A STUDY OF THE PROTECTION AFFORDED TO PERSONS AT RISK OF TRAFFICKING BY ARTICLE 1A(2) OF THE GENEVA CONVENTION REGARDING THE STATUS OF REFUGEES (1951) AS AMENDED BY THE PROTOCOL RELATING TO THE STATUS OF REFUGEES (1967)

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I want to dedicate this study to Sylvia and Warne Eriksson, whose passion and compassion has been an inspiration all my life.

London, October 22 2009
Abstract

The Geneva Convention regarding the Status of Refugees (1951) protects whoever can be considered a refugee internationally. Even though there is little doubt trafficked persons suffer harm on account of this criminal business, the applicability of the Convention in these cases is problematic since persons at risk cannot easily fulfil the criteria set up in Art. 1A(2) of the Refugee Convention. Challenges are faced both in relation to the concept of persecution and in linking the harm to a Convention ground. Development in the field of gender-specific and gender-related persecution has however provided for limited opportunities to claim refugee status when fearing trafficking, which can be seen in case law and the Office of the United Nations High Commissioner for Refugees Guidelines on the Application of the refugee Convention to People who have been Trafficked. However, it may sometimes prove more fruitful to claim complementary protection under the European Union Refugee Qualification Directive or Art. 3 European Convention of Human Rights.
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1. INTRODUCTION

1.1 The Topic

Human Trafficking is an issue raising a great deal of international debate. It is also a reality for many people across the globe.\(^1\) The most recent attempt to deal with the problem is the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Trafficking Protocol). People having been trafficked are here begun to be seen as ‘victims’ for the first time, rather than consistently illegal migrants to be prosecuted for their entry. Recognition is made of the fact that these people may not be able to return to their countries of nationality based on the same considerations as can be found in refugee law.\(^2\) There is thus a link between refugee law and the protocol.

Refugee status offers wide-ranging international protection for those deemed deserving according to the determination criteria set out in Art. 1A(2) of the 1951 Geneva Convention Regarding the Status of Refugees (Refugee Convention).\(^3\) Historically this has primarily been European political refugees due to the drafting history of the treaty.\(^4\) The understanding and application of the Refugee Convention however continuously develops as the world changes. One of the areas within the ambit of refugee law which has developed most in the last decade is that of gender-specific and gender-related persecution. Courts and scholars are still working on how to interpret the refugee definition “with an awareness of possible gender dimensions in order to determine accurately claims to refugee status”\(^5\). Lately, as part of that development there has been a slow recognition of that people at risk of trafficking may be considered as refugees. It signifies a reconsideration of the refugee definition and the politics around both refugee law and the understanding of trafficking. Two previously separate areas of law have thus begun to meet in the

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\(^2\) Please note the saving clause in Art. 14 of the Trafficking Protocol stating that the Refugee Convention shall not be affected by the Protocol, Piotrowicz, supra note 1, at 162f

\(^3\) See e.g. Art. 3-8, 16, 23, 27ff Refugee Convention

\(^4\) Hathaway, J.C. The Law of Refugee Status (1991), at 1

\(^5\) UNHCR Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HRC/GIP/02/01 (2002), at para. 2
refugee determination process bringing with it challenges on a theoretical as well as practical level. It is so far a rather unknown, territory.

Where refugee status cannot be afforded there is a possibility of receiving complementary protection in the European Union (EU) through the Refugee Qualification Directive or Art. 3 of the European Convention of Human Rights (ECHR). As this kind of protection does not offer as many benefits as refugee status, it will be secondary to refugee protection. However, it may sometimes be the only possibility to receive protection since refugee status is difficult to attain.

1.2 Literature Review

The academic context of the title of this dissertation is essentially comprised of two separate areas of law namely refugee law and law on trafficking. Relevant sources hence tend to deal with one of the two areas and are in this study brought together in order to answer the questions posed. There are however a couple of academic articles discussing the particular subject chosen. In this literature review I will firstly consider writings which specifically relate to the topic and subsequently reflect upon academic discourse in the areas of refugee law and trafficking.

Professor Ryszard Piotrowicz conducts research on refugee law and trafficking and smuggling of human beings and the legal response to people trafficking at international, regional and national levels at Aberystwyth University, Wales. In his articles “Victims of People Trafficking and Entitlement to International Protection” and “The UNHCR’ Guidelines on Human Trafficking” he takes an analytic approach to how refugee law may address the international protection needs of victims of trafficking. In his argument he problemizes the criteria in the Refugee Convention in relation to the situations faced by trafficked persons to find if and how refugee status may be granted. He concludes that there are significant hurdles to be overcome in order to secure refugee protection, which may essentially mean it is more fruitful to seek subsidiary protection. I have adopted a similar approach in my analysis in this dissertation and have taken his findings into account in the three analytical sections. I have thus made use of part of his international legal theory on human trafficking concerned with international protection obligations. His full theory

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6 http://www.aber.ac.uk/en/law_criminology/staff/staffdirectory/ryp, accessed 20/10/09
7 Piotrowicz, supra note 1
on trafficking has thus not been considered, and is neither relevant for the particular study conducted.\(^9\)

Dr Michelle Foster is a Senior Lecturer and Director of the International Refugee Law Research Programme at the Institute for International Law and the Humanities at Melbourne Law School.\(^{10}\) In “Obstacles to the Road to Protection: assessing the Treatment of Sex-Trafficking Victims under Australia’s Migration and Refugee Law”\(^{11}\) she attempts, together with Anna Dorevitch an critical approach to understanding how trafficked persons can gain protection through the Refugee Convention. In their argument, the criteria found in the Refugee Convention, as implemented in Australian law are analysed in relation to the experiences faced by trafficked persons. The conclusion drawn is that trafficking ought to be able to constitute acts of persecution where the victims are deprived of their liberty and subjected to physical, sexual and psychological violence. It may also be possible to link this persecution membership of a particular social group (PSG). The authors are however critical of the way that gender-perspectives of refugee law are being viewed in Australian jurisprudence, and of the way in which trafficked individuals are perceived. Their line of reasoning, as well as their way of conducting their analysis is taken into account when discussing the concept of persecution in section 2.1 and Convention ground under section 2.2.

When it comes to refugee law, Professor James C Hathaway is one of the most distinguished scholars. In his *The Law of Refugee Status*\(^{12}\) he methodologically maps out the criteria of the Refugee Convention and scrutinizes the concepts therein. He specifically argues that the harm that is needed to substantiate persecution can be understood through a hierarchy of rights. This approach is accepted by jurisprudence. In my section on persecution, I will use this approach as I attempt to unfold how persecution in can be understood in relation to trafficked persons in section 2.1. His perspective will also roughly be followed throughout the rest of the dissertation.

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\(^{10}\) [http://www.law.unimelb.edu.au/index.cfm?objectid=F9D2D075-B0D0-AB80E2BC98969E28989&username=Michelle%20Foster](http://www.law.unimelb.edu.au/index.cfm?objectid=F9D2D075-B0D0-AB80E2BC98969E28989&username=Michelle%20Foster), accessed 20/10/09


\(^{12}\) Hathaway, *supra* note 4
A specific area of study within refugee law that has recently developed is that of gender-specific and gender-related persecution. Heaven Crawley, Professor of International Migration is particularly interested in the conceptualisation of gender in an asylum determination process and was part of drafting the Gender Guidelines for the determination of asylum claims in the UK. In *Refugees and Gender: Law and Process* she takes a critical approach to refugee law from a gender perspective. She argues e.g. that persecution has not traditionally been interpreted to include gender specific experiences, which makes it difficult to substantiate serious harm and Convention ground. This is said to be partially caused by what is termed the public/private dichotomy. In addition, Thomas Spijkerboer who is a Professor of Migration Law has a particular interest in the gender aspects of migration. In *Gender and Refugee Status* he in a similar way to Crawley criticises the application of refugee law and the failure of member states to accept gender-specific and gender-related claims. My dissertation can be said to be framed within this wider academic study of gender-specific and gender-related harm and the arguments made in relation these issues in general are in my opinion highly relevant to understanding trafficking for sexual exploitation.

Furthermore, the understanding of the Convention ground PSG is one of the most complicated issues within refugee law. In ‘Protected Characteristics and Social perceptions: an Analysis of the meaning of ‘Membership of a Particular Social Group’ T. Alexander Aleinikoff who is a Professor of Law at George Town University in the USA explores the understanding of this Convention ground under international standards and state jurisprudence. He also considers difficult interpretive issues and the related nexus requirement. He argues that there is mainly two approaches to understanding the PSG ground, through the protected characteristics approach and the social perception approach. I have in this dissertation taken this argument into consideration.

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13 http://www.swan.ac.uk/staff/academic/EnvironmentSociety/Geography/crawleyheaven/, accessed 10/10/09; Asylum and Immigration Tribunal / Immigration Appellate Authority, Immigration Appellate Authority (UK): Asylum Gender Guidelines  
14 Crawley, H. *Refugees and Gender: Law and Process* (2001)  
15 Spijkerboer, T. *Gender and Refugee Status* (2000)  
17 http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=208 , accessed 21/10/09
when structuring my analysis of how trafficking can be linked to ground under section 2.2.2. His findings relating to case-law under these approaches have also been taken into account.

The area of refugee law also extends to complementary protection. Dr Hugo Storey who is a Senior Immigration Judge the Asylum and Immigration Tribunal in the UK explores this type of protection in his article ‘EU Refugee Qualification Directive: a Brave New World’[^18]. In the article he discusses the effort to harmonise international protection in the EU through the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (EU Qualification Directive). Part of his analysis is dedicated to comparing the subsidiary protection offered by the Directive with Art. 3 of the ECHR. This part is particularly useful for my analysis of complementary protection and I make use of it in section 2.3.2.

The study area of trafficking can be said to consist of much writings concerned with the Trafficking Protocol, and the fate of the persons concerned and the reasons behind the issue. Dr Silvia Scarpa examines, in *Trafficking in Human Beings Modern Slavery*[^19] the definition of trafficking according to the UN Trafficking Protocol, and other international legal instrument. The first part of the book analyses the causes and consequences of trafficking and the exploitation that it leads to. The second part contextualises trafficking under international conventions against slavery and the slave trade and makes the argument that trafficking ought to be seen as a modern form of slavery. The latter part is of particular relevance to this study. The questions posed and arguments made by Scarpa have been taken into consideration in this dissertation, in particular in section 2.1.3.

Moreover, Janice Raymond is Professor Emerita of Women’s Studies and Medical Ethics at the University of Massachusetts in Amherst.[^20] She is also Co-Executive Director of the Coalition Against Trafficking in Women (CATW).[^21] In ‘The New UN Trafficking Protocol’[^22] Raymond

[^19]: Scarpa, *supra* note 1
[^21]: Ibid.
summarises the key points of the Trafficking Protocol, the debate over the definition of trafficking, how it is to be interpreted, and its how it will affect regional and national policy against human trafficking. It also considers how trafficking for sexual exploitation is related to prostitution and debates arguments made about it not being related. She specifically argues that the consent of a victim of trafficking is irrelevant to the trafficking experience. Raymond’s arguments have been considered in particular with reference to section 2.1.2 on consent in the dissertation, but as can be seen in this section the argument made has got far-reaching consequences and is hence of relevance to the entire dissertation.

Dr Jo Doezema is a Visiting Fellow at the Institute of Development Studies at Sussex University. In her article ‘Who gets to Choose? Coercion, Consent and the UN Trafficking Protocol’ she explores the difficulties around the notion of consent in the UN Trafficking Protocol and the debate had during the drafting of the protocol. It is argued that the kind of trafficking discourse that Raymond and others conduct takes a patronizing stance, depriving women of choice and self-determination through stereotyping women as passive and making them either innocent victims or immoral prostitutes in way similar to what was done in early 20th century campaigns against white slavery. As with Raymond’s arguments, Doezema’s stand point is considered in particular under section 2.1.2 but is significant to the entire study.

In addition, Carina Johansson Wennerholm in ‘Crossing borders and building bridges: the Baltic Region Networking Project’, Ann D. Jordan in ‘Human Rights or Wrongs? The Struggle for a Rights Based Response to Trafficking in Human Beings’ and Beth Herzfeld in ‘Slavery and Gender: Women’s double exploitation’ are examples of authors who have provided valuable analyses of the various situations faced by trafficking victims across the world. These insights

23 http://www.ids.ac.uk/go/idsperson/jo-doezema, accessed 20/10/09
have been used in order to conduct analyses between the treatment faced and international protection obligations throughout the study.

1.3 Research Methodology

The purpose of this dissertation is to establish the legal standing in refugee law regarding persons who are at risk of being trafficked. For this purpose the pervasive, critical research question is:

1) Can/how can Art. 1A(2) of the Refugee Convention (as amended by the Protocol relating to the Status of Refugees 1967) give protection to people at risk of human trafficking?

This overarching question will be answered through the analysis of the following subsidiary questions:

1) Can/how can trafficking amount to persecution?

2) Can/how can trafficking be linked to a Convention ground?

3) Can/how can people at risk of trafficking receive protection through Art. 3 of the ECHR?

4) Can/how can people at risk of trafficking receive protection under the Swedish Aliens Act (2005:716)?

In order to reach my objectives, I have taken the determination criteria in Art. 1A(2) of the Refugee Convention as a starting point for my analysis. These have been scrutinized through the subsidiary questions above by critical analysis of literature and articles. I have mainly sought to analyse recent material from prominent scholars. The reliability of these sources is therefore high in the sense that the authors are well-reputed and acknowledged in their fields. However, they are naturally expressing their points of view on various matters. When it comes to articles specifically related to trafficking, these viewpoints are often coloured by a certain feminist stance taken. I have thus taken caution of this in my analysis. However since I have not studied the vast variety of feminism in depth, this may bring some weakness to the study.

Secondly, I have made use of case law, mostly from the common law countries United Kingdom (UK), United States (US), Canada and Australia for the international part of my analysis. I have chosen to do this firstly since there is no international organ making interpretations of the Refugee Convention. These jurisdictions provide useful alternative material since they are large
jurisdictions which interrelate. They are all also major receiving countries for trafficked persons. I have not aimed at making a comparative study, which means an overall picture has been sought rather than one based on individual jurisdictions. This has however sometimes meant alternative approaches have had to be analysed.

For the analysis conducted with regards to subsidiary protection, case law from the European Court of Human Rights has been used. This material is highly reliable and court’s interpretation of the relevant articles is binding for member states. In order to study Swedish law, Swedish case-law has naturally been used providing a reliable insight into the application of the Aliens Act (2005:716).

Thirdly, official documents from different UN organs have been useful. These have taken the form of guidelines and reports. The Office of the United Nations High Commissioner for Refugees (UNHCR) Guidelines e.g. are legal interpretive guidance to Signatory States and their composition is part of the UNHCR mandate. They thus provide reliable information on the UNHCR understanding of the Refugee Convention and how it wills States to apply it. Moreover, reports from UN Special Rapporteurs provide insight into specific trafficking source countries. These have often been paired with reports from other sources in order to gain a more complete picture.

In addition to these, when it comes to the study of Swedish legislation, preparatory work (“propositioner”) has been of much use. In the Swedish legal system, preparatory work is endowed with the quality of a source of law, which means it is highly reliable as well as relevant.

Qualitative and quantitative research such as interviews, surveys and focus groups are inappropriate to use for my purposes. Such research can only give a very limited understanding of the issue at hand, e.g. trafficking victims’ understanding of refugee protection. Such research would give an important insight into the practical implications of refugee protection in state parties to the Convention. However, this would have to be partnered with the kind of theoretical

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29 Statute of the Office of the United Nations High Commissioner for Refugees (1970), Art. 8(a)
research I have chosen to make in order to become broadly relevant. Therefore I have chosen against such methods.

