

## **Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights**

Vladislava Stoyanova\*

### Table of Contents

A. Introduction .....	778
B. Trafficked Victims or Smuggled Immigrants?.....	781
C. Victim Protection or Witness Protection? .....	783
D. Protecting Victims as Persons Eligible for Complementary Protection under the European Convention on Human Rights.....	789
I. Article 3 – Prohibition on Torture, Inhuman or Degrading Treatment....	789
1. Dangers from Re-trafficking, Retaliation, Rejection by Family and/or Community .....	790
2. Lack of Social and Medical Assistance in the Country of Origin .....	798
II. Article 4 – Prohibition of Slavery, Servitude, Forced or Compulsory Labour .....	804
III. Article 8 – Right to Respect for Private Life.....	809
E. Conclusion .....	816

\* Doctoral candidate Lund University, LLM Leiden University. I would like to thank Prof. Gregor Noll for his support and comments. Contact information: vladislava.stoyanova@gmail.com, vladislava.stoyanova@jur.lu.se.

## Abstract

The international legal framework regulating the problem of human trafficking contains the presumption that the return of victims of human trafficking to their countries of origin is the standard resolution for their cases. However, victims might have legitimate reasons for not wanting to go back. For those victims, resort to the legal framework of the European Convention on Human Rights could be a solution. I elaborate on the protection capacity of Article 3 when upon return victims face dangers of re-trafficking, retaliation, rejection by family and/or community and when upon return to the country of origin victims could be subjected to degrading treatment due to unavailability of social and medical assistance. In light of the *Rantsev v. Cyprus and Russia* case, I develop an argument under Article 4 that states cannot send victims to those countries which do not meet the positive obligations standard as established in the case. Article 8 could be relevant: first, when the level of feared harm in the country of origin does not reach the severity of Article 3 but is sufficiently grave to be in breach of the right to private life and engage the non-refoulement principle, and second, when the victim has developed social ties within the receiving state and the removal will lead to their disruption.

## A. Introduction

It is widely recognized that persons who become subjects of human trafficking are in need of assistance and protection. However, there seems to be uncertainty on the content of that protection. Could protection include remaining in the territory of the state where victims have been trafficked? Many victims of human trafficking do not have a legal migration status in the countries into which they have been trafficked (the receiving states).<sup>1</sup> They could have entered with a false passport and/or visa; they could have entered clandestinely, thus their entry was not authorized by immigration officials; they might have entered legally, however, subsequently their presence in the country could have become illegal due to expiration of their visa or due to termination of the necessary conditions for legal presence of

<sup>1</sup> Countries on whose territory victims have been trafficked will be referred as receiving countries/states; these are the countries seeking to remove/deport the victims. Countries from which victims have been trafficked will be referred as countries of origin.

aliens in the territory of the respective state. In this sense, many victims of human trafficking fall within the category of “illegal” migrants.<sup>2</sup> As “illegal” migrants, the relevant aliens’ laws are applicable to them, which means that if they do not have a legal ground to remain in the receiving state they will either have to leave or will be forcefully deported. After their identification as victims of human trafficking, some of them might agree to cooperate with the authorities of the receiving state for the purposes of prosecuting the traffickers, and they could be granted temporary permission to stay. However, they may be deported when they are no longer required for prosecution purposes.

Victims of human trafficking might have legitimate reasons for not wanting to return to their home countries. Danger of re-trafficking; fear of retaliation by the members of the trafficking organizations; fear of being found by the trafficking organization since the victim has not earned the targeted amount of money; lack of social and/or medical assistance in the country of origin; rejection and stigmatization by the local community and/or by the victim’s family are but a few examples.<sup>3</sup> Hence, victims might be in need of protection in the form of remaining in the territory of the receiving state. In the present article, I examine the question of how victims of human trafficking could be eligible for complementary protection<sup>4</sup> under

<sup>2</sup> K. Koser, *International Migration: A Very Short Introduction* (2007), 54; See also G. Noll, ‘The Laws of Undocumented Migration’, 12 *European Journal of Migration and Law* (2010) 2, 143.

<sup>3</sup> These types of dangers have been identified based on the cases involving victims of human trafficking cited throughout the article. As additional confirmation of how realistic these dangers are, see for example, Human Rights Joint Committee of the British Parliament, ‘Examination of Witness (Questions 1-65), Mr Alan Campbell MP of 26 January 2010’, Q22 (24 March 2010) available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrightts/88/10012602.htm> (last visited 31 August 2011); Concluding Observation of the Committee on the Elimination of Discrimination against Women, Albania, CEDAW/C/ALB/CO/3, (12-30 July 2010) available at [http://www.ecoi.net/file\\_upload/470\\_1283334\\_253\\_cedaw-c-alb-co-3.pdf](http://www.ecoi.net/file_upload/470_1283334_253_cedaw-c-alb-co-3.pdf) (last visited 31 August 2011); Home Office UK Border Agency, ‘Country of Origin Information Report Nigeria’, paras 26.13 and 26.14 (9 July 2010) available at [http://www.ecoi.net/file\\_upload/1226\\_1279789324\\_nigeria-150710.pdf](http://www.ecoi.net/file_upload/1226_1279789324_nigeria-150710.pdf) (last visited 15 July 2011); Country of Return Information Project, ‘Country Sheet Bosnia and Herzegovina’ (May 2009) available at [http://www.ecoi.net/file\\_upload/470\\_1258194867\\_cs-bosnia-en.pdf](http://www.ecoi.net/file_upload/470_1258194867_cs-bosnia-en.pdf) (last visited 31 August 2011).

<sup>4</sup> ‘Complementary protection’ describes protection granted by states on the basis of an international protection need outside the *Convention relating to the Status of Refugees*, 22 April 1954, 189 U.N.T.S. 150. It may be based on a human rights treaty or on more

the European Convention on Human Rights (hereinafter ECHR).<sup>5</sup> The article guides the reader through three stages. First, it points out the importance of identifying illegal immigrants as victims of human trafficking; without such identification the arguments justifying complementary protection due to the specific experiences associated with being a victim of human trafficking, will be rendered nonoperational. Second, I demonstrate that in the currently existing legal framework regulating human trafficking, there is hardly any protection to victims in the sense of allowing them to remain on the territory of the receiving countries. Third, I utilize the jurisprudence of the European Court of Human Rights (hereinafter ECtHR) for arguing that repatriating victims could be in breach of Article 3 (prohibition on torture, inhuman or degrading treatment), Article 4 (prohibition on slavery or servitude and forced labor), or Article 8 (right to respect for private and family life) of the ECHR, or a combination of any of these provisions.

The focus of the article on complementary protection is without prejudice to the eligibility of victims of human trafficking for refugee status.<sup>6</sup> However, the issue of refugee status determination has been excluded from the scope of the article since it raises specific problems which are worth dealing with in a separate contribution. In addition, several authors have already addressed the complications involved in victims' recognition as refugees.<sup>7</sup>

general humanitarian principles triggered by states' *non-refoulement* obligations; See J. McAdam, *Complementary Protection in International Refugee Law* (2007), 21.

<sup>5</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 3 September 1953, 213 U.N.T.S. 222 [ECHR].

<sup>6</sup> See UNHCR, 'Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked' (7 April 2006) available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=443679fa4&page=search> (last visited 31 August 2011); See also R. Piotrowicz, 'The UNHCR's Guidelines on Human Trafficking', 20 *International Journal of Refugee Law* (2008) 2, 242.

<sup>7</sup> See R. Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection', 24 *Australian Yearbook of International Law* (2005) 1, 159-180; A. Dorevitch & M. Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australian's Migration and Refugee Law', 9 *Melbourne Journal of International Law* (2008) 1, 1; O. Simic, 'Victims of trafficking for forced prostitution: Protection mechanisms and the right to remain in the destination countries' (July 2004) available at <http://www.gcim.org/attachements/GMP%20No%202.pdf> (last visited 31 August 2011); K. Saito, 'International

## B. Trafficked Victims or Smuggled Immigrants?

Before addressing the protection needs of victims of human trafficking, a preliminary issue has to be examined: the identification of persons as victims of human trafficking. This issue is of significance for the purposes of the article because if a case is not qualified as a case of human trafficking by the authorities of the receiving state, then the arguments in favor of granting complementary form of protection might not be functional.

In accordance with the definition of human trafficking as indicated in the UN Protocol against Trafficking and Council of Europe Trafficking Convention,<sup>8</sup> exploitation is viewed as fundamental to the trafficking experience. In connection with this, it is important to distinguish the phenomena of human trafficking from the phenomena of human smuggling, which is defined in the UN Protocol against Smuggling of Migrants.<sup>9</sup> The dichotomy between human smuggling and trafficking could be built on the following basis. First, unlike trafficking, smuggling does not entail coercion or deception, indicating that smuggling is a voluntary act on the part of those smuggled.<sup>10</sup> By contrast, the focus in cases of trafficking is on the exploitation and the majority of literature on trafficking has focused on women and prostitution.<sup>11</sup> Second, the services of smugglers end when

protection for trafficked persons and those who fear being trafficked' (December 2007) available at <http://www.unhcr.org/476652742.pdf> (last visited 31 August 2011).

<sup>8</sup> See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), 3 September 2003, [The Protocol against Trafficking]; See also *The Council of Europe Convention on Action against Trafficking in Human Beings*, (ETS No. 197), Warsaw, 16 Mai 2005. [Council of Europe Trafficking Convention], Art. 4(a).

<sup>9</sup> See *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime*, GA Res. 55/25, 28 January 2004, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 53, U.N. Doc. A/45/49 (Vol. I) (2001). The Protocol against the Smuggling of Migrants defines human smuggling in the following way: "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident".

<sup>10</sup> A. Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region* (2003), 17.

<sup>11</sup> K. Koser, 'The Smuggling of Asylum-Seekers into Western Europe: Contradictions, Conundrums and Dilemmas', in D. Kyle & R. Koslowski (eds), *Global Human Smuggling Comparative Perspectives* (2001), 59.

those smuggled have reached their destination, while trafficking results in people being exploited. Third, smuggling entails international movements; it always has a transnational element,<sup>12</sup> whereas trafficking can take place both within and across national frontiers.<sup>13</sup> Due to the specific subject matter of the present article, trafficking within national frontiers falls outside its scope. Fourth, smuggling entails illegal entry into a given state, and entry can both be legal and illegal in case of trafficking. A victim of human trafficking could have entered the destination country on a valid passport and/or visa and this in no way should preclude identification as a victim of human trafficking. Human smuggling could be summarized as an act of facilitating illegal entry<sup>14</sup> or as migrants exporting schemes, while human trafficking could be referred to as slave importing operations.<sup>15</sup>

Based on the above clarified distinction, the victimization of the trafficked persons and their need of protection and assistance have become understandable.<sup>16</sup> Once the case is defined as one of human trafficking, the migrants who are objects of the human trafficking are referred to as *victims*. However, there could be problems of how to define the case: is it a case of illegal immigration and thus possibly a case of human smuggling or is it indeed a case of human trafficking. This is related to the smuggling/trafficking dichotomy and the difficulties associated with its application in practice. It could be an artificial dichotomy if one looks at the realities of migration. Many migrants, including those who could be defined as victims of trafficking, in fact agree to be transported and expect to be exploited. There could be different degrees of victimization and exploitation during the migration process and once the migrant is in the receiving state.

