



European Master's Degree in Human Rights and Democratisation

*The nexus between human trafficking and asylum.*

*Can women trafficked for the purposes of sexual exploitation successfully  
claim asylum?*

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## **Abstract**

Can women trafficked for the purposes of sexual exploitation successfully claim asylum in accordance with the United Nations 1951 *Convention relating to the Status of Refugees* (the Refugee Convention)? This question surprisingly lacks definitive answers, in law and in practice.

There is no doubt that women trafficked for the purposes of sexual exploitation (VHT) require assistance, support and protection - but should this be provided through the asylum system or the trafficking system? This paper explores the nexus between the two systems and examines how they should be linked to ensure the most appropriate and effective protection for human trafficking victims with international protection needs.

The Refugee Convention protects people with a well-founded fear of being persecuted on account of their race, religion, nationality, political opinion or membership of a particular social group. VHT will usually claim asylum on this last ground. But some asylum authorities do not accept that women or VHT can constitute a particular social group and reject their asylum claims. How can the diverging approaches be reconciled to ensure these women are protected?

A critical issue is the lack of consistent definition of ‘particular social group’ for VHT. Four solutions are discussed in this paper, any of which could lead to consistent practices if agreement is reached amongst asylum-authorities. However in the absence of such agreement, VHT may continue to be deprived of reliable processes to protect them from future persecution. This paper proposes these solutions to bring convergence to the different applications of the Refugee Convention and ensure a fairer and more consistent application of the Refugee Convention to women who have been trafficked for the purposes of sexual exploitation.

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## Acronyms

CGRS	Center for Gender and Refugee Studies (California)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EWCA	England and Wales Court of Appeal
FMCA	Federal Magistrate's Court of Australia
GRETA	Group of Experts on Action against Trafficking in Human Beings
HCA	High Court of Australia
LRA	Lord's Resistance Army
OSCE	Organisation for Security and Cooperation in Europe
PSG	Particular Social Group
RMJ	Refugee and Migrant Justice
RRTA	Refugee Review Tribunal of Australia
UK	United Kingdom
UKIAT	United Kingdom Immigration Appeal Tribunal
UKUT	United Kingdom Upper Tribunal
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
US	United States
VCLT	Vienna Convention on the Law of Treaties
VHT	Victim/s of Human Trafficking (specifically, women trafficked for the purpose of sexual exploitation)

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## **Introduction**

When and how can victims of human trafficking (VHT) claim asylum in accordance with the United Nations 1951 *Convention relating to the Status of Refugees*<sup>1</sup> ('the Refugee Convention')? These apparently obvious questions surprisingly lack definitive answers in law and in practice. Asylum authorities, courts and academics have all been struggling with these questions. There is no doubt that VHT require assistance, support and protection - but should this be provided through the asylum system or the trafficking system?

The application of the Refugee Convention to VHT differs greatly across – and even within - jurisdictions. Additionally, certain key concepts of the Refugee Convention - such as whether women or certain subsets of women can constitute a 'particular social group' - are underdeveloped and inconsistently interpreted. VHT are thus forced to draft their applications hoping they will match the interpretation applied by the relevant immigration authority. Although various authors have identified relevant problems on this issue, the author believes this to be the first paper to propose a possible solution to bring convergence to the different applications of the Refugee Convention in this field.

The aim of this paper is to provide an up-to-date view of whether female VHT trafficked for the purposes of sexual exploitation can claim asylum, in theory and in practice. It aims thus to shed light on the differing interpretations of the Refugee Convention in the hope that the varying approaches may eventually be reconciled, to ensure a fairer and more consistent application of the Refugee Convention to VHT.

The term 'trafficking system' will be used in this paper to refer to the rights, obligations and actors involved in ensuring victims of trafficking are identified, protected and supported and their traffickers prosecuted, in any given state. Similarly, the term 'refugee

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<sup>1</sup>UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.



system' refers to the rights, obligations and actors relevant to a claim for protection under the Refugee Convention.

After providing an overview of relevant principles in Chapter I, Chapter II will determine when and how the Refugee Convention is applicable to VHT through an analysis of the jurisprudence on Article 1A(2)'s current application to VHT. Chapters III and IV will then examine the grounds upon which a VHT can claim asylum - notably race, nationality, religion, political opinion or membership of a particular social group. Chapter V will explore practical limitations in national asylum systems that prevent VHT from having their asylum claims assessed, or assessed correctly.

Finally, conclusions will be drawn as to how VHT can be better protected in future, through the development of a more consistent application of the Refugee Convention.

## **Methodology**

The aim of this paper is to provide an up-to-date view of whether female VHT trafficked for the purposes of sexual exploitation can claim asylum, in theory and in practice. There was a burst of literature on this issue between 2002 and 2008, but publications have decreased in recent years; this paper thus aims to determine the current situation and explain recent developments. The main approach will thus be a comparative case law analysis to determine the Refugee Convention's current application in this field.

### *Choice of Jurisdictions*

The main focus will be on decisions from Australia, Canada, the United States and the United Kingdom. There are inconsistencies between the application of the Refugee

Convention in these jurisdictions, and all four states seem to deviate from the UNHCR Guidelines<sup>2</sup> and *Handbook on Procedures*<sup>3</sup> when assessing asylum claims by VHT. These jurisdictions were also chosen because the general lack of information on the topic made it difficult to obtain published or reported decisions from other jurisdictions. European examples will only be used where no other information is available on the issue.

The Refugee Convention and its 1967 *Protocol relating to the Status of Refugees*<sup>4</sup> do not provide the only source of international protection for people facing harm. Other international instruments such as the *International Covenant on Civil and Political Rights*<sup>5</sup> and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>6</sup> and regional instruments and mechanisms, such as the *European Convention on Human Rights*<sup>7</sup>, provide complementary protection. The criteria and protection afforded under these other instruments will not be discussed in this paper. The Refugee Convention has its own peculiar application to protecting VHT in need of international protection and shall be focused on accordingly.

#### *Value of main approach and sources*

The main approach will thus be a comparative case law analysis to determine the Refugee Convention's current application in this field. This approach to treaty interpretation has

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<sup>2</sup> HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006.; HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002; HCR/GIP/02/02 (UNHCR PSG Guidelines), 7 May 2002.

<sup>3</sup> HCR/IP/4/Eng/REV.1 (UNHCR Handbook) 1979.

<sup>4</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

<sup>5</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 7.

<sup>6</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 3.

<sup>7</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

been held by the British House of Lords to be of importance, “precisely because there is no supranational court with the authority to issue determinative rulings on its meaning”.<sup>8</sup> The High Court of Australia has held that “courts in many countries, including Australia, pay close regard to court decisions in other countries grappling with the meaning and application of the [Refugee] Convention”.<sup>9</sup>

The author relies largely on the UNHCR Guidelines and academic commentary to determine whether the decisions are in line with international refugee law, as courts will look to these instruments for guidance on interpreting asylum standards and requirements. Although not binding, the *Handbook on Procedures*<sup>10</sup> has been held by superior courts around the world to be “a useful interpretative aid”<sup>11</sup> and “an important source of law (though it does not have the force of law itself)”.<sup>12</sup> The High Court of Australia has held it to be a vital tool for ensuring the consistent development of the Refugee Convention globally; where courts do not refer to the Handbooks they risk “adopting interpretations of the Convention that put it at odds with the courts of other State parties engaged in the interpretation of the treaty”.<sup>13</sup>

Finally, the views of academics are “[o]f equal and perhaps of greater importance”<sup>14</sup> than comparative case law, because “it is academic writers who provide the best hope of reaching international consensus on the meaning of the Convention”.<sup>15</sup>

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<sup>8</sup>Zimmermann, Dörschner and Machts, 2011, para 100.

<sup>9</sup>*Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 (High Court of Australia), para 54.

<sup>10</sup>HCR/IP/4/Eng/REV.1 (UNHCR Handbook) 1979

<sup>11</sup>*Immigration and Naturalization Service v Aguirre-Aguirre*, 526 US 415 (US Supreme Court), para 427. Cited in Zimmermann, Dörschner and Machts, 2011, para 109.

<sup>12</sup>*T v Secretary of State for the Home Department* [1996] AC 742 (UK House of Lords), para 786.

<sup>13</sup>*Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 (High Court of Australia), para 81.

<sup>14</sup>*Adan v Secretary of State for the Home Department* [1999] 1 AC 293 (UK House of Lords), para 307. Cited in Zimmermann, Dörschner and Machts, 2011, para 123.

<sup>15</sup>*Adan v Secretary of State for the Home Department* [1999] 1 AC 293 (UK House of Lords), para 307. Cited in Zimmermann, Dörschner and Machts, 2011, para 123.

## 1. Key definitional concepts and the nexus between human trafficking and asylum

*Slowly and painfully a picture is emerging of a global crime that shames us all. Billions of dollars are being made at the expense of millions of victims of human trafficking. Boys and girls who should be at school are coerced into becoming soldiers, doing hard labour or sold for sex. Women and girls are being trafficked for exploitation: forced into domestic labour, prostitution or marriage. Men, trapped by debt, slave away in mines, plantations, or sweatshops.*<sup>16</sup>

It is estimated that 27 million people are trafficked annually.<sup>17</sup> Recent data has shown VHT being exploited in 118 countries and originating from 136 countries;<sup>18</sup> it is a global crime that generates billions of dollars in profits annually.<sup>19</sup> Although UNODC has contributed to a centralisation of human trafficking statistics, empirical data remains severely limited due to the clandestine nature of the crime and is often based on estimates; the full breadth and nature of the crime remains unknown.<sup>20</sup>

Undoubtedly, however, human trafficking is a crime with low risks and high profits,<sup>21</sup> and violates fundamental human rights including the right to be free from torture, cruel, inhumane or degrading treatment, the right to liberty, and the right to life.<sup>22</sup> It particularly

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<sup>16</sup> United Nations Office on Drugs and Crime, *Human Trafficking: An Overview*, 2008, at <http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf> (consulted on 3 April 2013), Preface.

<sup>17</sup> United States Department of State, 2011.

<sup>18</sup> United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, December 2012, at [http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf) (consulted on 7 April 2013).

<sup>19</sup> *Idem*.

<sup>20</sup> United Nations Office on Drugs and Crime, *Human Trafficking: An Overview*, 2008, at <http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf> (consulted on 3 April 2013), p 3.

<sup>21</sup> *Idem*.

<sup>22</sup> These fundamental rights are contained in, for example, 1984 *Convention Against Torture, Cruel, Inhumane or Degrading Treatment*, 1966 *International Covenant on Civil and Political Rights*, 1948 *Universal Declaration on Human Rights*, 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

affects the vulnerable, preying on their poverty, hope and innocence.

### **1.1. VHT trafficked for the purposes of sexual exploitation**

This paper will address only the protection needs of VHT who have been trafficked for the purposes of sexual exploitation; it is estimated that 79% of victims are trafficked for this purpose<sup>23</sup> and that 98% of those trafficked for sexual exploitation are women and girls.<sup>24</sup> It is of course recognized that human trafficking extends far beyond sexual exploitation and affects women, men and children in a variety of ways. The different forms of trafficking and exploitation undoubtedly require different strategies to combat them, and the application of the Refugee Convention to VHT will vary from category to category and victim to victim.

Furthermore, the application of the Refugee Convention to VHT trafficked for the purposes of exploitation raises very specific issues. Given the magnitude of the trafficking industry, and the large percentage of women trafficked for the purposes of sexual exploitation, it is extremely important to develop the application of the Refugee Convention to this category of women. It is for these reasons that this paper will address only the application of the Refugee Convention to victims trafficked for sexual exploitation.

### **1.2. Defining a refugee**

The Refugee Convention defines a refugee in Article 1A(2) as someone who:

*[...] owing to well founded fear of being persecuted for reasons of race,*

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<sup>23</sup>UNODC, 2009, p 7.

<sup>24</sup>International Labour Organisation, 'Give Girls a Chance: Tackling Child Labour, a Key to the Future', June 2009, available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=10290> (last accessed 12 April 2013).

*religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (emphasis added).*<sup>25</sup>

The Refugee Convention is concerned with assessing a protection need. Article 33, said to be the “backbone of refugee protection” enshrines the principle of *non-refoulement*.<sup>26</sup>

*No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*<sup>27</sup>

This international protection, generally termed asylum, “is being sought by persons facing a substantial risk of persecution or serious harm if returned to their country of origin. [...] To determine the nature and the reality of the risk faced by these persons, national authorities are required to assess their protection needs. This is done through defined criteria and effective asylum procedures and remedies, which must be made available to asylum-seekers”.<sup>28</sup> The asylum procedure, aimed at determining a protection need, should be differentiated from the *non-refoulement* principle, which prohibits a state from extraditing a person to a country where s/he will be persecuted.<sup>29</sup> Unlike the *non-refoulement* provisions

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<sup>25</sup>UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 1A(2).

<sup>26</sup>Wouters, 2009, p 32.

<sup>27</sup>UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 33.

<sup>28</sup>Oliver and Kautzmann, 2012, p 36.

<sup>29</sup>For a more detailed explanation of the *non-refoulement* principle see OSCE, 2013, p 28.

in some other international instruments (for example Article 3 CAT and Article 3 ECHR), the non-refoulement provision in Article 33 Refugee Convention is not absolute.<sup>30</sup>

### **1.3. Defining human trafficking**

The leading global international instrument on human trafficking is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*<sup>31</sup> (Trafficking Protocol). It aims to prevent and combat human trafficking, to protect and assist VHT and to promote cooperation amongst State Parties. It entered into force on 25 December 2003 and has been widely ratified with over 120 State Parties.

#### **1.3.1. Defining VHT**

This paper will adopt the definition of VHT as expressed in Article 3 of the Trafficking Protocol:

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

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<sup>30</sup>UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 33(2).

<sup>31</sup>UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

*or services, slavery or practices similar to slavery, servitude or the removal of organs.*<sup>32</sup>

UNODC has explained this definition by dividing it into three elements. Human trafficking thus consists of:<sup>33</sup>

The act (what is done): recruitment, transportation, transfer, harbouring or receipt of persons. The means (how it is done): threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim. The purpose (why it is done): for the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs. As noted by Nowak and Planitzer, “[a]t least one form of action, one specific means and one form of exploitation needs to be fulfilled in order to qualify a case as trafficking in human beings.”<sup>34</sup> That is, for the situation to fall under the definition of human trafficking, all three components must be present.<sup>35</sup>

This definition is intended to provide global consistency and consensus on human trafficking. Pursuant to Article 5 of the Trafficking Protocol, states must criminalize the conduct in Article 3 in their domestic legislation.<sup>36</sup>

It is important to stress that a VHT cannot consent to being trafficked. Article 3(b) of the Trafficking Protocol provides:

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<sup>32</sup>UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Article 3.

<sup>33</sup>UNODC, Human trafficking, at <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (consulted on 30 April 2013).

<sup>34</sup>OSCE, 2013, p 19.

<sup>35</sup>Gallagher, 2010, p 34.

<sup>36</sup>UNODC, Human Trafficking, at <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (consulted on 30 April 2013).