1.4 Limitations

The study will be limited to trafficking of women for sexual commercial exploitation. Looking at one form of exploitation allows for a sufficiently in-depth analysis. Also, in answering the second and fourth question a clear emphasis will be on membership of a particular social group (PSG) since this ground is of most interest. Furthermore, it is recognised that much procedural issues go hand in hand with the legal ones, emphasising problems faced in already difficult claims. This dimension is however too complex in itself to be contained within the space of this dissertation. Finally, this dissertation is aimed at being primarily a study of international law, which will have an impact on the balance of the work.

2. ANALYSIS

Art. 1A(2) of the Refugee Convention defines a refugee as any person who, “owing to 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”. This chapter will be analysing whether persons at risk of trafficking can substantiate the refugee definition. Henceforth it will analyse whether complementary protection through Art. 3 of the ECHR may be achieved where refugee protection cannot be obtained. Lastly, Swedish national legislation will be discussed to gain an understanding of how international refugee law may be interpreted in a domestic setting.

2.1 A Well-Founded Fear of ‘Being Persecuted’

There is little doubt that trafficked persons often suffer harm on account of this illegal activity and much international attention has been given to the issue and how victims ought to be
protected. This section will problemize the concept of persecution in the refugee definition through analysing the question: can/how can trafficking amount to persecution? Firstly, gender-specific harm and trafficking will be considered in a refugee context. Secondly, trafficking as slavery will be studied and thirdly trafficking as torture. Hereafter, lack of state protection and location will be deliberated upon.

2.1.1 Gender-Specific Harm and Trafficking in Refugee Law

Persecution is not defined in the Refugee Convention. It is however firstly understood as a threat to life or freedom according to Art. 1A(2) read together with Art. 33 of the Refugee Convention. Other serious violations of human rights may also qualify as persecution. Hathaway defines persecution as the “sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community”. We are thus considering serious harm. In order to define what obligations are to be considered core entitlements Hathaway develops a hierarchy of rights based on four distinct types of obligations drawn from the Bill of Rights. This approach is widely accepted and has been crystallized into hard law through case law such as Sandralingham and Ravichandran v SSHD. I also find it the most helpful theory in trying to understand persecution. First in his hierarchy are the rights stated in the Universal Declaration of Human Rights (UDHR), made binding through the International Covenant on Civil and Political Rights (ICCPR), from which no derogation is permissible, even in times of national emergency. Here we find e.g. freedom from slavery and the prohibition on torture or cruel, inhuman, or degrading treatment or punishment. This category will be the focus of this dissertation.

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30 Evidenced e.g. by the drafting of such treaties as the Trafficking Protocol (2000) and the Council of Europe Convention on Action against Trafficking in Human Beings (2005)
32 UNHCR Handbook supra note 31, at para. 51
33 Hathaway, supra note 4, at 112
34 Ibid, at 108
35 Sandralingham and Ravichandran v SSHD CA [1996] Imm AR
36 Hathaway, supra note 4, at 109, see Art. 8, 7 ICCPR
Persecution has not traditionally been interpreted to include women’s gender specific experiences.\textsuperscript{37} A key problem in cases dealing with these issues has been the understanding of serious harm according to Crawley. Even though the Refugee Convention appears objective, universally applicable and gender neutral at first glance it is a product of its time and political realities.\textsuperscript{38} The persecution faced by the refugee depicted in the Convention is a male, public character generally oppressed because of political views.\textsuperscript{39} Much of the harm faced by women across the globe on the other hand occurs in the private sphere, which has meant their situations have fallen outside the scope of the legal definition of a refugee, rendering them without international protection.\textsuperscript{40} However, gender-specific persecution today needs to be viewed in the context of developments in refugee and human rights law. This is acknowledged by the Office of the United Nations High Commissioner for Refugees (UNHCR).\textsuperscript{41} It concludes that the refugee definition is to be interpreted “with an awareness of possible gender dimensions”\textsuperscript{42}. This includes claims brought by victims and potential victims of trafficking.\textsuperscript{43} There is hence ground for State Parties to consider persons at risk of trafficking for refugee status. However, the guidelines provide “legal interpretive guidance”\textsuperscript{44} and are as such not legally binding. Also, the guidelines do not deal extensively with all the circumstances surrounding a trafficking situation, which means questions are left unanswered.

Whether or not trafficking can be understood as amounting to persecution has, in my opinion to be answered with reference to Art. 3 of the Trafficking Protocol, since there is strong international consensus over this definition.\textsuperscript{45} The definition is drafted as a process made up of

\textsuperscript{37} Crawley, supra note 14, at 39
\textsuperscript{39} Crawley, supra note 14, at 7
\textsuperscript{40} Freedman, J. Gendering the International Asylum and Refugee Debate (2007), at 69
\textsuperscript{41} UNHCR Guidelines on Gender-Related Persecution supra note 5, at para. 5
\textsuperscript{42} Ibid, at para. 2
\textsuperscript{43} Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of refugees to victims of trafficking and persons at risk of being trafficked, UNHCR, UN Doc. HCR/GIP/06/07 (2006), UNHCR Guidelines on Gender-Related Persecution, supra note 5, at para. 18, Scarpa, supra note, at 95
\textsuperscript{44} UNHCR Guidelines on Gender-Related Persecution supra note 5, preamble; UNHCR Guidelines on Trafficking supra note 28, preamble
\textsuperscript{45} As of 26 Sept. 2008 117 states were signatories and 124 Parties to the Protocol
three parts. Firstly, there is recruitment or another trade measure. Secondly, certain illicit means are to be used, and thirdly the purpose shall be exploitation. Art. 3(a) states that “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”. As stated in the introduction this dissertation is limited to considering trafficking for ‘the exploitation of the prostitution of others’.

It should be noted that in considering a specific case, persecution is analysed in relation to future risk. This has to be assessed in accordance with the criterion of well-founded fear, requiring both a subjective and objective fear to be established. The experience of previous persecution can however support a claim made. The assessment of future risk will not be considered further.

2.1.2 The Trafficking Definition and the Issue of Consent

In order to effectively analyse and more fully understand how trafficking can amount to persecution with reference to slavery and torture provisions the inherent difficulties with the trafficking definition as found in Art. 3 of the Trafficking Protocol in my opinion need to be considered.

The definition reflects a long-standing feminist debate concerning the issue of consent. The chasm between such groups as Global Alliance Against Trafficking in Women (GAATW) and Coalition Against Trafficking in Women (CATW) relates to their respective understandings of prostitution. The former understands prostitution as labour, which a woman may freely choose to engage in. The latter regards prostitution as violence against women, something which cannot effectively be consented to. In the drafting of the Trafficking Protocol this meant GAATW promoted a definition including violence/coercion as a necessary element of trafficking, whereas CATW saw this as superfluous. Their understanding is that trafficking is always a violation of human rights, and not something you can consent to. Instead of taking a stand on the matter, the

46 Hathaway, supra note 4, at 65ff, 88ff, UNHCR Handbook, supra note 31, at para. 45
49 Sutherland, supra note 47, at 144
final draft of the definition became a compromise where both groups claim victory.\textsuperscript{50} This is in my opinion troublesome. It can be seen in the formulation of Art. 3(b) and in the fact that neither the ‘exploitation of the prostitution of others’ nor ‘other forms of sexual exploitation’ have been defined.\textsuperscript{51} This allows for State parties to address prostitution in the way they desire and also to determine the precise scope of trafficking.\textsuperscript{52}

Where the perspective promoted by GAATW is practiced, I would argue a distinction will be made between women who have been coerced into trafficking and those who have consented to migrate for sex work. The consequence of this will, in my opinion be that consenting women will be grouped together with smuggled individuals or otherwise irregular migrants. As such they will reasonably be expelled by immigration authorities as “current destination countries are prima facie negatively disposed toward those present or working illegally in their jurisdictions”\textsuperscript{53}. They will not on the basis of trafficking be considered refugees. This liberalist individualistic stance can be criticised for not duly considering the contexts in which the choices of these women are made.\textsuperscript{54} As Quirk states “trafficking can be a difficult concept to pin down. It does not denote a uniform condition but covers a spectrum of practices, involving varying degrees of consent, coercion, treatment and autonomy”\textsuperscript{55}. The question of what free choice actually is, is in my view relevant here since other factors such as poverty play a role in decisions made by women entering the trafficking process.

In contrast, where the perspective promoted by CATW is adopted I believe no distinction will be made between women who have consented to being trafficked or not. These will be separated from illegal immigrants as a category in need of protection. The consequence of this perspective

\textsuperscript{50} Raymond, supra note 22, at 4; Simm, supra note 48, at 147; Westerstrand, J. Mellan mäns händer Kvinnors rättssubjektivitet, internationell rätt och diskurser om prostitution och trafficking (2008), at 258
\textsuperscript{53} Askola, H. Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union (2007) , at 32
\textsuperscript{54} Ibid, at 34
could be that all of these women can be considered for refugee status, which obviously would provide a great deal of protection. The perspective can however be criticised for depriving trafficked women of their agency in making choices and hence reducing them to helpless victims.\textsuperscript{56} It may also in my view endanger more women of falling into the hands of traffickers when it becomes known that country X grants refugee status to all trafficking victims. However it cannot be ascertained that even where this perspective is adopted all these women will be understood as having experienced persecution. It can be argued this kind of application would mean refugee protection would be given on the basis of social and economic rights, since the lack of these tend to be push factors for women choosing to enter the trafficking process.\textsuperscript{57} This could potentially cause conflict with the Refugee Convention since it favours protection for civil and political rights unless an element of discrimination is involved.

It seems, in my opinion as though these polarized views in relation to the Refugee Convention could result in either a significant loss of international protection for the group of trafficked women having given their consent to recruitment, or the victimisation of the whole range of women trafficked for prostitution. I would not therefore ascribe completely to any of them, even though the CATW argument is certainly the most attractive at first glance.

\textbf{2.1.3 Trafficking for the ‘Exploitation of the Prostitution of Others’ as Slavery or Slavery-Like Practices}

Prohibitions on slavery and slavery-like practices have gained the status of \textit{jus cogens} in public international law.\textsuperscript{58} Where it occurs it amounts to persecution within the meaning of the Refugee Convention according to Hathaway’s rights hierarchy.\textsuperscript{59} Connections have been made between trafficking and slavery from the International Agreement for the Suppression of the White Slave Traffic in 1904.\textsuperscript{60} However, it needs to be analysed whether trafficking today can be understood as a form of slavery or slavery-like practice.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{56} Askola, supra note 53, at 25; Doezema, supra note 24
\item \textsuperscript{57} Wennerholm, supra note 25, at 12
\item \textsuperscript{59} Hathaway, supra note 4, at 9, Art. 8 ICCPR
\item \textsuperscript{60} Doezema, supra note 24, at 23
\end{enumerate}
\end{footnotesize}
The Slavery Convention from 1926 defines slavery in Art. 1(1) as the “status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. This is henceforth reiterated in Art. 4 Universal Declaration of Human Rights (UDHR) and Art. 8 International Covenant on Civil and Political Rights (ICCPR). Many understand the definition as narrow, referring to the black slave trade where ownership was exercised on a permanent basis. An interpretation such as this speaks for the exclusion of trafficking from the definition. This conclusion is supported by the drafting process of the Convention. In the process a suggestion to include in Art. 2 practices resembling slavery, such as trafficking was turned down. On the other hand, the Working Group on Contemporary Forms of Slavery in 1998 adopted a recommendation stating that “transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights”. Their promotion of trafficking as slavery, in my view carries more weight and seems supported by the Human Rights Committee. Further support for this view can also be found in humanitarian law. The International Criminal Court (ICC) Statute defines enslavement, a crime against humanity as including the “exercise of such power [powers attached to the right of ownership] in the course of trafficking in persons”. Furthermore, in the case Prosecutor v Kunarac before the International Criminal Tribunal for the Former Yugoslavia (ICTY) the Tribunal finds that indications of enslavement are elements of control, ownership and exploitation. As examples of exploitation sex, prostitution and human trafficking are given.

However, even if there is support for a general understanding trafficking as slavery, it cannot in my view be concluded that every instance of trafficking for the exploitation of the prostitution of others will be considered as such. According to Westerstrand, in a trafficking context slavery is

61 Westerstrand, supra note 50, at 326; Bassiouni, supra note 58
62 Scarpa, supra note 1, at 46
64 Human Rights Committee, General Comment 28, ‘Article 3 (The equality of rights between men and women)’, UN Doc. HRI/GEN/1/Rev.8 (2006), at para. 12
65 To be understood as equivalent to slavery according to Prosecutor v Kunarac and others (Judgement) ICTY-96-23-T and ICTY-96-23/I-T (22 February 2001)
66 Art. 7(2) (c) ICC Statute, see also Art. 8(2)(b)(xxii), 8(2)(e)(vi)
67 Prosecutor v Kunarac and others supra note 65, at para. 539, 542
68 Ibid, at para. 542
the coarsest form on a continuous scale.\textsuperscript{69} The Appeals Chamber in \textit{Prosecutor v Kunarac and others} states that whether something is to be deemed enslavement will depend upon the operation of factors such as: “control of someone’s movement, physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”\textsuperscript{70} In \textit{R v Tang} before the High Court of Australia it is stated that the difference between slavery and harsh exploitative conditions “may be found in the nature and extent of the powers exercised over a complainant.”\textsuperscript{71} It is emphasised that the treatment of a person as a commodity involves powers of control and inadequacy of payment well beyond those of the most exploitative employment situation. The claimants in this case were seen to have been exposed to \textit{de facto} slavery. The basis for this understanding was that they were financially deprived and vulnerable on arrival, their passports were held by the brothel owner, they were effectively restricted to the premises and they had to work without pay until their contract debt had been paid.\textsuperscript{72} I would argue many trafficked persons face this power of ownership. Sometimes they will experience it already on route where they may be sold from one “owner” to another, being confined to hotel rooms and sometimes being forced into prostitution.\textsuperscript{73} On other occasions, this experience only starts on arrival. Many are restricted to a brothel where they are made to work until the payment made for them, and other supposed expenses have been paid for.\textsuperscript{74} These may thus be able to argue they have been exposed to slavery in the form of trafficking and thus make a case for that persecution has occurred and hence that they may be exposed to this harm again. What may speak against such a claim being successful is the fact that the control often is not total but limited e.g. in time. Bassiouni claims this removes the situation from protection by

\begin{itemize}
  \item \textsuperscript{69} Westerstrand, \textit{supra} note 50, at 326
  \item \textsuperscript{70} \textit{Prosecutor v Kunarac and others} (Judgement) IT-96-23 and IT-96-23/1-A (12 June 2002), at 119
  \item \textsuperscript{71} \textit{R v Tang} [2008] HCA 39, at para. 44
  \item \textsuperscript{72} Ibid, at para. 15ff
  \item \textsuperscript{73} Human Rights Watch, ‘Bosnia and Herzegovina Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution’, 14:9 \textit{Human Rights Watch} (2002), at 15f
  \item \textsuperscript{74} Ibid, at 16ff; Coomeraswamy, R. Report of the Special Rapporteur on violence against women, its causes and consequences: Mission to Bangladesh, Nepal and India on the issue of trafficking of women and girls, UN Doc E/CN.4/2001/73/Add.2 (2001) at 10
\end{itemize}
international instruments on slavery.\textsuperscript{75} The Appeals Chamber in \textit{Prosecutor v Kunarac} disagrees and so do I.\textsuperscript{76}

Where the slavery definition cannot be met, the 1956 Supplementary Convention on Slavery, the Slave Trade, and Institution and Practices Similar to Slavery (Supplementary Convention on Slavery) broadens the scope of the Slavery Convention through adding institutions and practices similar to slavery.\textsuperscript{77} These are set out in Art.1 and include debt bondage.\textsuperscript{78} This occurrence is herein defined as the practice of repaying a loan with services where the length and value has not been specified. The creditor potentially adds interest to such a loan in order to gain further control over the debtor and to increase the length of time of the bondage.\textsuperscript{79} The experiences faced by many trafficked women in my view fit this definition. The definition of trafficking in the Trafficking Protocol also provides recognition of that debt bondage can be involved in trafficking.\textsuperscript{80} Many are told they have to work to repay travel and other expenses. This has been found to be common with women trafficked from Tajikistan to control the victims and ensure high profits.\textsuperscript{81} Women trafficked to Bosnia Herzegovina and Japan are similarly bound to work until large debts have been paid off.\textsuperscript{82} Women who face these kinds of situations may thus claim they have been exposed to slavery-like practices and might be able to ascertain they have experienced persecution.