<sup>12</sup> V. Bulger, M. Hofman & M. Jandl, 'Human Smuggling as a Transnational Service Industry: Evidence from Austria', 44 *International Migration* (2006) 4, 59, 61.

<sup>13</sup> The Council of Europe Trafficking Convention (see Art. 2) is applicable to all forms of trafficking in human beings, whether national or transnational.

<sup>14</sup> T. Obokata, 'Smuggling of Human Beings from Human Rights Perspective: Obligations of Non-state and State Actors under International Human Rights Law', 17 *International Journal of Refugee Law* (2005) 2, 394, 397.

<sup>15</sup> D. Kyle & J. Dale, 'Smuggling the State Back in: Agents of Human Smuggling Reconsidered', in D. Kyle & R. Koslowski (eds), *Global Human Smuggling Comparative Perspectives* (2001), 32.

<sup>16</sup> K. Ziegler, 'The Legal Framework of Trafficking and Smuggling in Germany: Victim Protection emerging from Witness Protection', in E. Guild & P. Minderhoud (eds), *Immigration and Criminal Law in the European Union, The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (2006), 97.

Therefore, the legal dichotomy between human smuggling and trafficking is an oversimplification of the reality and it does not and cannot represent the dynamics of the migration process. The concept of exploitation itself is hard to define.<sup>17</sup> The means in the definition of human trafficking, especially “abuse of power or of a position of vulnerability”, are similarly hard to establish. Migrants who agree and pay to be smuggled are also in a comparably vulnerable situation in relation to the smuggler. Accordingly, state officials themselves have difficulties identifying migrants as victims of human trafficking. When legitimate migration control considerations are added into the picture, identification of victims becomes even more problematic since many victims have irregular migration status and states are entitled to demand their removal. It has also been commented that states have an incentive to identify irregular migrants as having been smuggled, not as having been trafficked due to the protection obligations placed upon states towards victims of trafficking,<sup>18</sup> irrespective of how limited those obligations are. Accordingly, due to the problems with the distinction between human smuggling and trafficking, identification of irregular migrants as victims of human trafficking is hindered. If such identification is not made, protection and assistance is not likely to take place.

However, despite the hardship and uncertainty of passing the “test” of recognition as a victim of trafficking, such recognition might not ultimately ensure a fate different from the fate of a smuggled illegal migrant who is meant to be deported. This is due to the weak victim protection mechanisms as explained in the following section of the article.

### C. Victim Protection or Witness Protection?

Before proceeding with the issue of complementary protection under the ECHR, one more issue in the legal framework on human trafficking needs to be clarified. After recognition as a victim of human trafficking, the

<sup>17</sup> The Protocol against Trafficking, *supra* note 8, Art. 3(a), (second sentence) gives a non-exhaustive list of what exploitation might include. However, the concept remains vague. For the problems with the currently existing definition of human trafficking see G. Noll, ‘The Insecurity of Trafficking in International Law’, in V. Chetail (ed.), *Mondialisation, migration et droits de l’homme: le droit international en question* (2007), 343.

<sup>18</sup> A. Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’, 23 *Human Rights Quarterly* (2001) 1, 975, 982; C. Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law* (2008), 91.

fate of the victim could become a fate of a *witness*, which entails permission to remain in the territory of the receiving state *for the purposes* of the criminal prosecution of the traffickers. However, this possibility is not a victim protection mechanism. It fits into the discourse which presently dominates the “solutions” to the problem of human trafficking, namely to “combat” human trafficking, in addition to border control measures more robust prosecution and stricter criminalization is allegedly necessary.<sup>19</sup> Protection and assistance for victims have ostensibly been put forward in the discourse; however, on closer scrutiny, serious doubts as to the existence of a real victim protection regime arise as demonstrated below.

The purpose of the UN Trafficking Protocol is to protect and assist victims of trafficking “with full respect for their human rights”<sup>20</sup>. A pertinent question with regard to trafficked persons is: what does it mean to protect the person with *full* respect of his/her human rights? From the perspective of the human rights obligations of the receiving state, is this not an empty statement if the question whether that person can remain in the receiving state’s territory is left open? Under the ECHR, States have undertaken human rights obligations in regard to individuals who are “within their jurisdiction”<sup>21</sup>, which means that once deported the victim is rendered outside the jurisdiction and accordingly outside the realm of the receiving state’s human rights obligations. This is even expressly indicated in the UN Trafficking Protocol (Article 6(5)) which urges its state parties to “endeavor to provide for the physical safety of victims of trafficking in persons *while they are within its territory* (emphasis added).” The message to those states in whose territory the victims have been exploited seems to be: send the victims away from your territory so that you do not have to be concerned with their safety and with their human rights.

Part II of the Protocol with the promising title “Protection of Victims of Trafficking in Person” avoids any reference to the victims’ human rights, which is surprising if one considers the flamboyant commitment in Article 2 to protect victims “with full respect for their human rights”. As to the status of victims of trafficking in receiving states, the UN Protocol (Article 7(1)) stipules that “each State Party *shall consider* adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain

<sup>19</sup> A. Edwards, ‘Trafficking in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’, 36 *Denver Journal of International Law and Policy* (2007) 1, 9, 11.

<sup>20</sup> Protocol against Trafficking, *supra* note 8, Art. 2.

<sup>21</sup> See ECHR, *supra* note 5, Art. 1.

in its territory, temporarily or permanently, *in appropriate cases*”<sup>22</sup>. Article 8(2) further indicates that when a state returns a victim of trafficking to a state party of which that person is a national, the return shall be with *due regard* for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall *preferably* be voluntary.

One cannot fail to notice the discretionary language in which these provisions are framed. The self-contradictory formulation: “shall preferably be voluntary”, is particularly obvious. It is a “shall” obligation, however, at the same time it is “preferably.” The *travaux* makes clear that the “shall preferably be voluntary” phrase is “understood not to place any obligation on the State Party returning the victims”<sup>23</sup>. Similarly oxymoronic is the phrase “shall consider” in Article 7(1). In practice the “*shall*” does not imply an obligation. In addition, it is not in each and every case that the states “shall consider” measures to permit victims to remain in their territory, but only “in appropriate cases.” Which these “appropriate cases” are, is far from clear.

The Trafficking Protocol does not provide for victims’ right to remain in the territory of the receiving state. This touches upon the sensitive issue of immigration control and the prerogatives of states to determine who enters and remains on their territory. Many of the victims of human trafficking are illegal migrants and accordingly subject to aliens and immigration laws in the receiving states. The logical consequence is that victims of trafficking might be sent back to their countries of origin without their consent and/or despite any possible fears. The receiving states are reluctant to provide for right to remain and to legal residence for victims who are illegal immigrants since states are concerned that this could be a pull factor for more immigration. When the Trafficking Protocol was to be adopted many delegates feared that “the Protocol might inadvertently

<sup>22</sup> Emphases added.

<sup>23</sup> Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to 11<sup>th</sup> session, Addendum Interpretative notes for the official records of the negotiations of the UN Convention against Transnational Organized Crime and the Protocols thereto, UN Doc.A/55/383/Add.1, 3 November 2000, 14, para. 73, available at [http://www.unodc.org/pdf/crime/final\\_instruments/383a1e.pdf](http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf) (last visited 31 August 2011).

become a means of illicit migration”<sup>24</sup>. The receiving states did not want trafficking to create a hole in their migration system.

With regards to the countries from which victims originate, there is a clear change in the language used by the UN Protocol against Trafficking. While Article 8(2), which is related to the return of victims, is framed in a discretionary fashion, this is not the case with Article 8(1), which relates to the obligation of states to accept back victims who are their nationals or permanent residents. Accordingly, the repatriation dimension of the so called “protection” of victims is cast in the form of hard obligations.<sup>25</sup> Article 8(1) prescribes that countries of origin “shall [...] accept” the return of their nationals or permanent residents “without undue or unreasonable delay”. It is a universally recognized human right to return/enter the territory of one’s state of nationality.<sup>26</sup> However, this refers to an entitlement to enter/return, which implies that it is the individual’s discretion whether to return. While the UN Trafficking Protocol refers to obligation on states to accept the return of their nationals, which implies that the individual could be forced to return. The repatriation dimension of the UN Trafficking Protocol is further strengthened by the temporal obligation: “without undue or unreasonable delay”.

The Council of Europe Trafficking Convention has been perceived as being different from the Trafficking Protocol because of the former’s emphasis on victim protection. This is clearly indicated in the stated purposes of the Convention and in its intention to “*enhance* [emphasis added] the protection afforded by [the Protocol] and develop the standards

<sup>24</sup> L. Potts, ‘Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons’, 35 *George Washington International Law Review* (2003) 1, 227, 240; See also M. Valsamis, ‘The United Kingdom National Report on the Implementation of the Victims Protection Directive’ (29 April 2004) 907, available at [http://ec.europa.eu/home-affairs/doc\\_centre/immigration/docs/studies/odysseus\\_2004\\_81\\_victims\\_trafficking\\_national\\_reports\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/odysseus_2004_81_victims_trafficking_national_reports_en.pdf) (last visited 31 August 2011) as part of the project of the Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe.

<sup>25</sup> Noll, *supra* note 17, 356.