*(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.*<sup>37</sup>

It is often misconstrued that where a woman consents to go to work in a sex trade overseas, that she cannot be a VHT.<sup>38</sup> This is false; where any of the ‘means’ identified in paragraph (a) are used, the consent of the victim becomes irrelevant, and she is a victim of human trafficking. This is the case, regardless of whether she agreed initially to perform work that meets with the general disapproval of society such as sex work. For example, she may have agreed to work as a prostitute but upon arrival discovered the conditions were not as described; her documents may be taken from her, or she may be held as a sex slave with no payment, instead of as a sex worker earning a living. This will be further discussed in Chapter V.

### **1.3.2. The principle of non-punishment for VHT and asylum-seekers**

Asylum authorities must not penalize an asylum-seeker, including a VHT claiming asylum, for the means in which she entered the country. Both the trafficking system and the asylum-system provide for the non-penalisation of VHT or asylum-seekers.

The non-punishment requirement exists in both the asylum and trafficking systems. The Trafficking Protocol is silent on the issue directly, however more attention has been given to the non-penalisation issue since the Trafficking Protocol’s entry into force in 2003.<sup>39</sup> The Working Group on Trafficking in Persons (which advises the Conference of the Parties to

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<sup>37</sup>UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Article 3.

<sup>38</sup>GRETA(2012)6 (UK), 12 September 2012.

<sup>39</sup>Organization for Security and Co-operation in Europe, 2013; UN OHCHR, 2002, Principle 7, Guideline 2(5).

the *United Nations Convention Against Transnational Organized Crime*<sup>40</sup> on the Trafficking Protocol) has communicated that states should not punish or prosecute VHT “for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts”.<sup>41</sup> The issue has also been addressed regionally, with the 2005 *Council of Europe Convention on Action Against Trafficking in Human Beings* prohibiting parties from imposing penalties on VHT for their involvement in unlawful activities where they have been compelled to partake in them.<sup>42</sup>

The public perception that asylum-seekers are criminals or illegal immigrants must be briefly touched upon.<sup>43</sup> As noted by Oliver and Kautzmann, “[a]sylum procedures are not aimed at reviewing the legality of the ‘entry, stay or residence’ of an asylum-seeker in his or her country of asylum. Instead, they assess a protection need. They are concerned with the determination of whether the person concerned risks his or her rights [to be free from torture, inhumane or degrading treatment] being violated if returned to his or her country of origin. The result of the asylum procedure does not depend on the lawfulness of the presence of the asylum-seeker”.<sup>44</sup> It is for this reason that the Refugee Convention contains the non-penalty provision in Article 31, forbidding states from imposing penalties on asylum-seekers as a result of their illegal entry to the territory. Once an asylum-seeker claims asylum, s/he is legally present on the territory whilst his/her claim is being processed.

This issue may have an effect on the way the Refugee Convention is interpreted; asylum authorities may interpret the Convention in conformity with public opinion, given much of

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<sup>40</sup>United Nations General Assembly, *United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25.

<sup>41</sup>CTOC/COP/WG.4/2009/2, 2009, Recommendation 12.

<sup>42</sup>Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, Article 26.

<sup>43</sup>See, for example, Sedley, 2002.

<sup>44</sup>Oliver and Kautzmann, 2012, p 38.

social debate is influenced by the term ‘illegal immigrants’, rather than in line with these subtle international legal principles. That would presumably be to the detriment of VHT. This has been discussed by the Former Lord Justice of Appeal, England and Wales in a paper questioning the independence of the judiciary in asylum cases:

*Asylum law, however, has an aspect which I think makes it unique: the need for it to deal in outcomes which are publicly perceived as having a direct and often unwelcome effect on the lives of the settled population. Asylum judges consequently handle facts and topics which, unlike those addressed by any other branch of the law except crime, are a matter of often passionate daily debate.*<sup>45</sup>

UNHCR explains that “these comments are applicable not just to the judiciary but also to all first instance and other administrative refugee and protection decision makers”.<sup>46</sup>

### **1.3.3. Human trafficking is not human smuggling**

Human trafficking must be distinguished from human smuggling.<sup>47</sup> Smuggling is a voluntary act involving the payment of a fee to a smuggler to move the person across a border. Human trafficking, on the other hand, involves the exploitation of a human being and involves a serious restriction of his/her freedom – it is often termed ‘modern slavery’.<sup>48</sup> VHT are usually ‘owned’ by their traffickers, whereas upon arrival at the final destination the services of smugglers are complete.<sup>49</sup> Additionally, smuggling involves crossing a national border, whereas VHT can be trafficked within a state. Finally, VHT often enter the country legally, for example, on a valid passport and visa; Stoyanova suggests that human

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<sup>45</sup>Sedley, 2002, p 3.

<sup>46</sup>Mackey and Barnes, 2013, p 17.

<sup>47</sup>UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

<sup>48</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006; United States Department of State, 2011.

<sup>49</sup>Stoyanova, 2011, p 782.

smuggling “could be summarized as an act of facilitating illegal entry [...] while human trafficking could be referred to as slave importing”.<sup>50</sup>

Smuggled people may become VHT, if they were to be exploited upon arrival (for example, where the smuggler then takes their travel documents, and demands a service from the individual). The nexus between human trafficking and migrant smuggling can cause confusion and may result in authorities failing to correctly identify a person as a VHT,<sup>51</sup> accordingly s/he does not then receive the protection and assistance to which s/he would be entitled if correctly identified as a VHT.<sup>52</sup>

#### **1.3.4. Who are these victims?**

Human trafficking often results from the desire to seek a better life. As Adams explains, “[m]ost sex trafficking victims come from poor families in underdeveloped countries who see sending their child to work abroad as the only way to escape poverty”.<sup>53</sup> The following stories are representative of some, although of course not all, female victims’ experiences of human trafficking:

*[The victim] grew up in a Northern Thai village and did not attend school. [...] She had a brutal childhood, including sexual violence from her adoptive father. At the age of 12, after an abortive escape, her adoptive father agreed that she go to Bangkok with an acquaintance of his who had a beauty salon. In Bangkok, she worked in the salon; the applicant was occasionally fondled by customers, and once she was raped. Eventually she met a woman who promised her that life could be far better in the U.S., and the applicant agreed to travel there. Arriving*

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<sup>50</sup>Idem.

<sup>51</sup>Stoyanova, 2011.

<sup>52</sup>Stoyanova, 2011, p 783.

<sup>53</sup>Adams, 2011, p 204.

*on a false Thai passport with a woman she knew only as “Pee,” she was apprehended at the airport in the U.S. The woman she was travelling with was convicted of alien smuggling.<sup>54</sup>*

This case is an example of young women’s willingness to trust other women or family members who send them to work in a capital or foreign city; in some cases, the job description is false and the woman ends up in forced labour or sexual servitude. In the above case the girl was rescued by authorities at the U.S. border. However authorities are not always willing or able to recognize an individual as a victim of human trafficking; the authorities themselves may be involved in the trafficking:

*“Sophie” is a young ethnic Russian woman who was living in a former Soviet Republic when she was abducted by a local mafia leader, “Sergey”. He had seen her [around] and wanted her to be his girlfriend. After she refused, she was raped by Sergey and then gang-raped by his friends and bodyguards. Sophie was then held in one of his homes and forced to have sex with Sergey’s guests. He told her that “you’re now working for me, and you’re my property...” Among the regular visitors who raped Sophie were the mayor and the chief of police. Sophie tried to escape, but she was caught and beaten. Later, Sergey traded her to another Russian mafia leader, who was planning to traffic her to the Mideast. She was able to escape with the help of one of the trafficker’s associates. When she later called that person’s cell phone from a third country to tell him she was safe, Sergey answered and told her that the associate had been murdered for helping her, that Sergey knew where she was, and that his people would find her. Sophie fled to the U.S.<sup>55</sup>*

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<sup>54</sup>Knight, 2007, p 13.

<sup>55</sup>Idem, p 9.

The applicants both applied for protection in the United States and both were granted relief under international human rights law. Both cases emphasize the innocence and hopefulness that feed the trafficking industry.

### **1.3.5. Human trafficking is a form of gender-based violence**

Some of the arguments developed in this paper stem from the assertion that human trafficking is a gender-based phenomenon, or even a form of gender-based violence.<sup>56</sup> Indeed, the United Nations has recently stressed that human trafficking is a form of gender-based violence.<sup>57</sup>

Although men can also be trafficked, the percentage of male victims is much lower; 80% of trafficking victims are women or girls.<sup>58</sup> Duong notes that human trafficking is “a socioeconomic issue that relate[s] to gender discrimination and gender inequality”.<sup>59</sup>

Poverty has been recognized as a main cause of human trafficking. Both the so-called ‘feminization of poverty’ and the increase in female migration are said to augment the likelihood of women being trafficked over men. Demir argues that globally, “poverty is increasingly and disproportionately affecting women” and that “70% of [the absolute poor] are women and their minor dependents”.<sup>60</sup> Demir demonstrates that “due to gender inequities and relative powerlessness, ‘people who have little to lose may be willing to take great risks’”.<sup>61</sup> She argues that this feminization of poverty reflects a feminization of migration, which in turn puts women at greater risk than men of becoming VHT. Although the push-pull factors for migration apply to both men and women, several authors point out that

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<sup>56</sup>Demir, 2003.

<sup>57</sup>UNHCR, *Prevent. Combat. Protect: Human Trafficking*, November 2011, at <http://www.refworld.org/docid/4edcbf932.html> (consulted on 28 May 2013).

<sup>58</sup>Saito, 2007, p 1.

<sup>59</sup>Duong, 2012, p 57.

<sup>60</sup>Demir, 2003, p 4.

<sup>61</sup>Idem, p 4.

women are particularly vulnerable when migrating and this can lead to trafficking.<sup>62</sup> The powerlessness experienced by poor/migrant women results in an increased vulnerability to recruitment by traffickers; women are increasingly willing to take work overseas with limited safeguards for their personal security.

Moreover, as the majority of victims of human trafficking are exploited for sexual purposes, and due to the stigma attached to prostitution in many countries of origin, women are unlikely to reveal the exact nature of their experiences if ever they return to their countries of origin.<sup>63</sup> Accordingly, prospective female migrants are not always aware of the experiences of former VHT when considering a similar relocation.<sup>64</sup> Further, it is not unusual for VHT to be offered their freedom if they deliver a new victim to their traffickers: traffickers ensure that those doing the recruiting are people trusted in the society by younger women.

#### **1.4. The nexus between human trafficking and refugee systems**

As noted in the introduction, the term ‘trafficking system’ shall be used in this paper to refer to the rights, obligations and actors involved in ensuring victims of trafficking are identified, protected and supported and their traffickers prosecuted, in any given state. Similarly, the term ‘refugee system’ will be used to refer to the rights, obligations and actors relevant to a claim for protection under the Refugee Convention.

The two systems may interlink, and even overlap, where a VHT is in need of international protection. The trafficking system may provide protection through specific legislative measures such as residence permits. For VHT who may be eligible for refugee status, the Refugee system may provide an alternative, or additional form of protection.

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<sup>62</sup>Idem, p 3; Duong, 2012.

<sup>63</sup>Saito, 2007, p 1.

<sup>64</sup>Demir, 2003, p 5.

#### **1.4.1. Linking the systems to ensure VHT's protection needs are assessed**

UNHCR has suggested that states require a “systematic referral mechanism [to direct] identified trafficked persons to a structure where their international protection needs can be assessed”.<sup>65</sup> Although it may be assumed that a VHT will be able to claim asylum at any point in time, this may not be the practice in reality. The key question asked by UNHCR on this issue is “once a trafficked person is identified, is there a system for referral to the asylum authorities or other national agencies dealing with international protection procedures in cases where this is relevant?”.<sup>66</sup>

It is unknown to what extent VHT in need of protection actually do claim asylum. Lack of data renders it impossible to answer this question, however UNHCR suggests that “international protection remains a seriously underused protection tool for trafficked persons”.<sup>67</sup> Field observations by UNHCR indicate that “there are aspects of current state practice regarding trafficked persons’ identification and referral to international protection that are unsatisfactory and likely to benefit from attention and change”.<sup>68</sup>

UNHCR is thus indicating that VHT who may also be refugees might not be able to claim asylum due to ineffective referral mechanisms. It is not suggested that the two systems be dependent on each other. Individuals should be able to claim asylum at any point in time regardless of their involvement in another system. However, VHT who receive certain short-term protection through the trafficking system may not be aware that longer-term protection may be available. In this context, there must be in place a mechanism to ensure these VHT are informed of their right to claim asylum.

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<sup>65</sup>PPLAS/2009/03 (UNHCR), 1 October 2009, para 44.

<sup>66</sup> Idem, para 11.

<sup>67</sup> Idem, para 6.

<sup>68</sup> Idem, para 11.



#### 1.4.2. International push for the nexus to be established

Various international bodies have explained the importance of ensuring effective access to asylum procedures for VHT. The *Office of the United Nations High Commissioner for Human Rights* has explained the significance of:

*Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.*<sup>69</sup>

Equally, the 2002 UNHCR *Agenda for Protection* (welcomed by the United Nations General Assembly in 2002) has called upon states “to ensure that their asylum systems are open to receiving claims from individual victims of trafficking”.<sup>70</sup> A similar statement can be found in the Explanatory Report of the Council of Europe Convention.<sup>71</sup> Accordingly, the importance of state asylum-systems being effectively open to claims from VHT, has been recognized by leading regional and global bodies.

There is no ‘correct’ way for the two systems to work together. There is no suggested model and no one model will work for every state. UNHCR has explained that although there is no ‘correct’ way of linking the two systems, “there seems ... to be an urgent imperative to explore ways of doing better than we do at present”.<sup>72</sup>

UNHCR has expounded the need for “three essential elements” to render a referral

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<sup>69</sup>United Nations Office of the High Commissioner for Human Rights, 2002, Guideline 2(7).

<sup>70</sup>A/AC.96/965/Add.1 (UNHCR Agenda for Protection), 26 June 2002, Goal 2, Objective 2.

<sup>71</sup>Council of Europe, 2005, para 377.

<sup>72</sup>PPLAS/2009/03 (UNHCR), 1 October 2009, para 12.

mechanism effective:

1. *A functioning domestic procedure for identifying and registering trafficked persons including the provision of free legal counselling;*
2. *an effective additional system for addressing international protection needs; and*
3. *a consistent and competent mechanism for referring trafficked persons from the first to the second procedure.*<sup>73</sup>

The trafficking and asylum systems should thus not be mutually exclusive nor entirely parallel systems. They should be linked in some manner to allow VHT to claim asylum, and conversely, for asylum-seekers to be identified as a VHT.

#### **1.4.3. Prerequisite to identification: the existence of the two systems**

It may seem a fairly obvious prerequisite to a linking of the trafficking and asylum systems, that both must exist independently. However it must be noted that many states do not have functioning trafficking or asylum systems.<sup>74</sup> For example, the *Group of Experts on Action against Trafficking in Human Beings* (GRETA)<sup>75</sup> has recently examined the French trafficking system and discovered that “France has no formalised procedure or established criteria for identifying victims of trafficking”. Although a draft national action plan to combat human trafficking was drafted between 2008 and 2010, it had still not been implemented at the date of publishing of the GRETA report in January 2013.<sup>76</sup> As a result, formal identification measures are lacking which results in some aspects of the trafficking

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<sup>73</sup> PPLAS/2009/03 (UNHCR), 1 October 2009, para 11.