The definition of trafficking with its inherent problems can in relation to the above, in my view be criticised for its focus on the initial stage of the trafficking process. The discussion about consent, which will ultimately affect who is seen as a victim of trafficking, begins and ends with

\textsuperscript{75} Bassiouni, \textit{supra} note 58, at 459; Westerstrand, \textit{supra} note 50, at 330

\textsuperscript{76} \textit{Prosecutor v Kunarac and others, supra} note 70, at para. 121

\textsuperscript{77} Scarpa, \textit{supra} note 1, at 49

\textsuperscript{78} Art. 1(a) Supplementary Convention on the Abolition of Slavery (1956)

\textsuperscript{79} Scarpa, \textit{supra} note 1, at 19

\textsuperscript{80} Art. 3(a) Trafficking Protocol; Kelley, E. ‘Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe’, 11 \textit{IOM Research Series} (2002), at 15

\textsuperscript{81} International Organization for Migration (IOM), Deceived Migrants from Tajikistan- A Study of Trafficking in Women and Children, Capacity Building in Migration Management Programme (2001), at 19

the means of recruitment or other trade measure. This can according to Reilly make the exploitation following the initial process invisible and hence prevent it from becoming clear that slavery/slavery-like practices have occurred. I consider this paradoxical and troublesome since slavery cannot be consented to. The result Reilly foresees is that perpetrators will not be prosecuted and the crime of trafficking not fully exposed. I would add that it means victims of trafficking are made invisible to the refugee determination process.

2.1.4 Trafficking for the ‘Exploitation of the Prostitution of Others’ as Torture

The prohibition on torture has gained the status of *jus cogens* in international law. It amounts to persecution within the meaning of the Refugee Convention according to Hathaway’s rights hierarchy. The prohibition can be found in both human rights treaties such as Art. 5 UDHR and Art. 7 ICCPR, humanitarian law instruments such as the common Art. 3 of the Geneva Conventions and in international criminal law treaties concerned with war crimes and crimes against humanity, both of which include torture. The UN Convention Against Torture (CAT) finally constitutes an instrument entirely dedicated to the eradication of torture and is understood as reflecting international customary law as far as state obligations are concerned. It will therefore be at the centre of the analysis below. Torture has traditionally been understood as an interrogation method to secure evidence and hence had little to do with the gender-specific

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83 Compare Art. 3(a) and (b) Trafficking Protocol
85 *Prosecutor v Kunarac and others supra* note 70, at para. 120; *R v Tang supra* note 71, at para. 35
86 Reilley, *supra* note 84, at 118ff
88 Hathaway, *supra* note 4, p. 9
89 Art. 7(1) (f), Art. 8(2)(a)(ii) of the ICC Statute includes torture as a crime against humanity and a war crime, compare Art.5(f) of the ICTY Statute, Art. 3(g) of the ICTR Statute; First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (1864), Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1906), Third Geneva Convention relative to the Treatment of prisoners of War (1949), Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949)
90 *Prosecutor v Kunarac and others supra* note 70, at para. 147
harm. However, much development has been made in understanding gendered forms of torture and it needs to be analysed whether trafficking today can be understood as a form of torture.

In Art. 1 CAT the act of torture is defined by four essential components, namely: severe physical or mental pain or suffering, intent, purpose and the _rationae personae_ reserved for public officials. These therefore need to be considered in relation to trafficking. Firstly, trafficking has been recognised as a form of violence against women. Where the exploitation takes the form of (forced) prostitution, this violence is of a sexual nature. Various forms of sexual violence against women has by the ICTY and the International Tribunal for Rwanda (ITR) been recognised as “constituting ‘wilfully causing great suffering’, ‘cruel treatment’, ‘inhumane acts’, etc.” However, in order for such treatment to be understood as torture the acts must be of substantial gravity. According to _Prosecutor v Kunarac_ there is no absolute threshold level of pain or suffering that is to be determined. It is rather a matter of taking into account “objective and subjective criteria as well as the disposition of the victim”. In _Prosecutor v Krnojelac_ some of the aspects considered are the nature, length, consistency and context of the treatment together with the age, sex, health and inferiority of the victim. Rape has on a number of occasions been recognised by the tribunals as torture. In the case of _Prosecutor v Kunarac_ it was stated that once rape has been proved, it can be established that torture has occurred since the act of rape “necessarily implies such pain or suffering” as required by the definition. The pain and suffering caused by trafficking can in my opinion effectively be compared with that caused by rape, since it also involves “a physical invasion of sexual nature”. During the exploitation

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91 Burchard, _supra_ note 87, at 9
92 UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 19 ‘Violence against Women’, UN Doc. HRI/GEN/1/Rev.8 (2006), at 302
94 _Prosecutor v Kunarac and others_ supra note 70, at para. 149
95 Burchard, _supra_ note 87, at 4
96 _Prosecutor v Krnojelac_ (Judgment) IT-97-25-T (15 March 2002), at para. 182, compare section 2.3 on Art.3 ECHR
97 _Prosecutor v Delalic, et al._ supra note 87; _Prosecutor v Furundzija_ (Judgement) IT-95-17/1-T (10 December 1998); _Prosecutor v Akayesu_ (Judgement) ICTR-96-4-T (2 September 1998). Rape has also been recognised as persecution, please refer to _Lazo-Majano v INS_, 813F.2d 1432 (1987); _Lopez-Galarza v INS_, 99 F. 3d 954 (1996)
98 _Prosecutor v Kunarac and others_ supra note 70 at para. 149ff; Burchard, _supra_ note 87, at 3
99 _Prosecutor v Akayesu_ supra note 97, at para. 688
phase, trafficked women serve clients during 9-18 hours a day.\textsuperscript{100} Many also face beatings, rape and starvation by their “owners”.\textsuperscript{101} In contrast to rape victims, trafficking victims endure their ill-treatment for longer periods of time and are often held in a position of inferiority through isolation, control and deception.\textsuperscript{102} Trafficking victims also tend to be young, which adds to their vulnerability.\textsuperscript{103} The severity of this treatment is evidenced by the fact that the experience is detrimental to the physical, sexual and reproductive health and often causes substance abuse and misuse.\textsuperscript{104} Many victims also suffer from post-traumatic stress disorder, depression, anxiety and phobias.\textsuperscript{105} Depending on the particular circumstances of the case, this treatment ought in my view to be considered severe enough to constitute torture. If it in a particular case is not, cruel, inhuman or degrading treatment should be possible to evidence.\textsuperscript{106}

Secondly, the act must be intentionally inflicted for the purpose of obtaining information or a confession, to punish, to intimidate or coerce or for “any reason based on discrimination of any kind”\textsuperscript{107}. It can be argued that gender-specific violence is a form of discrimination.\textsuperscript{108} This means, according to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that where violence against women occurs the “purpose element is always fulfilled, if the acts can be shown to be gender-specific”\textsuperscript{109}. In \textit{Prosecutor v Delalic et al} the Trial Chamber concluded that the sexual violence experienced by the victims was inflicted because


\textsuperscript{101}Ibid, Coomeraswamy, \textit{supra} note 74, at para. 21

\textsuperscript{102}Ibid, IOM Kosovo Anti-Trafficking Project, Return and Reintegration Project, Situation Report February 2000 to September 2002, at. 16

\textsuperscript{103}Human Rights Watch, \textit{supra} note 73, at 4, 16

\textsuperscript{104}London School of Hygiene and Tropical Medicine, The Health Risks and Consequences of Trafficking in Women and Adolescents, findings from a European Study, available at: http://www.oas.org/atip/Global\%20Reports/Zimmerman\%20TIP\%20HEALTH.pdf, accessed 25/06/09, p. 44ff


\textsuperscript{106}Compare \textit{Prosecutor v Akayesu}, \textit{supra} note 97, at para. 692ff

\textsuperscript{107}Art.1 CAT

\textsuperscript{108}CEDAW, \textit{supra} note 92, at para. 7

\textsuperscript{109}Nowak, M. Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/7/3 (15 January 2008), at para. 30
they were women and that it therefore “represents a form of discrimination”\textsuperscript{110}. This is in my opinion a convincing argument which means that sexual violence experienced by women trafficked into prostitution can also be understood as a form of discrimination. It is also emphasised by the fact that the female body is made an object of purchase. The Special Rapporteur considers intent to be implied in these circumstances.\textsuperscript{111}

Thirdly, trafficking tends to be perpetrated by non-state actors.\textsuperscript{112} The limitation provided by the public official requirement in Art. 1 CAT can therefore prove difficult to satisfy. In international criminal law, this requirement was lifted in \textit{Prosecutor v Kunarac}.\textsuperscript{113} However, the main reason was the specific nature of international humanitarian law.\textsuperscript{114} General conclusions about the crime of torture therefore cannot be made on this basis. Gaeta suggests the public official requirement is a necessary feature with of the definition of torture in CAT, since it imposes obligations in criminal matters under exceptional circumstances.\textsuperscript{115} The requirement should hence not be interpreted to include acts by non-state actors.\textsuperscript{116} In contrast, the Special Rapporteur on torture considers the language of Art. 1 as regards consent and acquiescence by a public official to extend State obligations to the private sphere.\textsuperscript{117} He states that this “should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals”\textsuperscript{118}. I consider this argument highly plausible. This stance also seems to be held by the Committee against Torture which claim that where the State knows or has reasonable grounds to believe that torture or ill-treatment is being perpetrated by non-state actors and fails to due diligently prevent, investigate, prosecute or punish these “the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts”\textsuperscript{119}. They

\begin{itemize}
\item \textit{Prosecutor v Delalic, et al. supra} note 87, at paras. 941, 963
\item Report of the Special Rapporteur on Torture \textit{supra} note 109, at para. 30
\item Raymond, \textit{supra} note 22, at 493; Wennerholm, \textit{supra} note 25, at 13f
\item \textit{Prosecutor v Kunarac and others, supra} note 65, para. 459; \textit{supra} note 70, at para. 145ff
\item Burchard, \textit{supra} note 87, at 3
\item Gaeta, P. ‘When is the Involvement of State Officials a Requirement for the Crime of Torture?’, 6:2 \textit{Journal of International Criminal Justice} (2008) 183, at 2ff
\item Gaeta, \textit{supra} note 115, at 3
\item Nowak, \textit{supra} note 109, at 31
\item Ibid
\item Committee against Torture, General Comment 2, ‘Implementation of article 2 by State Parties’, UN Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), at para. 18
\end{itemize}
consider such indifference as facilitating and encouraging such actions. Even if this view is not accepted by jurisprudence, Art. 7 ICCPR provides a prohibition on torture without the public official requirement. Referring to Art. 2(1) of the ICCPR, Smith claims “state liability will not necessarily be limited to acts committed by its officials in the pursuance of their public duties, but may extend liability for harm inflicted by private actors where a State has failed to take the necessary protective and/or investigative steps”\(^{120}\). Since both CAT and ICCPR are of relevance to establishing that trafficking amounts to persecution, I conclude that this requirement ought not to pose any difficulty.

The same criticism of the trafficking definition regarding the issue of consent can be made in relation to torture, as it was with regards to slavery. Like slavery, torture cannot be consented to, which means a focus on the initial recruitment stage and whether consent was given should not be of major importance where the person can be considered to have been exposed to torture.\(^{121}\)

### 2.1.5 Failure of State Protection

In addition to the serious harm requirement, there needs to be a lack of state protection for persecution to be established, according to the principle of surrogacy.\(^{122}\) In most instances of trafficking in persons, private agents are the perpetrators.\(^{123}\) The UNHCR Handbook states that when serious harm is committed by private actors, “they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection”\(^{124}\). This has been analysed in *Horvath v SSHD*, where Lord Hope states that “the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals”\(^{125}\). The test is one of reasonable willingness. Lord Clyde explains this as meaning a criminal law must be in place making to punish the crime

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\(^{120}\) Smith, E. ‘A Legal Analysis of Rape as Torture’, in Peel (ed.), *Rape as a Method of Torture* (2004), at 180f

\(^{121}\) *R v Brown* [1993] 2 All ER 75, see in particular Lord Templeman; *Laskey, Jaggard and Brown v UK* (Case No. 109/1995/615/703-705) Judgement of 19 February 1997

\(^{122}\) Goodwin-Gill, *supra* note 31, at 9ff; *Regina v SSHD ex parte Sivakumaran* [1988] AC 958

\(^{123}\) UNHCR Trafficking Guidelines, *supra* note 43, at para. 21


\(^{125}\) Lord Hope of Craighead in *Horvath v SSHD* [2000] UKHL 37 (6th July, 2000); *Adan v SSHD* [1999] 1 AC 293; Hathaway, *supra* note 4, at 125
without exempting the victims as a class from this protection. There also needs to be willingness amongst law enforcement agencies to utilise this law. In relation to trafficking, legislative and administrative mechanisms and their effectiveness in preventing and combating trafficking and protection and assisting victims will have to be analysed in a given country.

In considering case-law regarding trafficking, this could potentially pose a problem in a status claim. In V01/13868 from 2002 the Refugee Review Tribunal of Australia (RRTA) considers whether Albania can be seen to provide state protection in relation to trafficking. It is concluded that Albania has accepted responsibility to protect women from being trafficked and that they are therefore willing and able to do so. This conclusion is based mainly on the fact that Albania was promoted from a ‘Tier 3’ to a ‘Tier 2’ country in the US Department of State Trafficking in Persons Report 2002, which signifies the fact that the Albanian Government has shown willingness to stop trafficking even though they are not yet fulfilling the minimum requirements for the elimination of trafficking. Similar conclusions regarding Albania are drawn two years later in V03/16442 even though the minimum requirements are still not met. It seems in my view that the Tribunal is taking a hopeful approach to state protection in relying on willingness than actual ability to perform.

Moreover, state corruption and lack of prosecution of trafficking offenders expanded upon in VD Albania and V01/13868. These major problems in the countries in question are however not given enough weight for it to be considered as impairment on available state protection. The House of Lords accept this stance in Horvath v SSHD. This seems to ignore the emphasis of the Trafficking Guidelines that when trafficking activities are de facto tolerated, condoned or facilitated by corrupt State officials, the agent of persecution may well be the state itself.

In contrast, in the case of SK Albania the Tribunal concludes that even though Albania has been promoted from a ‘Tier 3’ to a ‘Tier 2’ in the 2002 US Department of State Trafficking in Persons

126 Lord Clyde, at para. 22
127 See Part II Trafficking Protocol, UNHCR Trafficking Guidelines, supra note 43, at para. 23
131 Horvath v SSHD, supra note 125, see Lord Clyde
132 UNHCR Trafficking Guidelines, supra note 43, at para. 24
Report it does not yet fully comply with the minimum standards for the elimination of trafficking. This is seen as an indication of there not being sufficient state protection. The fact that a country is a major source country of trafficking and consistently fails to prosecute offenders has also been accepted as evidence of failure of state protection in SSHD v Dzyhygun regarding Ukraine. There are also judgements contrasting what is determined above in relation to state corruption. In N03/47757 the Tribunal accepts police corruption in Thailand as evidence of failure of state protection.

The requirement of there being willingness and ability to protect women from trafficking in a State seems clear and reasonable. However, judging from the case-law presented I believe it may not be as simple. In some cases a high threshold for state failure to be accepted was used. However, in others a more empathetic approach can be seen. This difference makes me wonder about the risk of arbitrariness in the consideration of country reports.