<sup>26</sup> *Universal Declaration of Human Rights*, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 13; *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 23 March 1976, Art. 12(4); *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. No. 46, 2 May 1968, Art. 3(2).

contained therein”<sup>27</sup>. Perhaps the most important of all victim protection provisions is the one relating to identification of individuals as victims of trafficking<sup>28</sup> and in particular, the obligation on the states to “provide its competent authorities with persons who are trained and qualified [...] in identifying and helping victims”<sup>29</sup>. As to the possibility of victims to remain in the territory of the receiving state, there are important innovations: if the competent authorities have *reasonable grounds* to believe that a person has been victim of trafficking in human beings, *that person shall not be removed from its territory until the identification process* as victim of the offence of trafficking in human beings has been completed by the competent authorities. Victims or presumed victims are to be given a *thirty-day period of grace* (recovery and reflection period) during which time they will be given support and assistance and permitted to decide whether or not to cooperate with the competent authorities. Victims cannot be repatriated against their will during this period. Once this thirty-day period is up, state parties are to issue a renewable residence permit to victims if, in their opinion, an extended stay is necessary owing to the victim’s personal situation *or* for the purposes of their cooperation in an investigation or prosecution. This provision has the practical effect of ensuring that States Parties retain the right to grant residence permits only to those victims cooperating with the authorities.<sup>30</sup>

The above analysis makes at least three things clear. First, the Protocol against Human Trafficking presumes that return of the victim is the

<sup>27</sup> See Council of Europe Trafficking Convention, *supra* note 8, preamble and Art. 1(1)(b).

<sup>28</sup> A. Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments’, 8 *European Journal of Migration and Law* (2006) 1, 163, 176.

<sup>29</sup> See Council of Europe Trafficking Convention, *supra* note 8, Art. 10(1).

<sup>30</sup> I am aware of two studies on the national legislation of the European Union member states concerning the provision of residence permit to victims of human trafficking. See G. Noll & M. Gunneflo, ‘Directive 2004/81 Victims of Trafficking Synthesis Report’ (2007) available at [http://ec.europa.eu/home-affairs/doc\\_centre/immigration/docs/studies/odysseus\\_2004\\_81\\_victims\\_trafficking\\_synthesis\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/odysseus_2004_81_victims_trafficking_synthesis_en.pdf) (last visited 1 September 2011). According to the Synthesis’ Report, in only three countries (Finland, the Netherlands and the Czech Republic) there is a possibility for residence permit not conditional on cooperation with the authorities. See also European Union Agency for Fundamental Rights, ‘Country Reports on the FRA Report “Child Trafficking in the EU – Challenges, Perspectives and Good Practices”’ (July 2009) available at [http://194.30.12.221/fraWebsite/research/background\\_cr/cr\\_child\\_traff\\_0709\\_en.htm](http://194.30.12.221/fraWebsite/research/background_cr/cr_child_traff_0709_en.htm) (last visited 31 August 2011).

standard solution. This is supported by, from the one hand, the discretionary language in which any commitments by the receiving states are phrased, and from the other hand, by the hard obligations incumbent upon the countries of origin to readmit the victims. The Protocol against Trafficking could be read as a comprehensive multilateral readmission agreement, suggesting that return will be the standard response in handling trafficking victims. The proper place of the trafficked migrants is supposedly at home.<sup>31</sup>

Second, as it is clear from the Council of Europe Trafficking Convention, protection in the sense of remaining in the territory of the receiving states is not actually a victim protection scheme, but a witness protection scheme. The receiving states are struggling with alleviating a conflict within their interest to control immigration. Proper immigration control presupposes removal of illegally staying migrants. Victims of human trafficking often fall within this category of migrants. However, states are interested in ensuring prosecution and conviction of traffickers, which serves not only the suppression of crimes against persons but also sanctioning breaches of immigration control, which could be involved in the trafficking. Successful prosecution necessitates availability of witnesses. Thus, the temporal residence permit for victims is a way of reconciling this clash. The victim will be allowed to stay as long as she is available and useful as a witness.

Third, since neither on UN, nor on Council of Europe level the human trafficking legal framework affords a right for the victims of human trafficking to remain on the territory of the receiving states, it is necessary to have resort to the states' human rights obligations, in particular the principle of *non-refoulement* as developed by the jurisprudence of the ECtHR which has the effect of imposing a prohibition on states to remove individuals to countries where they are at risk of harm.

<sup>31</sup> Noll, *supra* note 17, 357.

## D. Protecting Victims as Persons Eligible for Complementary Protection under the European Convention on Human Rights

### I. Article 3 – Prohibition on Torture, Inhuman or Degrading Treatment

The ECHR does not contain a right to asylum; neither does it expressly safeguard the principle of *non-refoulement*.<sup>32</sup> However, starting with the *Soering* judgment,<sup>33</sup> the ECtHR has developed a body of case law on Article 3 which imposes on states an obligation not to return persons to countries where there are *substantial grounds* for believing that they face a *real risk* of being subjected to torture, inhuman or degrading treatment or punishment. After *Soering*, the prohibition on *refoulement* has been established as inherent in the general terms of Article 3 of the ECHR.<sup>34</sup> The *non-refoulement* obligations of Council of Europe Member States under Article 3 of the ECHR have been subject of a comprehensive research and therefore the only purpose of the present article is to address the relevance of Article 3 to victims of human trafficking.<sup>35</sup> The analysis of the protection possibilities under Article 3 is divided into two subsections: the first one concentrating on non-state agents and the types of harm which they could cause to a victim; and the second one looks into a scenario when the harm in the country of origin is neither inflicted by state nor by non-state agents, but it is the failure of the state of origin to provide care and assistance to the

<sup>32</sup> McAdam, *supra* note 4, 136.

<sup>33</sup> *Soering v. The United Kingdom*, ECtHR (1989) Application No. 14038/88. Soering was charged with murder in the state of Virginia, The United States. He was arrested in England and United States requested his extradition. Soering successfully argued before the ECtHR that his extradition will be in violation of Article 3 since he is in danger of being subjected to torture, inhuman or degrading treatment due to his exposure to the “death row phenomena” if extradited to Virginia to face capital murder charges.

<sup>34</sup> See *Cruz Varas v. Sweden*, ECtHR (1991) Application No. 15576/89; *Vilvarajah and Others v. the United Kingdom*, ECtHR (1991) Application No. 13163/87, 13164/87 and 13165/87; *H.L.R. v. France*, ECtHR (1997) Application No. 24573/94, 1997; *Chahal v UK*, ECtHR (1995) Application No. 22414/93; *Salah Sheekh v. the Netherlands*, ECtHR (2007) Application No. 1948/04; *Saadi v. Italy*, ECtHR (2008) Application No.37201/06.

<sup>35</sup> See K. Wouters, *International Legal Standards for the Protection from Refoulement* (2009); N. Mole, *Asylum and the European Convention on Human Rights* (2007).

victim. Within the first subsection entitled ‘Dangers from Re-trafficking, Retaliation, Rejection by Family and/or Community’, I have also included discussion of two issues of relevance when the source of risk barring *refoulement* originates from non-state agents; to wit, failure of the state to provide protection and the availability of internal protection alternative.

### 1. Dangers from Re-Trafficking, Retaliation, Rejection by Family and/or Community

Without dismissing other possible factual complexities and varieties characterizing the individual case of each victim, it is submitted that there are two non-state agents that could cause harm to the victim in her country of origin. First, the individuals involved into trafficking or the trafficking gang could cause harm in the form of re-trafficking; retaliation since the victim could have testified against her traffickers and the trafficking organization or she is believed to have testified; the victim might not have earned the targeted amount of money as a result of which the traffickers might try to find her. Second, the victim’s community and/or the family in the country of origin could be another possible agent of harm and in these cases the concrete type of harm could be rejection and stigmatization by the community and/or the family due to the victim’s involvement in sex trade and prostitution. In each of these scenarios the following legal issues as developed in the ECtHR’s case law arise: whether the harm reaches the severity of inhuman or degrading treatment;<sup>36</sup> the individualization of the harm which relates to the standard of proof: “substantial grounds for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3”<sup>37</sup>; and since the agents of the harm are non-state, the issue of availability and sufficiency of state protection arises.<sup>38</sup>

<sup>36</sup> In *Hilal v. the United Kingdom*, ECtHR (2001) Application No. 45276/99, para. 60, the ECtHR held that “[i]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case”.

<sup>37</sup> *Salah Sheekh v. the Netherlands*, *supra* note 34, para. 135.

<sup>38</sup> In *H.L.R. v. France*, *supra* note 34, para. 40, the ECtHR held that “[o]wing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or group of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving state [the state where the individual is to be deported] are not able to obviate the risk by providing appropriate protection”.

## a) Re-trafficking

If the harm is re-trafficking, the level of severity of the harm necessary to meet the threshold of Article 3 is not problematic. There is little doubt that the type of treatment to which victims of human trafficking are subjected, amounts to inhumane or degrading treatment. They are raped; forced to engage in sexual acts; bought and sold and treated as objects for profit; subjected to physical maltreatment; held in captivity. However, it has to be shown that there are substantial grounds for believing that the victim would face the same kind of dangers upon return. It might be difficult to prove that once having been trafficked, the victim is again in danger of re-trafficking. The risk of re-trafficking should have a more personal nature.<sup>39</sup> The mere possibility of re-trafficking will not be sufficient to give rise to a breach of Article 3; there should be some distinguishing features characterizing the case of the victim, which to lead to individualization of the harm feared.<sup>40</sup> In certain countries certain section of the population are in general exposed to the risk of human trafficking. After all, human trafficking is a crime<sup>41</sup> and in general all individuals are exposed to the danger of becoming a victim of a crime. A general risk of re-trafficking will not make an individual eligible for protection under Article 3. The relevant question at this juncture relates to the level of individualization. The authoritative judgment in this regard is *Salah Sheekh v. the Netherlands*. The ECtHR accepted that the treatment to which the applicant claimed he had been subjected prior to his leaving Somalia can be classified as inhuman within the meaning of Article 3 and noted that the minority (Ashraf) to which he belonged continues to be vulnerable to abuses.<sup>42</sup> In the opinion of the ECtHR, the argument by the Dutch government that “problems experienced by the applicant were to be seen as a consequence of the generally unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people,” is insufficient to remove the applicant from the scope of Article 3.<sup>43</sup> The only distinguishing feature that the applicant was required to establish was his belonging to the Ashraf

<sup>39</sup> Mole, *supra* note 35, 32.

<sup>40</sup> *Vilvarajah and Others v. the United Kingdom*, *supra* note 34, para. 111.

<sup>41</sup> See R. Piotrowicz, ‘The Legal Nature of Trafficking in Human Beings’, 4 *Intercultural Human Rights Law Review* (2009) 1, 175, 183.

<sup>42</sup> *Salah Sheekh v. the Netherlands*, *supra* note 34, para. 146.

