' and 'country of safety' is often blurred in the context of trafficking-based claims. Whilst the risk of persecution must be judged against the country of origin, the past experiences of trafficking, which might give rise to the well-founded fear, might have taken place in countries other than this State of origin, including (but not limited to) the same country where protection is being sought. The UNHCR Trafficking Guidelines note that the fact that the main part of the exploitation has not taken place within the country of origin does not preclude the existence of a well-founded fear of persecution in the individual's own country.⁴⁷ This is in part recognition of trafficking as a process involving a range of acts, the sum of which amounts to persecution.

In addressing the obligation to investigate allegations of trafficking, the ECtHR has highlighted the express inclusion of recruitment within the definition of trafficking adopted in the Protocol and in the Council of Europe Convention.⁴⁸ In determining its jurisdiction with regard to Russia, the court noted:

The court is competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant's daughter from trafficking, to investigate allegations of trafficking and to investigate the circumstances leading to her death.⁴⁹

By analogy, the fact of recruitment in the country of origin creates a sufficient link to that State to merit the analysis of a protection claim. Trafficking is a persecutory process composed of various parts, often occurring across multiple international boundaries and over a period of time. One explanation is that the persecutory conduct would not have taken place had the State of origin effectively prevented the preliminary (albeit non-persecutory) stages from successfully taking place. The issue of sufficiency of State protection therefore becomes a critical issue here.

For example, in *AZ (Thailand)*⁵⁰ the trafficked person was seduced by a 'lover boy'⁵¹ in Thailand,⁵² brought to the UK, and exploited there. She then sought and received international protection in the UK. Seduction by a lover boy in and of itself can hardly be considered as persecutory, however the fact that that seduction was a recruitment technique adopted by traffickers provided a sufficiently strong link to the country of origin for protection to be warranted. This case is typical of many others where the 'main part' of the persecution, indeed the physical, sexual, and mental violence, deprivation of liberty

and other egregious acts have in fact taken place in the same country where protection is being sought.

The notion of refugee *sur place* is also relevant in a context where an individual left his/her country of origin out of their own free will, found him/herself in a situation of trafficking, and now fears going back. A refugee *sur place* is 'a person who was not a refugee when he left his own country, but who becomes a refugee at a later date'.⁵³ The term relates to situations where a change in circumstances makes an individual who is already outside of the country a refugee. For instance, a national of country A might have moved to country B for work purposes. During her time in country B, possibly as a result of the lack of social capital, she was recruited into a situation of trafficking. Having been exploited in the sex industry, she now fears that her family back in country A might disown her for breaking the family's honour (by virtue of having been a sex worker).⁵⁴ In this case, refugee status is still possible even if the persecution was not the primary reason the person left the country of origin, indeed even if it was not a reason at all.

For example, in RRTA 799 'the adviser noted that there was a '*sur place*' claim based on the eldest daughter having reached puberty while she was in Australia, so she would be in danger now if she were to return to Albania. The case involved an Albanian mother and her children. The mother claimed that she was a member of a particular social group composed of her family and that she would be harmed if returned to Albania because of blood feuds in which her family was involved. She highlighted the possibility that her daughters would be abducted and forced into prostitution. The main target of the blood feud was her son.⁵⁵

In some cases, a trafficked person might still fear reprisals within the country in which he/she is seeking asylum. Indeed, in some cases the risk in such country might be higher than the risk in one's country of origin. Refugee law does not specifically address this issue except by allowing the trafficked person the right to decide whether to leave the country of his/her own accord. In this context, it might be appropriate for resettlement opportunities to be sought.⁵⁶ In the European context it might also have implications for the implementation of the Dublin Regulation,⁵⁷ specifically in order to avoid trafficked persons being returned to the country where they have experienced exploitation if they do not wish to return there.

This section has shown that trafficking qua trafficking can be considered as persecution for the purposes of Article 1A of the Refugee Convention. That is the result of significant developments over the past decades on the recognition of trafficking as a human rights violation, when coupled with the human rights benchmark approach to the interpretation and understanding of 'being persecuted' for the purposes of the Convention. Moreover, trafficking-based asylum claims blur the lines between countries of protection and countries of persecution, but the recognition of trafficking as a process often involving multiple countries raises the possibility of protection being received in a country where part of the exploitation may have taken place.

5. Convention Ground Nexus

Despite its broad humanitarian imperative, the Refugee Convention is not intended to protect everyone who has a well-founded fear of persecution but is limited to those instances where the individual is particularly targeted because of who he/she is or what he/she believes (Hathaway and Foster 2003). That gap between having a fear of persecution and receiving protection is particularly pronounced in the case of trafficked persons. We now turn to two ways in which trafficked persons might meet the convention ground nexus requirement, namely under membership of a particular social group and race.

The ground of membership of a particular social group, with its undefined contours, has provided a route into refugee protection for trafficked persons. As this is an area where other research exists, it will not be an extended focus here (Walker 2007; Juss 2012; Karvelis 2013). Some of the groups that have been tested (to varying degree of success) include 'former victims of trafficking for sexual exploitation', women from Ukraine forced into

prostitution against their will, former sex trade workers, impoverished women from the former Soviet Union recruited for exploitation in the international sex trade, trafficked Shan women, and young women in Albania. The majority of groups identified in the current research focus on women. However, the successful claims have tended to be, for the most part, a lot more focused on identifying other particular characteristics such as former trafficking status, the lack of family protection, nationality, and the specific type of exploitation endured. That said, a number of trafficking-based claims have failed because of the reluctance to accept the existence of a particular social group, that the individual was a member of the group, that the group existed independently of the harm feared, or that membership in that group was a reason for the harm feared. This latter point is often a concern, especially in a context where financial and other benefits for traffickers are primary considerations.