<sup>74</sup> *Idem*.

<sup>75</sup> GRETA is the monitoring mechanism established to supervise the implementation of the *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197.

<sup>76</sup> GRETA(2012)16 (France), 28 January 2013.

system functioning in an ad hoc or piece-meal way.

#### **1.4.4. The Norwegian example: linking the two systems**

The Norwegian example will be used to demonstrate how the two systems can be linked to ensure VHT can access the asylum system. Norway has established both a trafficking and an asylum system; both have been established through domestic legislation that reflects Norway's obligations under international law, including the Refugee Convention.

The key component in the Norwegian structure is that identified VHT receive legal counselling and advice on asylum. UNHCR has explained that this support includes:

*free legal assistance which covers issues such as whether to make a report to the police and whether to apply for asylum [...] If the trafficked person decides to seek asylum, he or she is immediately registered as an asylum seeker. A caseworker within the asylum authority trained in trafficking cases conducts these asylum interviews and determines whether asylum or leave to remain can be granted.<sup>77</sup>*

This seemingly simple linking component is non-existent or ad hoc in many other national systems.<sup>78</sup> Similarly, that the asylum claim is assessed by an expert in human trafficking has many positive implications, including that the issues discussed in the following chapters may be more likely to be considered by an asylum authority trained in trafficking, than by an asylum authority who knows little about the needs and experiences of asylum-seekers who have been trafficked. On the other hand, referral is dependent upon one single person doing their job and doing it correctly. It is a tenuous connection, but it does provide a systematic referral mechanism directing VHT to a structure where their international

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<sup>77</sup>PPLAS/2009/03 (UNHCR), 1 October 2009, paras 25-26.

<sup>78</sup>Idem; GRETA(2012)16 (France), 28 January 2013.

protection needs can be assessed.

That said, the systems must still remain independent. An asylum-seeker should be entitled to all rights under the asylum system, and a VHT should be entitled to all rights under the trafficking system, regardless of whether they are in both systems. In Ireland, VHT who have also made a claim for asylum, are usually only entitled to protection under the asylum system, and are excluded from the trafficking system.<sup>79</sup> Accordingly, non-asylum-seeking VHT are entitled to protection specifically aimed at VHT, whereas asylum-seeking VHT are not. The Irish Immigrant Council has been critical of this approach, explaining that “[t]he rights afforded to asylum-seeking victims of trafficking versus other suspected victims of trafficking are not the same. Asylum-seeking victims of trafficking have less access to safe and appropriate accommodation, education, training, work and the possibility of acquiring longer-term status in the State”.<sup>80</sup> For example, accommodation afforded to asylum-seekers generally is not considered appropriate for female VHT who have been trafficked for the purpose of sexual exploitation. The Immigrant Council considers it “inappropriate” to house female VHT trafficked for sexual exploitation in the general asylum accommodation, which is usually mixed gender, “as they have already experienced highly traumatising human rights violations, including sexual exploitation”.<sup>81</sup>

Accordingly, the two systems need to be linked, but not merged, to provide the most appropriate and effective level of protection for VHT with international protection needs.

#### **1.4.5. Advantage for VHT in accessing the asylum system**

In becoming a party to the Trafficking Protocol, states have made a commitment to protect VHT, to prevent human trafficking and to prosecute traffickers. States usually take action

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<sup>79</sup> Immigrant Council of Ireland, 2011, pp 4-6.

<sup>80</sup> Idem, p 4.

<sup>81</sup> Idem, p 7.

in relation to the latter two matters, but protection of trafficking victims is often given a secondary or less important role in the fight against transnational crime.<sup>82</sup> This can be seen through the system of residence permits that some states offer to VHT, which are short term and focused upon the VHT assisting in the investigation or prosecution of traffickers, rather than the protection of the VHT themselves. Accordingly, national trafficking systems are often aimed at preventing and punishing crime, rather than protecting victims.

Protection under the trafficking system is usually temporary and conditional upon the VHT participating in criminal proceedings taken against traffickers.<sup>83</sup> In contrast, a VHT who successfully claims asylum will have no requirement to cooperate with police in the criminal proceedings and will usually obtain a permanent form of residence. Accordingly, it has been said that asylum provides a “more direct” route to long-term protection, and that the trafficking system looks only at short-term protection,<sup>84</sup> “such short-term protection and residence are not so much considered trafficking protection measures as methods for keeping witnesses for criminal proceedings in the country”.<sup>85</sup>

Consequently, VHT who wish to remain in their host country must cooperate with authorities to receive a residence permit. This permit is usually temporary, although in certain circumstances a more long-term form of residence might be available (depending on the state’s domestic legislation). The short-term residence might be renewed if the individual is thought to be of continued value to the prosecutor, but if not, the VHT will be expected to return to her country of origin if she is ineligible for other forms of protection or a long-term residence.<sup>86</sup> Where a VHT does not qualify as a refugee under the Refugee Convention, she may nevertheless qualify for some form of subsidiary, or complementary

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<sup>82</sup>Heinrich, 2010, p 3.

<sup>83</sup>Idem, p 5.

<sup>84</sup>PPLAS/2009/03 (UNHCR), 1 October 2009, para 29.

<sup>85</sup>Idem, para 80.

<sup>86</sup> Idem, para 27.

protection, for example, a residence permit on humanitarian grounds.<sup>87</sup>

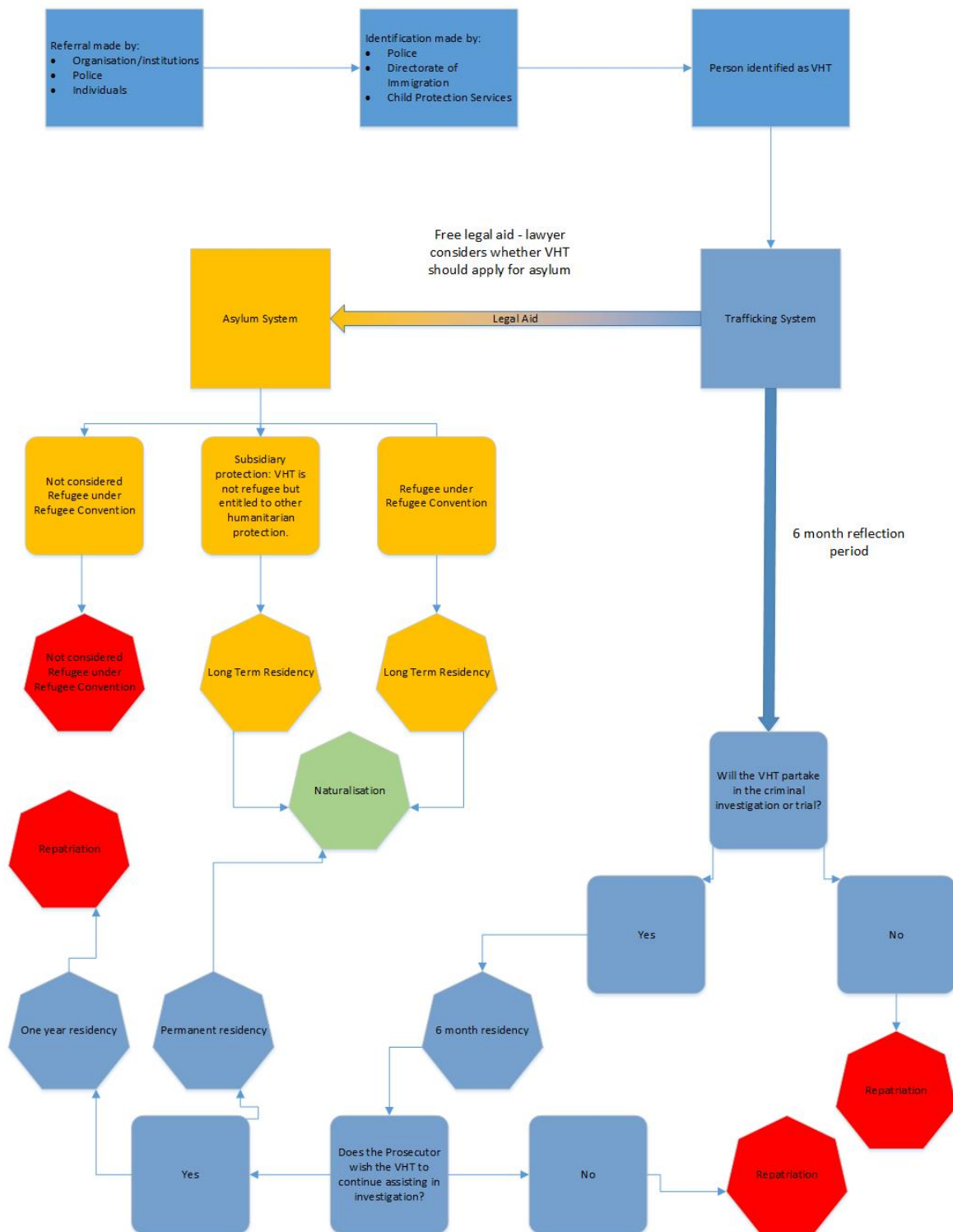
The following diagram demonstrates the uncertainty that stems from the protection afforded to VHT in the trafficking system. It has been created by the author and is based off research produced by UNHCR in 2008, and GRETA in 2013 on the functioning of the two systems in Norway and demonstrates the way VHT are usually repatriated if they do not manage to access the asylum procedure.<sup>88</sup>

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<sup>87</sup>Idem, para 5.

<sup>88</sup>This flowchart was developed by the author of this paper from data sourced from: United Nations High Commissioner for Refugees, *The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs* (2009), PPLAS/2009/03, 1 October 2009; Council of Europe, 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Norway, First Evaluation Round by the Group of Experts on Action against Trafficking in Human Beings (7 May 2013) GRETA(2013)5.

Figure 1: Example referral mechanism for victims of human trafficking: from the trafficking system to the asylum system



## 1.5. Conclusion

This chapter has provided a brief explanation of the key concepts relevant to the research question. For a woman to be fully protected under the Refugee Convention, asylum authorities must be aware of certain definitional concepts. The non-penalisation of VHT and asylum-seekers exists in both the trafficking and the asylum system. Where a woman consents to work in the sex industry but the means identified in Article 3(a) of the Trafficking Protocol are used, the consent is irrelevant and the woman can still fall under the definition of trafficking victim. Equally, an asylum-seeker who enters the country illegally must not be punished for the means in which she entered the country. Furthermore, human trafficking must be differentiated from migrant smuggling. If asylum authorities are not aware of these definitional specificities, a VHT may not be identified as a VHT and accordingly, she will not benefit from the protection and assistance to which she would be entitled had she been properly identified.

States must ensure there is a functioning systematic mechanism that refers VHT to the asylum system when international protection is required. The systems must be sufficiently connected for a VHT to claim asylum, and to be informed of her right to claim asylum. The systems should be linked, but not merged, to provide the most appropriate and effective level of protection for VHT with international protection needs.

This chapter has also shown that human trafficking is a form of gender-based violence, affecting women disproportionately to men. In the following chapter it will be argued that asylum law must develop in a gender sensitive way, to better protect VHT under the Refugee Convention.



## 2. The applicability of the Refugee Convention to VHT

This chapter will analyse how judiciaries are currently interpreting claims by VHT for refugee status. The chapter will first break down Article 1A(2) of the Refugee Convention which sets out the international requirements for claiming refugee status. Case law will be analysed to give meaning to the elements of Article 1A(2) on how they should be being applied, and how they are being applied in practice. The aim of the chapter is to determine the applicability of Article 1A(2) to the protection needs of VHT. The subsequent chapters will then turn to the grounds in Article 1A(2) pursuant to which VHT may claim to be being persecuted: race, religion, nationality, membership of a particular social group or political opinion. These categories will be referred to as ‘convention grounds’ throughout this paper.

As noted above, the Refugee Convention defines a refugee in Article 1A(2) as someone who:

*[...] owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (emphasis added).*<sup>89</sup>

Article 14 of the Trafficking Protocol foresees that VHT may be eligible for refugee status:

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<sup>89</sup>UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 1A(2).

*Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.*<sup>90</sup>

Thus to be recognized as a refugee, a VHT must prove s/he fears harm that is sufficiently serious to amount to ‘persecution’ and that such fear is well founded, i.e. in layman’s terms, reasonable. VHT must also show that their persecution is *on account of* their race, religion, nationality, political opinion or membership of a particular social group. As will be shown in the following chapters, the most likely ground upon which VHT could claim asylum is on account of their membership of a ‘particular social group’ (PSG). The grounds are not exclusive and VHT may argue they are being persecuted for reasons of more than one ground.

As explained above, VHT who are trafficked within their state will not be eligible for refugee status, because Article 1A(2) only applies to an individual that is “outside the country of his nationality”.<sup>91</sup> However a VHT need not show she left her country of origin *because of* a well-founded fear of persecution.<sup>92</sup> As Gallagher has noted, the fear “could arise (and, in cross-border trafficking cases, will typically arise) *after* that person has left the country”.<sup>93</sup>

This chapter will now deconstruct the relevant elements of Article 1A(2), notably

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<sup>90</sup>UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Article 14.

<sup>91</sup>UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 1A(2).

<sup>92</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 25.

<sup>93</sup>Gallagher, 2010, p 203.

persecution, the extent to which the claim is well-founded, the nexus requirement (that the persecution is for reasons of a convention ground) and the availability of state protection.

## 2.1. Persecution

VHT often suffer many forms of abuse, but to qualify for refugee status, this harm must amount to persecution. The UNHCR *Handbook on Procedures* provides that:

*There is no universally accepted definition of “persecution” and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights for the same reasons would also constitute persecution.*<sup>94</sup>

Harm suffered by VHT can include rape and other sexual abuse, deprivation of liberty, physical violence, psychological violence, forced labour, severe economic deprivation, denial of education, or other severe human rights violations.<sup>95</sup>

Furthermore, VHT “may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination”.<sup>96</sup> Whether these elements amount to persecution will depend on the severity of the conduct and the individual circumstances of the case.

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<sup>94</sup>HCR/IP/4/Eng/REV.1 (UNHCR Handbook) 1979, para 52.

<sup>95</sup>World Organisation for Human Rights USA, 2011, p 16; Amnesty International, 2007.

<sup>96</sup>HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002, para 18.

Gallagher explains that in the context of human trafficking, persecution can be divided into three categories. Firstly, exploitation that is inherent in the trafficking experience, such as abduction, incarceration or rape. Secondly, persecution that is particular to the trafficking experience, such as ostracism, discrimination or punishment, which the VHT would face in her country of origin. And thirdly, the “impact of previous persecution [which] may, under certain circumstances, be severe enough to render return to the country of origin intolerable”.<sup>97</sup>

To determine whether the treatment upon return to a VHT’s country of origin is likely to be severe enough to amount to persecution in the individual case, the court will consider, *inter alia*, the following:

1. The social status and economic standing of the trafficked woman’s family.
2. The level of education of the trafficked woman or her family.
3. The trafficked woman’s state of health, particularly her mental health.
4. The presence of an illegitimate child.
5. The area of origin of the trafficked woman’s family.
6. The trafficked woman’s age.<sup>98</sup>

It is important to consider the cumulative effect of harm: individual harm not amounting to persecution may, if taken together with other harm, amount to persecution; “this will necessarily depend on all the circumstances including the particular geographical, historical and ethnological context”.<sup>99</sup> This accumulation concept is particularly important for asylum claims by VHT whose persecution often results from an accumulation of various treatments. Most importantly, as asylum claims are assessed in light of the psychological make-up of the individual asylum applicant, it is very important to question whether the

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<sup>97</sup>Gallagher, 2010, p 200.