2.1.6 Location

The whereabouts of an individual wanting to claim refugee status is important; the claimant must be outside the country of nationality. It is also important in relation to where the alleged persecution took place. The claim is to be assessed with reference to the conditions in the state of nationality or origin. It is the risk upon return which is assessed in the determination process. Protection in the form of refugee status is only to be afforded if protection cannot be sought from the state of origin.

The traditional view of a refugee is that the individual has crossed an international border to seek protection from political oppression from the state of origin. In the context of trafficking, movement is not made to escape harm but the beginning of a process leading to harm. This could potentially complicate a claim for asylum. It is not necessary to have left because of fear, refugee

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133 SK Albania UKIAT [2003] 00023, para. 12; P v SSHD [2008] EWHC 2447 (Admin)
134 SSHD v Dzyhygun, [2000] UKIAT 00TH00728, at para. 23
136 Art. 1A(2) of the Refugee Convention
137 Hathaway, supra note 4, at 55ff
138 Goodwin-Gill, supra note 31, at 9ff
139 Crawley, supra note 14, at 4ff
law recognises refugees *sur place*. As can be seen in the definition of trafficking, it is a process. Usually it starts with recruitment by word of mouth, marriage schemes and advertisements for jobs as e.g. waitresses, dancers, baby-sitters. Both native and foreign girls are attracted in this way in e.g. Poland and Russia. Among the foreigners are women in search of employment, refugees, forced migrants and displaced persons having lost their nationality. Recruitment is also made directly into destination countries. After this initial contact the traffickers usually offer to handle logistical matters, tickets and necessary documents. This part of the trafficking process is voluntary on the part of the individual and in itself not harmful. The journey hereafter may involve violence, rape, and sale from one trafficker to another, beginning the actual harm. It is equally possible for the harm to begin only on arrival in the destination country. There is thus an inherent complexity in the trafficking process which will affect the process of establishing trafficking as persecution.

The Special Rapporteur on violence against women claims that the recruitment as well as transport of trafficked persons is “inextricably linked to the end purpose of trafficking” and suggests a holistic understanding of trafficking generally. This is a reasonable argument in my view. It also coheres with the definition of trafficking in the Trafficking Protocol. On this basis, a woman who has been recruited in her country or origin can relate the harm she fears to this country. This is however not possible where the recruitment has taken place in a foreign country. The only link that can be made to the country of origin here is the reason for why the woman left her country in the first place. These reasons will often be of socio-economic nature

140 Hathaway, *supra* note 4, at 33ff
141 Ibid, at 55
143 Orlova, *supra* note 142, at 167; Coomeraswamy, *supra* note 100, at 14
144 Coomeraswamy, *supra* note 100, at 15
145 Ibid, at 16; Orlova, *supra* note 142, at 171f
146 Human Rights Watch, *supra* note 73, at 15f; Orlova, *supra* note 142, at 159
and thus something which cannot easily be argued for as a basis of refugee status. Where recruitment is made through the internet, the complexity is added to. Perhaps the targeting in various ways of certain countries could be used to build a claim here, but I perceive this to be difficult.

Furthermore, internal trafficking occurs in many places. From rural and economically deprived areas people are trafficked to cities. In some places like Mauritania women are also trafficked between ethnic groups. These individuals are out of bounds of refugee status, since they have not crossed an international border, even though their harm clearly relates to their country of origin.

2.2 For Reasons of a Ground

In addition to establishing trafficking as persecution, a claimant must show this is feared for reasons of a ground, which is what this section will be problemizing. This will be done through analysing the question: can/how can trafficking be linked to a Convention ground? Firstly consideration will be given to gender-related harm where the grounds race, religion, nationality and political opinion will be mentioned. Secondly a more in-depth analysis of membership of a PSG will be made. Lastly nexus will be discussed.

2.2.1 Gender-Related Harm and Trafficking

The harm feared by a claimant of refugee status has to be linked to a Convention ground as stated in Art. 1A(2) of the Refugee Convention. Gender is not included among the grounds, which means gender-related claims must be satisfied by the other grounds. According to Crawley “some of the most difficult issues in current jurisprudence arise over whether a gender-related asylum claim involves persecution ‘on account of’ one of the five enumerated grounds”. It has

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149 Coomeraswamy, *supra* note 74, at 29
150 Coomeraswamy, *supra* note 147, at 25
151 UNHCR Guidelines on Gender-Related Persecution, *supra* note 5, at para. 22
152 Crawley *supra* note 14, at 62
been particularly difficult to show that sexual violence is linked to a ground, rather than an expression of individual violence.\textsuperscript{153}

Some women are trafficked because of race, religion, nationality or political opinion.\textsuperscript{154} This is today generally accepted as encompassed by the refugee definition.\textsuperscript{155} This will therefore not be explored further. More problematic are the instances where women are trafficked because they are vulnerable. Membership of a PSG can here be used. It is also under this ground that trafficking cases commonly have been brought.\textsuperscript{156} However, it is not straightforward.

2.2.2 Membership of a Particular Social Group

Purely being vulnerable to being trafficked is not enough to substantiate a claim for refugee status. The vulnerability must be attributable to membership of PSG. The understanding of the ground has mainly developed through case law and scholarly writings.\textsuperscript{157} Chiefly two approaches have emerged. How trafficking can be linked to this ground thus needs to be analysed in relation to these. It should be noted initially that there is consensus over a few matters. One of them is that a PSG cannot be defined by the persecution feared although it may aid in defining the group.\textsuperscript{158} Additionally, the UNHCR promotes the view that the two approaches are to be brought together.\textsuperscript{159}

2.2.2.1 Protected Characteristics Approach

The \textit{ejusdem generis} approach has evolved essentially through the cases \textit{Matter of Acosta} and \textit{Canada v Ward}.\textsuperscript{160} It is herein proposed that the meaning of membership of a PSG should

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\textsuperscript{153} Crawley \textit{supra} note 14, at 62
\textsuperscript{154} See e.g. \textit{N03/45573} [2003] RRTA 160 (24 February 2003), Coomeraswamy, \textit{supra} note 147, at 25
\textsuperscript{155} Piotrowicz, \textit{supra} note 1, at 168ff, \textit{SSHD v K Fornah} v \textit{SSHD}, [2006] UKHL 46
\textsuperscript{156} Dorevitch, Foster, \textit{supra} note 11, at 17; Poppy Project, ‘Hope Betrayed: An analysis of Women Victims of Trafficking and their Claims for Asylum’ (2006)
\textsuperscript{157} Aleinikoff, \textit{supra} note 16, at 265ff
\textsuperscript{160} \textit{Matter of Acosta}, Interim Decision No. 2986, 1985, 19 I&N Decisions 211, BIA, 1 March 1985
\end{flushright}
consider the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.\textsuperscript{161} Justice La Forest in \textit{Canada v Ward} hence defines the ground as including groups defined by e.g. an innate or unchangeable characteristic.\textsuperscript{162} On this basis the House of Lords in \textit{Islam and Shah} recognise ‘women in Pakistan’ as a PSG with sex/gender as the innate and unchangeable characteristic.\textsuperscript{163} Central to the determination is the deeply enshrined discrimination against women found in Pakistani society, one which is condoned or tolerated by the State.\textsuperscript{164} Similarly, in the case of \textit{Fornah} the House of Lords find that ‘women in Sierra Leone’ are a group “sharing a common characteristic which, without fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men”.\textsuperscript{165} The group’s existence is separate from the persecution faced, specifically Female Genital Mutilation (FGM) since it exists whether or not FGM is practiced.\textsuperscript{166}

It is thus possible to bring a claim regarding trafficking on the basis of sex/gender as an innate and unchangeable characteristic. To succeed with this, it needs to be established that the claimant is exposed to the type of severe discrimination as seen in the cases above in the country of origin as a result of being a woman. Women who are trafficked come from countries such as Moldova, Romania and Bulgaria where they are vulnerable due to e.g. low income and socially deprived circumstances.\textsuperscript{167} The question is if this is discriminatory. Many of these push-factors\textsuperscript{168} will be spread broadly over the population and not only affect women. Where this is the case, it can be argued women do not constitute a PSG but are affected by generalized hardship, something which the Refugee Convention does not protect from.\textsuperscript{169} I think this is a rather solid argument to be made under refugee law. In contrast it can be contended that the hardship these women face

\textsuperscript{161} Attorney General of Canada v Ward, [1993] 2 S.C.R 688, 1993 CanLII 105, at 7; Hathaway, supra note 4, at 158f
\textsuperscript{162} Canada v Ward, supra note 161, at 75
\textsuperscript{163} Islam and Shah, supra note 158
\textsuperscript{164} Ibid. at 503
\textsuperscript{165} SSHD v K Fornah supra note 155, at para. 31
\textsuperscript{166} Ibid.
\textsuperscript{167} Omelaniuk, I. Trafficking in Human Beings, UN Expert Group Meeting on International Migration and Development, UN Doc. UN/POP/MIG/2005/15 (2005), at 3f
\textsuperscript{168} The concept denotes such factors which help create a supply of women which traffickers take advantage of, see Jordan, supra note 26, at 28ff
\textsuperscript{169} UNHCR Handbook, supra note 31, at para. 66ff
are based on uneven, patriarchal systems in society. Masika and Williams exemplify this by referring to that families in countries where a dowry is paid are less prepared to make investments in a daughter than a son, leading to limited access to education, political participation and economic possibilities. This is also a fair argument. However, it is doubtful whether unfairness such as this reaches the threshold of making women clearly distinguishable in society, as understood by the courts. The treatment would probably have to be tolerated or condoned by the State, making it institutionalised or deeply entrenched. In major source countries such as Albania, I believe this would be a difficult argument to make. Anti-discrimination legislation is in place and series of measures are taken to improve reality. Substantiating the existence of women as PSG is hence hard. This can be exemplified by SSHD v Dzygun where consideration is given to whether women in Ukraine will be able to constitute a PSG for the purpose of substantiating a claim regarding trafficking. The Court concludes that women in the Ukraine face discrimination on account of their gender. It is however not considered to be sufficiently deep-rooted for a PSG to exist. Women are not seen as sufficiently distinct from general society. However, the court finds that a significantly narrower group exists, namely women in the Ukraine who are forced into prostitution against their will. “The unifying factors being their gender, coercion, prostitution, societal recognition, persecution and the lack of State protection”. The group would seem to include women who have previously been forced into prostitution and possibly those who are or have been seriously threatened to be so, whether or not trafficking has occurred. This narrow way of defining a group in my view runs the risk of excluding potential victims where they cannot evidence previous forced prostitution or a serious threat thereof. Also, the construction of the group seems slightly odd considering trafficking is

171 Masika, supra note 170, at 6; Herzfeld, supra note 27, at 50
172 Fornah, supra note 155, at para. 31, 54; Islam and Shah supra note 158, at 497ff
174 CEDAW, supra note 173, at 23f
175 SSHD v Dzygun supra note 134, at para. 27f
176 Ibid, at para. 29
177 Ibid, at para. 28
defined not only by transportation to another country but also by coercion and the exploitative purpose, in this case prostitution.\textsuperscript{178} These are elements which define the group. Even so, the group is considered separate from the persecution feared. In \textit{Petition of Olga Shimkova} similar reasoning to that of \textit{Dzhygun} can be found.\textsuperscript{179} Here however, an even more narrow definition is considered, namely ‘women being trafficked or at risk of being trafficked’.\textsuperscript{180}

Moreover, in the case of \textit{SK Albania} the Immigration Appeal Tribunal (IAT) accepts that the Appellant belongs to the social group, ‘women from the north east of Albania’.\textsuperscript{181} This shows the possibility of establishing a ground based upon sex/gender narrowed down by geographical location. This restricts the scope of the group, but in my opinion not as much as the alternatives presented in \textit{Dzhygun} and \textit{Petition of Olga Shimkova}. It can be concluded that if the group is defined broadly it may not be considered sufficiently distinct from general society. On the other hand, if it is defined more narrowly women at real risk of persecution may potentially be excluded.

In addition, trafficked women may, according to the Trafficking Guidelines base membership of a PSG on the fact of having previously been trafficked. The experience is a historic fact common to all victims and unchangeable.\textsuperscript{182} This line of argument is supported by Baroness Hale of Richmond who, in the case of \textit{Ex parte Hoxha} explains that “women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment”.\textsuperscript{183} In the case of \textit{SB Moldova} regarding trafficking victims, this position is used.\textsuperscript{184} This can be compared with the earlier case \textit{MP Romania} where the same argument was rejected on the basis that this construction falls foul of the principle that the group must exist independently of persecution.\textsuperscript{185} In addition to the sharing of a historical fact, it must bring the group a distinct identity in the relevant society, which was the case in

\begin{itemize}
\item Please refer to section 2.1.2
\item \textit{Olga Shimkova Petitioner Against SSHD Respondent} 2004 Scot(D) 24/3 Outer House Court of Session
\item Ibid, para. 19
\item \textit{SK Albania} supra note 118
\item Trafficking Guidelines, supra note 43, at para. 39, Piotrowicz, supra note 8, at 250
\item \textit{SB Moldova} CG [2008] UKAIT 00002, at para. 53(c)
\item \textit{MP Romania} [2005] UKIAT 00086
\end{itemize}
Moldova. Evidence of social stigmatisation and the fact that follow-up assistance was rarely sought to avoid the local community learning about the victim’s past experience brought the court to its conclusion. This construction, helpful as it is precludes claims being made by individuals having never been trafficked.

2.2.2.2 Social Perception Approach

The social perception approach has been established in primarily Australian jurisprudence through the case Applicant A v Minister for Immigration and Ethnic Affairs (MIEA). The High Court of Australia here adopts the understanding that a PSG “is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large”. It is proposed that the ordinary meaning of the words should inform its application. Therefore the characteristic in common to group members may be any attribute which makes the group cognizable in society. On this basis Gleeson CJ holds in MIEA v Khawar that ‘women in Pakistan’ can be seen as a PSG. He goes on to state that “women in any society are a distinct and recognisable group”. As Dorevitch and Foster note, this illustrates that “the social perception test could, in theory be used to consistently recognise PSG of women”. This would of course include women who fear trafficking. However, jurisprudence regarding trafficking shows the application of the ground is not quite as straightforward as might have been the case.

In the case V01/13868 it is stated “the Tribunal accepts that in some countries women and more specifically young women can constitute a PSG”. It goes on to explain that age and gender may unite women, making them a cognisable group in society. A more narrow definition is thus promoted. ‘Young women in Albania’ is accepted as one of these groups. They are identifiable

186 SB Moldova, supra note 184, at para. 74
187 Ibid, at para. 106
188 Applicant A v MIEA, supra note 158, at 9, 23
189 Ibid, Chen Shi Hai v MIEA, (2000) 170 ALR 553
190 Applicant A v MIEA, supra note 158, at 4
191 Aleinkoff, supra note 16, at 196, Goodwin-Gill, G.S., McAdam, J. The Refugee in International Law (2007), at 86
192 MIMA v Khawar [2002] HCA 14; 210 CLR 1; 187 ALR 574; 76 ALJR 667 (11 April 2002), at para. 32
193 Ibid, at para. 35
194 Dorevitch, Foster, supra note 11, at 35
195 V01/13868 supra note 128, at 19; V03/16442 supra note 130
and distinct in Albanian society since they face the danger of being trafficked by criminals, evidenced by the many agencies working to assist young trafficking victims.\textsuperscript{196} Ironically, this is also the fact which makes the claim fail on the basis of existence of state protection. Similar reasoning is made in \textit{N98/24000}. Here the PSG considered is ‘young (vulnerable) Colombian women’. This group is not accepted because it is not seen as cognisable in Colombian society.\textsuperscript{197} Vulnerability to trafficking is not enough.