<sup>43</sup> *Salah Sheekh v. the Netherlands*, *supra* note 34, para. 147.

minority.<sup>44</sup> The ECtHR concluded that the protection afforded by Article 3 of the ECHR is to be rendered illusory “if, in addition to the fact of his belonging to the Ashraf – which the Government has not disputed – the applicant were required to show the existence of further special distinguishing features”<sup>45</sup>. If those principles are transposed to a case of a victim of human trafficking seeking the protection of Article 3 due to danger of re-trafficking, it should be sufficient if the victim proves either one strong distinguishing feature of her case or a combination of features which make her case distinguishable. Such possible features could be: she has not earned the targeted amount of money and/or has not paid her debt as a result of which her trafficker might go to extreme lengths to find her; she has been trafficked by a trafficking organization/gang which makes it more likely that upon return she might meet some of them; the traffickers believe that she holds incriminating information and she might testify against them in the country of origin; the victim could be from a particular background, from a particular age group, coming from certain ethnicity or minority, having no education and residing in certain areas of the country, which puts her at very high risk of re-trafficking. There could be a combination of such factors. For example, it has been recognized that

“if a victim has been trafficked by a gang of traffickers, as opposed to a single trafficker, then the risk of re-trafficking may be greater for someone who escapes before earning the target earnings set by the trafficker, because the individual gang members will have expected to receive a share of the target sum and will, therefore, be anxious to ensure that they do receive that share or seek retribution if they do not”<sup>46</sup>.

## b) Retaliation

If the harm feared by the victim is retaliation, then there will be clear individual targeting of the victim if she is to be returned. The facts of the case *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of*

<sup>44</sup> Salah Sheekh v. the Netherlands, *supra* note 34, para. 148.

<sup>45</sup> *Id.*

<sup>46</sup> United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, ‘PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department’ (23 November 2009) para. 192, available at <http://www.unhcr.org/refworld/docid/4b0ab38f2.html> (last visited 1 September 2011).

*State for the Home Department* are exemplary for this type of harm.<sup>47</sup> The woman in this case was trafficked from Moldova into the United Kingdom. She subsequently gave evidence against Z., the person responsible for her exploitation. This resulted in the successful prosecution of Z who received a term of imprisonment. At the time when the Secretary of State for the Home Department took a decision to direct the woman's removal from the United Kingdom, Z. had already served his sentence. The woman was afraid from Z, Z's family and Z's associates if she is to return to Moldova. Z had a wide network of contacts throughout Eastern Europe and the woman had given evidence that Z's associates are still in Moldova and that the trafficking operation is still ongoing.<sup>48</sup>

### c) Rejection by Family and/or Community

If the victim is afraid that upon her return she will be ostracized and rejected by her family and/or community, the anticipated harm is of individual nature since it is the particular victim to be targeted due to her involvement in prostitution, which involvement could be contrary to the established moral and societal principles and norms. A relevant question is whether this rejection and its consequences amount to a harm which reaches the threshold of inhuman or degrading treatment. Importantly, any conclusion on this issue will depend on the particular society and situation within the country of origin. Rejection by family and community combined with inability and/or unwillingness by the country of origin to provide essential support structures, in the form of housing, medical assistance and care, rehabilitation, education necessary for finding a job, all of which are fundamental for severing the dependence of the victim on her family and/or community, could result in a serious harm amounting to inhuman or

<sup>47</sup> United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 'SB (PSG - Protection Regulations – Reg 6) Moldova v. Secretary of State for the Home Department' (26 November 2007) available at <http://www.unhcr.org/refworld/docid/47837c902.html> (last visited 31 August 2011).

<sup>48</sup> The legal issues discussed in the case 'SB (PSG - Protection Regulations – Reg 6) Moldova v. Secretary of State for the Home Department', *supra* note 47 refer to the human trafficking victims' eligibility for refugee status. The UK Asylum and Immigration Tribunal determined in the case that in the context of Moldovan society "former victims of trafficking for sexual exploitation" form a particular social group for the purposes of the refugee definition. In the context of the present article, I put an emphasis on the facts of the case which are demonstrative of retaliation as a possible type of harm.

degrading treatment. In some societies, it may be enough for her family to reject a woman to make her whole existence in her original community untenable.<sup>49</sup> Relevant questions would be how victims are perceived in the surrounding society; if there is social stigmatization; if victims refuse to avail themselves of follow up assistance because of concerns about members of their home communities learning about their experiences.

d) Non-State Agents of Harm and Failure of the State to Provide Protection

The ECtHR's jurisprudence has firmly established that the protection obligations under Article 3 "apply in situations where the danger emanates from persons or groups of persons who are not public officials"<sup>50</sup>. When the source of harm is non-state, the issue of availability and quality of protection offered by the country of origin, the country where the individual is to be deported, is of significance. As reaffirmed by the ECtHR: "it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection"<sup>51</sup>.

The pertinent question is what kind of measures the country of origin is expected to undertake in order to be concluded that it provides protection for victims of human trafficking. As it is evidenced from the international legal framework in the field of human trafficking, imposition of criminal sanctions is the principle response.<sup>52</sup> Indeed, in case of harm inflicted by one private individual to another private individual, in order for the state to live up to its positive obligations to ensure the human rights of the injured individual, the state is expected to criminalize the activity constituting the harm and to prosecute the alleged perpetrator.<sup>53</sup> However, in the particular

<sup>49</sup> Piotrowicz, *supra* note 7, 167.

<sup>50</sup> *T.I. v. the United Kingdom*, ECtHR Decision No. 43844/98, ECHR 2000-III; H.L.R. v. France, *supra* note 34, para. 40.

<sup>51</sup> H.L.R. v. France, *supra* note 34, para. 40; Salah Sheekh v. the Netherlands, *supra* note 34, para. 137.

<sup>52</sup> See Protocol against Trafficking, *supra* note 8, Art.5; Council of Europe Trafficking Convention, *supra* note 8, Chapter IV. On this issue see generally the contributions in E. Guild & P. Minderhoud (eds), *Immigration and Criminal Law in the European Union, The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (2006).

<sup>53</sup> *Siliadin v. France*, ECtHR (2005) Application No. 73316/01, para. 148. The positive obligations of states include "categorization of many forms of conduct as criminal

country of origin there could be problems rendering prosecution unlikely: high level of corruption; initiation of criminal investigation only if the victim makes a complaint and, in reality, she is not likely to do that since she is afraid of the authorities.<sup>54</sup> Alternatively, the country of origin might have criminalized trafficking and might take successful steps to prosecute, but still in practice there might not be sufficient protection for the particular victim. The circumstances surrounding the case of the particular victim could be of such a nature as to demand a higher level of protection and the country of origin might not be able to meet that demand. This was under consideration by the United Kingdom Asylum and Immigration Tribunal in the case of *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*. The main issue determining the victim's asylum claim was the ability and willingness of the Nigerian authorities to offer protection to victims of trafficking.<sup>55</sup> After concluding that "the legal and institutional foundation for combating trafficking and, equally important, support for victims of trafficking, have been in place in Nigeria",<sup>56</sup> the analysis of the ability and willingness of the state to protect had a second step. This second step required answer to the question whether the situation of the appellant was so peculiar that the state was not likely to provide additional protection. The source of the peculiarity in this concrete case was that the victim had escaped before earning the targeted sum demanded by the traffickers. In such a situation the traffickers "are very likely to go to extreme lengths in order to locate the victim or members of the victim's family, to seek reprisals"<sup>57</sup>.

activity"; See Jacobs, White & Ovey (eds), *The European Convention on Human Rights* (2010), 176.

<sup>54</sup> The USA Trafficking in Persons Report 2009 indicates in regard to some countries that victims are required to file a formal complaint and many of them do not do that due to fear of violence or reprisals, or lack of confidence in the country's criminal justice system. See for example, the report on Azerbaijan (p. 70) and Guatemala (p. 146), available at <http://www.state.gov/documents/organization/123357.pdf> (last visited 1 September 2011).

<sup>55</sup> *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, *supra* note 46, para. 191.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, para. 192; The UK Asylum and Immigration Tribunal did not analyze on the substance whether in this situation Nigeria was capable of protection, since on the facts of the case it was found that there was no evidence that the victim had been trafficked by a gang of traffickers.

When it is the community and/or family within the country of origin with its particular social morals rejecting women involved in the sex trade or stigmatizing them as AIDS positive, then effective legal system for the detection, prosecution and punishment of acts constituting the feared harm is not the appropriate response. The appropriate response within the country of origin will be protection of victims by providing shelters and social assistance, to which they can have access. Therefore, availability of protection in the country of origin should be interpreted in the sense of whether the measures undertaken provide meaningful and effective protection against the non-state agents for the particular victim. Due consideration is to be given to the specific protection needs (as access to shelters and quality of social assistance) of victims of human trafficking. This approach was adopted by the UK Upper Tribunal, which took note that the shelters for victims of human trafficking in Thailand provide detention-like environment; that counseling services are very limited; that great deal of personal information is required and “given the perception of corruption, and of the appellant’s belief that her trafficker had links with the authorities”, victim would be reluctant to provide such information for fear of reprisals.<sup>58</sup>

#### e) Internal Protection Alternative

The existence of internal protection is an issue in cases involving victims of human trafficking since it is non-state agents who are the source of feared harm and thus is might be expected from the victim to relocate within her country of origin in a safe place where the non-state agents will not harm her. Availability of internal protection alternative has been a reason for victims of human trafficking being denied protection as refugees. This happened, for example, in the case of *JO (Internal Relocation - No Risk of Re-Trafficking) Nigeria v. Secretary of State for the Home Department* decided by the UK Immigration Appeal Tribunal.<sup>59</sup> It was

<sup>58</sup> United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), ‘AZ (Trafficked women) Thailand v. Secretary of State for the Home Department’ (8 April 2010) available at [http://ec.europa.eu/anti-trafficking/download.action;jsessionid=r0TbTfcY2Vc7C2whbq7hm25PvJ89kKLGRjIX4Bd3qFxV9T6nPHTh!-1845574121?nodeId=078a2deb-e1b6-4063-a139-5735358db042&fileName=Thailand+v.+Secretary+of+State+for+the+Home+Department\\_en.pdf&fileType=pdf](http://ec.europa.eu/anti-trafficking/download.action;jsessionid=r0TbTfcY2Vc7C2whbq7hm25PvJ89kKLGRjIX4Bd3qFxV9T6nPHTh!-1845574121?nodeId=078a2deb-e1b6-4063-a139-5735358db042&fileName=Thailand+v.+Secretary+of+State+for+the+Home+Department_en.pdf&fileType=pdf) (last visited 1 September 2011).