<sup>98</sup>*AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (UK Upper Tribunal, Immigration and Asylum Chamber), para 158.

<sup>99</sup>HCR/IP/4/Eng/REV.1 (UNHCR Handbook) 1979, para 53.

harm amounts to persecution *in the individual case*.<sup>100</sup>

The most recent UK Guidance Case on VHT from Albania explains as follows:

*Each case will turn on its own particular facts or circumstances. The treatment which such women might receive from their families could in certain circumstances amount to persecution. They may also be at risk from their former traffickers, particularly if the trafficker considers that he has some right over them if he has entered into a financial arrangement with their family or alternatively if they consider that the trafficked woman would be able to give the police evidence of crimes which they have committed. In other cases there may be nothing to indicate that either the trafficker or the victim of trafficking's family would be likely to harm her.*<sup>101</sup>

It does not appear that UK judges or asylum authorities are determining asylum claims in line with the UNHCR guidelines in relation to the cumulative effect of harm. Various examples show UK decision makers refusing to accept combinations of the above harm as being sufficiently serious to amount to persecution.<sup>102</sup> It is worth quoting at length the result of research published by UNHCR on this point:

*The U.K. Immigration Appeal Tribunal considered none of the following combinations of atrocious experiences of trafficking traumatic enough to influence the assessment of whether any future harm feared by the applicant would amount to persecution: threats to be trafficked, assaults,*

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<sup>100</sup> HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, paras 14-15.

<sup>101</sup> *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (UK Upper Tribunal, Immigration and Asylum Chamber), para 214.

<sup>102</sup> *Kacaj v Secretary of State for the Home Department* [2002] EWCA Civ 314 (England and Wales Court of Appeal); *ZG Kosovo* [2002] UKIAT 06307 (UK Immigration Appeal Tribunal).

*abduction, and gang-rape; abduction from home at gunpoint in front of family members, rape and being trafficked abroad; or kidnapping, rape and forced prostitution, physical punishments after escaping and being sold abroad.*<sup>103</sup>

The research then concludes that UK decision-makers are struggling to decide these issues in line with the UNHCR Trafficking Guidelines.<sup>104</sup>

Although there is little doubt that rape and other forms of sexual violence amount to persecution, one must examine jurisprudence to determine when and if re-trafficking, reprisals, ostracism or discrimination can amount to persecution.

### **2.1.1. Types of persecution**

#### **2.1.1.1. Physical and mental suffering**

UNHCR holds that abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, and the deprivation of medical treatment generally amount to persecution.<sup>105</sup>

As explained in Paragraph 52 of the *Handbook on Procedures*, “a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights for the same reasons would also constitute persecution”.<sup>106</sup> It is of interest to note that human trafficking can amount to torture- in a recent article co-authored by the Former United Nations Special

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<sup>103</sup>Saito, 2007, p 17.

<sup>104</sup>Idem.

<sup>105</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 15.

<sup>106</sup>HCR/IP/4/Eng/REV.1 (UNHCR Handbook) 1979, para 52.

Rapporteur on torture and other forms of cruel, inhuman, degrading treatment or punishment, the issue was summarized as follows:

*[...] it can be said that cases of trafficking in human beings may amount to torture. This is the case if the trafficker inflicts severe pain or suffering on a powerless victim under his/her control for the purpose of intimidation, punishment or discrimination, and when the State is not taking necessary measures under the concept of due diligence to protect the victim against this treatment. [...] Torture requires a specific purpose. Exploitation within the context of trafficking in human beings implies intimidation, punishment and coercion, which are all purposes of torture.*<sup>107</sup>

Because torture is one of the most serious violations of human rights, this finding provides further support that human trafficking can amount to persecution pursuant to the definition expounded in Paragraph 52. Of course, “all human trafficking cases have their individual characteristics, each case is different and therefore needs to be assessed individually”, however some cases of human trafficking may amount to torture, and therefore persecution due to the serious violation of human rights of the VHT.<sup>108</sup>

Case law from various countries demonstrates wide recognition that forced prostitution or human trafficking for sexual purposes amounts to persecution.<sup>109</sup>

In *AA (Uganda v SSHD)*<sup>110</sup> it was found that returning a woman to a life of almost certain prostitution in Uganda was unduly harsh and thus could amount to persecution. However the

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<sup>107</sup>OSCE, 2013, p 26.

<sup>108</sup>OSCE, 2013, p 26.

<sup>109</sup>*SZBFQ v Minister for Immigration* [2005] FMCA 197 (Federal Magistrate’s Court of Australia); *Bian v Canada (Minister of Citizenship and Immigration)* (2000) IMM-1640-00 (Federal Court of Canada); *Rantsev v Cyprus and Russia, ECtHR*, (Appl. N. 25965/04, 7 January 2010).

<sup>110</sup>*AA (Uganda v SSHD)*110 [2008] EWCA Civ 579 (England and Wales Court of Appeal).

availability of support and assistance upon return will decrease the likelihood of an asylum applicant falling into prostitution and thus will remove asylum from the protection options. In *AM and BM (Trafficked women)* the Court held:

*We do not consider that there is any parallel in this case with the circumstances of the appellant in AA. In Albania, there is the availability of work other than prostitution for single women. The victim of trafficking, on return to Tirana can access a shelter and is not left on the streets; there will be assistance in finding work and there is some State support. That is very different to the situation of a woman who returns to a country where there is no support from the State and prostitution is the only way in which she can prevent herself becoming destitute.<sup>111</sup>*

In summary, most physical suffering experienced by VHT will amount to persecution. However asylum authorities – particularly in the UK – seem to struggle with the concept that combinations of harm can amount to persecution, even if each harm taken individually does not amount to persecution. Equally, returning a woman to certain prostitution has been held to amount to persecution, but where support and assistance is available for the VHT in the country of origin, the conditions upon return would not amount to persecution.

#### **2.1.1.2. Re-trafficking and reprisals**

Various authorities have held that re-trafficking and reprisals can amount to persecution. UNHCR has stated that re-trafficking “would usually amount to persecution” and reprisals can amount to persecution given they would usually amount to serious breaches of human rights.<sup>112</sup>

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<sup>111</sup>*AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (UK Upper Tribunal, Immigration and Asylum Chamber), para 174.

<sup>112</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 17.



In practice, however, research published by UNHCR suggests that UK courts and asylum authorities rarely grant asylum on the basis of a fear of re-trafficking or reprisals, holding that the risk of re-trafficking is too unlikely.<sup>113</sup> Equally, some judges, notably in the US, have argued that in situations where females surrounding the victims have not been trafficked in the country of origin, return will be safe for the VHT claiming asylum.<sup>114</sup> This is a dangerous argument, as the fact that the VHT was chosen in the first place may indicate she is different from those around her in some way; the safety of other women does not necessarily indicate that she personally would be safe.

It appears that the risk of being re-trafficked is taken more seriously where the victim has been ordered to earn a certain amount of money to secure her freedom ('target earnings'). She will thus be at a greater risk of re-trafficking as she will be expected to make her initial target earnings. Accordingly, the UK Upper Tribunal has held that the terms or circumstances of the victim's initial trafficking must be vigilantly assessed to determine the re-trafficking risk. The Court held:

*It must always be remembered that within Nigeria there are gangs of people traffickers operating who generate enormous sums of money from their activities. The evidence seems to us to be clear that where a victim escapes the clutches of her traffickers before earning the target earnings, then 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>115</sup>*

Similarly, the research published by UNHCR also showed that UK judges rarely granted

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<sup>113</sup>Saito, 2007.

<sup>114</sup>CGRS Case #1034, *Matter of Anon.* A# redacted, 4 February 2004 (New York, NY, Immigration Court).

<sup>115</sup>*PO (Trafficked Women) Nigeria CG* [2009] UKAIT 00046 (UK Immigration Appeal Tribunal), para 192(b).

asylum where VHT claimed to be at risk of reprisals by their traffickers.<sup>116</sup> It appears the judges place heavy reliance on the availability of internal relocation and state protection to escape reprisals from traffickers. This is a highly questionable approach and will be discussed below.

Asylum officials and judges should be aware that reprisals need not be inflicted on the VHT herself, but may be threatened upon the victim's family members. This "could render a fear of persecution on the part of the victim well-founded, even if she or he has not been subjected directly to such reprisals".<sup>117</sup>

In summary, although re-trafficking and reprisals would usually amount to persecution because they would usually amount to a serious breach of human rights, some American and British judges have held that re-trafficking or reprisals are unlikely. They place heavy reliance on the availability of state protection and internal relocation to prevent the harm from occurring. The availability of state protection in practice will be further elaborated upon below.

### **2.1.1.3. Ostracism and discrimination**

The UNHCR Trafficking guidelines specify that "severe ostracism, discrimination or punishment may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process".<sup>118</sup> The cumulative effect mentioned above is particularly relevant when VHT face ostracism and discrimination, as the culmination of various forms of mistreatment may raise the level of harm to that of persecution. This is particularly so where isolation from support networks or family may heighten the VHT's vulnerability. The question essentially becomes: when is ostracism

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<sup>116</sup>Saito, 2007, p 14.

<sup>117</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 17.

<sup>118</sup>Idem, para 18.

and/or discrimination (either alone or in conjunction with other forms of harm) so severe as to amount to persecution?

VHT trafficked for sexual exploitation, may be particularly vulnerable to discrimination and ostracism by many sections of society including family and local authorities.

This is well evidenced by the case of *SZAQK v Minister for Immigration*<sup>119</sup> before the Federal Magistrate's Court of Australia. The court examined the asylum claim of a Nepali woman who was duped by a village elder, trafficked to the border with India, but before being subjected to sexual servitude, she was saved by a police officer. Upon returning to her village she was labelled a prostitute. As a result she was subjected to sexual harassment and was unable to marry because she had been labelled as a prostitute. Her asylum application was refused on the basis that her treatment did not amount to persecution. This was held even though the Court considered many aspects of her personal situation, for example, that she came from an area that is "underdeveloped and the population are uneducated, illiterate, conservative and traditional".<sup>120</sup>

This case demonstrates the vulnerability of women returned from trafficking, as the social stigma attached to prostitutes (however unjustified) can have a real and lasting effect on the woman's ability to find employment, respect, equality and other economic and social prospects. The victim in this case claimed to experience continued stigmatization and harassment despite moving away from her village to Kathmandu where "the rumours that she had become a prostitute clung to her".<sup>121</sup> She also alleged she was the victim of sexual harassment at the hands of owners, management and customers of the places in which she worked even after relocation from her village. Moreover, when she sought assistance from the police she was not helped but merely labelled as a prostitute. In essence, the trafficking

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<sup>119</sup>*SZAQK v Minister for Immigration*, [2004] FMCA 407 (Federal Magistrate's Court of Australia).

<sup>120</sup>*Idem*, para 2.

<sup>121</sup>*Idem*.

experience left her ostracized and harassed, and this abuse continued well after her return from being trafficked.

Equally, in *AM and BM (Trafficked women) Albania CG* the UK Upper Court demonstrated the concept of ‘kurva’ in Albanian society which translates “as meaning “a whore”, which effectively referred not only to someone who had committed adultery or was a prostitute but also someone who had been raped or was considered to be of loose morals”.<sup>122</sup> In this context, sexual contact outside societal norms – regardless of the woman’s consent - brought shame upon the family that could only be removed through death or exile. Despite this information, the Court still held that general societal discrimination resulting from being labelled a ‘kurva’ did not amount to persecution, but only considerable discrimination.

Removing a VHT’s child from her could amount to persecution. The Court in *AM and BM (Trafficked women) Albania CG* held that “where the victim of trafficking has a child, if it is considered that the family’s sense of “honour” meant that a daughter could not live in the family home with an illegitimate child, that could lead to the family separating the child from the victim of trafficking. That too would amount to persecution”.<sup>123</sup>

Whether the treatment amounts to persecution will ultimately depend on the individual facts of the case. As the High Court of Australia has held:

*The feared harm must be of a serious nature that goes beyond simple discrimination ... It is not to be supposed that the Convention required signatory States to give asylum to persons who were persecuted for a Convention reason but who were unlikely to suffer serious infringement of*

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<sup>122</sup>*AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (UK Upper Tribunal, Immigration and Asylum Chamber), para 172.

<sup>123</sup>*Idem*, para 171.

*their rights as human beings. Thus, for the purpose of the Convention, the feared harm will constitute persecution only if it is so oppressive that the individual cannot be expected to tolerate it ...*<sup>124</sup>

In summary, although UNHCR suggests that severe ostracism and discrimination can amount to persecution – particularly when VHT are isolated from support networks and family due to the stigma attached to their trafficking experience – asylum authorities do not generally accept that the harm is sufficiently serious to rise to the level of persecution, preferring instead, to see it as merely discrimination. Ultimately, whether the treatment amounts to persecution will depend on the individual facts of each case.

#### **2.1.1.4. Other forms of persecution: ‘continued persecution’**

A VHT could still be recognized as a refugee where the harm was a one-off past experience unlikely to reoccur. Where an asylum-seeker faces no physical harm, but would risk intolerable psychological harm if returned to her country of origin, the harm may nevertheless constitute persecution.

This can be summarized as follows:

*[I]t may still be appropriate to recognize the individual concerned as a refugee if there are compelling reasons arising out of previous persecution, provided the other interrelated elements of the refugee definition are fulfilled. This would include situations **where the persecution suffered during the trafficking experience, even if past, was particularly atrocious and the individual is experiencing on-going traumatic psychological effects** which would render return to the country*

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<sup>124</sup>*MIMA v Respondents S152/2003* [2004] HCA 18 (High Court of Australia), para 73.

*of origin intolerable. In other words, the impact on the individual of the previous persecution continues*(emphasis added).<sup>125</sup>

As explained above, VHT often face serious physical and psychological harm; sometimes the harm is so severe as to amount to torture.<sup>126</sup> The Helen Bamber Foundation, a British organization that supports survivors of violence, including trafficking, has recently explained the mental effects of the trafficking experience on VHT:

*Interpersonal violence in various physical and psychological forms may be exercised by traffickers for a very long time, sometimes years. It can span the stages of recruitment, the journey, transit, arrival in the destination country, and exploitation of the victim. The psychological bonds of this relationship, and the trauma that can result from it, often endure well beyond the point at which the victim leaves the control of the trafficker*(emphasis added).<sup>127</sup>

The research further emphasises that the mental harm suffered by VHT is usually long-term and on-going, and can significantly worsen over time unless treated with long-term psychological assistance.<sup>128</sup>

It appears that this concept of continued persecution is not widely accepted or understood. The United Kingdom has repeatedly refused to accept asylum on this basis, stating that no risk of persecution is foreseen upon return. This is so even where the trauma suffered was intolerable and particularly brutal or cruel.<sup>129</sup>

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<sup>125</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 16.