Other routes of narrowing groups of women are also taken. In \textit{060779039} the Tribunal accepts one based on the common characteristic of marital status when recognising ‘unmarried women in Nepal’ as a PSG.\textsuperscript{198} Its acceptance is based on the fact that society is organised in a traditional way where family ties, caste and traditions are central. The lack of this safety net is presumably what sets them apart as cognisable. This is supported by the fact that police and government are “less than adequately responsive to protecting vulnerable women in the situation of the applicant”\textsuperscript{199}.

In contrast, narrowing a group of women through making reference to situations of vulnerability such as homelessness, abandonment, unemployment has not been successful. In \textit{N02/13996} this is deemed impermissible on the basis that the group cannot exist independently of the persecution feared.\textsuperscript{200} Dorevitch and Foster disagree strongly with this application saying that “the persecution feared is not vulnerability per se but rather it is the harm which is intrinsic to and/or stems from situations of debt-bondage and sexual servitude”\textsuperscript{201}. I would strongly agree with their argument.

Furthermore, a woman who has already been trafficked can base a claim on membership along the lines of ‘sex workers’ or ‘trafficked’ women’.\textsuperscript{202} These experiences can be seen as common characteristics which can make a group distinguishable in society. In \textit{N98/24000} however, the Tribunal states that it is not “appropriate to characterise women forced into prostitution as a

\begin{itemize}
\item \textsuperscript{196} \textit{V01/13868 supra note} 128, p. 20
\item \textsuperscript{197} \textit{N98/24000} [2000] RRTA 33 (13 January 2000), at 10
\item \textsuperscript{198} \textit{060779039} [2006] RRTA 187 (21 November 2006); see also \textit{V03/16442 supra note} 130
\item \textsuperscript{199} \textit{060779039}, supra note 183, findings and reasons
\item \textsuperscript{200} \textit{N02/13996}, [2003] RRTA 56 (22 January 2003)
\item \textsuperscript{201} Dorevitch, Foster, \textit{supra note} 11, p. 34; compare \textit{VXAJ v MIA} [2006] FMCA 234 (20 April 2006) which may imply vulnerability can be accepted as part of a definition
\item \textsuperscript{202} \textit{Ibid}, p. 30
\end{itemize}
social group, as that would be to define the group by reference to the harm feared”\textsuperscript{203}. On the other hand, in \textit{VXAJ v Minister for Immigration & Anor} the Federal Magistrates Court of Australia finds the Tribunal has misapplied established legal principles through simply rejecting trafficked women having given evidence against traffickers as a PSG.\textsuperscript{204} The court found that the Tribunal erred when treating these facts as simply “providing the context and not the means to identify whether a particular social group existed”\textsuperscript{205}. This provides support for the construction of a PSG based on past experience. Case \textit{N03/45573} gives further affirmation of this.\textsuperscript{206} Different PSG are here suggested and accepted. One of them is ‘trafficked shan women’ and another ‘women who have been working in prostitution in countries neighbouring Burma’.\textsuperscript{207} The cognizance of the first group seems based on the wide scale of the trafficking problem, the Government’s failure to address it effectively, together with the vulnerability of shan women in general. The second group seems to be cognisable because of the wide-spread and illegal nature of prostitution.

As can be seen, both approaches allow for the inclusion of some women who are at risk of trafficking in PSGs. In making a claim it will in my opinion be important to recognise the differences of how this can be achieved. When doing this the outcome ought not to differ much.

\subsection*{2.2.3 Nexus and Non-State Actors}

The words “for reasons of” in Art. 1A(2) of the Refugee Convention require causal nexus between a ground and well-founded fear of persecution. Where persecution is perpetrated by non-state actors such as criminals, which is often the case with trafficking, this requirement becomes particularly important. It is generally agreed that where this is the case nexus can be established either between the conduct of the persecutor and a ground or between failure of State protection and a ground.\textsuperscript{208}

\begin{small}
\begin{itemize}
\item \textsuperscript{203} N98/24000, supra note 197, at 10
\item \textsuperscript{204} VXAJ v MIA, supra note 201, at para. 11
\item \textsuperscript{205} Ibid, at para. 21
\item \textsuperscript{206} N03/45573 [2003] RRTA 160 (24 February 2003)
\item \textsuperscript{207} Ibid, at para. 70ff
\item \textsuperscript{208} UNHCR Guidelines on Membership of a Particular Social Group, supra note 159, at para. 20ff; UNHCR Guidelines on Trafficking, supra note 43, at para. 20f; \textit{Horvath v SSHD}, supra note 125; Aleinikoff, supra note 16, at 301ff
\end{itemize}
\end{small}
The way in which nexus can be established between the trafficking of a person and a Convention ground will differ in and between different jurisdictions. As Foster notes “there is little consensus as to the appropriate test to be applied in interpreting this aspect of the definition. In some jurisdictions courts have promoted the understanding that the persecutor’s intention must provide the link to a ground. By analogy to other gendered harms I conclude that this will have awkward consequences in trafficking cases. In Matter of RA the applicant could not establish nexus between her husband’s abuse and a Convention ground. She could not show group membership was the motivation behind the abuse, rather than her being his wife. Equally in V00/11003 a victim of rape could not convince the Tribunal of nexus. It found the violence to be a criminal act perpetrated against her as an individual rather than motivated by a ground. These acts are hence seen as private and outside the scope of protection. In N98/24000 this is articulated in relation to trafficking. The Tribunal considers being a young woman as presenting an opportunity for criminal activity, however not constituting the motivation behind the persecution feared. This brings us to the public/private dichotomy which Crawley describes and the difference between ‘normal’ versus ‘women’ claims as Spijkerboer puts it. Hence where a gender-sensitive reading enables trafficking to be recognised as persecution, and a membership of a PSG has been established, the nexus requirement can still thwart efforts to claim protection. The “construction of the female applicant is thus unstable”, as I perceive it.

Henceforth, standards of causation are ranging from an ‘effective sole cause’ and ‘but for’ test to ‘contributing cause’ in jurisdiction. The sole cause test will be virtually impossible to meet in a trafficking context, since profit tends to be a primary motivator. Where the ‘but for’ test is utilised multiple causes are recognised, however it is asked whether the persecution would have occurred but for the Convention ground. This was rejected as too inclusive by Lord Hoffman in

211 Matter of RA, BIA Interim Decision No. 3403, 11 June 1999
212 V00/11003 [2000] RRTA 929 (29 September 2000)
213 N98/24000 supra note 197
214 Crawley, supra note 14, at 18ff; Spijkerboer, supra note 15, at 190ff
215 Spijkerboer, supra note 15, at 192
216 Foster, supra note 209, at 269ff
217 Wennerholm, supra note 25, at 13, Foster, supra note 209, at 273
In contrast the Court of Appeal for the Ninth Circuit has considered it to be too demanding on the basis that “it is not always possible to identify the one determinative cause of the fear of persecution”\(^\text{219}\). Its use in trafficking cases will thus depend upon the understanding of the test. The ‘contributing cause’ will be in my view be the most beneficial in the relevant cases. It has frequently been applied in extortion cases where it is difficult to separate personal interest and Convention ground.\(^\text{220}\) In *Rajaratnam v Minister for Immigration and Multicultural Affairs* the Court recognised that even though extortion will involve attraction to personal characteristics of the victim such as wealth this does not preclude the possibility that race or ethnicity is also a (critical) factor “influencing or motivating those engaging in the extortion”\(^\text{221}\). By analogy, trafficking motivated by profit may also be understood to be motivated by the victim’s membership of a PSG. This application is in line with the UNHCR Guidelines on Trafficking.\(^\text{222}\)

Where it cannot be established that the traffickers imposed harm on account of a ground, it is necessary to look to failure of State protection. As can be seen in section 2.1.5 above this is difficult. According to Dorevitch and Foster it is only possible to rely upon this for nexus where the State’s “conduct in withholding protection is selective and discriminatory”\(^\text{223}\).

### 2.3 Subsidiary Protection and Art. 3 of the ECHR

So far the analysis has suggested significant hurdles to achieving the much sought after protection established through the Refugee Convention. International protection is however not limited to refugee protection. The principle of *non-refoulement* is wider than Art. 33 of the Refugee Convention.\(^\text{224}\) ‘Complementary protection’ or as referred to in the European context ‘subsidiary protection’, can be gained as a result of human rights obligations such as the ECHR, although this is not as beneficial as refugee protection.\(^\text{225}\) This section will be considering this kind of protection, through analysing the question: can/how can people at risk of trafficking

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\(^{218}\) Islam and Shah, *supra* note 158, at 513

\(^{219}\) Foster, *supra* note 209, at 282

\(^{220}\) Ibid, at 284

\(^{221}\) *Rajaratnam v MIMA* [2000] FCA 1111, at para. 10

\(^{222}\) UNHCR Trafficking Guidelines, *supra* note 43, at para. 31

\(^{223}\) Dorevitch, Foster, *supra* note 11, at 37; *MIMA v Khawar*, *supra* note 192, para. 84ff

\(^{224}\) Goodwin-Gill, McAdam, *supra* note 191, p. 285

\(^{225}\) Ibid, Piotrowicz, *supra* note 1, p. 174ff
receive protection through Art. 3 of the ECHR? Firstly, an analysis of Art. 3 in relation to trafficking will be made. Secondly, subsidiary protection through the EU Qualification Directive will be considered in relation to Art. 3 ECHR.

2.3.1 Art.3 ECHR and Trafficking

Art. 3 ECHR provides an absolute prohibition on torture, inhuman or degrading treatment or punishment as can be seen in *Chahal*. This has extra-territorial application according to the case of *Soering*, which means liability is incurred when an action such as extradition is taken which exposes an individual to a real risk of such treatment. This thus provides for an extension of the principle of *non-refoulement* found in Art. 33 of the Refugee Convention, without the additional requirements therein. Therefore, if it can be established that trafficking is to be included under this prohibition, a person at risk cannot be sent home.

When Art. 3 ECHR was drafted, trafficking most likely was not considered as one of the targeted prohibited conducts. It has only recently started to gain understanding as a human rights violation rather than merely a problem of law and order. However, the case of *Selmouni v France* indicates that the Convention should be interpreted as a living instrument. This means that as a result of increasingly high standards for the protection of human rights, ill-treatment which was previously understood as suffering falling short of torture could now be considered as such. Ovey and White state that this presumably means that “conduct which previously had not attained the threshold for categorization as inhuman or degrading treatment might be so categorized in the future.” The Council of Europe among other international organisations today recognises trafficking as a violation of human rights, human dignity and integrity, which can be seen in the Convention on Action against Trafficking in Human Beings and related documents. Hence, even though trafficking previously may not have qualified to be included in the prohibition,

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226 *Chahal v UK* (1997) 23 EHRR 413
229 *Selmouni v France* (1999) 29 EHRR 403
231 Council of Europe Convention on Action against Trafficking in Human Beings (2005), preamble; Council of Europe Convention on Action against Trafficking in Human Beings Explanatory Report, CETS No. 197, at para. 10ff
through the understanding of trafficking as a human rights violation, a living interpretation of Art. 3 may well include it today where it can be seen to qualify.

In order for a conduct to qualify as a prohibited treatment according to Art. 3, it must attain a minimum level of severity according to Ireland v UK.\textsuperscript{232} In the case it is explained that the difference between torture and inhuman and degrading treatment lies in the special stigma of torture “to attach only to deliberate inhuman treatment causing very serious and cruel suffering”\textsuperscript{233}. By deliberate the court meant that the suffering was inflicted intentionally and for a specific purpose.\textsuperscript{234} However, the consequence of a risk of either is non-refoulement. In Cyprus v Turkey a number of detainees were sexually assaulted and raped by Turkish soldiers. The court deemed the treatment as inhuman.\textsuperscript{235} In a more recent case Aydin v Turkey a 17 year-old was abducted to detention, stripped naked, and beaten, sprayed with cold jets of water and raped.\textsuperscript{236} Here, an especially cruel rape by a public official in police custody is understood to be deliberately inflicted and thus amounting to torture. The treatment is seen as “especially grave and abhorrent...given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim”\textsuperscript{237}. The treatment of trafficking victims can in my view be compared with that of rape victims, as a related kind of sexual violence as stated above. Many serve some 10 clients every night of the week.\textsuperscript{238} They are often confined to the brothel they work in or kept under close surveillance, which makes it easier for the offender to exploit the woman as in the case above. In addition they often face rape and beatings by their so called owners.\textsuperscript{239} In Aydin v Turkey the Court gives attention to the fact that rape leaves deep psychological scars together with acute physical and emotional pain from the forced penetration.\textsuperscript{240} The trafficking experience equally leaves psychological scars resulting in e.g.

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\textsuperscript{232} Ireland v UK (1978) 2 EHRR 25, para. 162; K. Starmer, European Human Rights (1999), at 91
\textsuperscript{233} Ibid, at para. 63
\textsuperscript{234} Harris, D.J. et al. Law of the European Convention on Human Rights (2009), at 72
\textsuperscript{235} Cyprus v Turkey (1982) 4 EHRR 482
\textsuperscript{236} Aydin v Turkey (1997) 25 EHRR 251; M.C. v. Bulgaria (App. 39272/98) Judgement of 4 December 2003 recognised rape by non-state actors as a violation of Art.3
\textsuperscript{237} Aydin v Turkey, supra note 221, para. 83
\textsuperscript{238} Coomerawany, supra note 74, at para. 12
\textsuperscript{239} Ibid, at para. 21, Coomerawany, supra note 100, at 11; IOM supra note 102, at 16
\textsuperscript{240} Aydin v Turkey supra note 236, para. 83
depression and anxiety. \(^{241}\) Also, the treatment can cause serious physical, sexual and reproductive health problems, which emphasises the severity of the treatment.\(^{242}\)

Like the Refugee Convention, Art. 3 ECHR embraces situations where the risk is posed by non-state actors and state protection is for whatever reason unavailable, as established by *HLR v France*.\(^{243}\) This has also been recognised in relation to rape in *M.C v Bulgaria*.\(^{244}\) Since most trafficking is perpetrated by non-state actors this recognition is significant.\(^{245}\) As seen above, the gravity of a treatment is nonetheless increased where it is conducted by a state official and can potentially be the difference between inhuman treatment and torture. However, establishing lack of state protection in countries from which people are trafficked may as explained in section 2.1.5 above prove difficult.

Furthermore, the assessment of the severity of a particular treatment is according to *Ireland v UK* and the *Greek* case dependent upon the duration of the treatment, its physical or mental effects and in some cases sex, age and state or health of the victim.\(^{246}\) This means the vulnerability of a victim can act as an aggravating factor to any treatment. The principle can be found in *A v UK* where it is clearly stated that children and other vulnerable individuals have the right to be protected against serious breaches of personal integrity in the form of effective deterrence.\(^{247}\) Being a young woman has been recognised as implying such vulnerability in certain situations. In *Menesheva v Russia* a young woman was beaten up, insulted and threatened with rape and violence against the family in detention. The fact that the claimant was a young female confronted by several male policemen, made her vulnerable and added to the severity of the treatment.\(^{248}\) Therefore, since many of the women trafficked into sexual commercial exploitation are young, it can be argued they possess characteristics which may help establish the severity of their treatment. The vulnerability of these women is further supported by the case of *Siliadin v*
France where the court is faced with a case concerning the prohibition of slavery and forced and compulsory labour regarding a household servant having been trafficked to France. At the centre of the case is Art. 4 ECHR, not Art. 3 however the court’s ruling is relevant to the extent that it recognises a sensitivity toward the vulnerability of women in this situation.\textsuperscript{249}

2.3.2 The EU Refugee Qualification Directive

The EU Qualification Directive is the first supranational instrument harmonising the protection afforded to persons in need, who fall outside of the scope of the Refugee Convention.\textsuperscript{250} This has meant that a codified regime of subsidiary protection has to a great extent replaced the ad hoc, discretionary approach previously in use in the EU.\textsuperscript{251} It is however based on obligations already in place through e.g. the ECHR, and therefore does not create any new legal obligations as such.\textsuperscript{252}

The scope of the protection afforded through the Directive is limited through defining a person eligible for subsidiary protection, as a third country national or stateless person who does not qualify for refugee protection but would face a real risk of suffering serious harm on return to his or her country of origin.\textsuperscript{253} Subsequently, the key to protection here is nationality or lack thereof and the risk of suffering serious harm. Serious harm is defined in Art. 15 of the Directive. Of the three alternative definitions, paragraph (b) which defines serious harm as “torture or inhuman or degrading treatment or punishment of an application in the country of origin” is of interest here. It broadly covers the same ground as Art. 3 ECHR,\textsuperscript{254} which means the analysis above, regarding whether trafficking can amount torture or inhuman or degrading treatment or punishment applies when considering subsidiary protection according to Art. 15 of the Directive. However the autonomous role of Art. 3 has henceforth diminished.\textsuperscript{255} In order to answer the question posed it

\textsuperscript{249} Siliadin v France (App. 73316/01) Judgment of 26 July 2005
\textsuperscript{252} Ibid, at 3
\textsuperscript{253} Art. 2(e) Refugee Qualification Directive
\textsuperscript{254} Storey, \textit{supra} note 250, at 5
\textsuperscript{255} Ibid, at 5ff; The definition in ECHR is the most liberal of the torture prohibitions which makes it plausible to consider this provision, see Lambert, H. ‘Protection against \textit{Refoulement} form Europe: Human Rights Law Comes to Rescue’, 48 \textit{International and Comparative Law Quarterly} (1999) 515, at 532
is necessary to understand when the Directive applies, and Art. 3 has a supportive role and when Art. 3 needs to be used on its own.