<sup>59</sup> United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, ‘JO (Internal Relocation - No Risk of Re-Trafficking) Nigeria v. Secretary

recognized that the girl, who was under 18 years old and trafficked to the UK, would face a real risk of harm on return to her home area in Nigeria. The woman who trafficked her was from the same village as the girl. Either she would be there when the girl returned or it was reasonably likely that she would come to learn of the girl's return. It was further recognized that the girl was "indebted" with 40 000 dollars and the woman would use violence to extort the money.<sup>60</sup> After making these findings, the UK Immigration Appeal Tribunal addressed the issue of internal protection alternative. The Tribunal agreed with the submissions of the Secretary of State for the Home Department that it "was not plausible to suggest the family members [the girl was also ill-treated by her stepmother] or the woman who trafficked her in her home village would be able or would have the motivation to locate her elsewhere in Nigeria"<sup>61</sup>. Unfortunately, it was not considered how a female child could be expected to relocate on her own in a country where informal social safety nets and belonging to ethnicity group play a paramount role. It is not only the significance of social networks, but gender factors also have a role. In some countries of origin, practically women might not have an internal freedom of movement; if they relocate on their own they could be viewed as violators of their own culture and be stigmatized. For example, in regard to Albania, it has been held that internal relocation is unlikely option to victims of human trafficking due to the difficulties of a single woman to reintegrate into a society where the family is the principal unit for welfare and mutual support as well as the channel through which employment is most often obtained.<sup>62</sup> This relates to one of the guarantees as a precondition for relying on an internal flight alternative: possibility for settlement.<sup>63</sup> I submit that when assessing the

of State for the Home Department' (10 September 2004) available at <http://www.unhcr.org/refworld/docid/47a70794d.html> (last visited 1 September 2011).

<sup>60</sup> *Id.*, para. 9.

<sup>61</sup> *Id.*, paras 12-13.

<sup>62</sup> United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 'AM and BM (Trafficked women) Albania v. Secretary of State for the Home Department' (18 March 2010), para. 187, available at <http://www.unhcr.org/refworld/docid/4ba796112.html> (last visited 1 September 2011).

<sup>63</sup> In the case of Salah Sheekh v. the Netherlands, *supra* note 34, the ECtHR ruled that "as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee

conditions in the proposed area of relocation and the possibility for settlement, the recognized special needs of victims of human trafficking (facilities for physical, psychological and social recovery, appropriate housing, medical and material assistance)<sup>64</sup> are to be given full consideration. If these special needs are not met, then it is not to be expected from the victim to relocate. Further, in assessing the internal protection alternative, not only the mere availability of shelters is to be addressed, but the existing options and the situation faced after leaving the shelters. This argument finds firm support in the case of *KA, AA, & IK (domestic violence - risk on return) Pakistan v. Secretary of State for the Home Department*,<sup>65</sup> where the UK Tribunal concluded that the viability of internal relocation alternative for victims of domestic violence (whose situations is very similar to victims of human trafficking in terms of the source of harm: non-state agents of harm combined with unavailability of state protection) depends not only to the availability of shelters/centers but also on the situation women will face after they leave such centers.

## 2. Lack of Social and Medical Assistance in the Country of Origin

My objective in this section of the article is to examine how the prohibition on inhumane or degrading treatment embodied in Article 3 of the ECHR could be of relevance for victims of human trafficking who are unwilling to go back because their countries of origin cannot offer them appropriate social and/or medical assistance. There might not be a “*real risk*” of re-trafficking, of being targeted for the purposes of retaliation or of severe rejection by the family and/or community reaching the level of inhuman or degrading treatment, but the harm only consists of unavailability of social and/or medical assistance necessary for victims of trafficking. Taking into consideration the horrific experiences of trafficking, the suicidal tendencies (this is particularly relevant when the victim has already made suicide attempts) and the post-traumatic stress disorder from which victims

ending up in a part of the country of origin where he or she may be subjected to ill-treatment” (para. 141).

<sup>64</sup> See Protocol against Trafficking, *supra* note 8, Art.6 (3).

<sup>65</sup> See United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), ‘KA, AA, & IK (domestic violence - risk on return) Pakistan v. Secretary of State for the Home Department’ (22 April 2010) available at <http://www.unhcr.org/refworld/docid/4c3ed00d2.html> (last visited 1 September 2011).

suffer, the mere unavailability of social and/or medical assistance in the country of origin might reduce the victim to a situation of degrading treatment.

The leading case on the issue is *D. v. The United Kingdom*<sup>66</sup> in which the ECtHR held that removing an AIDS patient in the terminal stages of his illness, would violate Article 3. The case of *D. v. The United Kingdom* furthers the protection offered by Article 3 of the ECHR since the ECtHR held that Article 3's prohibition on return, covers situations where there is no deliberately inflicted act that breaches Article 3, but rather an inability of the state to provide basic facilities that would prevent the individual at risk from being reduced to living in circumstances that could be construed as inhuman or degrading treatment. The applicant was not at risk of intentionally inflicted harm by any state or non-state agents. The source of the risk was the *inability of the state* to provide basic facilities.<sup>67</sup> As the ECtHR explains, it has reserved to itself

“sufficient flexibility to address the application of Article 3 in other contexts that might arise, where the source of the risk of proscribed treatment in the receiving country [the country of origin is meant here] stemmed from factors which could not engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, did not in themselves infringe the standards of Article 3”<sup>68</sup>.

Although, the ECtHR held that the removal of the applicant will be in violation of Article 3, in *D. v. the UK*, the ECtHR also underlined the exceptional circumstances of the case and pointed to “the applicant’s *fatal illness* (emphasis added)” and to the “real risk of *dying* (emphasis added) under most distressing circumstances”<sup>69</sup>.

<sup>66</sup> *D. v. The United Kingdom*, ECtHR (2007) Application No. 30240/96.

<sup>67</sup> *Id.*, para. 49.

<sup>68</sup> *N. v. The United Kingdom*, ECtHR (2008) Application No. 26565/05, para. 32.

<sup>69</sup> *D. v. The United Kingdom*, *supra* note 66, para. 53; In *N. v. The Secretary of State for the Home Department*, the House of Lords concluded in regard to the case of *D. v. The United Kingdom* that “it was the fact that he was already terminally ill while present in the territory of the expelling state that made his case exceptional”. See United Kingdom: House of Lords, ‘*N (FC) v. Secretary of State for the Home Department*’ (5 May 2005) para. 36, available at <http://www.unhcr.org/refworld/docid/43fc2d1a11.html> (last visited 1 September 2011).

In *Bensaid v. the United Kingdom*, a case involving a schizophrenic Algerian national treated in the UK and threatened with deportation from the UK, the ECtHR noted that the suffering associated with possible relapse of his medical condition could, in principle, fall within the scope of Article 3. However, the ECtHR made it clear that “The fact that the applicant’s circumstances in Algeria would be less favorable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention” and that this case “does not disclose the exceptional circumstances of *D. v. the United Kingdom*, where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts”. Accordingly, the ECtHR did not find that there is a sufficient real risk that the applicant’s removal in these circumstances would be contrary to the standards of Article 3.<sup>70</sup>

In *N. v. the United Kingdom*, the ECtHR elucidated the general principles applicable in this type of cases. In particular, it highlighted that the “high threshold set in *D. v. the United Kingdom*” should be maintained “given that in such cases the alleged future harm would emanate *not from the intentional acts or omissions of public authorities or non-state bodies* (emphasis added), but instead from a *naturally occurring illness* (emphasis added) and the lack of sufficient resources to deal with it in the receiving country”<sup>71</sup>. Maintaining a high threshold in cases like *D. v. the United Kingdom*, *Bensaid v the United Kingdom* and *N. v. the United Kingdom*, practically means that Article 3 is applied to guarantee *a dignified death* in the receiving country rather than guaranteeing a life which is not degrading.

<sup>70</sup> *Bensaid v the United Kingdom*, ECtHR (2001) Application No.44599/98, 2001, paras 36-40.

<sup>71</sup> *N. v. The United Kingdom*, *supra* note 68, paras 42-45. It should also be taken into account that the principles established by the ECtHR in *N. v. The United Kingdom*, *supra* note 68, have not received the support of all judges. There is a strong dissenting opinion by Judges Tulkens, Bonello and Spielmann who criticize the justification for maintaining a high threshold. They emphasize that Article 3 equally applies where the harm stems from a naturally occurring illness and a lack of adequate resources to deal with it in the receiving country, if the minimum level of severity, in the given circumstances, is attained. Therefore, whether the harm stems from international acts or omissions of public authorities or non-state bodies should be irrelevant. They point to the absolute nature of Article 3, which allows neither for any balancing analysis, nor for policy considerations such as budgetary constraints. If the approach of the dissenters is to be followed, then it will be sufficient to prove that there are substantial grounds to believe that the unavailability of social and/or medical assistance in the country of origin will expose the victim to a situation, which meets the minimum level of severity of Article 3.

As it is evident from the above cited ECtHR's pronouncement, the justification for this high threshold is that the source of the harm is not acts or omissions by state or non-state entities, but 'naturally occurring illness'. I argue that this justification is not applicable to cases involving victims of human trafficking because their cases are distinguishable from the above mentioned cases (*Bensaid v the United Kingdom* and *N. v. the United Kingdom*), in which the ECtHR refused to grant Article 3 protection.

To make the distinction, I ask the question what is a 'naturally occurring illness'? Can the mental, physiological or physical illness from which a victim of trafficking suffers and for which she is in need of special care, be qualified as a 'naturally occurring illness'? That illness is direct result of being a victim of human trafficking; the illness is 'natural' to the extent that each normal human being will naturally develop a mental, psychological and/or physical illness if she is subjected to the harm normally experienced in cases of trafficking. However, it is not naturally *occurring*. The suffering of a victim of human trafficking is a consequence of having been a subject to severe exploitation, which should not have been allowed to happen in the first place. The exploitation was most probably made possible due to omissions by both states: the receiving state on whose territory the exploitation occurred and the sending state from whose territory the trafficking started. Both states might through their omissions be involved in the suffering of and the harm already sustained by the victim, in the sense that both states might have failed to fulfill their international obligations by allowing the functioning of the criminal trafficking enterprise. The trafficking has usually started in the country of origin and the victim has ended up being exploited in the receiving state. Both states have respective obligations. This issue was dealt with by the ECtHR in the case of *Rantsev v. Cyprus and Russia*, where "[i]n light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking" the ECtHR found the application admissible *rationi loci* in regard to Russia (the country of origin).<sup>72</sup> Accordingly, the country of origin could through its omissions be responsible for the harm done to the victim, for which harm the victim is in need of special social and/or medical assistance. Cyprus, the receiving state in the case, was found responsible for violation of Article 4, which the ECtHR declared to include within its scope human trafficking, since Cyprus failed to fulfill its positive obligation to put in place appropriate legislative

<sup>72</sup> *Rantsev v. Cyprus and Russia*, ECtHR (2010) Application No. 25965/04, para. 207.

and administrative framework (the artist visa regime in Cyprus was found to be most troubling to the point that the visa regime itself created favorable conditions for human trafficking).<sup>73</sup> This could be interpreted to the effect that it might well be the case that the receiving state has created the conditions for the suffering of the victim. In cases involving the prohibition on *refoulement*, the analysis is concentrated on the acts/omissions of the authorities in the country of origin. However, still, when making an assessment whether the receiving state is prohibited from sending back a victim of trafficking, the receiving states' own omissions should be allowed into the picture. These omissions should be considered in the analysis since the receiving state could argue that it has nothing to do with the harm caused to the victim due to unavailability of medical and social facilities in the country of origin; when in fact it could have a lot to do with the harm for which such facilities are needed and thus the receiving state cannot simply escape from addressing the care necessary to heal the harm.