<sup>126</sup>OSCE, 2013, p 20.

<sup>127</sup> Idem, p 53.

<sup>128</sup> Idem, p 112.

<sup>129</sup> Saito, 2007, p 16.

In this type of case, it is particularly important to consider the individual psychological make-up of the applicant and the nature of the harm experienced.

The UNHCR Gender Guidelines stress the importance of considering all the relevant circumstances of the case because “it is essential to have both a full picture of the asylum-seeker’s personality, background and personal experiences, as well as an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin”.<sup>130</sup> The guidelines further state that “[m]aking generalisations about women or men is not helpful and in doing so, critical differences, which may be relevant to a particular case, can be overlooked”.<sup>131</sup> Accordingly, one must criticize the overreliance placed on country reports (discussed below) when authorities determine the existence of persecution (or the extent to which the claim is well-founded).

It is doubtful how relevant this basis of protection is in practice. Presumably, the relevant information would be presented to the asylum authority through the victim’s testimony and through a psychological evaluation showing the harm suffered by the applicant was particularly atrocious, and that the on-going traumatic psychological effects would render return to the country of origin intolerable. This is prefaced by the assumption that the individual has access to psychological help and evaluation, legal assistance, and a lawyer who is sufficiently familiar with the asylum system to argue this specific point. Given the limited access to services many asylum-seekers face in their host country (see Chapter V), especially when in administrative detention, this may not be realistic in many cases.

### **2.1.2. Fear of persecution must be well founded**

The requirement in Article 1A(2) that fear of persecution must be ‘well-founded’ means “a

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<sup>130</sup>HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002, para 7.

<sup>131</sup>Idem.

person has either been actually a victim of persecution or can show good reason why he fears persecution”.<sup>132</sup>In considering this explanation, the Commentary notes the objective and subjective requirements of a well-founded fear:

*This statement therefore adopted an objective approach towards the assessment of the alleged past persecution ('has... been actually a victim of persecution'), while at the same time referring to a combined subjective and objective element as to future acts of persecution ('show good reason why he fears persecution').*<sup>133</sup>

The requirement to consider the individual circumstances of the case (explained in Part 2.1.1.3) is particularly important in determining whether the fear is well founded for the purposes of Article 1A(2). The UNHCR Handbook states that “[d]ue to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary”.<sup>134</sup> It is thus a curious finding that refugee status determiners sometimes rely heavily on country reports and reject evidence of direct relevance to the particular VHT before them, as will be shown in the following paragraphs.

Recent research published by UNHCR has shown that the U.K. Immigration Appeal Tribunal often refuses to accept the existence of a risk unless it is specified in a country report.<sup>135</sup> Further, the tribunal has refused to follow expert evidence on the individual circumstances of particular VHT where that information is inconsistent with country reports. One such example is the case of a 27-year-old Romanian woman forced into sexual

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<sup>132</sup>Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/L.2/Rev. 1 (1950), para 1.

Cited in Zimmermann, Dörschner and Machts, 2011, para 174.

<sup>133</sup>Zimmermann, Dörschner and Machts, 2011, para 174.

<sup>134</sup>HCR/IP/4/Eng/REV.1 (UNHCR Handbook) 1979, para 52.

<sup>135</sup>Saito, 2007.



servitude.<sup>136</sup> After escaping from her captors and claiming asylum in the UK, she argued she would be re-trafficked if returned to her country of origin. Her asylum claim was rejected on the basis that the country report indicated that the majority of women trafficked for the purposes of sexual exploitation were between 18 and 24 years old. Yet a senior advisor on anti-trafficking for the Organization for Security and Co-operation in Europe (OSCE) had testified that age did not exclude women from being trafficked. The expert provided other evidence of the likelihood and vulnerability of this particular woman to being re-trafficked. The testimony was ignored and the tribunal held:

*The country information does not support the contention that the Appellant now falls within the profile of the majority of women trafficked for prostitution. The majority of victims are between 18 and 24. She is nearly 28 years of age and although we accept [her] evidence that this does not put her totally outside the danger zone, it is a risk reducing factor.*<sup>137</sup>

Country reports should be one of many sources of information upon which a court or tribunal can rely to determine the extent to which the claim is well-founded. Country reports may be out of date or merely too general to apply to an individual VHT's specific situation. Credible evidence can be gained from a variety of sources, including expert witnesses, and it is imperative that VHTs' protection needs be assessed in light of their individual circumstances.

Finally, it should be recognised that isolation from family and friends (due to the stigma associated in some cultures with being a prostitute, however justified) can increase the vulnerability of the victim, especially to re-trafficking, and this can contribute to rendering

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<sup>136</sup>MP (*Trafficking-Sufficiency of Protection*) Romania [2005] UKIAT 00086 (UK Immigration Appeal Tribunal).

<sup>137</sup>Idem, para 100.

the fear of persecution well founded.

### **2.1.3. Persecution distinguished from criminal acts**

Often, asylum claims by VHT are rejected on the basis that the harm is simply a random, criminal one and not something that could raise a claim for asylum. As has been noted above, whether harm constitutes persecution will depend on the severity of the acts and the circumstances of each individual case. The UNHCR guidelines clearly state, however, that “a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights for the same reasons would also constitute persecution”.<sup>138</sup> Accordingly, international guidance and norms are relevant to determining what harm rises to the level of persecution.

The ‘random criminal act is not persecution’ argument has been used in three odd ways, particular only to asylum claims made by VHT and not to other types of asylum claimants.

Firstly, judges have held that trafficking is a personal, criminal act that does not amount to persecution. In the United States, for example, an Albanian asylum-seeker who was abducted, raped, and threatened that she would be trafficked, was held to have suffered only personal, criminal acts that did not amount to persecution.<sup>139</sup> This argument has not been supported in Canada, however, where the Federal Court held that re-trafficking amounts to persecution.<sup>140</sup> Knight aptly notes that “[m]any acts of persecution also amount to criminal conduct; that reason alone hardly renders them unable to support a claim to asylum. Physical violence, rape and sexual assault, torture, destruction of personal property,

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<sup>138</sup>HCR/IP/4/Eng/REV.1 (UNHCR Handbook) 1979, para 51.

<sup>139</sup>CGRS Case #560, *Matter of S-*, A# redacted, 18 June 2001 (Chicago, IL, Immigration Court).

<sup>140</sup>*Bian v Canada (Minister of Citizenship and Immigration)* (2000) IMM-1640-00 (Federal Court of Canada).

death threats, and other crimes have all been found to support grants of asylum”.<sup>141</sup>

This issue has been discussed by Knight in his review of cases brought before asylum authorities by the *Center for Gender and Refugee Studies* in the United States. He was deeply critical of this ‘random criminal acts are not persecution’ approach when analysing the asylum experience of a minor who refused the request of marriage of a young trafficker (Artan) in Albania.<sup>142</sup> She was then abducted, raped, beaten and threatened with trafficking and eventually claimed asylum in the US:

*The IJ [Immigration Judge] referred to Artan as a “spurned suitor.” Since Artan’s actions “were personal and criminal toward the respondent, the Court finds that the respondent did not demonstrate that it was persecution.”*

***The judge’s ruling that her trafficker was merely a “spurned suitor” motivated by a “personal and criminal” intent is difficult to reconcile with well-established facts known to the U.S. and international anti-trafficking community. In the words of the U.S. government’s leading official on trafficking issues, “[t]raffickers are documented to have used offers of marriage to recruit women for the sex trade and for forced labor.” The Department of Justice’s “Introduction to Human Trafficking” repeatedly makes reference to the use of “sham” and “false” marriages. The IJ stated there was an absence of sufficient objective evidence “that [Artan] was a trafficker, or criminal, or had engaged in this type of activity in the past.” The IJ’s ruling ignored the overwhelming evidence—which was in the record in this case—that such treatment is completely consistent with the manner in which young***

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<sup>141</sup>Knight, 2007, p 8.

<sup>142</sup>CGRS Case #1034, *Matter of Anon.* A# redacted, 4 February 2004 (New York, NY, Immigration Court).

*women are forced into trafficking*(emphasis added).<sup>143</sup>

Accordingly, it is difficult to understand why judges are rejecting asylum claims made by VHT on the basis that the acts are random criminal ones. Firstly, the acts are often consistent with common trafficking ruses, and secondly, no such reasoning is commonly applied to asylum claims made by other types of claimants.

The second peculiar use of the ‘random criminal act is not persecution’ argument is by judges who have held that trafficking is not motivated by a convention ground but is merely a crime directed at society in general. In one case, an Albanian VHT who was abducted and raped at gunpoint was held not to have been targeted for a convention ground, but due to her location at that particular moment.<sup>144</sup> Similarly, another Albanian VHT was said to have been targeted on the basis that criminal violence was rampant in Albania: “[m]ore than likely, these organized criminal gangs harass many people similarly”.<sup>145</sup> The legitimacy of this argument is questionable, given that “[w]here a State fails to take such reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well-founded”.<sup>146</sup> The fact that the crime is widespread should evidence the inability of the state to protect the victim, not that the persecution is so common that it cannot form the basis of an asylum claim.

Thirdly, it has been asserted that as the trafficking was done, in part, for personal enrichment by the traffickers, that it could not amount to persecution. This is refuted by the Trafficking Guidelines which state that “[VHT] are likely to be targeted above all because of their perceived or potential commercial value to the traffickers. This overriding economic motive does not, however, exclude the possibility of Convention-related grounds

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<sup>143</sup>Knight, 2007, p 6.

<sup>144</sup>CGRS Case #2506, *Matter of H-H-*, A# redacted, 29 May 2003 (Chicago, IL, Immigration Court).

<sup>145</sup>CGRS Case #562, *Matter of A-L-*, A# A76-868-511, 3 May 2001 (Chicago, IL, Immigration Court).

<sup>146</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 22.

in the targeting and selection of victims of trafficking”.<sup>147</sup> To find otherwise would be not only illogical but presumably contrary to the Trafficking Protocol itself; the Trafficking Protocol, in Article 14, specifically provides that VHT can claim asylum, even though it is widely recognised that the primary objective of human trafficking is to gain profit. A VHT thus need only prove that the Convention ground is “a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause”.<sup>148</sup>

It is thus important for asylum applicants to vividly describe the harm involved in their trafficking experience, to ensure the judge is cognizant of the seriousness of the harm. The asylum applicant must also stress that on-going and repeated rape, physical abuse or forced labour is a violation of well-established international human rights and thus amounts to persecution. Although this is true for all asylum claims, it is particularly relevant for VHT for whom judges seem to set the barrier higher – as explained in the preceding paragraphs - than other types of asylum-seekers.

## **2.2. Nexus – ‘for reasons of’**

Claims for asylum often fail as judges hold that the fear of being persecuted is not *for reasons of* race, religion, nationality, membership of a particular social group or political opinion. This nexus is particularly difficult for VHT to prove, as there is rarely evidence that they have been, or will be, trafficked for reasons of political opinion, belief, race, nationality, or membership of a social group.

It is crucial for the VHT to adduce as much evidence as possible to prove the nexus. Accordingly, and as noted above, it is regrettable that judges have often refused to accept expert witness testimony as this is an important means of proving the nexus in any particular case. In claims where the persecution is stemming from family members, it is

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<sup>147</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 31.

<sup>148</sup>Idem, para 29.

particularly important to frame the persecution as a transgression of social norms, and not merely as disappointment of a particularly strict parent/family.

Equally, as discussed above, the accumulation of various harms can often raise the level of harm to that of persecution. Adducing evidence that a particular group is marginalized by society (in addition to adducing evidence of the convention ground's relevance to the victim herself) may be vital, as this could help support her claim that she is persecuted for her membership of a particular social group. Firstly, it could show that it is “easy to traffic members of the group with impunity”<sup>149</sup> and second, it could show that “users of trafficked labour would willingly exploit her”.<sup>150</sup>

As direct evidence may be impossible to obtain, VHT should adduce circumstantial evidence to prove the nexus. This is well established in American jurisprudence and is a logical and important evolution of refugee law. The importance of circumstantial evidence can be explained through the case of *Garcia-Martinez v Ashcroft*<sup>151</sup> in which the applicant was a young Guatemalan woman claiming asylum in the United States. She had been gang raped by members of the Guatemalan military when they entered her house and beat her father. She fled to the United States fearing continued rape and other forms of persecution by the military in her town, as “someone in the village was raped by soldiers “[a]bout every 8 to 15 days””.<sup>152</sup> The immigration judge rejected her asylum claim, *inter alia*, on the basis that the soldiers did not explicitly state that they were raping her on account of a convention ground. The United States Court of Appeals Ninth Circuit rejected this holding on the following basis:

*Because it is so difficult to prove motives with any precision ... an applicant does not have to provide direct evidence that [her] persecutors*

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<sup>149</sup>World Organization for Human Rights USA, 2011, p 47.

<sup>150</sup>Idem.

<sup>151</sup>*Garcia-Martinez v Ashcroft* 371 F.3d 1066 (2004) (US Court of Appeals, Ninth Circuit).

<sup>152</sup>Idem, para 4.

*were motivated by one of the protected grounds; instead, compelling circumstantial evidence is sufficient.*<sup>153</sup>

It further held:

*The IJ treated Garcia's personal experiences as if they had occurred in a vacuum, focusing on [her rape] in isolation, rather than examining the events in context.*<sup>154</sup>

Accordingly, the Federal Court rejected the holding that the applicant's rape was a random criminal act. It found that the circumstantial evidence and the applicant's credible testimony showed her rape was part of a systematic attack by the military against her village.

Consequently, a VHT does not need to prove her persecutors explicitly stated they were harming her on the basis of a convention ground. Instead, it should be sufficient to prove the persecution was (or will be) for reasons of a convention ground by drawing together all the circumstances surrounding the events, including the social, political and religious contexts.

As explained above, a VHT need only prove that the Convention ground is "a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause".<sup>155</sup> It is questionable whether this is widely known by immigration judges or officials. An Albanian girl was refused asylum on the basis that the nexus failed. Her father was a member of the Albanian Democratic Party and after he was arrested and beaten for his participation in an anti-government demonstration, his daughter was targeted

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<sup>153</sup>*Garcia-Martinez v Ashcroft* 371 F.3d 1066 (2004) (US Court of Appeals, Ninth Circuit), para 29.

<sup>154</sup>*Idem*, para 28.

<sup>155</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 29.

by traffickers. Although she escaped before being forced into prostitution, she argued she was targeted due to her father's political affiliations. The asylum claim was rejected on the basis that she could not say "with any degree of certainty" why she was targeted:

*The Court is left with no persuasive evidence that the kidnapping was motivated for any particular reason. It could have been for purposes of putting her into prostitution. It could have been for purposes of attacking her father for his political activities. It could have been for purposes of ransom. It could have been for purposes of sexual gratification by the individuals who were kidnapping her. It could have been for any one of a number of reasons".*<sup>156</sup>

Similarly, in Australia, the Refugee Review Tribunal has applied a higher standard of causation. The nexus test applied has been to ask whether the convention ground constitutes "at least the essential and significant motivation for the persecution feared".<sup>157</sup>

Accordingly, although UNHCR suggests that the Convention ground need only be a relevant factor contributing to the persecution, it appears that in practice some jurisdictions are requiring asylum-seekers to prove the nexus through a higher standard of causation.