It can be argued that the definitions found in the Directive makes the scope of subsidiary protection narrower than Art. 3 provides for. Only third country nationals or stateless persons can gain entry to the legal regime provided by the Directive. In contrast the obligations found in ECHR extend to “everyone within their [the Member States’] jurisdiction”. This limitation is of little importance for a person at risk of trafficking, since they will predominantly be third country nationals or stateless individuals having already been exposed to international trafficking. In contrast, the difference between Art. 15(b) of the Directive and Art. 3 ECHR is critical. Firstly, the Directive limits, in the same way as the Refugee Convention its protection to persons fearing ill-treatment in the country of origin. This means that as stated in section 2.1.6 a claimant will have to make a link between her trafficking experience and the country of origin in order to receive protection. In contrast, Art. 3 ECHR applies whatever the source of the ill-treatment.

This means, where a person has been caught in the trafficking chain whilst abroad, Art. 3 will be applicable where the Directive is not. Furthermore, exclusion from subsidiary protection is possible under the Directive just as under the Refugee Convention. This is not the case with Art. 3 ECHR. This will not be of any major significance to most trafficked persons. However, I imagine this could have importance in a country where prostitution is illegal. It can from what has been said be concluded that Art. 3’s autonomous role has been limited by the Directive, however its importance in trafficking cases is evident where the Directive limits eligibility.

In contrast to refugee status, protection under the Directive and Art. 3 ECHR does not require a link to a ground as it is focused on the ill-treatment, making it more accessible. The benefits of refugee status cannot however be found anywhere else. Through the Directive, subsidiary protection status, a second-rate status has nevertheless been developed. This includes access to

256 Storey, supra note 250, at 29
257 Art. 1 ECHR
258 Lambert, supra note 255, at 534
259 Art. 17 Refugee Qualification Directive
260 Chahal v UK supra note 226, Soering v UK supra note 227
261 Soering v UK supra note 227
262 Art. 18 Refugee Qualification Directive
entitlements regarding e.g. family unity, residence permits and employment. Seeking this protection will thus be secondary to claiming refugee status. Where the requirements for this cannot be fulfilled, Art. 3 provides a third possibility. In contrast to subsidiary protection, it however only guarantees non-refoulement. It is hereafter up to the state to decide upon other measures taken.

2.4 The Swedish Aliens Act

The application of international and regional law can only fully be grasped in a domestic environment. This section aims at giving an insight into Sweden’s legislation regarding protection for aliens and its relevance to the purposive question at hand. This will be conducted through analysing the question: can/how can people at risk of trafficking receive protection under the Swedish Aliens Act (2005:716)? Firstly, Chapter 4 Section 1 concerning refugees will be considered. Secondly, Chap. 4 Sec. 2 regarding persons otherwise in need of protection will be analysed. Thirdly, Chap. 5 Sec. 6 will be discussed and lastly attention will be given to Chap. 5 Sec. 15.

2.4.1 Chapter 4 Section 1 Aliens Act

Sweden has ratified the Refugee Convention and Chap. 4 Sec. 1 of the Aliens Act defines who is to be considered a refugee. It is herein stated that the alien is to be “outside the country of the alien’s nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country”. Refugees are generally granted permanent residence according to Chap. 5 Sec. 1 of the Aliens Act along with a range of other beneficial rights. Chap. 4 Sec. 1 thus provides attractive protection. This section will be analysing whether it is currently possible for people at risk of trafficking to access this protection.

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263 See Art. 23-33 Refugee Qualification Directive
264 Storey, supra note 250, at 6
265 Piotrowicz, van Eck, supra note 250, at 122
266 See e.g. UK Asylum Policy Instruction on “Humanitarian Protection” and “Discretionary Leave” available at: http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/ accessed 04/08/09
267 Aliens Act (2005:716), Chap. 4 Sec. 1
268 Regeringens proposition 1988/89:86 med förslag till utlänningslag m.m., at 153
The concept of persecution, failure of state protection and Convention ground will be considered as stated.

2.4.1.1 A Well-founded Fear of ‘Being Persecuted’

The concept of persecution in the Aliens Act is complex, as in international refugee law. It is not defined in current legislation. Guidance as to its meaning can however be found in preparatory work and earlier legislation.\(^\text{269}\) From this it can be concluded that conduct which threatens the life and freedom of an alien, or that is otherwise severe in nature is to be considered persecution.\(^\text{270}\)

We are considering serious harm.\(^\text{271}\) Serious harm is caused by violation of fundamental human rights.\(^\text{272}\) All human rights violations will however not be considered serious harm.\(^\text{273}\) The EU Qualification Directive by which Sweden is bound states that an act’s severity can be estimated on the basis of its nature or its recurrence. Violations of human rights to which no derogation can be made under Art. 15.2 of the ECHR are understood as particularly serious.\(^\text{274}\) Among these are slavery and torture. As seen above there is scope internationally to consider trafficking as either of these violations and hence as persecution. The question is if trafficking can be understood as persecution in Sweden.

It has been particularly difficult to base a claim for refugee status on gender-related violence in Sweden until recently. This has been due to legislative difficulties regarding membership of a PSG. Until 2006 it was not possible to base such membership on gender.\(^\text{275}\) In my opinion, this

\(^{269}\) It is worthy of note that in the Swedish legal system, preparatory work is endowed with the quality of a source of law.


\(^{271}\) See section 2.1.

\(^{272}\) Statens Offentliga Utredningar (SOU) 1951:42, Betänkande med förslag till utlänningsslag, at 170; compare Hathaway’s hierarchy of rights section 2.1.1.


\(^{275}\) Regeringens Proposition 2005/06:6 Flyktningsskap och könsrelaterad förföljelse på grund av kön eller sexuell läggning; Regeringens Proposition 1996/97:25 Svensk migrationspolitik i globalt perspektiv; Chap. 3 Sec. 3 Para. 1. 3 Aliens Act (1989:529 ).
has probably meant that protection from gender-related harm has been neglected in the refugee
determination process. Since 2006 it is however possible to make a claim based on gender.\textsuperscript{276}

Sweden today recognises gender-related violence as serious harm, in line with international
guidelines.\textsuperscript{277} In \textit{UN 328-97} it is established that FGM is one such harm.\textsuperscript{278} At the time of
judgement this did not however grant refugee status because of the legislative limitation
mentioned. In the more recent \textit{UM 2676-07} however the same treatment resulted in protection
under Chap. 4 Sec. 1. Moreover, in \textit{MIG 2008:39} a woman’s continued exposure to domestic
violence is accepted as serious harm by the Migration Appeals Court.\textsuperscript{279} In contrast, the court
does not consider the domestic violence faced by the claimant in \textit{UM 1030-08} as persecution,
despite the treatment being understood as inhuman or degrading.\textsuperscript{280} Since there is a lack of
reasoning behind the decisions it is impossible to know what caused the difference in outcome.

Furthermore, rape and other kinds of sexual harm have also been recognised as sufficiently
serious to be considered persecution. Case law is however not coherent.\textsuperscript{281} In \textit{UM 10365-06} the
sexual exploitation experienced by a Mongolian woman is considered to be persecution.\textsuperscript{282} In a
number of other cases involving rape as part of a wide range of cruel or inhuman or degrading
treatment, persecution has also been confirmed.\textsuperscript{283} However in other cases concerning rape and
gang rape persecution has not been established. This implies an understanding of rape as not by
necessarily resulting in such pain and suffering required by the concept of persecution.\textsuperscript{284} The
courts’ reasoning however fails to reveal how a judgement on the matter is made.

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\textsuperscript{276} Prop. 2005/06:6, \textit{supra} note 275, at 18ff, see also the wording of Chap. 4 Sec. 1
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\textsuperscript{277} UNHCR, Comparative analysis of Gender-related Persecution in National Asylum Legislation and Practice in
Europe, UN Doc. EPAU/2004/05 (2004), at para. 140; UNHCR Guidelines on Gender-Related persecution, \textit{supra}
note 5; Migrationsverket, Utlänningshandboken, Kap. 40.1 Utredning och bedömning av skyddsbehov p.g.a. kön
(2006)
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\textsuperscript{278} \textit{UN 328-97}, at 6
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\textsuperscript{279} \textit{MIG 2008:39}, at 4
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\textsuperscript{280} \textit{UM 1030-08}
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\textsuperscript{281} Bexelius, M. \textit{Kvinnor på flykt: en analys av svensk asylpolitik ur ett genusperspektiv 1997-2000} (2000); see also
UNHCR, \textit{supra} note 277, at para. 7; compare section 2.1.4
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\textsuperscript{282} \textit{UM 10365-06}; compare \textit{UM 1324-08}
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\textsuperscript{283} Bexelius, \textit{supra} note 281, at 60
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\textsuperscript{284} Ibid, at 51ff; compare \textit{Prosecutor v Kunarac and others}, \textit{supra} note 70 at para. 149ff; \textit{Prosecutor v Delalic, et al.}
\textit{supra} note 87; \textit{Prosecutor v Furundzija, supra} note 97; \textit{Prosecutor v Akayesu, supra} note 97
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Trafficking in human beings for the purpose of sexual exploitation is recognised by the 1993 UN Declaration on the Elimination of Violence against Women to constitute gender-related violence. By analogy to these gender-specific and gender-related harm it should hence be possible to conclude that certain instances of trafficking is to be deemed persecution by the court. As human trafficking is however only just emerging in refugee law it would be simplistic to draw such a conclusion in my opinion.

In SOU 2008:41 it is expressed that it is possible for victims of trafficking to receive obtain refugee status. A claim for this is made in *UM 1335-06* by a young woman of roman ethnicity having suffered human trafficking for sexual exploitation. She fears ill-treatment and re-trafficking on return to her country, but is not granted refugee protection. The court is in my opinion ambiguous in its motives. It is unclear whether the treatment suffered is deemed insufficient to grant status, whether evidence with regards to future trafficking is lacking or whether it is criteria of state failure to protect or internal flight which is decisive. SOU 2008:41 also gives account of three decisions made by the Migration Board where human trafficking is considered. None of the victims are deemed refugees. Instead protection is granted under Chap. 3 Sec. 3 of the Aliens Act (1989:529) and Chap. 5 Sec. 6 of the Aliens Act (2005:716). Interestingly protection was in two of the cases was granted because of threats made against the victim’s family in the country of origin. This in my opinion implies a future risk towards the victim, something which ought to cause consideration under the refugee provision. Nevertheless, in the cases available for study there is no indication of a refugee determination in favour of a person at risk of human trafficking.

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285 UN Declaration on the Elimination of Violence against Women (1993), UN Doc. A/RES/48/104
286 UNHCR, *supra* note 277
288 *UM 1335-06*
289 Ibid, p. 4
290 SOU 2008:41, *supra* note 287, at 142
2.4.1.2 Failure of State Protection

The Swedish Aliens Act explicitly recognises persecution committed by non-state agents, in coherence with UNHCR. Failure of state protection however needs to be shown in addition to the serious harm requirement in these instances. Where there is failure of protection is due to insufficient resources or inefficiency persecution cannot be established according to the preparatory work for the new Aliens Act. It is only where the reasons are of a political, social, cultural or religious nature that such a claim will be accepted. This interpretation is in my opinion more stringent than its international counterpart. The UNHCR Handbook states that where serious harm is committed by private actors, “they can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse or prove unable, to offer effective protection”. The danger with the Swedish stance is of course the difficulty in determining what discriminatory inability is.

Other difficulties revealed by case law is the Migration Board and Migration Courts’ expectation that victims of gender-related violence should seek protection from the authorities in their home country in order for a determination to be made on whether there is a state failure of protection. This can be seen in UM 1082-06 concerned with domestic violence. This is contrary to the Swedish and international definition of a refugee, where it is stated that the alien is to be “unable or, owing to such fear, unwilling to return to” the country of origin. Hence, there is seemingly no appreciation of the reasons behind unwillingness to seek protection from the state, which shows a lack of understanding of gendered aspects of persecution.

291 Chap. 4 Sec. 1 Aliens Act; Regeringens Proposition 2004/05:170 Ny instans- och processordning i utlännings- och medborgarskaps ärenden, at 274; prop. 1996/97:25, supra note 275, at 289f; UNHCR Handbook, supra note 31, at para. 65
292 See section 2.1.5
293 Prop. 2005/06:6, supra note 275, at 28; Wikrén, Sandesjö, supra note 274, at 136
294 Ibid
295 UNHCR Handbook, supra note 31, at para. 65
296 UM 1082:06, compare MIG 2008:39, UM 133-09, UM 1532-09, UM 1030-08, see also Bexelius, supra note 281, at 82ff, 111f
297 Art. 1A (2) of the Refugee Convention, see also Chap. 4 Sec. 1 Aliens Act
Moreover, in *UM 1335-06*, which specifically concerns trafficking it is stated that the Romanian police ought to have resources to give her protection. The court thus makes the assumption that there is state protection. Bexelius has also made note of this in relation to cases concerning domestic violence.

### 2.4.1.3 For Reasons of a Ground

The harm feared needs to be linked to a Convention ground according to Chap. 4 Sec. 1 of the Aliens Act. As seen above in section 2.2 membership of a PSG is the most relevant ground in relation to trafficking. Before 2006 gender ("kön") could not be the basis of a PSG under Swedish law. In the preparatory work 1996/97:25 it is stated that a person can hardly be at risk of persecution purely on the basis gender. Laws or customs would also have to be broken, attracting the attention of the government causing a risk of harm. This type of reasoning in my opinion fails to understand the gendered dimensions of persecution and reinforces the historical male norm found in refugee law. In 1997 protection from gender-based persecution was in accordance with this view introduced under Chap. 3 Sec. 3 Para. 1:3 of the Aliens Act (1989:529) relating to persons otherwise in need of protection. Folkelius and Noll have criticised this construction as being discriminatory, as the protection gained is clearly inferior to refugee status. The ‘gender clause’ has however had limited use. This can be seen in cases regarding FGM.