The inconsistent application of the concept of membership of a particular social group risks prejudicing consistency of status determination. Legislative developments in Norway help overcome some of these shortcomings and have important ramifications and implications. They are not, however, without their own challenges and problems, including the possibility of restricting protection. Moreover, other grounds listed in the same definition (including religion and race) may also provide viable convention ground nexus to the persecution feared. We turn to these in turn.

In 2010, a number of amendments were made to immigration law in Norway. One of these included an addition to the definition of a particular social group to include former victims of human trafficking.⁵⁸ This amendment represents a unique example of a positive legislative development that can go some way towards rendering refugee protection more accessible to trafficked persons. The relevant provision now reads:

A particular social group shall in particular be considered to consist of a group of people who share a characteristic in addition to the risk of being persecuted, and who are perceived as a group by society. The common characteristic may be innate or for other reasons immutable, or otherwise consist of a manner or belief that is so fundamental to identity, conscience, or the exercise of human rights that a person cannot be expected to renounce it. Former victims of human trafficking shall be regarded as members of a particular social group (emphasis added).⁵⁹

This provision leaves no doubt as to the cumulative assessment of membership of a particular social group. The definition of common characteristic is like that in the Ward judgment with its dual requirement.⁶⁰ The provision explains that it does not refer to situations immutable by virtue of being historical, as these are covered by the reference to 'for other reasons immutable'. It does specifically address the situation of trafficked persons, identifying former victims of human trafficking as members of a particular social group. Such identification is reserved exclusively for trafficked persons, and no other group is explicitly mentioned in the same way.

Various explanations can be suggested for this amendment, most notably a pre-determined concern that trafficked persons could not otherwise fulfil the cumulative test for membership of a particular social group, and an acknowledgment of the need for asylum as a channel for the long-term protection of trafficked persons. The legislative proposal introducing the amendment notes how:

The Ministry has proposed a provision that former victims of trafficking shall be considered as members of a particular social group, so that persecution aimed at this category will provide a basis for protection.⁶¹

This clearly indicates a political will, at the decision-making level, to accommodate trafficked persons within the parameters of international protection, facilitating their recognition as refugees.

The suggested provision was strongly supported by a wide range of organisations and entities, including the counter-trafficking organisations, as well as the relevant governmental departments. It was perceived as a way of providing clarity and a degree of certainty that individuals facing a well-founded fear relating to their trafficking experience will receive

refugee protection under Norwegian law. From a politico-legal perspective, it is interesting to observe the distinction that the legislative proposal draws between trafficking-based claims and claims based on gender and/or sexual orientation. The proposal notes how in the latter case it was not advisable to have a specific legal provision covering areas in which the law has already offered protection. The Ministry noted that it:

Is inappropriate to legislate examples of groups that are considered covered, because this can cause the attention paid to the aforementioned groups without opening for other groups.

This statement indicates on the one hand a reluctance to be overly specific (in order to avoid closing off the ground to listed groups), and on the other an acknowledgement that there was scope for doubt and complications in the application of the ground to trafficked persons.

That said, a practice note dating from before the enactment of the legislation clearly indicates that the new legal provision had little-to-no impact on practice in the area. The note also indicates that the dual test (immutable characteristic and social perception) was in any case met in most cases by trafficked persons. What is of particular interest is the focus of the practice note on trafficking for the purposes of forced prostitution. Moreover, this appears to contradict the proposal above, which implies that the provision was needed because trafficked persons were not considered as being covered by the interpretations given through the existing legal framework and case law. Also of interest is the ongoing reference the proposal makes to the qualification directive. Whilst the directive focuses on LGBTQI and gender-based claims, the proposal does not, and whilst the directive does not specifically address trafficked persons in this context, the proposal puts forward this specific legislation.

The provision is also gender neutral and does not refer exclusively to women. This is one of the ways in which the provision moves forward from much of the existing case law that has tended to have a very strong gender component (partly justified by the individual cases under which it was developed). Whilst the gendered component of trafficking cannot be ignored, this provision again acknowledges that trafficking impacts both men and women. In part, this move away from the gender dimension is also a reflection on the previous point that all forms of exploitation are covered by the provision. Indeed, whilst generalisations should be avoided, women are (believed to be) more often exploited in the sex industry whilst forced labour (with the exception of domestic servitude) has been predominantly performed by men.

In terms of scope, the provision refers to 'former victims' and does not refer to persons at risk of trafficking, or those associated with trafficked persons. The implication therefore is that being a trafficked person meets the required needs for engaging the ground of membership of a particular social group, but being at risk thereof does not qualify as a result of the non-circularity principle (that a group cannot be defined exclusively by its fear of persecution). This issue is also addressed in the UNHCR Trafficking Guidelines:

It should therefore be noted that it is the past trafficking experience that would constitute one of the elements defining the group in such cases, rather than the future persecution now feared in the form of ostracism, punishment, reprisals, or re-trafficking. In such situations, the group would therefore not be defined solely by its fear of future persecution.⁶²

For those at risk of trafficking and for whom the fear is forward-looking, the circumstances for meeting the requirements of a particular social group are more complex and relate to the personal and societal context. Arguing that 'persons at risk of being trafficked' are, per se, members of a particular social group will fall foul of the non-circularity requirement, which states that members of a particular social group must not be united exclusively by their shared fear of persecution. Whilst past experience provides an experience that is at the same time a cause of, but also independent of, the persecution suffered, the same cannot be said for persons 'at risk of being trafficked.' Such claims can, however, be argued on the basis of the broader grounds of vulnerability much in the same way that similar claims are

argued in other jurisdictions. In such cases, the persecution would be trafficking-based, but the Convention ground would rely on gender, age, or specific forms of vulnerability.