Finally, the nexus can be established in two ways. Firstly, the persecution may be committed for reasons of the convention ground. Secondly, the persecution may not be committed on account of a convention ground, but the state's inability or unwillingness to protect the VHT may stem from a convention ground (for example, the state may be unwilling to protect a particular race in a time of inter-ethnic conflict). In both situations the nexus can be validly established.

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<sup>156</sup>CGRS Case #4486, *Matter of P-C-*, A# redacted, 8 November 2002 (New York, NY, Immigration Court).

<sup>157</sup>Dorevitch and Foster, 2008, p 44.



### 2.3. Unavailability of State protection

To satisfy Article 1A(2), the asylum authorities will consider whether the individual is unable or unwilling, owing to a well-founded fear of persecution, to avail herself of the protection of her country of origin. Accordingly, the fear of persecution may be well-founded when inflicted by either state or non-state actors. In *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (the Commentary) it is explained that:

*Four different situations may be distinguished: persecution is **conducted** by the State; persecution is **condoned** by the State; persecution is **tolerated** by the State; or, finally, persecution is neither condoned nor tolerated by the State concerned, but nevertheless present because the State either **refuses or is unable** to offer adequate protection (emphasis added).<sup>158</sup>*

In all four situations, state protection is unavailable, satisfying Article 1A(2) that the individual shows that she will not be protected in her own state.

#### 2.3.1. Test to determine a state's ability and willingness to protect

Gallagher has explained that the test for determining whether the state is unable or unwilling to provide protection is an objective one, and a range of factors must be considered – “most importantly, whether mechanisms are being effectively implemented”.<sup>159</sup> As the UNHCR Trafficking Guidelines explain:

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<sup>158</sup>Zimmermann, Dörschner and Machts, 2011, para 266.

<sup>159</sup>Gallagher, 2010, p 202.

*Where a State fails to take such reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well-founded (emphasis added).<sup>160</sup>*

The recent developments in international law can assist in determining whether a state has taken such ‘reasonable steps’. Whether the authorities in the country of origin can sufficiently protect the VHT “will depend on whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking, as well as to protect and assist the victims on whether these mechanisms are effectively implemented in practice”.<sup>161</sup>

To determine the issue, asylum authorities should examine how Part II of the Trafficking Protocol is being implemented in the state – Part II requires states to take steps to protect VHT.<sup>162</sup> The better the protective mechanisms have been implemented, the less likely the state will be found to be unwilling or unable to protect the victim. However UNHCR points out that the “protection measures set out in Part II of the Trafficking Protocol are not exhaustive and should be read in light of other relevant binding and non-binding human rights instruments and guidelines”.<sup>163</sup>

Gallagher has further explained that:

*In all cases, assessment of capacity and willingness to protect should look beyond formal measures such as the passing of anti-trafficking law or the*

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<sup>160</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 23.

<sup>161</sup>Idem, para 22.

<sup>162</sup> Idem; UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Part II.

<sup>163</sup> HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 22: the document then directs the reader, in its footnote 23, to other international instruments that require states to protect VHT.

*development of a national action plan to deal with trafficking. It would be necessary to consider whether the identified source of protection is effective or being effectively implemented, **and** whether the individuals concerned are, in fact, able to access the protections provided.*<sup>164</sup>

The protection afforded by the state must thus be effective both in theory and in practice.

### **2.3.2. State as persecutor**

Persecution will easily fall within the meaning of Article 1A(2) where “the agents of persecution are organs of the State or where the acts can be attributed to the State according to general rules of State responsibility”.<sup>165</sup> In the case of human trafficking, a useful example is where police or border guards are involved in the trafficking. Recent material published by OSCE on this very issue has explained:

*[Human trafficking] is mostly committed by private persons; nevertheless trafficking in human beings can also be committed by public officials when acting in their public capacity or facilitated by corrupt public officials. There is rather little knowledge about the influence of corruption in trafficking in human beings, but it is clear that there is a strong correlation between corruption and trafficking in human beings. Corrupt public officials may assist in organizing travel documents, in enabling irregular entry or exit out of a country, but at the same time they can be involved in managing a network of trafficking.*<sup>166</sup>

Thus the first question to ask is whether the conduct is attributable to the state. If it is not

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<sup>164</sup>Gallagher, 2010, p 202.

<sup>165</sup>Zimmermann, Dörschner and Machts, 2011, para 267.

<sup>166</sup>OSCE, 2013, p 20.

attributable to the state, it must then be asked whether the state is able and willing to protect the individual from the persecution by non-state actors. If the state is not able or willing to protect the individual, the persecution may come under Article 1A(2).

### 2.3.3. Non-state actor as persecutor

The issue of persecution by non-state actors is especially pertinent in the trafficking context. Harm, sufficiently serious to amount to persecution, can be inflicted by many non-state actors including traffickers or the community (when referring to ostracism or discrimination). In Australia, Canada, the UK and US, non-state actors recognized as persecutors of VHT have included parents,<sup>167</sup> a brothel owner,<sup>168</sup> an organized crime group,<sup>169</sup> and men who bought girls from their families.<sup>170</sup>

Determining whether the source of persecution is one that the government is unable or unwilling to control is a challenging task. Of course, criminal activity exists in all countries and not all of these criminals are persecutors for the purposes of the Refugee Convention.<sup>171</sup> The Commentary explains that in these situations “the reaction to the State to such incidents is decisive”.<sup>172</sup> As explained above, the protection must be effective in theory and law, as well as in practice.

It is important to note that VHT need not have actually sought the protection of their state to demonstrate it was unwilling or unable to protect her. The Canadian Supreme Court held that:

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<sup>167</sup>*Decision of the Immigration Judge*, U.S. Immigration Court, Chicago, Illinois, 13 March 1998, and CRDD VA0-02635, 22 March 2001.

<sup>168</sup>*Decision N03/47757* [2004] RRTA 355 (Refugee Review Tribunal of Australia).

<sup>169</sup>*Decision V95-02904* (1997) (Convention Refugee Determination Division of the Immigration and Refugee Board of Canada).

<sup>170</sup>*VD (Trafficking) Albania CG* [2004] UKIAT 00115 (UK Immigration Appeal Tribunal).

<sup>171</sup>Javaherian, 2012, p 431.

<sup>172</sup>Zimmermann, Dörschner and Machts, 2011, para 265.

*It would seem to defeat the purpose of international protection if a claimant were required to risk his or her life seeking ineffective protection of a State, merely to demonstrate that ineffectiveness.*<sup>173</sup>

This issue is core to the Refugee Convention's functioning – i.e. it only applies where a VHT cannot be protected in her home state – accordingly the burden of proof is on the applicant where there is no obvious failure of state protection.<sup>174</sup>

#### **2.3.4. VHT-specific considerations in determining availability of state protection**

In determining whether state protection is available, asylum authorities must be sensitive to certain VHT specific issues.

Firstly, female VHT might not report their experiences to the police in their country of origin – but this is not necessarily a reason to disbelieve their story. As noted by Saito “[i]t is hard to imagine that a woman with a severe psychological trauma who fears being re-trafficked to keep her quiet, would go to the state authorities to complain about her armed abductors”.<sup>175</sup> This is especially true where the state authorities are involved in the trafficking ring. Equally, VHT might not reveal their experiences to anyone in their home country, let alone the police. Refugee authorities might not be sensitive to the fact that “by trying to prosecute [traffickers] in a small conservative community, [the VHT] could face serious discrimination and social stigma for having been a prostitute”.<sup>176</sup>

Secondly, female VHT might not report their experiences to authorities in the host country,

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<sup>173</sup>*Canada (Attorney General) v Ward* [1993] 2 SCR 689 (Supreme Court of Canada), para 49.

<sup>174</sup>Crawley, Heaven. *Refugees and Gender: Law and Process*, Jordan Publishing Limited, Bristol, 2001, 3.4.5.

<sup>175</sup>Saito, 2007, p 16.

<sup>176</sup>*Idem*.

i.e. the country where they seek asylum. Traffickers frequently convince their victims that if they go to the authorities, the authorities will punish them if, for example the VHT were present on the territory without the correct visa/travel documents.<sup>177</sup> Equally, it may be physically impossible for the woman to go to the police in the host state. As the US Department of Justice has explained about an asylum claim made by VHT in the US:

*Evidence showed that the defendants intimidated and controlled their victims by threatening to beat them and kill their loved ones in Guatemala if they tried to escape. Some defendants also used witchdoctors to threaten the girls that a curse would be placed on them and their families if they tried to escape. At least two of the dependants further restrained the victims by locking them in at night and blocking windows and doors. The defendants also used manipulation of debts, verbal abuse and psychological manipulation to reinforce their control over the victims. The scheme included strict controls over the victims' work schedules and ominous comments about consequences that befell the families of other victims who attempted to escape.*<sup>178</sup>

It might thus be unrealistic or unreasonable to expect a VHT to have sought the help of police in the host state; failure to seek help from local police should not necessarily reflect upon her credibility.

Thirdly, asylum authorities appear to place heavy reliance on the availability of state protection or internal relocation to avoid reprisals from traffickers. Saito argues there is generally a large gap between the “mounting efforts by states to tackle trafficking and the

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<sup>177</sup>Christensen, 2011, p 1.

<sup>178</sup>United States Department of Justice, ‘Five Sentenced for Forcing Guatemalan Girls and Women to Work as Prostitutes in Los Angeles, press release, 18 August 2009, available at <http://www.justice.gov/opa/pr/2009/August/09-crt-812.html> (last accessed on 28 June 2013).

actual effectiveness of such efforts<sup>179</sup> – therefore while in theory the state may be doing enough to satisfy the asylum authority that the VHT will be protected upon return, in practice no such protection is available. One must also question the true availability of internal relocation for VHT. For example, it is occasionally held that a VHT can be returned to her country of origin as she can relocate internally to another city where she will be safe. The practical ramifications of this holding are rarely discussed however, and it may be difficult for a young, traumatised, single woman, to relocate to another city alone, especially in a country where family ties and family protection are important.<sup>180</sup> Presumably this is where the national trafficking protections are expected to take over from the protection afforded in the refugee system.

## 2.4 Conclusion

This chapter has analysed how judiciaries are interpreting Article 1A(2) of the Refugee Convention as applied to VHT. The relevant elements of Article 1A(2) were analysed, notably: persecution, the extent to which the claim is well-founded, the nexus requirement and the availability of state protection.

It was shown that many forms of harm suffered by VHT can amount to persecution, and whether such harm will amount to persecution will depend on the individual facts of each case. The types of harm accepted as constituting persecution are physical and mental suffering, re-trafficking and reprisals, ostracisms and discrimination, and severe mental harm termed ‘continued persecution’.

Most physical suffering experienced by VHT will amount to persecution, however some asylum authorities struggle with the concept that combinations of harm can amount to persecution. Although re-trafficking and reprisals can amount to persecution, some

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<sup>179</sup>Saito, 2007, p 18.

<sup>180</sup>Bennet, 2008, p 26.

jurisdictions consider the risk of re-trafficking or reprisals unlikely, and place heavy reliance on the availability of state protection and internal relocation, although the practical ramifications of this holding are rarely discussed, and neither may be an available remedy in practice.

Although severe ostracism and discrimination can amount to persecution, asylum authorities often see the harm as mere discrimination and do not accept that the harm is sufficiently serious to rise to the level of persecution. Equally, UNHCR has suggested that where an asylum-seeker faces no physical harm, but would risk intolerable psychological harm if returned to her country of origin, the harm may nevertheless constitute persecution. However, it is doubtful whether this concept is accepted by asylum authorities in practice.

It has been argued – and accepted by many judges – that human trafficking and related activities are merely criminal acts that do not amount to persecution. This argument has been criticised by some academics because just because acts are criminal does not mean they do not also amount to persecution. Furthermore, this argument is contrary to established asylum jurisprudence, and the criminal acts are often indicative of trafficking ruses, and suggest a protection need. Thirdly, the argument that trafficking is done for personal enrichment and thus cannot amount to persecution has been rejected.

Proving the nexus, i.e. that a VHT has been trafficked for reasons of political opinion, religious belief, race, nationality, or membership of a social group is particularly difficult; circumstantial evidence should be adduced. Although UNHCR suggests that the convention ground need only be a ‘relevant factor’ contributing to the persecution, it appears that some jurisdictions require asylum-seekers to prove the nexus through a higher standard of causation.

Finally, for a VHT to claim asylum she must be unable or unwilling, owing to a well-founded fear of persecution, to avail herself of the protection of her country of origin.



Protection will not be available where the state is conducting, condoning, or tolerating the trafficking; protection afforded by the state must be effective both in theory and in practice. In determining whether state protection is available, asylum authorities must be sensitive to certain VHT specific issues. Female VHT might not report their experiences to the police in their country of origin, or their country of asylum, but this should not necessarily indicate a lack of credibility on the part of the VHT.

### **3. The most relevant ground under Article 1A(2): Particular Social Group**

The interpretation of ‘Particular Social Group’ (PSG) applicable to female VHT will be analysed in this chapter. There is no general consensus as to when women, or certain subsets of women, can constitute a PSG under the Refugee Convention; VHT can thus only draft their applications in the hope that they will match the interpretation applied by the particular immigration authority.

It is vital that a consensus on the definition of PSG for female VHT be found. The valid asylum-seekers, who are fleeing persecution, should not have to rely on undefined and capricious decision-making – the asylum process should be made clear, fair, and consistent. Refugee authorities thus have two basic solutions: specify a tight PSG definition that clearly indicates which groups constitute a PSG for the purposes of Article 1A(2), or broaden the definition to allow ‘women’ generally as a PSG. A third interpretive solution will also be proposed at the end of this chapter, followed by a fourth legislative solution.

This chapter thus aims to shed light on the differing interpretations of the Refugee Convention in the hope that the various approaches may eventually be reconciled, to ensure for fairer and more consistent asylum procedures for VHT with international protection needs.

#### **3.1. Article 1A(2)’s application to VHT**

Being a victim of human trafficking is not enough to entitle someone to refugee status. To be eligible for refugee status, VHT must prove they have a well-founded fear of persecution for reasons of one of the grounds enumerated in 1A(2) of the Refugee Convention. As will be demonstrated in the following chapters, the most likely ground upon which VHT could claim asylum is on account of their membership of a PSG. The most commonly claimed

groups are ‘victims of human trafficking’ and ‘females’ or ‘females from a given country and/or of a particular age’. It is encouraged that VHT suggest multiple social groups to the asylum authority because this can increase the chance of a judge accepting at least one.<sup>181</sup>

A PSG is not defined in the Refugee Convention and many jurisdictions lack a clear definition. Consequently, VHT are all too often being returned to their country of origin, and ultimately, their place of persecution, as they do not succeed in linking their persecution to a convention ground.

A review of the American jurisprudence on when victims of human trafficking can fall into a PSG is worrying. Research published by Thomson West on judges’ definitions of PSG in the context of VHT, shows that judges believed the women were being persecuted and that the “women’s stories of feared and actual abduction, rape and trafficking are found credible by the adjudicators”.<sup>182</sup> The principal reason for rejecting the asylum claims was an inability to prove the women belonged to a PSG. This finding has significant negative implications for the success of refugee law in its protection of VHT.