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298 *UM 1335-06*, at 4, “Även om det, enligt vad hon berättat, finns en kvarstående hotbild mot henne, torde den rumänska polisen ha resurser att ge henne skydd”
299 *Bexelius, supra* note 281, at 111
300 See section 2.2.1
301 *UN 328-97*
303 Ibid, at 290, Migrationsverket, Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection (2001)
304 UNHCR, Guidelines on Gender-Related Persecution, *supra* note 5, at para. 2; Crawley, *supra* note 14, at 39;
Sztucki, *supra* note 38, at 55
305 Previously protection from this type of harm had to be sought under discretionary humanitarian grounds under the so called *de facto* refugee provision
307 Prop. 2005/06:6, *supra* note 275, at 19
308 See e.g. *UN 420-00*; prop. 2005/06:6, *supra* note 275, at 14
In contrast, the new Aliens Act explicitly allows a PSG to be constructed on the basis of gender.\(^{309}\) According to the preparatory work 2005/06:6, the ground should be interpreted in accordance with the EU Qualification Directive and the guidance provided by the UNHCR.\(^{310}\) The Directive expresses in Art. 10 (d) that a PSG can be said to exist where “members of that group share an innate characteristic, or a common background that cannot be changed… and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society”. Gender aspects are to be specifically considered. The Directive hence requires that a PSG is united by both e.g. an innate characteristic and that the group is perceived as distinct in a given society. This implies that both the protected characteristics approach as well as the social perception approach are to be satisfied, making application of the ground very restricted.\(^{311}\) This is contrary to the interpretation favoured by the UNHCR, which proposes the views are used as alternatives.\(^{312}\)

In SOU 2004:31 preceding current legislation the interpretation of membership of a PSG made can be compared with the stance taken by the UNHCR.\(^{313}\) Innate and inviolable characteristics are mentioned as able to unite groups of people on the one hand. On the other hand it is stated that a PSG can be identified by the fact that it is perceived as a particular group by society.\(^{314}\) These appear to be alternative options. Sweden thus seems to have developed further than its common-law counter-parts studied above since the amendment of 2006. However, it is difficult to estimate the relevance of this with regards to persons at risk of trafficking, even though it can be said to be beneficial in general to gender-related claims.

\(^{309}\) Chap. 4 Sec. 1 Aliens Act; prop. 2005/06:6, supra note 275; SOU 2004:31, *Flyktningsskap och könsrelaterad förföljelse*; the Swedish concept “kön” is said to include biological as well as social and cultural aspects, prop. 2005/06:6, supra note 275, at 37

\(^{310}\) Prop. 2005/06:6, supra note 275, at 38; UNHCR Handbook, supra note 31; UNHCR Guidelines on Membership of a Particular Social Group, supra note 159, at para. 11f; UNHCR Guidelines on Gender-related persecution, supra note 5, at para. 30; EU Qualification Directive

\(^{311}\) See section 2.2.2

\(^{312}\) UNHCR Guidelines on Membership of a Particular Social Group, supra note 159

\(^{313}\) SOU 2004:31, supra note 309; UNHCR, Guidelines on Membership of a Particular Social Group, supra note 159; Hathaway, Foster, supra note 159, at 489ff

\(^{314}\) SOU 2004:31, supra note 309, at 97
In *MIG 2008:39* the court accepts that the social and cultural structures in Albania prevent the state from providing protection for the claimant because she is a woman.\(^{315}\) She is thus seen to belong to a PSG sharing the innate and unchangeable characteristic of gender. The reasoning behind the court’s decision is scarce and it is not possible to make any far reaching conclusions as to how this type of PSG can be found. It is for instance not clear whether the court has limited the PSG to women in northern Albania, or whether the group is nation wide.\(^{316}\) Nevertheless, the crucial point considered by the court seems to be the same as in *Islam and Shah* namely structural denial of rights.\(^{317}\) Similar conclusions can be drawn in relation to *UM 2676-07* where a young woman fearing FGM is considered to be a member of a PSG.\(^{318}\) These cases provide confirmation of the possibility of establishing a Convention ground on the basis of gender. There is a possibility this could benefit some persons at risk of trafficking, if this treatment is recognised as persecution. However as can be seen in section 2.2.2.1 it is difficult to establish there is a structural denial of rights in a country.

As an alternative to using gender as the characteristic uniting the PSG, historic facts can be used.\(^{319}\) This possibility has in British jurisprudence allowed for the inclusion of persons at risk of trafficking under refugee protection.\(^{320}\) Today there are however no indications that Sweden is prepared to make similar interpretations.

In addition to establishing that an individual is a member of a PSG which can be evidenced to exist in the country of origin, it needs to be ascertained that the persecution feared is on the basis of this Convention reason.\(^{321}\) This is known as the nexus requirement. According to Luoparjärvi, the requirement is particularly unclear in civil law countries.\(^{322}\) This seems to be partially true with regards to Sweden. Internationally, it is generally accepted that where persecution is committed by non-state actors the link can be established either between the perpetrator’s

\(^{315}\) *MIG 2008:39*, see also *UM 1042-08, UM 1324-08*

\(^{316}\) Compare *SK Albania*, *supra* note 133

\(^{317}\) *Islam and Shah*, *supra* note 158

\(^{318}\) Compare *Fornah*, *supra* note 155

\(^{319}\) Prop. 2005/06:6, *supra* note 175

\(^{320}\) *SB Moldova*, *supra* note 184; *ex parte Hoxha*, *supra* note 183

\(^{321}\) See section 2.2.3

\(^{322}\) Luoparjärvi, K. *Gender-related Persecution as Basis for Refugee Status: Comparative Perspectives*, at 85
conduct and a ground or between the failure of state protection and a ground.\textsuperscript{323} However, in the preparatory work 2005/06:6 it is stated that where persecution is committed by private actors, refugee status can be afforded where state failure can be linked to a ground.\textsuperscript{324} This coheres with the fact that state failure cannot be established where this is due to a lack of resources or inefficiency in Sweden. If this is meant as a general principle which seems to be the case, Sweden has avoided the awkward construction of a nexus based on the persecutors intention which can be seen in other jurisdiction and instead opted for a solution where the focus is on the state in the determination process. Again the problem of evaluating state intention is evident.

Henceforth, the standard of causation chosen by Sweden is ‘contributing cause’, as stated in the preparatory work 2005/06:6.\textsuperscript{325} This is the most beneficial standard in use internationally and is in my view particularly helpful with regards to trafficking where a range of motivations often cause the perpetrator to act.\textsuperscript{326}

2.4.2 Chapter 4 Section 2 Aliens Act

The regulation regarding ‘persons otherwise in need of protection’ found in Chap. 3 Sec. 3 of the Aliens Act (1989:529) specifically provided protection from gender-related violence as stated above. The gender clause was however abandoned in 2006.\textsuperscript{327} Chap. 4 Sec. 2 of the Aliens Act (2005:716) defines a ‘person otherwise in need of protection’ under three categories: those having a well-founded fear of death penalty, torture or inhuman or degrading treatment or punishment; those needing protection because of conflict or having a well-founded fear of being subjected to serious abuses; and those who cannot return to their countries or origin due to environmental disaster. These individuals will generally be given permanent residence permits under Chap. 5 Sec. 1 of the Aliens Act.

\textsuperscript{323} Aleinikoff, \textit{supra} note 16, at 131ff, UNHCR Guidelines on Membership of a Particular Social Group, \textit{supra} note 159, at para. 20ff; UNHCR Guidelines on Trafficking, \textit{supra} note 43, at para. 20f
\textsuperscript{324} Prop. 2005/06:6, \textit{supra} note 275, at 28
\textsuperscript{325} Prop. 2005/06:6, \textit{supra} note 275, at 23, Wikrén, Sandsjö, \textit{supra} note 274, at 135
\textsuperscript{326} See section 2.2.3
\textsuperscript{327} Prop. 2005/06:6, \textit{supra} note 275
Chap. 4 Sec. 2:1 of the Aliens Act, provides protection from torture and inhuman and degrading treatment and punishment as required by CAT and ECHR. As clarified above, Art. 3 ECHR provides an absolute prohibition on torture, which extends extra-territorially. Since ECHR is incorporated into Swedish law, if trafficking can be considered as torture or inhuman or degrading treatment a person at risk cannot be sent home. When contemplating the scope of the regulation it should be recognised that case law from the European Court of Human Rights has a direct impact upon the application of this clause. The analysis made in section 2.3.1 is thus applicable here. Therefore I conclude that by analogy to rape and with consideration to the assessment of the severity of treatment made by the European court, it is likely that trafficking can be considered as torture or inhuman or degrading treatment under Swedish law. It is more difficult to know whether a Swedish court would in fact consider it such. Some general support for this can be found in UM 1030-08 where domestic violence, another type of gender-related harm, is considered inhuman or degrading treatment. Also, according to the Migration Board Gender Guidelines from 2006, rape and other sexual abuse can under certain circumstances be classified as torture.

In addition, Chap. 4 Sec. 2:2 of the Aliens Act, protection can be sought for fear of serious abuse. According to Wikrén and Sandesjö this includes severe abuse experienced by women. Because of the absolute nature of the torture clause, this regulation ought however to be used only where the level of severity does not reach that of torture, or inhuman or degrading treatment. In UM 4455-08 the Migration Court grants protection under this clause to a mother in fear of domestic abuse and a daughter facing the risk of forced marriage. Depending on the treatment faced, a victim of trafficking may be able to receive protection under this provision.

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328 CAT; Regeringens Proposition 1987/88:133 med anledning av Sveriges tillträde till den europeiska konventionen till förhindrande av tortyr m.m.; ECHR; Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna; Regeringens Proposition 1993/94:117 Inkorporering av Europakonventionen och andra fri- och rättighetsfrågor; Regeringens Proposition 1993/94:115 Valperiodens längd och vissa andra grundlagsfrågor; Art. 2(e) of the EU Refugee Qualification Directive; Migrationsverket, supra note 277, at 5
329 Chahal v UK, supra note 226, Soering v UK, supra note 226
330 Chap. 4 Sec. 2:1, Chap. 12 Sec. 1 Aliens Act, Art. 3 ECHR
331 Wikrén, Sandesjö, supra note 274, at 146
332 Migrationsverket, supra note 277, at 8
333 Wikrén, Sandesjö, supra note 274, at 148
Chapter 5 Section 6 Aliens Act

According to Chap. 5 Sec. 6 of the Aliens Act, a residence permit may be granted to an alien where the individual cannot obtain other kind of protection and is found to be “in such exceptionally distressing circumstances ("synnerligen ömmande omständigheter") that he or she should be allowed to stay in Sweden”.\(^{334}\)

The application of the provision is to be made restrictively and exceptionally according to \(MIG\) 2007:35 and \(MIG\) 2007:15.\(^{335}\) In order to access protection consideration needs to be given to the entirety of the individual situation. Particular weight is given to the alien’s health, adaption to Swedish society and the situation in his or her country of origin.\(^{336}\) Also, other especially difficult circumstances are to be taken into account. In SOU 2004:74 it is stated that human trafficking is one such circumstance.\(^{337}\)

In \(UM\ 1335-06\) the claimant is a woman having suffered from human trafficking for sexual exploitation at an age of 17. The court did not consider her circumstances serious enough to grant protection under the refugee or ‘persons otherwise in need of protection’ provisions in the Aliens Act. It is however considered appropriate to afford her protection under Chap. 5 Sec. 6. Interestingly it does not seem to be the exposure to trafficking which is decisive in the judgement. Instead the motives state that neither the claimant’s adaption to Swedish society, nor the situation in the home country, nor her state of health can be perceived to fulfil the requirements of the law. However on the basis of these circumstances together with the claimant’s young age, her situation can be understood as exceptionally distressing. It is in my opinion encouraging to find a victim of trafficking is granted a residence permit in Sweden, however the fact that the court does not seem to give particular attention to this fact is concerning.

\(^{334}\) Wikrén, Sandesjö, supra note 274, at 199; \(MIG\) 2007:33

\(^{335}\) \(MIG\) 2007:35, \(MIG\) 2007:15

\(^{336}\) Wikrén, Sandesjö, supra note 274, at 199

\(^{337}\) SOU 2004:74 Utlänningslagstiftningen i ett domstolsperspektiv, at 196ff; prop. 2004/05:170, supra note 291, at 192
In addition, SOU 2008:41 mentions two cases where Chap. 5 Sec. 6 of the Aliens Act has provided protection for victims of trafficking.\textsuperscript{338} This reinforces the use of the provision in these instances, but since the motives cannot be analysed it is hard to know how far this possibility reaches. The three cases taken together however show that out of the protection alternatives thus far mentioned, Chap. 5 Sec. 6 seems to be the most realistic option. In my opinion this shows a lack of understanding of the human rights abuse that human trafficking is in the courts and with the Migration Board. This is emphasised by it being only the third option in a line of protection, and by the fact that it is only applicable on a restrictive and exceptional basis.

For the purpose of strengthening protection for victims of human trafficking it is in SOU 2008:41 suggested that Chap. 5 Sec. 6 is amended to include human trafficking as a circumstance to be considered in its application.\textsuperscript{339} This would perhaps somewhat strengthen the possibility of receiving this type of protection. It would however also indicate that refugee status and protection as a person otherwise in need of protection was out of bounds for persons fearing human trafficking. This would in my opinion be an unwanted development, and one which would contradict international opinion.\textsuperscript{340} The government’s preparatory work will be released in the spring 2010.\textsuperscript{341}

2.4.4 Chapter 5 Section 15 Aliens Act

Upon the application from the person in charge of a preliminary investigation, a temporary residence permit can be granted for six months for an alien who is needed and willing to assist in the investigation or a main hearing of a criminal court case, according to Chap. 5 Sec. 15 of the Aliens Act. The provision was first introduced in 2004 and is applicable to any type of criminal court case.\textsuperscript{342} Cases concerning human trafficking have however been highlighted as a result of the EU Directive 2004/81/EC, which specifically deals with temporary residence permits for

\textsuperscript{338} SOU 2008:41, supra note 287
\textsuperscript{339} Ibid. at 147
\textsuperscript{340} UNHCR Trafficking Guidelines, supra note 43
\textsuperscript{341} Maria Hölke, L5, Straffrättsenheten, Justitiedepartementet Regeringskansliet
\textsuperscript{342} Regeringens proposition 2003/04:35 Människosmuggling och tidsbegränsat uppehållstillstånd för målsägande och vittnen m.m.
victims of trafficking assisting the conviction of traffickers. The Directive caused a clarification of the criteria in the Swedish provision.

Victims of human trafficking hence have a very real opportunity to receive protection through Chap.5 Sec. 6 of the Aliens Act. In contrast to the provisions analysed above this provision is however not firstly concerned with the victim but with the achievement of law and order. This can be seen from the fact that it is the person in charge of a preliminary investigation who applies for this permit, rather than the victim. It is also stated in the preparatory work for the amendment made in 2007 that it is a basic requirement for a temporary residence permit to be granted that the alien should stay because he/she is needed in a criminal case. The provision is thus serving a societal rather than an individual need.

This European approach was strongly criticised by both governmental and non-governmental organisations internationally already during its drafting process. Human Rights Watch has criticised the fact that protection for victims of human rights abuse is traded for cooperation with the authorities. This is cannot be found with any other type of abuse than human trafficking. The fact that the focus in the Directive is upon law and order rather than victim protection has also been criticised by the UNHCR and the UN High Commissioner for Human Rights (UNHCHR). Piotrowicz also argues that the scheme is bound to fail since it offers little incentive to cooperate in relation to what asked of the victims. In addition to having to overcome the fear of authorities, the victims are asked to potentially increase their own risk of being harmed, with the relatively weak assurance of being able to stay in the country for a short period

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343 Council 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
344 Regerings proposition 2006/07:53 Genomförande av EG-direktivet om offer för människohandel, at 20ff
345 Chap. 5 Sec. 15 of the Aliens Act
346 Prop. 2006/07:53, supra note 344, at 21
348 UNHCR, UNHCHR, Observations by the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Commissioner for Human Rights (UNHCHR) on the Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal migration or trafficking in human beings who cooperate with the competent authorities
of time. After this period is concluded, nothing in the Directive (or the Swedish provision) allows for further protection.  