In anticipation of an argument that it is the *future harm* which should emanate from intentional acts or omissions of public authorities, while the victim's illness is a result of past acts/omissions, I argue that it would be artificial within the context of human trafficking to make a differentiation between past harm and future harm. The past harm could be the exploitation itself, while the future harm could be lack of special care needed to address the mental and physical consequences from that same exploitation. Eventually it is one and the same harm done to a human being for which that person is in need of special medical and social assistance. If such assistance is unavailable in the country of origin, the receiving state should not send the victim there. A second line of reasoning is possible to address the abovementioned anticipated argument. The harm which the victim will sustain due to lack of medical and social facilities in the country of origin could emanate from that country's omissions. If that country is a party to the UN Protocol against Trafficking, then it is bound by Article 6(3), which provides that

“[e]ach State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant

<sup>73</sup> *Id.*, paras 290-293.

organizations and other elements of civil society, and in particular, the provision on

- (a) Appropriate housing; [...]
- (c) Medical, psychological and material assistance”.

It is true that Article 6(3)’s obligations are hedged by the phrase “shall consider”, which means that the state parties have not accepted hard obligation to indeed provide for the physical, psychological and social recovery of victims. However, still when the ECtHR makes an assessment whether it would be in breach of ECHR to send a victim of human trafficking back to the country of origin, Article 6(3) should not simply be ignored.

A victim of human trafficking is eligible for protection under Article 3 of the ECHR and thus cannot be removed from the territory of the receiving state, due to inability of the country of origin to provide basic medical and social facilities, which inability will reduce the victim to living in circumstances that could be construed as inhuman or degrading treatment. First, the ECtHR has recognized that Article 3 is applicable when the source of the risk is the inability of the state to provide basic facilities. At this point, it should not be forgotten what the ECtHR said in the old case of *Airey v. Ireland*:

„Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”<sup>74</sup>

This pronouncement demonstrates that entering the sphere of social and economic rights when applying the ECHR does not *per se* constitute a problem. Second, since cases of victims of human trafficking have

<sup>74</sup> *Airey v. Ireland*, ECtHR (1979) Application No. 6289/72, para. 26; Mrs Airey wanted a judicial separation from her violent husband. She was effectively unable, however, to institute the appropriate court proceedings herself as she did not have sufficient legal knowledge to litigate. Since she had no money to pay for a lawyer and legal aid was not available, she claimed that in practice she did not have access to court contrary to Article 6(1) of the ECHR. The ECtHR agreed with her.

distinguishable characteristics, a high threshold in the sense of having a fatal illness and of applying Article 3 to guarantee a dignified death rather than guaranteeing life which is not degrading, is unsubstantiated.

However, the unavailability of social and/or medical assistance should lead to suffering reaching the minimum level of severity required by Article 3. Pertinent considerations for each case would be the availability of family and community support, since there could be alternatives to state support and provision of facilities by the state. It should be kept in mind that in some countries of origin, the family and the community could be more a source of harm than of support. Thus, the state could be the only provider for physical, psychological and social recovery for the victim and for medical, psychological and material assistance.

## II. Article 4 – Prohibition of Slavery, Servitude, Forced or Compulsory Labour

Article 4(1) of the ECHR provides that “[n]o one shall be held in slavery or servitude”. This is an absolute prohibition. Article 4(2) provides that “[n]o one shall be required to perform forced or compulsory labour”, which is qualified to the extent allowed by Article 4(3) of the ECHR. The ECtHR has tried to clarify the distinction between the three concepts. The 1926 Slavery Convention contains the following definition:

“Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>75</sup>

The ECtHR has referred to this definition and has furnished the following understanding of ‘slavery’: the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an object.<sup>76</sup> With regard to the concept of ‘servitude’, the ECtHR has held that

<sup>75</sup> *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*, 9 March 1927, 60 L.N.T.S. 253 [Slavery Convention of 1926].

<sup>76</sup> *Siliadin v. France*, *supra* note 53, para. 122; *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 276. It has to be noted that the ECtHR has not been consistent in its approach to defining trafficking and slavery. In *Siliadin v. France*, *supra* note 53, the ECtHR found that the case of the applicant was not one of slavery since it defined slavery in accordance with its classic meaning in the 1926 Slavery Convention. And yet, in *Rantsev v. Cyprus and Russia*, *supra* note 72, the ECtHR determined that human trafficking was based on the definition of slavery. In para.281, the ECtHR ruled that “trafficking in human beings, by its very nature and aim of exploitation, is based on

what is prohibited is a “particularly serious form of denial of freedom”; it entails an obligation under coercion to provide one’s services.<sup>77</sup> For “forced or compulsory labor” to arise, there must be some physical or mental constraint, as well as some overriding of the person’s will.<sup>78</sup>

Article 4’s protection cannot be sustained by simply claiming that a person *was* a victim of trafficking, since to engage the principle of *non-refoulement* it will be necessary to show that the individual *will* face a real risk of serious harm in the sense of Article 4 if removed. Thus, while Article 4 will be highly relevant to an individual at risk of re-trafficking (or to other conditions constituting slavery or servitude), from which the receiving state is unable or unwilling to offer protection, the generality of Article 3 may otherwise better encapsulate the harm feared on return, such as reprisals or retaliation from trafficking gangs or individuals, severe community or family ostracism, or severe discrimination. As was demonstrated in the previous section of the present article, Article 3 could also be relevant when there is no medical and/or social assistance available in the country of origin. Thus, the level of harm envisioned by Article 3 (inhuman or degrading treatment) could be lower than the harm envisioned by Article 4. Accordingly, arguing non-removal under Article 3 could be more successful.

However, this does not mean that Article 4 is superfluous. The reasons are at least two. The first reason is the finding by the ECtHR in the case of *Rantsev v. Cyprus and Russia* that trafficking in human beings “threatens the human dignity and fundamental freedoms of the victims and cannot be considered compatible with the democratic society and *values* [emphasis added] expounded” in the ECHR and the ECtHR’s conclusion that

the exercise of powers attaching to the right of ownership”. For further discussion on the problem see J. Allain, ‘Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’, 10 *Human Rights Law Review* (2010) 3, 546. In addition, although in *Siliadin v. France*, *supra* note 53, the ECtHR relies on the 1926 Slavery Convention to define slavery, it says “the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of *legal ownership* [emphasis added] over her, thus reducing her to the status of an ‘object’”. The slavery definition in the 1926 Slavery Convention does not require “legal ownership”; all that it requires is “powers attaching to the right of ownership”. See J. Allain, ‘The Definition of Slavery in International Law’, 52 *Howard Law Journal* (2009) 2, 239.

<sup>77</sup> *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 276.

<sup>78</sup> *Siliadin v. France*, *supra* note 53, para. 117; *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 276.

trafficking itself, within the meaning of Article 3(a) of the UN Trafficking Protocol and Article 4(a) of the Council of Europe Trafficking Convention, falls within the scope of Article 4 of the ECHR.<sup>79</sup> The second reason is the elaborate positive obligations within the context of human trafficking, which the ECtHR imposes on states in order to comply with Article 4 of the ECHR.<sup>80</sup> Each of these two distinguishing features is to be used for the advancement of arguments justifying protection for victims.

In *Siliadin v France*, the ECtHR recognized that Article 4 imposes positive obligations on states and it held that the criminal law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.<sup>81</sup> The applicant was a 15 year old girl from Togo, who was taken to France. She became an unpaid servant to various families. The ECtHR qualified her situation as being one of servitude and forced labor and found a violation of Article 4 since France did not fulfill its positive obligation to impose criminal law sanctions. The ECtHR explained that

“limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice”<sup>82</sup>.

The ECtHR’s approach in *Siliadin v. France* restricted to requiring imposition of criminal law sanctions, has justifiably been subject of criticism. In particular, from the case of *Siliadin v. France*, it appears that for trafficked child workers the approach of the ECtHR to positive obligations, as applied to Article 4, may not extend much beyond the obligation to have robust criminal law with appropriate crimes and adequate sanctions. However, the needs of such children go much further, as was

<sup>79</sup> Rantsev v. Cyprus and Russia, *supra* note 72, paras 272-282.

<sup>80</sup> *Id.*, paras 283-308.

<sup>81</sup> *Siliadin v. France*, *supra* note 53, para. 148; For commentary on the case see Holly Cullen, ‘*Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights*’, 6 *Human Rights Law Review* (2006) 3, 585, 590-591.

<sup>82</sup> *Siliadin v. France*, *supra* note 53, para. 89.

demonstrated by the facts of *Siliadin v. France*. Such children need regularization of their immigration status. They also need rehabilitation measures such as re-housing and education.

In *Rantsev v. Cyprus and Russia*, the ECtHR explained that prosecution is only one aspect of states' positive obligation. Thus, states' positive obligations arising under Article 4 were considered within a broader context.<sup>83</sup> However, still the facts of the case were such that the ECtHR did not address issues of irregular migration status and rehabilitation. The girl who was allegedly trafficked in Cyprus had entered the country on a valid visa and had a regular migration status; she allegedly committed suicide or was murdered and accordingly the problem of rehabilitation was irrelevant.