It is possible, however, that this shortcoming does not arise from the Refugee Convention itself, but from a narrow interpretation of ‘particular social group’ being applied to VHT.

### **3.2. Defining ‘Particular Social Group’**

UNHCR is the international body responsible for defining PSG. It provides guidance through its *Guidelines on International Protection: “Membership of a particular social group”* and other related Guidelines.<sup>183</sup>

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<sup>181</sup>World Organization for Human Rights USA, 2011, p 28.

<sup>182</sup>Knight, 2007, p 6.

<sup>183</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006; HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002; HCR/GIP/02/02 (UNHCR PSG Guidelines), 7 May 2002.

*A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.*<sup>184</sup>

This definition can thus be broken down into two complementary approaches - the *immutability approach* and the *social perception approach*; both are relevant to VHT.

The *immutability approach* “examines whether a group is united by an immutable characteristic or by a characteristic that it is so fundamental to human dignity that a person should not be compelled to forsake it”.<sup>185</sup> This approach also includes groups united by “a past temporary or voluntary status that is unchangeable because of its historical permanence”.<sup>186</sup>

The *social perception approach* asks whether a group “shares a common characteristic which makes them a cognizable group or sets them apart from society at large”.<sup>187</sup> The *social perception approach* can be well demonstrated by members of a particular profession – occupation “is neither unchangeable nor a fundamental aspect of human dignity” but all members of a particular profession “might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart”.<sup>188</sup>

A particular social group cannot be defined merely by the fact that it suffered persecution.

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<sup>184</sup>HCR/GIP/02/02 (UNHCR PSG Guidelines), 7 May 2002, para 11.

<sup>185</sup>Idem, para 6.

<sup>186</sup>Idem.

<sup>187</sup>Idem, para 7.

<sup>188</sup>Idem, para 13.

Logically, “motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution”.<sup>189</sup> The exception to this rule is VHT who fear future persecution in the form of discrimination, reprisals, re-trafficking or ostracism and will be discussed below.

### **3.3. Gender based asylum claims: Particular Social Group**

As noted in Chapter I, human trafficking overwhelmingly affects women, who due to their vulnerability when migrating, are more likely than men to be forced into sexual servitude. Refugee law, if it were to fully protect victims of human trafficking, must develop to reflect current protection needs. Yet this gender-based persecution is not being reflected in the current case law on victims of human trafficking who claim asylum. All too often, women VHT are being refused asylum on the basis that they do not fall into a particular social group. It would be appropriate that gender-based persecution in the form of human trafficking be reflected in a gender sensitive application of the Refugee Convention. Women, or certain subsets of women, can be – and should be recognised as being - a particular social group for the purposes of Article 1A(2) of the Refugee Convention.

One author has noted that this area of refugee law consists of “a plethora of definitions, tests, and factors for establishing a social group, [creating] an uncertain backdrop for applicants with gender-based claims”.<sup>190</sup>

Many VHT have tried to claim asylum on the basis that their gender (plus some other immutable characteristic such as age, tribal affiliation, nationality or region) qualifies them as a PSG. Women are an “example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men”<sup>191</sup> and

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<sup>189</sup>*Sarkisian v Attorney General* 322 F. App'x 136 (2009) (US Court of Appeals, Third Circuit).

<sup>190</sup>Martin, 2011, p 43.

<sup>191</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 14.

thus logically could constitute a PSG under Article 1A(2).

The below table shows some situations in which certain subsets of women have been accepted as constituting a PSG in American jurisprudence:

**TABLE A: Particular social groups recognised in American jurisprudence**

<b>Victim's nationality</b>	<b>Particular Social Group accepted</b>
Somalia <sup>192</sup>	<i>Somali females</i>
Albania <sup>193</sup>	<i>Single women living alone in north-east Albania without the support of male relatives</i>
Thailand <sup>194</sup>	<i>A member of an ethnic group in Thailand, who has been forced into indentured servitude and deprived of the right of citizenship</i>
Honduras <sup>195</sup>	<i>Children who have been abandoned by their parents and who have not received surrogate form of protection</i>
China <sup>196</sup>	<i>Women in China who oppose coerced involvement in government sanctioned prostitution</i>
Togo <sup>197</sup>	<i>Young women who are members of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice</i>

However the above cases demonstrate the exception rather than the rule where women have

<sup>192</sup>*Hassan v Gonzales*, 484 F.App'x 513 (2007) (US Court of Appeals, Third Circuit).

<sup>193</sup>CGRS Case #1445.Cited in Knight, 2007, p 11.

<sup>194</sup>CGRS Case #560, *Matter of S-*, A# redacted, 18 June 2001 (Chicago, IL, Immigration Court). Cited in Knight, 2007, p 13.

<sup>195</sup> CGRS Case #216, *Matter of F-L-*, A# redacted, 24 July 1998 (Anchorage, AK, Immigration Court). Cited in Knight, 2007, p 13.

<sup>196</sup> CGRS Case #364, *Matter of J-M-*, A# redacted, 3 December 1996 (San Pedro, CA, Immigration Court). Cited in Knight, 2007, p 11.

<sup>197</sup>*In re Kasinga* 21 I. & N. Dec. 357 (1996) (US Board of Immigration Appeals).

been recognized as a PSG. The following table shows the categories of women that have been rejected as belonging to a PSG:

**TABLE B: Particular social groups not recognised in American jurisprudence**

<b>Victim's country of origin</b>	<b>Particular Social Group rejected</b>
Somalia <sup>198</sup>	<i>Females (but only in some circumstances)</i>
Guatemala <sup>199</sup>	<i>All women in Guatemala</i>
El Salvador <sup>200</sup>	<i>Women from El Salvador</i>
Albania <sup>201</sup>	<i>Women in Albania</i>
Albania <sup>202</sup>	<i>Young, unmarried Albanian women</i>
Albania <sup>203</sup>	<i>Young women who have been approached or threatened with kidnapping, forced [prostitution] or killing by human traffickers</i>
Albania <sup>204</sup>	<i>Young... attractive Albanian women who are forced into prostitution</i>
Thailand <sup>205</sup>	<i>Sex slaves from foreign countries who are brought to the US under false pretences and forced at the threat of death and destruction to participate in sexual activities</i>  <i>In effect, trafficked sex slaves</i>

<sup>198</sup> *Mohammed v Gonzales*, 400 F.3d 785 (9<sup>th</sup> Circuit, 2005) (US Court of Appeals, Ninth Circuit).

<sup>199</sup> *Perdomo v Holder* 611 F.3d 662 (2010) (US Court of Appeals, Ninth Circuit).

<sup>200</sup> *Gomez v INS* 947 F.2d 660 (1991) (US Court of Appeals, Second Circuit).

<sup>201</sup> CGRS Case #4486, *Matter of P-C-*, A# redacted, 8 November 2002 (New York, NY, Immigration Court). Cited in Knight, 2007, p 11.

<sup>202</sup> *Gjura v Holder* 695 F. 3d 223 (2012) (US Court of Appeals, Second Circuit).

<sup>203</sup> *Kuci v Attorney General* 299 F. App'x 168 (2008) (US Court of Appeals Third Circuit).

<sup>204</sup> *Rreshpja v Gonzales*, 420 F.3d 551 (2006) (US Court of Appeals, Sixth Circuit).

<sup>205</sup> CGRS Case #2506, *Matter of H-H-*, A# redacted, 29 May 2003 (Chicago, IL, Immigration Court). Cited in Knight, 2007, p 7.

Albania <sup>206</sup>	<i>Young Albanian women who will not voluntarily enter a life of prostitution</i>
Albania <sup>207</sup>	<i>Young women in Albania who have no protection from criminal gangs who would kidnap them and force them into protection</i>
Albania <sup>208</sup>	<i>Women and young girls who are sold for prostitution by criminals in Albania</i>

### 3.3.1 Rationale behind the refusals to accept these social groups

The rejection of the social groups asserted in Table B is puzzling. Pursuant to UNHCR’s definition of a PSG - “a group of persons who share a common characteristic [which] will often be one which is innate, unchangeable” – it must be conceivable that sex or gender can form the basis of a PSG.<sup>209</sup> This is confirmed by the UNHCR Gender Guidelines which specify that “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men”.<sup>210</sup> Equally, the narrower definitions in Table B fit the definition of PSG declared by UNHCR yet they were also rejected.

Accordingly, it must be assumed that policy considerations play a factor in the rejection of these decisions. Firstly, judges may fear they are misapplying the Refugee Convention when interpreting PSG to include sex or gender, as the Refugee Convention does not include it as an independent ground under Article 1A(2). Secondly, asylum authorities may

<sup>206</sup> CGRS Case #3695, *Matter of P-H-*, A# redacted, 4 March 2004 (Houston, TX, Immigration Court). Cited in Knight, 2007, p 10.

<sup>207</sup> CGRS Case #562, *Matter of A-L-*, A# A76-868-511, 3 May 2001 (Chicago, IL, Immigration Court). Cited in Knight, 2007, p 10.

<sup>208</sup> CGRS Case #2928, *Matter of V-R-*, A# redacted, 24 March 2003 (Detroit, MI, Immigration Court). Cited in Knight, 2007, p 11.

<sup>209</sup> HCR/GIP/02/02 (UNHCR PSG Guidelines), 7 May 2002, para 11.

<sup>210</sup> HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002, para 30.



fear flooding the asylum system with women asylum-seekers. These two reasons will be discussed in the following sections.

Regardless of the rationale behind limiting the PSG in these ways, it is vital that a consensus on the definition of a PSG for women VHT be found to ensure for fairer and more consistent asylum procedures for VHT with international protection needs.

### **3.3.2 Fear of misapplying the Refugee Convention and the ‘living instrument’ debate**

It has been said that the Refugee Convention does not extend to claimants fearing persecution based on sex or gender, because neither ground is specifically mentioned in Article 1A(2). Protection under the Refugee Convention is limited to people who fear persecution on account of their race, religion, nationality, political opinion or membership of a particular social group. This can be evidenced through the rejection of the following draft proposal for Article 1A(2) by states. It was proposed that Article 1A(2) be drafted broadly to protect:

*a) persons who are not nationals of any State; and b) persons who, being outside the territory of the State of which they are nationals, do not enjoy the protection of the State either because that State refuses them protection or because for good reasons (such as, for example, serious apprehension based on reasonable ground, of political, racial or religious persecution in the event of their going to that State) they do not desire the protection of that State.*

The broad wording of this paragraph suggests that the grounds of political, racial or religious persecution are just examples of people needing protection, but that the

convention could also apply for other reasons of persecution too (such as sex or gender). Yet states chose to reject this definition and chose a more limited definition of Article 1A(2) restricting protection to those with a well-founded fear of being persecuted on the basis of race, religion, nationality, political opinion, or membership of a PSG. The Commentary aptly summarises the argument against interpreting Article 1A(2) broadly:

*[a]lthough he [Lord Steyn] observed two fundamental principles of interpretation – that the 1951 Convention ‘is a living instrument and must be interpreted as such’, and that it must ‘be interpreted in accordance with good faith’ – he concurred with Lord Bingham that these principles were ‘not capable of filling gaps which were designedly left in the protective scope of the Refugee Convention.’<sup>211</sup>*

Accordingly, it could be argued that the drafters specifically intended for ‘sex’ or ‘gender’ to be excluded from Article 1A(2)’s scope because sex was not specifically included in the grounds of Article 1A(2), but nor was the refugee definition drafted as broadly as the UK proposal.

On the other hand, the object and purpose of the Refugee Convention is to provide protection “by creating an obligation for the contracting parties to ensure that individuals within their jurisdiction are not turned back to countries where they would be exposed to the risk of persecution”.<sup>212</sup> As explained in the Commentary, “placing too great a reliance on the original intent of the drafters may lead to the ‘petrification’ of a particular interpretation that fails to take into account subsequent developments in international law (as required by [Article 31(3)] VCLT)”.<sup>213</sup>

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<sup>211</sup>Zimmermann, Dörschner and Machts, 2011, para 95.

<sup>212</sup>Idem, para 182.

<sup>213</sup>Zimmermann, Dörschner and Machts, 2011, para 83 (referring to: United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331).

The British House of Lords has succinctly explained that the Refugee Convention is a living instrument, “in the sense that while its meaning does not change over time its application will”<sup>214</sup> and UNHCR has explained that the term ‘particular social group’ “should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms”.<sup>215</sup> The High Court of Australia has explained that the Refugee Convention must adapt to the situations of refugee displacement as they evolve and that the meaning of ‘particular social group’ “is not a static one”.<sup>216</sup> Other international courts have made similar statements.<sup>217</sup> Not only have courts stated that the meaning of ‘particular social group’ is not a static one, but they – and the Convention drafters - have held that ‘persecution’ was intended to be expanded to include future forms of harm.<sup>218</sup> One must conclude that this is further evidence that PSG is to be interpreted in light of changing trends: it is the only category open to wide interpretation and development, thus the meaning of PSG must be flexible to reflect the changing needs of groups facing persecution, if courts truly intend that ‘persecution’ is intended to include future forms of harm.

The Commentary further explains that states often look to international human rights law to help them determine the Refugee Convention’s applicability.<sup>219</sup> The Refugee Convention is a living instrument and its Introductory Note claims it to be “supplemented ... via the progressive development of international human rights law”.<sup>220</sup> Equally, the Supreme Court of Canada has simply stated that the “essential question is whether the persecution alleged

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<sup>214</sup>*R v Uxbridge Magistrate’s Court, ex parte Adimi* [2001] QB 667 (UK High Court, England and Wales), para 688.

<sup>215</sup>HCR/GIP/02/02 (UNHCR PSG Guidelines), 7 May 2002, para 117.

<sup>216</sup>*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (High Court of Australia), para 294. Cited in Zimmermann, Dörschner and Machts, 2011, para 85.

<sup>217</sup>*Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (Supreme Court of Canada), para 87; *R v Immigration Appeal Tribunal and another, ex parte Shah* [1999] 2 AC 629 (UK House of Lords), para 657.

<sup>218</sup>Zimmermann, Dörschner and Machts, 2011, para 237.

<sup>219</sup>*Idem*, para 86.

<sup>220</sup>UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, Introductory Note.

by the claimant threatens his or her basic human rights in a fundamental way”.<sup>221</sup> As explained above, VHT face serious threats to their human rights.

### **3.3.2.1 The changing protection needs of women**

The Refugee Convention is a post World War II product, and its drafters had specific people in mind when considering protection needs – these people were survivors of war rather than victims of human trafficking. At the time the Refugee Convention was drafted, women were not generally persecuted because they were women, but because, for example, they were Jews or members of other persecuted groups. However, times have changed and protection needs have changed.

International asylum courts are increasingly recognising the protection needs of some gender-based claims. For example, asylum based on a fear of female genital mutilation has been accepted in many jurisdictions.<sup>222</sup> This reflects the broader framework of advancements in international human rights law where the international community has taken significant steps to protect women through the development of various international instruments.<sup>223</sup> When the Refugee Convention was drafted, there was no international human rights framework obliging states to protect VHT, as exists today.