Since, Sweden today offers very meagre protection options for trafficking victims outside of a criminal investigation or main hearing as seen above there is also not much compensation elsewhere for the lack of victim protection found in Chap. 5 Sec. 15 of the Aliens Act. The current available protection opportunities may thus not only be insufficient on the part of the victim but also for the authorities working against trafficking as a criminal activity crippling society as a whole.

3. CONCLUSION

Human Trafficking is a current issue provoking public emotion as well as scholarly and political debate.  

Many trafficked individuals suffer harm on account of this activity. The Refugee Convention has not traditionally been interpreted to include what is today referred to as gender-specific and gender-related harm under which trafficking for commercial sexual exploitation can be categorized. However, the understanding of this Convention and the scope of Art. 1A(2) defining a refugee has developed much in this area in the last decade. The purpose of this dissertation was to establish if and in that case how Art. 1A(2) of the Refugee Convention can give protection to people at risk of human trafficking for the purpose of commercial sexual exploitation. This purpose was sought to be satisfied through answering four subsidiary questions, to which reference in turn will be made below.

3.1 Trafficking As Persecution

General conclusions applying to all instances of trafficking cannot be drawn with regard to the concept of persecution. I would however say it is possible to conclude with a high degree of likelihood that some instances of trafficking amount to persecution, in accordance with the

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351 See e.g. UN Office on Drugs and Crime, supra note 105, at 155; London School of Hygiene and Tropical Medicine, supra note 104, at 44ff
352 UNHCR Guidelines on Gender-related persecution, supra note 43, at para. 18; Scarpa, supra note 1, at 95
UNHCR Trafficking Guidelines. This will arguably to some degree be dependent upon the understanding of the trafficking definition found in Art. 3 of the Trafficking Protocol adopted in a particular state. The possibility of including or excluding consent as a requirement for the recruitment stage may cause a different scope of women to be eligible to seek protection. These conclusions can however only be ascertained through the study of how individual countries apply the Trafficking Protocol, something which is outside of the scope of this dissertation.

According to Hathaway persecution is the “sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community”. In his hierarchy of rights, the prohibition on slavery and torture come first. Since these have the status of jus cogens any breach will constitute persecution. It can fairly safely be concluded that trafficking can be included in the definition of slavery today. However, not all instances of trafficking will reach the high threshold of slavery. In a specific case slavery can only be said to have occurred where the measure of control exercised over the individual in question implies ownership. This may be difficult to ascertain, since trafficked individuals are usually not exploited on a permanent basis. On the other hand, where slavery cannot be proved slavery-like practices such as debt bondage are included in the same category. Many trafficked women experience having to work without pay in the sex industry in order to pay off debts relating to travel and other expenses. Where this happens, it almost certainly will amount to debt bondage and persecution can be established.

An alternative argument to trafficking as slavery can be made on the basis of the torture prohibitions. Sexual violence has been recognized as causing great suffering by the ICTY and the

353 UNHCR Trafficking Guidelines supra note 43
354 Raymond, supra note 22, at 4; Simm, supra note 48, at 147; Westerstrand, supra note 50, at 258; Reilley, supra note 84, at 118ff
355 Hathaway, supra note 4, at 112
356 Ibid, at 109
357 Bassiouni, supra note 58, at 9; Burchard, supra note 87, at 3
358 See e.g. Report of the Working Group on Contemporary Forms of Slavery supra note 63
359 Art. 1(1) Slavery Convention (1926); Prosecutor v Kunarac and others, supra note 65, para, 539, 542
360 Bassiouni, supra note 58, at 459
361 Preamble, Art. 1 Supplementary Convention on the Abolition of Slavery
362 Art. 3(a) UNHCR Trafficking Protocol; Kelley, supra note 80, at 15
ICTR. It is henceforth the “objective and subjective criteria as well as the disposition of the victim” which in a particular case determine whether the harm faced reaches the level of torture. Rape has on a number of occasions been considered as a form of torture and I have argued this treatment can be compared with trafficking. Furthermore, it can be said that many of the aspects which aggravate treatment such as nature, length and context of the treatment together with age and sex tend to be present in many instances of trafficking. In order to ascertain that trafficking can in fact be understood as torture, more specific jurisprudence needs to be awaited.

In addition to the serious harm requirement, the failure of state protection and location requirements pose challenges to claims made by individuals at risk of trafficking. Where trafficking is perpetrated by non-state actors it is necessary to establish failure of state protection. On an international basis it has not been possible to draw any certain conclusions as to what this means in practice. Case-law is contradictory. In contrast, the location requirement is fairly clear in its scope, asking of a claimant that he/she is outside the country of origin and for the harm to be related to the same. This limitation will however systematically exclude claims made e.g. by persons who have been trafficked from abroad.

### 3.2 Convention Ground

When it comes to establishing a Convention ground, I would argue some claims made by women fearing trafficking ought to be successful. In some instances connections can be made between the trafficking experience and the race, religion, nationality or political opinion of the victim. In order to quantify the use and success of these grounds for trafficking related claims further

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363 Askin, supra note 93, at 60
364 Burchard, supra note 87, at 4
365 See section 2.1.4
366 Prosecutor v Krnojelac, supra note 96, at para. 182; IOM, supra note 102, at 16; Human Rights Watch, supra note 73, at 4, 16
367 Horvath v SSHD supra note 125
368 Compare V01/13868 supra note 128; V03/16442 supra note 130, SK Albania supra note 133; SSHD v Dzhygyn supra note 134
369 Art. 1A(2) Refugee Convention; Hathaway, supra note 4, at 55ff
370 See e.g. N03/45573 supra note 135; Coomeraswamy, supra note 147, at 25
Where trafficking on the other hand is related to vulnerability, the ground membership of a PSG provides the best opportunity to achieve protection. Most trafficking claims are brought under this ground.371 Two main approaches to understanding this ground dominate jurisprudence; the protected characteristics approach and the social perception approach.372 I concluded from analysing case law that both approaches allow for the inclusion of some women facing the risk of trafficking in particular social groups. This result is however achieved in different ways.373 Under both approaches, sex/gender can serve as foundation for the existence of a particular social group.374 This common trait is however not enough to substantiate the existence of a PSG under either approach. Groups of women are narrowed down through such facts as geographical location and youth.375 The protected characteristics approach also clearly accepts previous trafficking as constituting an unchangeable characteristic, uniting women having had this experience.376 Identification of groups on the basis of past experience has also been attempted under the social perception approach. The result is however not as clear.377 It is therefore not possible to determine with certainty whether this is currently a feasible route to take under this approach.

Furthermore, establishing a nexus between a Convention ground and the persecution feared may provide considerable challenges. Much uncertainty surrounds this requirement378, which means further studies into specific jurisdictions would be necessary to establish the full extent of its impact upon a trafficking claim. This could be achieved through adding a subsidiary question focused on this particular issue. It can however be stated that gender-related violence such as trafficking perpetrated by non-state actors generally face a significant hurdle in this requirement.

371 Dorevitch, Foster, supra note 11, at 17; Poppy Project, supra note 156
372 Aleinikoff, supra note 16; Hathaway, Foster, supra note 11
373 Compare Canada v Ward, supra note 161; Applicant A v MIEA, supra note 158
374 Islam and Shah supra note 158; SSHD v K Fornah supra note 155; MIEA v Khawar supra note 192
375 Compare SK Albania supra note 133; V01/13868 supra note 128
376 SB Moldova, supra note 184; ex parte Hoxha supra note 183
377 Compare N98/24000 supra note 197, at 10; VXAJ v MIA, supra note 201, at para. 11, N03/45573 supra note 206
378 Foster, supra note 209, at 266
The extent of this depends upon the standard of causation applied in a particular country. The difficulties are further emphasised in jurisdictions where this violence is generally perceived as stimulated by private motives, rather than a ground. It can with certainty be said that where the contributing cause test is applied, most trafficking cases will be considered favourably, since it is here recognised that persecution can be linked to a ground even where there are additional motivating factors such as profit.

### 3.3 Art.3 ECHR and the EU Refugee Qualification Directive

Where refugee status cannot be achieved, complementary protection can be sought through the protection afforded by Art. 3 ECHR and the related Refugee Qualification Directive. It is likely that the development in the understanding of trafficking as a human rights violation would today allow for consideration of trafficking as torture, inhuman or degrading treatment under Art. 3 ECHR and Art. 15 of the Directive respectively. Thus, where the severity of the experience of trafficking in a particular case can be compared with that of rape, it is possible to reach this kind of protection. The factors affecting the assessment of the gravity of a treatment have in the Greek case been said to be the duration of the treatment, its physical or mental effects and in some cases sex, age and state of health of the victim. In many cases of trafficking, several of these factors will be aggravating. This means, many persons at risk of trafficking ought to be able to substantiate a claim under the complementary protection regime.

The Refugee Qualification Directive provides for subsidiary protection status which means it will be secondary to refugee status. However, its scope is limited in ways similar to the Refugee Convention, which means not all persons at risk of trafficking are encompassed even where

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379 Compare the ‘effective sole cause’, ‘but for’ test and ‘contributing cause’, see Foster, supra note 209, at 269ff
380 Matter of RA supra note 211; V00/11003 supra note 212; N98/24000 supra note 197; Spijkerboer, supra note 15, at 190; Crawley, supra note 14, at 18ff on the public/private dichotomy
381 Foster, supra note 209, at 284; Rajaratnam v MIMA supra note 221, regarding extortion
382 Compare Chahal v UK supra note 226; Soering v UK, supra note 227
383 Selmouni v France, supra note 229
384 Cyprus v Turkey, supra note 235; Aydin v Turkey, supra note 236
385 Greek case, supra note 246; Ireland v UK, supra note 232, at para. 162
386 IOM, supra note 102, at 16; Human Rights Watch, supra note 73, at 4, 16
387 Art. 18 Refugee Qualification Directive
trafficking can be seen as amounting to torture or inhuman or degrading treatment.\textsuperscript{388} Art. 3 ECHR here provides an outer protection scheme since it applies unconditionally to all facing a risk of harm.\textsuperscript{389} Its protection however only reaches as far as \textit{non-refoulement}.\textsuperscript{390} In contrast to the Refugee Convention, neither of these routes require a link being made between fear of harm and a ground. This may ultimately mean complementary protection provides a more realistic protection opportunity for women facing the risk of trafficking.

\textbf{3.4 The Swedish Aliens Act}

In Sweden, aliens can receive international protection under the Aliens Act. Chap. 4 Sec. 1 provides refugee protection to those who have a well-founded fear of being persecuted on Convention grounds. According to preparatory work and earlier legislation acts which threaten the life and freedom of an alien, or that is otherwise severe in nature is to be considered persecution.\textsuperscript{391} Among these is conduct violating fundamental human rights such as those from which no derogation can be made according to Art. 15.2 of the ECHR.\textsuperscript{392} Gender-related violence is today recognised as such serious harm in Sweden.\textsuperscript{393} Case-law regarding domestic violence and rape however pose important questions about what the courts require in terms of ill-treatment for persecution to be established in these cases.\textsuperscript{394} Trafficking is to be considered gender-related violence and can as such be compared with other such violence. However there is little indication that the courts or the Migration Board would today recognise trafficking as persecution.\textsuperscript{395} Where this is nevertheless achieved, the requirement of failure of state protection poses considerable challenges to a claim, as in international law. In my opinion, this criterion is even more stringent than what is the case internationally, in particular since it can only be established where the lack protection is due to political, social, cultural or religious factors.\textsuperscript{396}

\begin{itemize}
\item \textsuperscript{388} See Art. 15(b), Art. 18 Refugee Qualification Directive
\item \textsuperscript{389} Art. 1 ECHR
\item \textsuperscript{390} \textit{Chahal v UK}, supra note 226; \textit{Soering v UK}, supra note 226
\item \textsuperscript{391} Prop. 1988/89:86, supra note 268, at 154f
\item \textsuperscript{392} Art. 9.1 EU Qualification Directive
\item \textsuperscript{393} Migrationsverket, supra note 277; UNHCR, supra note 277
\item \textsuperscript{394} See \textit{MIG} 2008:39, \textit{UM} 1030-08, \textit{UM} 10365-06, Bexelius, supra note 281, at 51ff
\item \textsuperscript{395} UN Declaration on the Elimination of Violence against Women (1993), SOU 2008:41, supra note 287, \textit{UM} 1335-06
\item \textsuperscript{396} Prop. 2005/06:6, supra note 275, at 28; Wikrén, Sandesjö, supra note 274, at 136
\end{itemize}
In establishing a PSG under Chap. 4 Sec. 1 of the Aliens Act it seems in my opinion that either the protected characteristics approach or the social perception approach can be used.\textsuperscript{397} This coheres with the UNHCR stance.\textsuperscript{398} Sex/gender can also serve as a basis for the construction of a PSG today.\textsuperscript{399} This can be seen in \textit{MIG 2008:39} and \textit{UM 2676-07}. The reasoning in these cases can be compared with that of Islam and Shah and Fornah.\textsuperscript{400} I am however weary that it may be as difficult in Sweden as elsewhere to prove a structural denial of rights and hence make use of the ground on the basis of gender. Also, even though it is accepted that historical facts may serve as foundation for a claim, no such claim relating to previous trafficking or the like has yet been accepted which makes me doubt its usefulness.\textsuperscript{401} Furthermore, in making a connection between a ground and the persecution feared it seems as though Sweden as avoided a construction of this link based on the persecutor’s intention. On the other hand it seems, in my view as though the link has to be made between state conduct and the Convention ground.\textsuperscript{402} This poses a different type of challenge in making a claim, namely establishing a form of intent on the part of the state. It is however enough for a discriminatory intention to be a contributing cause.\textsuperscript{403}

Chap. 4 Sec. 2 of the Aliens Act provides a secondary type of protection from e.g. torture and inhuman and degrading treatment and punishment. It is in my opinion more likely that persons in fear of trafficking may receive protection under this provision, on the basis of case-law from the European Court of Human Rights.\textsuperscript{404} There is however no Swedish case-law specifically in support of this to date.

Moreover, Chap. 5 Sec. 6 of the Aliens Act grants residence permits to aliens in exceptionally distressing circumstances. SOU 2004:74 states that human trafficking is a circumstance to be particularly considered when evaluating the personal situation of an individual.\textsuperscript{405} Victims of

\begin{itemize}
\item \textsuperscript{397} SOU 2004:31, \textit{supra} note 309
\item \textsuperscript{398} UNHCR Guidelines on Membership of a Particular Social Group, \textit{supra} note 159
\item \textsuperscript{399} Chap. 4 Sec. 1 Aliens Act, prop. 2005/06:6, \textit{supra} note 275
\item \textsuperscript{400} Islam and Shah, \textit{supra} note 158, Fornah, \textit{supra} note 155
\item \textsuperscript{401} Prop. 2005/06:6, \textit{supra} note 275
\item \textsuperscript{402} \textit{Ibid.}, at 28
\item \textsuperscript{403} \textit{Ibid.}; Wikrén, Sandesjö, \textit{supra} note 274, at 135
\item \textsuperscript{404} See section 2.3.1
\item \textsuperscript{405} SOU 2004:74, \textit{supra} note 337, at 196ff
\end{itemize}
human trafficking have been provided protection under this provision. At this point in time it is thus feasible to conclude that this clause provides the most likely long-term protection opportunity. Short-term, Chap. 5 Sec. 15 may be relevant to a victim of trafficking. This provision is however not concerned firstly with the well-being of the victim but with the conduct of a preliminary investigation or main hearing of a criminal court case and hence only provides temporary residence. It can be criticised both from a human rights perspective and on the basis of its effectiveness in offering very little in return for gaining a valuable witness.

406 UM 1335-06, SOU 2008:41, supra note 287
407 Chap. 5 Sec. 15 o the Aliens Act, prop. 2006/07:53, supra note 275, at 21
408 Human Rights Watch, supra note 347, UNHCR, UNHCHR, supra note 348; Piotrowicz, supra note 349, at 268ff
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