The reference to ‘former victims’ implies a requirement to sever ties with the trafficker and to be ‘out’ of the trafficking situation. This is an understandable requirement, replicating a similar condition in, for instance, the 2004 Residence Permit Directive. This, in turn, raises the question of whether some form of attestation/certification of being a victim of trafficking is required in order for the provision to come into play in the individual case.

Importantly, the provision does not make reference to where the trafficking has occurred, and therefore covers both internal and international trafficking, whether or not this has occurred in Norway itself, in the country of origin or in a third country. It is not only former victims of trafficking in Norway that are considered to form a particular social group.

In the provision, reference to ‘human trafficking’ refers to the international law definition of trafficking found in the Trafficking Protocol. This moves away from a debate that limits the application of membership of a particular social group to those trafficked for the purpose of sexual exploitation as most of the membership of a particular social group examples listed above would suggest. This is all the more important when one notes that general public awareness often still perceives trafficking as limited to the sexual exploitation of women, and that women trafficked for sexual exploitation are perceived as ‘better victims’ in that they fit the expected image and are therefore more likely to be considered as needing and deserving of international protection. Moreover, trafficking for the purposes of forced labour is more difficult to identify, as those trafficked for these purposes are often better hidden.

A possible implication of the provision is that former victims of trafficking will have access to protection unless the court or tribunal is satisfied that there have been considerable and sustainable improvement in their countries of origin, based on the presumption ensuing from their past experiences. There is little indication that this Norwegian model is being taken up elsewhere and indeed whilst it could have influenced the re-casting process of the Qualification Directive, this was not the case. This notwithstanding, the existence of such a provision is likely to impact future developments, both legislative and judicial.

Race as a Convention Ground for Trafficking-Based Asylum Claims

Beyond membership of a particular social group, other convention grounds may also be relevant. Whilst much research will draw parallels between race, racial discrimination, and trafficking, there has been little work that looks into the intersection in any meaningful way beyond the anecdotal (Bell 2011; Butler 2015; Chong 2014; Williamson 2017; Fehrenbacher et al. 2020; Greer 2013; Gonzalez 2017; Reid et al. 2019; Bryant-Davis and Tummala-Narra 2017). A focus on race as a relevant ground in trafficking-based claims helps shift attention away from the gendered perspective on trafficking. One thing is clear. There is little to no hard knowledge on the inter-relations between trafficking and race, and what information is available is largely speculative and based on repeated assumptions. Greater efforts ought to be undertaken in understanding the racial dynamics that underpin human trafficking. What is also clear is that such underpinnings will vary by region. For instance, issues of caste and class are far more prominent when discussing trafficking in Southeast Asia than they are in other regions (Rajbhandari et al. 2008).

Much like other terms in the Refugee Convention, the term race is not without definitional issues especially in terms of setting the contours of its meaning. The EU Qualification Directive provides that:

The concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group.⁶³

The UNHCR Handbook provides similarly expansive wording:

Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as ‘races’ in common usage.⁶⁴

This broad interpretation is also supported in academic writing. Grahl-Madsen associates the use of the term race with social prejudice rather than a more or less scientific division of mankind, highlighting that, within the context of the refugee definition, race is 'more a social than an ethnographic concept' (Zimmermann et al. 2011).

Race and ethnicity impact on trafficking in multiple inter-connected ways, most notably heightened risk due to increased demand, further supply due to inequality-fuelled vulnerability and inadequate protection by the State. First, particular ethnic backgrounds are more highly demanded in specific contexts, especially with regard to the sex industry. This may be explained by socio-culturally engrained notions of sexual attractiveness and as an assessment of trafficking through the economic lens of supply and demand. As one brothel client told Kempadoo; 'if she's light-coloured, then she is sexually attractive to this population' (Kempadoo and Doezema 1998). Truong notes how in sex tourism and related prostitution, the instrumental construction of the body around notions of race, ethnicity, and culture is used to activate the desire of potential buyers (Truong 2001). Research by Human Rights Watch found that Indian brothels preferred Nepali women 'for their reputation for sexual acquiescence and their golden skin' (Human Rights Watch 1995). The Curacao sex industry in the Caribbean is reportedly structured along a race/skin colour hierarchy, descending from white European to light-skinned Colombian and Dominican women to local Afro-Caribbean women (Cameron and Newman 2008a). These notions will vary by country or region, and specific traffickers will likely target specific populations based on their clients' demands, as well as their own 'access' to specific communities. For example, women from other cultural groups are considered (and often portrayed) to be docile and obedient, as reflected in greater demand in the context of trafficking for forced marriage and the mail order bride systems (Jones 2011), as well as in the sex industry more broadly (Cameron and Newman 2008a).