What makes *Rantsev v. Cyprus and Russia* a landmark case are the positive obligations elaborated by the ECtHR in regard to human trafficking: positive obligation to put in place an appropriate legislative and administrative framework (the artist visa regime in Cyprus did not afford effective protection against trafficking and exploitation); positive obligation to take protective and operational measures (the authorities in Cyprus failed to take protective measures within the scope of their powers to remove the individual from the situation of trafficking or risk of trafficking); and procedural obligation to investigate trafficking. Taking into account these elaborate obligations, will states parties to the ECHR be prohibited from sending victims or potential victims of human trafficking to those countries of origin, which do not live up to the positive obligation required by Article 4 as interpreted by the ECtHR? The answer to this question could be in negative since it is not expected from the country of origin to provide the same level of human rights protection in comparison with the level of human rights protection in the potential country of asylum (the receiving state), in order for a person to be declared as non-removable.<sup>84</sup> However,

<sup>83</sup> *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 285

<sup>84</sup> In *Januzi v The Secretary of State for the Home Department*, The House of Lords held that a person may be removed where an internal flight alternative exists, even if the general standards of living in that part of the country are not as high as the state where asylum was sought. However, the position would be different if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment. See United Kingdom: House of Lords, 'Januzi (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Hamid (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Gaafar (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Mohammed (FC) (Appellant) v. Secretary of State for the Home Department

here the issue involves not any human right, but specifically the prohibition on slavery and servitude, which is non-derogable<sup>85</sup> and as the ECtHR has noted, “enshrines one of the basic values of the democratic societies making up the Council of Europe”<sup>86</sup>. Thus Article 4 is put on the same level as Article 3 of the ECHR. The case of *Soering v. The United Kingdom*<sup>87</sup> was the first case, in which the ECtHR found that Article 3 of the ECHR contains the prohibition on *refoulement*. What is of importance is how the ECtHR substantiated this finding. The ECtHR ruled that

„[t]his absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. ... It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article“<sup>88</sup>.

(Respondent) (Consolidated Appeals)’ (15 February 2006) available at <http://www.unhcr.org/refworld/docid/43f5907a4.html> (last visited 1 September 2011). The ECtHR has also stated that “On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the Convention”. See *Z and T v. the United Kingdom*, Decision of 28 February 2006.

<sup>85</sup> Pursuant to Article 15(2) of the ECHR, no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3, 4(1) and 7 is permissible.

<sup>86</sup> *Siliadin v. France*, *supra* note 53, para.82.

<sup>87</sup> *Soering v. The United Kingdom*, *supra* note 33.

<sup>88</sup> *Id.*, para. 88.

It would hardly be compatible with the underlying values, spirit and intendment of the ECHR, were a state party to send an individual to a country where there are substantial grounds for believing that she would be in danger of being subjected to treatment contrary to Article 4 and in the assessment of the standard of “substantial grounds for believing”, the positive obligations in regard to Article 4 as elaborated on by the ECtHR in *Rantsev v. Cyprus and Russia*, are not fully considered. Thus when assessing the risk of treatment contrary to Article 4 upon return in the country of origin, the following is to be considered: the legislative and administrative framework in that country, and if it affords *effective* protection against trafficking and exploitation; the capacity, training, and willingness of the authorities to *identify* and protect victims and, to take operational measures (in case the authorities are aware of circumstances giving rise to a credible suspicion that an individual was, or was at real and immediate risk of being, a victim of trafficking and exploitation, they have to take protective measures);<sup>89</sup> and the conduction of effective investigation.

### III. Article 8 – Right to Respect for Private Life

Article 8 of the ECHR protects the right to private and family life. The purpose of the present section is to analyze if and how it is possible to argue that the removal of a victim of human trafficking from the territory of the receiving state could be in violation of this article. The analysis of Article 8 starts with the question whether the measures undertaken in respect to the individual are of such a nature as to fall within the scope of Article 8. This presupposes answer to the questions whether there is a family life and what is a private life. From the beginning, it is important to be clarified that the relevance of Article 8 only to situations specific to victims of human trafficking is to be addressed. Cases in which a victim claims protection under Article 8 since his/her removal from the territory of the receiving state will result in disruption of family life<sup>90</sup> are not addressed since this is a problem that could be faced by every documented or undocumented migrant and thus it is not specific to victims of human trafficking. In this sense it is the right to private life, which constitutes the focus of the present analysis.

For this purpose, it is necessary to present how the ECtHR has construed the notion of “private life”. In the case of *Bensaid v. the United*

<sup>89</sup> *Rantsev v. Cyprus and Russia*, *supra* note 72, para. 296

<sup>90</sup> See H. Storey, ‘The Right to Family Life and Immigration Case Law at Strasburg’, 39 *International Comparative Law Quarterly* (1990) 2, 328, 341.

*Kingdom*, the ECtHR held that “‘private life’ is a broad term not susceptible to exhaustive definition”<sup>91</sup>. ‘Private life’ includes “the physical and moral integrity of the person”<sup>92</sup> and mental health, since “the preservation of mental stability is [...] an indispensable precondition to effective enjoyment of the right to respect for private life”<sup>93</sup>. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.<sup>94</sup>

There are two lines of argumentation in regard to Article 8 for the purposes of the present article. The first is based on the question how the right to private life is engaged in relation to a removal of a victim from the receiving state, where the anticipated harm on the territory of the country of origin (the country where the victim is to be sent to) will be contrary to the requirements of the ECHR. The responsibility of the receiving state under the prohibition on *refoulement* is engaged since there is a real risk that the deportation of the victim will lead to violation of her private life due to the particular circumstances in the country of origin.<sup>95</sup> The second direction is based on the question how the receiving state through the act of deportation impedes the enjoyment of private life in the receiving state’s territory by a victim who had developed strong social ties in that same state.<sup>96</sup>

Venturing into the first line of argumentation, I suggest an argument that the foreseeable consequences for the victim’s health, physical and moral integrity and mental stability (all falling within the notion of private

<sup>91</sup> *Bensaid v. The United Kingdom*, *supra* note 70, para. 47.

<sup>92</sup> *Stubbings and Others v. The United Kingdom*, ECtHR (1996) Application No. 22083/93; 22095/93, para. 61.

<sup>93</sup> *Bensaid v. The United Kingdom*, *supra* note 70, para. 47.

<sup>94</sup> See H. Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights* (2006), 43; N. Blake, ‘Developments in the Case Law of the European Court of Human Rights’, in B. Bogusz *et al.* (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004), 447.

<sup>95</sup> This question relates to the issue whether any other article besides Article 3 of the ECHR could engage the prohibition on *refoulement*. For a comprehensive discussion of this issue see United Kingdom: House of Lords, ‘Regina v. Special Adjudicator, Ex parte Ullah; Do (FC) v. Secretary of State for the Home Department’ (17 June 2004) available at [http://www.unhcr.org/refworld/country,,GBR\\_HL,,PAK,,4162ab484,0.html](http://www.unhcr.org/refworld/country,,GBR_HL,,PAK,,4162ab484,0.html) (last visited 1 September 2011).

<sup>96</sup> For a more detailed discussion on the difference between the two perspectives see the Speech by Baroness Hale of Richmond (para.41- 65) in United Kingdom: House of Lords, ‘R v. Secretary of State for the Home Department, ex parte Razgar’ (17 June 2004) available at [http://www.unhcr.org/refworld/country,,GBR\\_HL,,IRQ,,46c998742,0.html](http://www.unhcr.org/refworld/country,,GBR_HL,,IRQ,,46c998742,0.html) (last visited 26 July 2011).

life as interpreted by the ECtHR) from the deportation is that she will suffer harm in the country of origin, which does not reach the severity of Article 3, but which reaches the level of severity of Article 8. The victim might suffer from post-traumatic stress disorder for which she is in need of special treatment, which is not available in her country or origin. This could be combined with unavailability of social assistance, including accommodation; discrimination; no prospects to earn one's living; no family and community support. The result could be severe relapse including commission of suicide.<sup>97</sup> In the case of *Bensaid v. The United Kingdom*, the ECtHR recognized that ill-treatment falling below the Article 3's threshold could breach the right to private life under Article 8 "where there are sufficient adverse effects on physical and moral integrity."<sup>98</sup> When the threshold of seriousness under Article 3 is not satisfied, the ECtHR should examine "closely and carefully the situation of the applicant and of her illness under Article 8 of the Convention, which guarantees, in particular, a person's right to physical and psychological integrity"<sup>99</sup>. However, even if the question whether the proposed removal will result in interference with the right to private life is answered in affirmative, additional threshold has to be passed: the interference has to be of such *gravity* as to engage the *non-refoulement* obligation under Article 8 of the receiving state. This relates to

<sup>97</sup> See United Kingdom: Court of Appeal (England and Wales), 'Y (Sri Lanka) v. Secretary of State for the Home department; Z (Sri Lanka) v. Secretary of State for the Home Department' (29 April 2009) available at <http://www.unhcr.org/refworld/docid/49faec8c2.html> (last visited 1 September 2011). In this judgment, the UK Court of Appeal held that the concomitant findings that the applicants fear is no longer objectively well-founded and that there exists a local health service capable of affording treatment do not materially attenuate the risk, which is subjective, immediate and acute. There was a clear likelihood that the appellants' only perceived means of escape from the isolation and fear in which return would place them would be to take their own lives.

<sup>98</sup> *Bensaid v. The United Kingdom*, *supra* note 70, para. 47. Nicholas Blake and Raza Husain argue that it is reasonable for Article 3 and Article 8 to cover different levels of ill-treatment. See N. Blake & R. Husain, *Immigration, Asylum and Human Rights* (2003). Jane McAdam adds that in theory, if Article 8 recognizes a lower threshold, it obviates the need for concurrent Article 3 claim. However, protection of private life remains subject to the balancing test. See McAdam, *supra* note 4. Helene Lambert tries to clarify the theoretical distinction between Article 3 and Article 8 and she criticizes the strong interdependent relationship forged between the two provisions. See H. Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities', 24 *Refugee Survey Quarterly* (2005) 1, 39, 40–49.

<sup>99</sup> *N. v. The United Kingdom*, *supra* note 68, Dissenting Opinion, para. 26.

the principle that the *non-refoulement* obligations cannot be interpreted to the effect that a state party to the ECHR is prohibited from removing an individual “unless satisfied that the conditions awaiting him in the country of destination [the country of origin or any country to which the person is to be removed] are in full accord with each of the safeguards of the Convention”<sup>100</sup>. Thus the *non-refoulement* obligation under Article 8 is triggered in case of flagrant denial or nullification of the right in the country where the victim is to be sent.<sup>101</sup> This requirement was applied in *MP Romania v. Secretary of State for the Home Department*. The woman, a victim of human trafficking, argued that her return to her country of origin will be in violation of Article 8 of the ECHR. The UK Immigration Appeal Tribunal found that the proposed removal would constitute interference by the public authority with the exercise of her right to respect for her private life. However, it was found that such interference would not have consequences of such gravity as potentially to engage the operation of Article 8.