Research in Latin America identified a heightened risk of trafficking and exploitation for indigenous people. Particular cultural practices may be exploited by traffickers in ways that heighten vulnerability. For instance, in some communities sending a child to live with a family member or acquaintance is socially acceptable and sometimes considered a means of social mobility or a family obligation. Beliefs of racial superiority will sometimes be used to justify the enslavement of others. Research into sex work has significantly shown the desire, express or implicit, of clients to exert their power over sex workers, a situation which can also include racist undertones. One research participant from the 'untouchable' caste participating in a research project in Nepal is reported as having been forced into prostitution by men of higher caste and told that this was her 'caste occupation' (Kumar et al. 2001). Moreover, in times of conflict, especially ethnic-based conflict, trafficking is used as a way to punish or intimidate specific groups. The conflict in Bosnia and the extensive sexual enslavement of Muslim women and girls is but one example of this phenomenon.

Some manifestations of trafficking have been particularly targeted at specific communities. For instance, the trafficking of pregnant women for the purposes of selling their babies abroad, through informal and illegal adoption channels, has been primarily focused on Roma women (Surtees 2005). One can also refer to various United States Trafficking in Persons Reports that report on the risks of trafficking for forced begging faced primarily by Roma children (United States Department of State 2013).

More generally, however, racial discrimination limits an individual's options in terms of education and employment and thereby heightens their risks and vulnerability to trafficking. Racial discrimination in employment is well-documented across many countries. In Europe, despite extensive legal and policy measures to combat discrimination, and significant funding being invested in such efforts, research by the European Union found extensive discrimination faced by ethnic minorities in accessing employment across the European Union (European Commission 2019). Specific communities, most notably the Roma community, were particularly affected by such discrimination as reflected in the disproportionately high unemployment rate. The research found that within the European Union, every second Roma respondent was discriminated against at least once in the

previous twelve months, and that Roma who were discriminated against experienced on average eleven incidents of discrimination over a twelve-month period (FRA 2009). This snapshot goes some way to outlining how being of Roma ethnic background increases the likelihood of trafficking.

Research with the Roma community in five European Union Member States refutes the idea that trafficking is a cultural practice of the Roma or that there is a 'unique Roma vulnerability factor', but found that:

Roma are highly vulnerable to trafficking due to structural forms of ethnic and gender discrimination, poverty, and social exclusion, which result in low educational achievement, high levels of unemployment, usury, growing up in state care, domestic violence affecting predominantly women and children, and substance abuse. Furthermore, many of the vulnerability factors such as domestic violence, high school dropout rates, homelessness, or being in state care affect children and youth exclusively or disproportionately. (European Roma Rights Centre 2011)

Moreover, race issues will often overlap with issues of national citizenship and access to rights. For instance, research by UNESCO in the Mekong Region describes lack of citizenship as 'the single greatest risk factor for hill tribe women in Thailand being trafficked' (Cameron and Newman 2008b). Within the notion of race, caste distinctions will also impact vulnerability to trafficking. Kumar's research in Nepal found that 'lower caste people face economic exploitation, social discrimination, and a high risk of sexual exploitation' (Kumar et al. 2001), leading Cameron and Newman to conclude that 'location within the caste system has a direct relationship to earning potential and poverty, and consequently to vulnerability to trafficking' (Cameron and Newman 2008b).

In summary, race dynamics in human trafficking (in terms of vulnerability, targeting, and lack of protection) will vary depending on the country where the recruitment happens, the country where the exploitation takes place, the desires of the client base, the nature of the criminal enterprise involved, the reach of the trafficker and his/her associates, the industry in which one is to be exploited, and the type of work that will be expected of the trafficked person. This is similar to (and should be read concurrently with) how gender, age, and other vulnerability factors come into play.

Discrimination(s) that will heighten vulnerability to trafficking include direct, indirect, and systemic discrimination, all of which, in different yet inter-related ways, will result in the exclusion of particular groups from the protective frameworks of the State and society. This heightens their vulnerability to trafficking by making them easier targets for traffickers whilst at the same time reducing the risks of prosecution and punishment for traffickers. The social, political, and legal marginalisation of particular groups of people often means that traffickers can act with impunity, and it is clear that they are well aware of this possibility.

One key challenge in identifying a racial 'motive' behind the crime of trafficking is the lack of specific data. Despite a growing awareness of specific manifestations of trafficking that are predominantly linked to the Roma community, for instance, data on these phenomena are missing. These omissions are explained in part under the pretext of data protection and the avoidance of race segregation. It may therefore be difficult for lawyers and representatives to argue that the applicant's racial or ethnic background was a factor in his or her vulnerability to trafficking.

As noted above, for the purposes of meeting the Convention ground requirement in refugee law, race and racial discrimination need to be either the reason for the persecution itself, or for the failure of State protection. Racial and ethnic minorities will often face discrimination by law enforcement and the system more broadly and may not be protected against threats of trafficking. They may feel that going to the police or the authorities will not result in receiving aid. For instance, research by the European Roma Rights Coalition and Persons in Need found, in researching the vulnerability of Roma communities to trafficking, that the important role played by the police in the identification of trafficked persons may constitute a barrier for the identification of Roma trafficked persons as a result

of recurrent police ill-treatment and profiling of Roma, fear and a lack of trust in police among Roma, and a general lack of confidence among Roma in the legal system (European Roma Rights Centre 2011). Similarly, Garciandia et al. identify biased application of legislation, including anti-slavery instruments, in Mauritania heightening the vulnerability of minority communities to slavery, exploitation and trafficking (Garciandia et al. 2020).

The fact that the Convention allows for multiple grounds to be sought at the same time allows for greater acknowledgement of the intersectionality approach. 'Intersectionality' is 'an analytical tool that examines the ways in which different identities converge and how they produce distinct experiences. The goal is not to identify and list multiple grounds as compound factors but rather to understand the full context and experience of vulnerability. This methodology is particularly relevant while assessing the situation of trafficked persons (. . .) very often affected by both multiple dependencies and multiple discrimination' (OSCE 2012; Crenshaw 1989; Crenshaw 1991; Crenshaw 1992). This reflects the fact that the phenomenon of trafficking is intrinsically multi-dimensional. Indeed 'multiple identities reflecting race, migration status, national or ethnic origin, gender, age, and other grounds often intersect in ways that reinforce trafficked persons' vulnerability, and that require specific and targeted responses' (OSCE 2012).

6. Conclusions

Protection within the existing anti-trafficking instruments is discretionary, conditional, and limited in scope. It reflects the dominant law enforcement paradigm that underpins it. Refugee law, by contrast, protects a wider group of persons, from a wider spectrum of harms, because the primary focus is the risk of harm to the individual as opposed to the interests of the criminal justice process (which justifies conditionality of protection). This reflects the 'broad humanitarian principles which underlie the (Refugee) Convention'.⁶⁵ Such a humanitarian focus makes refugee protection a viable avenue for protecting trafficked persons, a group of individuals who are otherwise not well served by international protection norms.

An assessment of case law and literature clearly identifies that the process is not as easy or smooth as this conclusion might suggest. Indeed, trafficked persons, like many other groups seeking protection in an increasingly shrinking asylum space, face significant hurdles in having their claims heard and their refugee status recognised. Two key substantive hurdles include the recognition of trafficking as a human rights violation tantamount to persecution as required by Article 1A of the Refugee Convention, and the recognition of trafficked persons as members of a particular social group. This paper has sought to provide evidence and arguments as to how these two requirements are met by trafficked persons, although a number of cases continue to falter because of one or both of the above.

Trafficking, as defined in the Trafficking Protocol and the instruments that build on that definition, can constitute persecution for the purposes of the Geneva Refugee Convention. Legislative developments in Norway have sought to overcome the challenge of convention ground nexus by designating former victims of human trafficking as constituting members of a particular social group. Case law from a range of jurisdictions has also done so for individual cases with a range of groups being considered. As highlighted throughout this paper, there is also under-utilised potential in other convention grounds, such as race, as the basis for refugee protection for some trafficked persons. Critical to this protection, and underpinning some of those difficulties, is the interplay of a range of areas of international and domestic law.

Beyond the challenges at the individual case level, the inclusion of a further group within those protected under refugee law raises questions as to the impact, legal and political, that this might have on how asylum is perceived and provided for in national systems. Conversely, developments that seek to curtail and limit refugee protection will likely negatively impact trafficked persons' access to and enjoyment of such protection.

Whilst these challenges must be acknowledged (and addressed), refugee protection remains a viable and effective channel for protecting trafficked persons.

Funding: This research received no external funding.

Conflicts of Interest: The author declares no conflict of interest.

Notes

- 1 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo, 15 November 2000, entered in force 29 September 2003), 40 ILM 335 (Trafficking Protocol).
- 2 For a broader discussion see (Gallagher 2010). See also (Styanova 2017).
- 3 Convention Relating to the Status of Refugees (Geneva, 28 July 1951, entered into force 22 April 1954), 189 UNTS 137 (Geneva Refugee Convention).
- 4 Indeed, some commentators have argued that subsidiary protection offers better chances of protection for trafficked persons than refugee status. See for instance: (Piotrowicz 2005), where the author argues that ‘the subsidiary protection regime offers perhaps more hope to trafficked women than the Refugee Convention’.
- 5 Trafficking Protocol (n 1).
- 6 United Nations Convention on Transnational Organized Crime (Palermo, 15 November 2000, entered into force 29 September 2000), 40 ILM (2001); 335 (CATOC).
- 7 Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005, entered into force 1 February 2008), CETS No 197.
- 8 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, 15.4.2011, 1–11.
- 9 ASEAN Convention Against Trafficking in Persons, Especially Women and Children, 2015.
- 10 European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01). Article 5(3) provides that ‘trafficking in human beings is prohibited’.
- 11 League of Arab States, Arab Charter on Human Rights, 2004.
- 12 Organisation of American States, American Convention on Human Rights, Costa Rica, 22 November 1969.
- 13 International Covenant on Civil and Political Rights (New York, 16 December 1966, entered into force 23 March 1976), GA Res. 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966); 999 UNTS 171; 6 ILM 368 (ICCPR).
- 14 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, entered into force 3 September 1953), CETS No 005; 213 UNTS 221 (ECHR).
- 15 Convention on the Elimination of All Forms of Discrimination Against Women (New York 18 December 1979, entered into force 3 September 1981), UNTS 1249, 13.
- 16 Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul 12 April 2011, entered into force 1 August 2014), CETS 210.
- 17 Convention on the Rights of the Child (New York, 20 November 1989, entered into force 2 September 1990), GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456.
- 18 Established inter alia in Article 5 of the Universal Declaration of Human Rights (UDHR).
- 19 Enshrined, inter alia, in Article 7 of the International Covenant on Economic, Social, and Cultural Rights.
- 20 Enshrined in Article 24, UDHR.
- 21 International Labour Organization, Forced Labour Convention, C29 (28 June 1930), C29.
- 22 Convention No. 105 concerning the abolition of forced labour (25 June 1957).
- 23 Convention No. 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour (17 June 1999).
- 24 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990), A/RES/45.158, C29 (28 June 1930), C29 the Convention on the Rights of Migrant Workers and Members of their families. ion of trafficke.
- 25 *Rome Statute of the International Criminal Court (Rome)*, 17 July 1998. (See William 2010). See also Gauci and Farias 2021.
- 26 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1).
- 27 UN High Commissioner for Refugees (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, HCR/GIP/06/07. For commentary on the guidelines see: (Piotrowicz 2008).