The second way of approaching Article 8 in cases of victims of human trafficking includes consideration of their level of integration into the society of the receiving state and the social relationships which they have developed therein. This relates to the victims’ identity, personal development, development of relationships with other human beings and the outside world, all of which fall within the scope of personal life. During the years in the receiving state, the victim might have formed a private life on the basis of her associations and contacts with people and organisations which have helped her to recover, to come to terms with her illness and have provided the specialized medical, social and psychological support needed. The removal could result in severance of these relationships and/or no prospects of developing similar relationships in the country of origin, which could be indispensable for the victims’ rehabilitation.

In *Sisojeva v. Latvia*, the ECtHR has recognized that

<sup>100</sup> *Soering v. The United Kingdom*, *supra* note 33, para. 85; In *Soering*, the ECtHR accepted that the UK’s *non-refoulement* obligation under Article 6 (right to fair trial) could be engaged. However, it also made the qualification that “an issue might *exceptionally* be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a *flagrant* denial of a fair trial in the requesting country” (para. 113).

<sup>101</sup> See speech of Lord Bingham in United Kingdom: House of Lords, *supra* note 95.

“the decisions taken by States in the immigration sphere can in some cases amount to interference with the right to respect for private and family life secured by Article 8(1) of the Convention, in particular where the persons concerned possess strong personal or family ties in the host country which are liable to be seriously affected by an expulsion order”<sup>102</sup>.

In light of this pronouncement in *Sisojeva v. Latvia*, there is strong support of the idea that the removal of non-nationals residing irregularly in a state party to the ECHR, but who are integrated in the host society, could be in violation of Article 8. This expansion of the scope of Article 8 concerns aliens who have strong ties in the receiving state and are integrated in that state’s society. It is doubtful whether these conditions could be met in cases of victims of human trafficking. Even if they have been in the receiving country for a long time, they will most probably be isolated from the society as, for example, is evidenced from the facts in the case of *Siliadin v France*.<sup>103</sup> However, these conditions could be met, for example, in cases of victims who have been allowed to remain in the receiving state for the purpose of acting as witnesses in the criminal prosecution of traffickers. During that time, their personal ties with the host society could become strong.

Whenever approach to Article 8 is adopted, the analysis of Article 8 does not stop with the establishment that the deportation will expose the victim to harm in the country of origin severe enough to engage the *non-refoulement* obligations of the receiving state, or with the establishment that the victim has integrated into the host society. As opposed to Article 3 and Article 4 of the ECHR, the right to private life is qualified. An interference with the right to private life is justified and thus there will be no violation of the ECHR if the interference with the right is in accordance with the law, pursues a legitimate aim under Article 8(2), and is necessary in a democratic society – that is, it responds to an important social need and is proportionate. Although immigration control is not, of itself, an interest which the state may expressly invoke,<sup>104</sup> it provides “the medium through which other

<sup>102</sup> *Sisojeva v Latvia*, ECtHR (2005) Application No. 60654/00, para. 101.

<sup>103</sup> In *Siliadin v France* no claim under Article 8 was made. However, the facts of the case are demonstrative of the situation of victims of trafficking and show how they stay in isolation.

<sup>104</sup> The UK Immigration and Appeal Tribunal has adopted quite an extreme approach in this respect since it has ruled that “legitimate immigration control will almost certainly

legitimate aims are promoted”<sup>105</sup> such as national security, public safety, public health and morals, rights and freedoms of others, the country’s economic wellbeing, and the prevention of disorder and crime. In *Bensaid v. The United Kingdom*, the ECtHR concluded that even if there was an interference with Article 8, that interference may be regarded as in compliance with Article 8(2), namely as a measure “in accordance with the law”, pursuing the aims of protection of the economic well-being of the country and the prevention of disorder and crime, as well as being “necessary in a democratic society” for the achievement of these aims.<sup>106</sup> In *PO Trafficking Nigeria* case, the UK Asylum and Immigration Tribunal accepted that “the appellant has a private life in the United Kingdom and were the appellant to be removed, there would be interference”<sup>107</sup>. It took note that the woman who was a victim of human trafficking had been in the UK for over four years. During that time she had undergone various training courses and has become dependent on support and help from the POPPY Project.<sup>108</sup> However, it was concluded that although the decision to remove her will interfere with her private life, it was necessary in order to maintain immigration control.<sup>109</sup>

It seems that it is relatively easy for the receiving state to characterize its action of removal as falling within the prescribed exceptions of Article 8(2). On the one hand, the ECtHR has expanded the notion of “private life”<sup>110</sup>, which allows victims of human trafficking to substantiate the existence of interference in case of removal. On the other hand, however, it seems to be equally easy to justify the interference under Article 8(2). Jane

mean that derogation from the rights will be proper and will not be disproportionate.”

See United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, ‘Kacaj (Article 3 – Standard of Proof – Non-State Actors) Albania v. Secretary of State for the Home Department’ (19 July 2001) para. 25, available at <http://www.unhcr.org/refworld/docid/4680c86fd.html> (last visited 1 September 2011).

<sup>105</sup> Blake & Husain, *supra* note 98, para. 4.72.

<sup>106</sup> *Bensaid v. The United Kingdom*, *supra* note 70, para. 48.

<sup>107</sup> *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, *supra* note 46, para. 210.

<sup>108</sup> Poppy Project has been established in the United Kingdom in order to provide accommodation and support to women who have been trafficked into prostitution or domestic servitude. See [http://www.eaves4women.co.uk/POPPY\\_Project/POPPY\\_Project.php](http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php) (last visited 1 September 2011).

<sup>109</sup> *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, *supra* note 46, paras 209-217.

<sup>110</sup> P. van Dijk *et al.*, *Theory and Practice of the European Convention on Human Rights*, 4th ed. (2006), 665.

McAdam comments that applicants seeking to rely on other ECHR's provisions typically invoke them in conjunction with Article 3, since Article 3 is a recognized ground for non-removal and an unqualified provision. The ECtHR's approach is to consider the Article 3's claim first, and if that is successful then prohibition on removal based on Article 8 will not be addressed. Where Article 3's claim fails, Strasbourg jurisprudence suggests there is little likelihood of the facts reaching the relevant severity threshold under other articles, given that they generally permit balancing of the rights of the individual vis-à-vis the state's interests.<sup>111</sup>

The ECtHR is yet to deliver a judgment on a case involving removal due to irregular migration status of a victim of human trafficking.<sup>112</sup> The present article will make two submissions in regard to such cases. First, the moral cause should be taken into account in any assessment under Article 8, in terms of the impact of the removal on the physical and psychological integrity of a victim of trafficking, having been exploited in the receiving country by criminals who ought not to have been allowed to do so. In addition to that exploitation, the uncertain immigration status has adverse effects on victim's mental health. These considerations must be taken into account when conducting the balancing test under Article 8(2). Further on, when a victim is allowed to stay for the purposes of the criminal prosecution of her traffickers and she develops social ties within the receiving state, simply sending her back after exhaustion of her usefulness as a witness since the state interests to exercise immigration control have greater weight in the balancing analysis as opposed to the interests of the victim, is far from acceptable. I argue that in this case the state has conceded its immigration

<sup>111</sup> McAdam, *supra* note 4, 145.

<sup>112</sup> At the time of writing, I am aware of two such cases before the ECtHR: *M. v. the United Kingdom*, Application No. 16081/08, Decision of 1 December 2009 and *L.R. v. the United Kingdom*, Application No.49113/09. *M. v. the United Kingdom* is case on challenging the decision of the UK authorities to refuse asylum and human rights protection to a young orphan girl who was trafficked, as a minor, firstly within Uganda for the purposes of sexual exploitation and then into the UK for the same purpose. The applicant complained that if she were returned to Uganda she would suffer a severe deterioration in her mental health and run a real risk of further sexual exploitation and trafficking, contrary to Articles 3, 4 and 8 of the ECHR. The ECtHR decided to strike the case out of its list since a friendly settlement was achieved. As a result of that friendly settlement M. was granted three years leave to remain in the UK. In regard to *L.R. v. the United Kingdom*, a judgment is yet to be delivered; for the facts of the case see <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=866566&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited 1 September 2011).

control objectives and the interests of the individual are to overbalance these objectives in the proportionality analysis under Article 8(2).

Second, it is an established principle in the ECtHR's jurisprudence that the provisions of the ECHR are not the sole framework of reference for the interpretation of the rights and freedoms enshrined therein.<sup>113</sup> The rights in the ECHR are not applied in vacuum.<sup>114</sup> Accordingly, the provisions and the purpose of the Council of Europe Trafficking Convention "to protect the human rights of victims of trafficking"<sup>115</sup> are to be taken into regard. Once abused by the traffickers, a victim should not simply be sent back, if it is not in accordance with her will and if she might be exposed to further suffering. Otherwise, the purpose of the Council of Europe Trafficking Convention has no real and practical meaning for the victims. Similarly, the measures indicated in this legal instrument for the physical, psychological and social recovery of victims, will have no real and practical meaning. It is not only that they have no real and practical meaning, but also simply sending back victims since they are undocumented migrants, undermines the whole legitimacy of the anti-trafficking measures. It does so because it appears that the objective of the anti-trafficking legal instruments and measures is not to help victims, but it is instead furtherance of the migration control interests of the receiving states. Accordingly, in the application of the balancing analysis under Article 8(2), it should be considered that the rights in the ECHR are not applied in vacuum, which means that the purpose of assisting victims of human trafficking and of protecting their human rights are to be fully included in the balancing test.

## E. Conclusion

Pursuant to the present international legal framework on human trafficking, sending victims home to their countries of origin is viewed as the presumed solution to their cases with the option for delaying the return home if the victim acts as a witness. Thus, I propose resort to complementary protection under the ECHR for those victims who have legitimate reasons not to go back. Article 3 of the ECHR which includes the principle of *non-refoulement* could be used when upon return the victims fear re-trafficking, retaliation, rejection by family and/or community. The

<sup>113</sup> Rantsev v. Cyprus and Russia, *supra* note 72, para. 273.

<sup>114</sup> *Id.*

<sup>115</sup> Council of Europe Trafficking Convention, *supra* note 8, Art. 1.1(b).

protection capacity of Article 3 is broader than that, though, as it could successfully be argued that return is prohibited since it will expose the victim to degrading situation due to the lack of social and medical assistance in the country of origin. As to Article 4 of the ECHR, states will be prohibited from sending victims of human trafficking to those countries of origin which do not live up to the positive human rights obligations within the context of human trafficking as elaborated by the ECtHR in *Rantsev v. Cyprus and Russia*. Article 8 of the ECHR is of use, first, when the level of feared harm in the country of origin does not reach the severity of Article 3 but is sufficiently grave to be in breach of the right to private life and engage the *non-refoulement* principle, and second, when the victim has developed social ties within the receiving state and her removal will lead to their disruption.