- 28 See for instance: Article 14 of the Trafficking Protocol.
- 29 As noted above, the preamble makes reference to a ‘comprehensive international approach’ as including measures in countries of origin, transit and destination.
- 30 *Case No V01/13868* [2002] RRTA 799 (6 September 2002) 11.
- 31 Décision No. 11026228, Cour Nationale du Droit d’Asile, 12 Juillet 2012. The case involved a Ukrainian woman who was kidnapped by (presumed) loan sharks to whom her father owed money. She was forced to work for the trafficker in order to pay off her father’s debts. She was repeatedly sexually assaulted and forced into prostitution for about a year in Ukraine. She was then moved via land to France as she was pregnant but managed to escape and with the help of an Armenian (Russian speaking) family and an association claimed asylum in France based on the fear that, if returned to the Ukraine, the forced prostitution network she escaped would look for and find her, and that the local community, informed of the reason for her disappearance, would reject her.
- 32 Author’s own translation. The original text in French reads: ‘Considérant enfin que la traite des êtres humains, telle qu’elle est internationalement définie par le Protocole additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants du 15 novembre 2000, constitue une persécution au sens de l’article 1 A 2 de la Convention de Genève’.
- 33 In *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 at para 282 the European Court of Human Rights held: “trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention”. For commentary on this see (Piotrowicz 2012). For a critical view of the case see (Allain 2010). He notes: ‘important as this case is for taking aim at the exploitive nature of the sex industry and the willingness of States to turn a blind eye to it, Rantsev brings with it questions regarding the very ability of the Court to adjudicate over issues emanating from Article 4 of the European Convention on Human Rights (ECHR). With the determination of the Court that obligations emanating from Article 4 of the ECHR come into play because trafficking is based on slavery, the Court reveals itself as not having truly engaged with the legal distinctions that exist between these two concepts’. See also: (Styanova 2012).
- 34 Directive 2011/36/EU Of the European Parliament and of the Council of 5 April 2011 on prevention and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.
- 35 Charter of Fundamental Rights of the European Union (7 December 2000, Official Journal of the European Communities, 18 December 2000), OJ C 364/01.
- 36 See Notes 11 above.
- 37 American Convention on Human Rights (Pact of San Jose) (San Jose, Costa Rica, 21 November 1969, entered into force 18 July 1978), OAS Treaty Series No 36; 1144 UNTS 123; 9 ILM 99.
- 38 Convention on the Elimination of All Forms of Discrimination Against Women (New York 18 December 1979, entered into force 3 September 1981), United Nations Treaty Series, vol. 1249, p. 13.
- 39 See notes 17 above.
- 40 See notes 16 above.
- 41 Preamble para 2.
- 42 Preamble para 1.
- 43 Here Piotrowicz introduces his argument as follows: It is incorrect to say that people trafficking is a breach of human rights for the same reason that it is incorrect to say that $2 + 2 = 5$: because it is wrong and there is an inherent good in getting things right. He concludes that no human rights are breached when a person is trafficked except for the failure of the State to act.
- 44 UN High Commissioner for Refugees (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, HCR/GIP/06/07, para 15.
- 45 Para 18.
- 46 *Case No V06/18399* [2006] RRTA 95 (22 June 2006).
- 47 *Ibid*, at 27.
- 48 *Rantsev v Cyprus and Russia* (n 33) at 307. It is interesting to note that the court is here discussing the notion of responsibility to investigate violations of Article 4.
- 49 *Ibid* at 208.
- 50 *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, CG [2010] UKUT 118 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 8 April 2010.
- 51 For an overview of this recruitment tactic see (Kara 2009).
- 52 *AZ Thailand* (n 50) 4, 41.
- 53 UN High Commissioner for Refugees (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*, December 2011, HCR/1P/4/ENG/REV. 3, para 94.

- 54 In some cultures where family honour is highly regarded and honour crimes are relatively frequent, the fact that a daughter was forced into prostitution will not result in her being less severely punished. Of course this is a general statement subject to a number of exceptions; however it can give rise to protection needs in this context.
- 55 See notes 30 above.
- 56 See UNHCR Trafficking Guidelines (n 44), para 29.
- 57 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; *Official Journal L 050, 25/02/2003 P.0001–0010*.
- 58 Due to language differences, the English version of the act was used during this research. The translation used is updated as of 1 January 2013. The English version does not have legal status, and is not updated continuously.
- 59 Section 30 (C) of the Norwegian Immigration Act (emphasis added).
- 60 *Ward v Attorney General of Canada* [1993] 2 SCR 689.
- 61 Ministry of Labour and Social Inclusion, *Proposition No. 75 (2006–2007) On the law on access to the territory and their presence (Immigration)* 29 June 2007 part 5.1.7.
- 62 UNHCR Trafficking Guidelines (n 44), para 39.
- 63 Article 10(1)(a).
- 64 UNHCR Refugee Status Handbook (n 53), para 68.
- 65 *Hoxha & Anor v Secretary of State for the Home Department* [2005] UKHL 19 (10 March 2005) 6.

References

- Aleinikoff, Alexander. 1991. The Meaning of Persecution in U.S Asylum Law. In *Refugee Policy: Canada and the United States*. Edited by Howard Adelman. Toronto: York Lanes Press.
- Allain, Jean. 2010. *Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery. *Human Rights Law Review* 10: 546–57. [CrossRef]
- Bell, Jamaal. 2011. Race and Human Trafficking in the US: Unclear but Undeniable. *Huffington Post*. Available online: https://www.huffpost.com/entry/race-and-human-traffickin_b_569795 (accessed on 18 December 2020).
- Bryant-Davis, Thema, and Pratyusha Tummala-Narra. 2017. Cultural Oppression and Human Trafficking: Exploring the Role of Racism and Ethnic Bias. *Women & Therapy* 40: 152–69.
- Buckland, Benjamin S. 2009. Human Trafficking and Smuggling: Crossover and Overlap. In *Strategies against Human Trafficking: The Role of the Security Sector*. Edited by Cornelius Friesendorf. Geneva: DCAF—Geneva Centre for Security Sector Governance.
- Butler, Cheryl Nelson. 2015. The Racial Roots of Human Trafficking. *University of California. Los Angeles Law Review* 62: 1464–514.
- Cameron, Sally, and Edward Newman, eds. 2008a. Trafficking in Humans: Structural Factors. In *Trafficking in Humans: Social, Cultural and Political Dimensions*. Tokyo: United Nations University Press, p. 46.
- Cameron, Sally, and Edward Newman. 2008b. *Trafficking in Humans: Social, Cultural and Political Dimensions*. Tokyo: United Nations University Press, p. 43.
- Chong, Natividad Gutierrez. 2014. Human Trafficking and Sex Industry: Does Ethnicity and Race Matter? *Journal of Intercultural Studies* 35: 196–213. [CrossRef]
- CoE. 2005. *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*. Warsaw: Council of Europe.
- Crenshaw, Kimberlé. 1989. Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *University of Chicago Legal Forum* 1989: 139–67.
- Crenshaw, Kimberlé. 1991. Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color. *Stanford Law Review* 43: 1241–99. [CrossRef]
- Crenshaw, Kimberlé. 1992. Whose Story is it Anyway? Feminist and Antiracist Appropriations of Anita Hill. In *Race-ing Justice, En-Gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*. Edited by Toni Morrison. New York: Pantheon Books, p. 402.
- European Commission. 2019. *Discrimination in the European Union*. Brussels: European Union.
- European Roma Rights Centre. 2011. *Breaking the Silence: A Report by the European Roma Rights Centre and People in Need—Trafficking in Romani Communities*. Budapest: European Roma Rights Center, p. 12.
- Fehrenbacher, Anne E., Jennifer Musto, Heidi Hoefinger, Nicola Mai, P. G. Maciotti, Calogero Giametta, and Calum Bennachie. 2020. Transgender People and Human Trafficking: Intersectional Exclusion of Transgender Migrants and People of Color from Anti-Trafficking Protection in the United States. *Journal of Human Trafficking* 6: 182–94. [CrossRef]
- Fineman, Martha. 2008. The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism* 20: 1–24.
- Fitzpatrick, Joan. 2002. Trafficking and a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking. *Michigan Journal of International Law* 24: 1143–67.
- FRA. 2009. *European Union Minorities and Discrimination Survey*. Vienna: European Union Agency for Fundamental Rights.

- Gallagher, Anne. 2001. Human Rights and The New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis. *Human Rights Quarterly* 23: 975–1004. [CrossRef]
- Gallagher, Anne T. 2009. Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway. *Virginia Journal of International Law* 49: 789–848.
- Gallagher, Anne T. 2010. *The International Law of Human Trafficking*. Cambridge, MA: Cambridge University Press.
- Garciandia, Rosana, Maeve Ryan, and Philippa Webb. 2020. "I Demand Justice. I Hold Them All Responsible". Advancing the Enforcement of Anti-Slavery Legislation in Mauritania. *Journal of Modern Slavery*. Available online: https://slavefreetoday.org/wp-content/uploads/2020/11/Advancing_the_Enforcement_of_Antislavery_Legislation_in_Mauritania.pdf (accessed on 18 December 2020).
- Gauci, Jean-Pierre. 2015. Why Trafficked Persons Need Asylum. In *Exploring the Boundaries of Refugee Law: Current Protection Challenges*. Edited by Jean-Pierre Gauci, Evangelia Tsourdi and Mariagiulia Giuffr . Leiden: Brill.
- Gauci, Jean-Pierre, and Marina Cardoso Farias. 2021. Human Trafficking as a Crime against Humanity: Some Legal Questions. In *Crimes Against Humanity: Towards a More Comprehensive Approach?* Edited by Owen Grech. Msida: University of Malta Mediterranean Academy of Diplomatic Studies.
- Gonzalez, Cassandra Mary Frances. 2017. Race, Gender, and Domestic Human Trafficking: An Intersectional Description of Human Trafficking Cases at the State Level. Ph.D. dissertation, University of Colorado, Boulder, CO, USA.
- Greer, Benjamin Thomas. 2013. Hiding Behind Tribal Sovereignty: Rooting out Human Trafficking in Indian Country. *Journal of Gender, Race & Justice* 16: 453–82.
- Hathaway, James. 1991. *The Law of Refugee Status*. Oxford: Oxford University Press.
- Hathaway, James C. 2008. The Human Rights Quagmire of Human Trafficking. *Virginia Journal of International Law* 49: 1–59.
- Hathaway, James C., and Michelle Foster. 2003. Membership of a Particular Social Group. *International Journal of Refugee Law* 15: 477–91. [CrossRef]
- Hathaway, James C., and Michelle Foster. 2014. *The Law of Refugee Status*. Cambridge: Cambridge University Press, p. 185.
- Human Rights Watch. 1995. *Rape for Profit: Trafficking of Nepali Girls and Women to India's Brothels*. New York: Human Rights Watch.
- Jones, Jackie. 2011. Trafficking Internet Brides. *Information & Communications Technology Law* 20: 19–33.
- Juss, Satvinder S., ed. 2012. Human Trafficking, Asylum and the Problem of Protection. In *The Ashgate Research Companion to Migration Law, Theory and Policy*. England: Ashgate Publishing.
- Kara, Sidharth. 2009. *Sex Trafficking: Inside the Business of Modern Slavery*. New York: Columbia University Press, p. 9.
- Karvelis, Kelly. 2013. The Asylum Claim for Victims of Attempted Trafficking. *Northwestern Journal of Law and Social Policy* 8: 274–94.
- Kempadoo, Kamala, and Jo Doezema. 1998. *Global Sex Workers: Rights, Resistance, and Redefinition*. New York: Routledge, p. 131.
- Kumar, K. C. Bal, Govind Subedi, Yogendra Bahadur Gurung, and Keshab Prasad Adhikari. 2001. *Trafficking in Girls With Special Reference to Prostitution: A Rapid Assessment*. Geneva: International Labour Organization.
- Magugliani, Noemi. 2022. (In)Vulnerable Masculinities and Human Trafficking: Men, Victimhood, and Access to Protection in the United Kingdom. *Journal of Human Rights Practice*, 1–19. [CrossRef]
- McClellan, John David. 2007. *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols*. Oxford: Oxford University Press.
- OSCE. 2012. *An Agenda for Prevention of Human Trafficking: Non-Discrimination and Empowerment: Concept Note*. Vienna: Organization for Security and Cooperation in Europe.
- Piotrowicz, Ryszard. 2005. Victims of People Trafficking and Entitlement to International Protection. *Australian Yearbook of International Law* 24: 159–79.
- Piotrowicz, Ryszard. 2008. The UNHCR's Guidelines on Human Trafficking. *International Journal of Refugee Law* 20: 242–52. [CrossRef]
- Piotrowicz, Ryszard. 2009. The Legal Nature of Trafficking in Human Beings. *Intercultural Human Rights Law Review* 4: 175–203.
- Piotrowicz, Ryszard. 2012. States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations. *International Journal of Refugee Law* 24: 181–201. [CrossRef]
- Rajbhandari, R., Sally Cameron, and Edward Newman. 2008. Human Trafficking in South Asia: A focus on Nepal. In *Trafficking in Humans*. Edited by Sally Cameron and Edward Newman. Tokyo: United Nations University Press.
- Reid, Joan A., Michael T. Baglivio, Alex R. Piquero, Mark A. Greenwald, and Nathan Epps. 2019. No Youth Left behind to Human Trafficking: Exploring Profiles of Risk. *American Journal of Orthopsychiatry* 89: 704–15. [CrossRef] [PubMed]
- Saito, K. 2007. *International Protection for Trafficked Persons and Those Who Fear Being Trafficked*. Geneva: United Nations High Commissioner for Refugees.
- Styanova, Vladislava. 2012. Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case. *Netherlands Quarterly of Human Rights* 30: 163–94. [CrossRef]
- Styanova, Vladislava. 2017. *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law*. Cambridge, MA: Cambridge University Press.
- Surtees, Rebecca. 2005. *Second Annual Report on Victims of Trafficking in South Eastern Europe*. Geneva: International Organization for Migration.
- Truong, Thanh-Dam. 2001. Human Trafficking and Organised Crime. *ISS Working Paper Series/General Series* 339: 1–30.
- United States Department of State. 2013. *Trafficking in Persons Report*. Washington, DC: United States Department of State.

- Vandenberg, Martina. 2002. Complicity, Corruption, and Human Rights: Trafficking in Human Beings. *Case Western Reserve Journal of International Law* 34: 323–33.
- Walker, Kristen. 2007. Damned Whores and the Border Police: Sex Workers and Refugee Status in Australia. *Melbourne University Law Review* 31: 938–66.
- Weissbrodt, David, and Stephen Meili. 2012. Recent Developments in the Human Rights of Trafficked Persons. In *Human Rights and Migration: Trafficking for Forced Labour*, 1st ed. Edited by Christien van den Anker and Ilse van Liempt. London: Palgrave Macmillan.
- William, Schabas. 2010. *The International Criminal Court: A Commentary on the Rome Statute*. Oxford: Oxford University Press.
- Williamson, Sarah Hupp. 2017. Globalization as a Racial Project: Implications for Human Trafficking. *Journal of International Women's Studies* 18: 74–88.
- Zimmermann, Andreas, Jonas Dörschner, and Felix Machts. 2011. *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*. Oxford: Oxford University Press, p. 377.