It is now internationally recognised that human trafficking and protection of women are serious issues and it therefore follows that the Refugee Convention should be interpreted to protect VHT from gender-based persecution. If there is perceived or actual unwillingness to

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<sup>221</sup>*Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593 (Supreme Court of Canada), para 635.

<sup>222</sup>*In re Kasinga* 21 I. & N. Dec. 357 (1996) (US Board of Immigration Appeals); *Bah v Mukasey* 29 F.3d 99 (2008) (US Court of Appeals, Second Circuit); and see generally Edwards, 2003.

<sup>223</sup>UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104; United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995.

interpret the Convention in this way, then changes should be made to clarify obligations. Although the Refugee Convention as it stands could be interpreted to reflect the protection needs of VHT, and provide safety, protection and certainty for VHT claiming asylum.

The following pages will explore these two solutions: states should either interpret Article 1A(2) broadly and allow ‘women’ to qualify as a ‘particular social group’, or states could interpret it narrowly but better define the accepted subcategories of women who would qualify as a PSG. A third interpretive solution and a fourth legislative solution will also be proposed.

### **3.3.3 Solution one: ‘women’ as a particular social group**

The UNHCR Guidelines on Human Trafficking clearly explain that “women may constitute a particular social group”.<sup>224</sup> However, as noted above, because the Refugee Convention does not provide a gender ground in Article 1A(2), refugee authorities have often held that women who are persecuted solely for reason of their sex cannot be refugees for the purposes of the Refugee Convention.

The UNHCR Gender Guidelines specify that “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men”.<sup>225</sup>

For example, the United States Court of Appeals for the Ninth Circuit in a seminal 2010 judgment held that females could potentially constitute a PSG for the purposes of the Refugee Convention. Although the Court was limited jurisdictionally and thus could not confirm that women are a particular social group, it did refer the case back to the Board of Immigration Appeals on the basis that it erred in not considering women as a potential

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<sup>224</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 38.

<sup>225</sup>HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002, para 30.

social group (which then accepted the Court of Appeal’s view, and further remanded the decision back to the Immigration Judge to determine the social group issue, and whether the applicant had shown she was persecuted on account of her membership of a PSG).<sup>226</sup> The Court referred to the UNHCR Gender Guidelines and confirmed that gender is an “innate characteristic that is fundamental to one’s identity” and that “women may constitute a particular social group under certain circumstances based on the common characteristic of sex”.<sup>227</sup> Unfortunately, this holding is not binding on other Circuits, and is of limited value in other jurisdictions.

It is thus possible to interpret Article 1A(2) sufficiently broadly to include ‘women’ as a PSG. This has been accepted in some jurisdictions including some Australian,<sup>228</sup> American,<sup>229</sup> Canadian<sup>230</sup> and British courts,<sup>231</sup> however resistance remains, and the acceptance that ‘women’ can constitute a particular social group remains a controversial and refuted argument.

Ten out of the eleven decisions in Table B above were decided on the basis that the alleged PSG was too broad. Submissions that ‘women’ or ‘women + nationality [+ age]’ constitute a PSG were overwhelmingly rejected. In *Perdomo v Holder*,<sup>232</sup> the American Board of Immigration Appeal held that “a social group consisting of ‘all women in Guatemala’ is overbroad and a ‘mere demographic division of the population rather than a particular social group’”.<sup>233</sup>

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<sup>226</sup>*Perdomo v Holder* (BIA 2011), remanding the case to the Immigration Judge following Federal Court decision *Perdomo v Holder* 611 F.3d 662 (2010) (US Court of Appeals, Ninth Circuit).

<sup>227</sup>*Perdomo v Holder* 611 F.3d 662 (2010) (US Court of Appeals, Ninth Circuit).

<sup>228</sup>*Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14 (High Court of Australia), para 35.

<sup>229</sup>*Niang v Gonzales* 22 F.3d 1187 (2005) (US Court of Appeals, Tenth Circuit); *Diallo v Mukasey* 268 F. App’x 373 (2008) (US Court of Appeals, Sixth Circuit).

<sup>230</sup>*Higbogan v Canada* [2010] FC 445 (Federal Court of Canada).

<sup>231</sup>*Islam v Secretary of State for the Home Department* [1999] 2 All E.R. 546 (UK Immigration Appeal Tribunal).

<sup>232</sup>*Perdomo v Holder* 611 F.3d 662 (2010) (US Court of Appeals, Ninth Circuit).

<sup>233</sup>*Idem*, para 663.

Rejecting asylum on the basis that the PSGs in Table B are too broadly defined is a questionable interpretation of the Refugee Convention. UNHCR confirms that “this argument has no basis in fact or reason, as the grounds are not bound by this question of size”.<sup>234</sup> Similarly, the United States Court of Appeals for the Ninth Circuit rejected the notion and held that “the size and breadth of a group alone does not preclude a group from qualifying as such a social group”.<sup>235</sup> Other US Federal Courts have come to similar conclusions although their conclusions have limited precedential effect outside of their jurisdictions.<sup>236</sup>

### 3.3.3.1 Rejecting ‘women’ as a particular social group

As will be shown in the following paragraphs, there are inconsistencies even within countries, as to how asylum authorities/judges interpret ‘particular social group’. Judges have identified a reluctance, or perhaps a fear of opening the asylum procedure to all members of a particular social group. It has been held that “if a woman has a well-founded fear of persecution because she is a woman, the necessary implication is that all women have a well-founded fear of persecution simply because they are a woman, and this simply cannot be”.<sup>237</sup>

In *Safaie*, a judge held that “no fact finder could reasonably conclude that all... women [from a certain country] had a well-founded fear of persecution based solely on their gender”.<sup>238</sup> In doing so, the judge attempted to determine whether the well-founded fear contributed to making the group a group.

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<sup>234</sup>HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002, para 31.

<sup>235</sup>*Perdomo v Holder* 611 F.3d 662 (2010) (US Court of Appeals, Ninth Circuit), p 3.

<sup>236</sup>World Organisation for Human Rights USA, 2011, p 42.

<sup>237</sup>Macklin, 1998, p 61. Cited in Javaherian, 2012, p 465.

<sup>238</sup>*Safaie v INS* 25 F.3d 636 (1994) (US Court of Appeals, Eighth Circuit).

In making these assertions, asylum authorities are blurring the three-step process inherent in Article 1A(2). Firstly, one must determine whether a particular social group exists. Secondly, one must determine whether the claimant belongs to the PSG. Thirdly, one must determine whether the claimant has a well-founded fear of being persecuted on account of her membership of a PSG. The steps are independent and in making the above statements the judges are merging the three-step process. The existence of the group is independent of whether the members of the group are being persecuted.

This issue has been discussed by the High Court of Australia, which has convincingly explained why the argument propounded in *Safaie* is illogical. In holding that women from Pakistan are a PSG for the purposes of Article 1A(2), the Court highlighted:

*Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely. The alleged persecution does not define the group.*<sup>239</sup>

The asylum authorities who do not follow this reasoning are applying the Refugee Convention differently to VHT than to other forms of asylum-claimants.

Other identified groups such as homosexuals or occupational groups have not been required to prove that all members of their group face persecution. To do so would be impossible, as some members may simply not be at risk; for example if they were to hide their identifying

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<sup>239</sup>*Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14 (High Court of Australia), para 35.



characteristic, cooperate with the perpetrators or be unknown to the perpetrators. The United States Court of Appeals for the Ninth Circuit has addressed this issue by rejecting “the notion that an applicant is ineligible for asylum merely because all members of a persecuted group might be eligible for asylum”.<sup>240</sup> Equally, UNHCR has explained that an asylum-seeker “need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group”.<sup>241</sup>

### **3.3.3.2 Fear of flooding the asylum system with women asylum-seekers?**

It appears that judges are refusing these social groups for fear of flooding the asylum system with claims from all women from all around the world. But recognition of women as a particular social group will not entitle all women to refugee status. As one author notes, these judges fail “to take into account that a finding of social group membership is simply one of a number of substantial hurdles that an asylum applicant faces in making out a successful claim”.<sup>242</sup> For example, female asylum-seekers will still have to prove the elements explained in Chapter I, that is, that the conduct is sufficiently serious to amount to persecution, that the persecution is *on account of* her membership of the PSG, etc. Accordingly, the allegation that ‘all women have a well-founded fear of persecution simply because they are women’ is an illogical assertion.

Further, an overwhelming increase in female asylum-seekers did not occur following recognition in Canada and France of gender-based persecution.<sup>243</sup>

Accepting that women can constitute a particular social group for the purposes of Article 1A(2) would not flood countries with asylum-seekers. It would, however, shift the analysis

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<sup>240</sup>*Perdomo v Holder* 611 F.3d 662 (2010) (US Court of Appeals, Ninth Circuit), p 3.

<sup>241</sup>HCR/GIP/02/02 (UNHCR PSG Guidelines), 7 May 2002, para 17.

<sup>242</sup>Knight, 2007, p 11.

<sup>243</sup>Imbriano, 2011, p 351.

of the asylum claim to the crucial issue: the determination of whether a VHT would face persecution if returned to her country of origin. It is time that VHT - who satisfy the relevant criteria and demonstrate persecution – be granted asylum, rather than subjecting them to a tedious debate on the technical issue of whether women, or certain groups of women, can constitute members of a PSG. States could do this through accepting that women are a PSG for the purposes of Article 1A(2) and stop returning VHT to their persecutors through a narrow application of the Refugee Convention.

### **3.3.4 Solution two: VHT as a particular social group: define the group narrowly**

As noted above, a PSG cannot be defined merely by the fact that it suffered persecution as “motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution”.<sup>244</sup> It is thus difficult to fit VHT into a PSG. Some PSG defined exclusively by gender and nationality have been successful. However as explained above, these situations are rare. VHT who seek asylum under the social group ‘women from [a particular country] and/or of a particular age’ are often refused asylum on the (arbitrary) assertion that such a social group is too broad. Some jurisdictions have been criticized for their inconsistent application of the PSG definition to the various sub-categories of women.<sup>245</sup>

Accordingly, it appears that claims for asylum based on membership of a PSG may be most successful when narrowly defined. For example, specific characteristics should be argued in addition to nationality and age, such as lack of education, family ties, or economic hardship. The UNHCR Trafficking Guidelines specify that “*certain social subsets of women* may also constitute particular social groups. Example of social subsets of women or children could, depending on the context, be *single women, widows, divorced women,*

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<sup>244</sup>*Sarkisian v Attorney General* 322 F. App’x 136 (2009) (US Court of Appeals, Third Circuit).

<sup>245</sup>Saito, 2007, p 24.

*illiterate women, separated or unaccompanied children, orphans or street children*”(emphasis added).<sup>246</sup>

That said, a string of Australian decisions emphasize the uncertainty in these narrow definitions, as additional narrowing elements such as ‘lacking in protection’, ‘vulnerable’, or ‘abandoned’ were rejected.<sup>247</sup>

Another possible approach is to suggest the persecution of VHT may be useful as identifying VHT as a particular social group within society. The UNHCR *social perception approach*, discussed above, specifies that a “particular social group is a group of persons who ... are perceived as a group by society”.<sup>248</sup> Accordingly, the VHT’s trafficking experiences and prior harms provide evidence that the group is visible. The High Court of Australia has held that “left-handed men are not a particular social group. But if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group”.<sup>249</sup> Surely this analogy can be applied to VHT.

One could even extend this analogy to more limited subsets of VHT forming a PSG. For example, one could submit that Albanian VHT are members of a particular social group of young women aged 14 to 20 who are vulnerable to human trafficking due to the high occurrence of human trafficking in Albania. Their persecution for being trafficked would create a public perception that they were a particular social group. But it would be the attribute of being women of a certain age in Albanian society that would qualify them as a

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<sup>246</sup>HCR/GIP/02/02 (UNHCR PSG Guidelines), 7 May 2002 para 38.

<sup>247</sup>Dorevitch and Foster, 2008, p 35.

<sup>248</sup>HCR/GIP/02/02 (UNHCR PSG Guidelines), 7 May 2002, para 11.

<sup>249</sup>McHugh, J., in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (High Court of Australia), para 274.

particular social group, not their trafficking experience. As noted in Table B, claims such as ‘young Albanian women who will not voluntarily enter a life of prostitution’ have been overwhelmingly rejected in the United States. However in comparison to the left-handed men example, it is yet another reason why these claims could be accepted as proving a PSG under Article 1A(2).

Ultimately, however, whether the PSG argued by the VHT will be accepted will depend on the particular immigration officer and the particular jurisdiction and this is worrying for the consistency of the development of international refugee law, and for the clarity and relative certainty of VHT claiming asylum.

It appears that other jurisdictions are more willing than the United States (see Table B) to accept that VHT can constitute a PSG. In Australia, courts and tribunals have held that “young women in Albania”<sup>250</sup>, “women in Northern Albania who have failed to honour an arranged marriage”<sup>251</sup>, “sex workers in Thailand”<sup>252</sup>, “trafficked Shan women”<sup>253</sup>, or “women who have been working in prostitution in countries neighbouring Burma”<sup>254</sup> can all constitute a PSG under Article 1A(2). Canadian authorities have held that “women and/or former sex trade workers”<sup>255</sup> can constitute a PSG, and British authorities have accepted, *inter alia*, “young females who have been victims of trafficking for sexual exploitation”,<sup>256</sup> “victims of trafficking in Albania”,<sup>257</sup> and “women in the Ukraine who are

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<sup>250</sup>*Decision V01/13868* [2002] RRTA 799 (Refugee Review Tribunal of Australia).

<sup>251</sup>*Decision V06/18399* [2006] RRTA 95 (Refugee Review Tribunal of Australia).

<sup>252</sup>*Decision N03/47757* [2004] RRTA 355 (Refugee Review Tribunal of Australia).

<sup>253</sup>*Decision N03/45573* [2003] RRTA 160 (Refugee Review Tribunal of Australia).

<sup>254</sup>*Idem*.

<sup>255</sup>*Decision T98-06186* (1999) CanLII 14662 (Convention Refugee Determination Division of the Immigration and Refugee Board of Canada).

<sup>256</sup>*AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (UK Upper Tribunal, Immigration and Asylum Chamber).

<sup>257</sup>*AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (UK Upper Tribunal, Immigration and Asylum Chamber).

forced into prostitution against their will”<sup>258</sup>.

Accordingly, if states are unwilling to accept ‘women’ as a PSG, it is necessary for greater consistency to be found amongst more specific definitions of PSG of VHT.

### **3.3.5 Solution three: VHT: a particular social group defined by the past trafficking experience**

Solution two is somewhat indirect, in that the PSGs are largely defined in ways that, for example, relate to the probability of being trafficked or to social perceptions of those who have been trafficked, rather than directly to the simple fact of having been trafficked.

The third option, is for asylum authorities to accept that the trafficking experience creates a particular social group for the purposes of Article 1A(2). VHT who face persecution as a result of their trafficking experience – such as ostracism, re-trafficking or reprisals – do exist prior to the (future) persecution and their status as VHT motivates the future persecution.

For the many reasons stated above, decision-makers have been reluctant to accept a more direct route. Yet a more direct route is available and UNHCR encourages its use. A more consistent use of the direct route would immediately remove the uncertainty, confusion and complexity that seem inextricably associated with the indirect approaches. Moreover, such an approach would considerably simplify the application of 1A(2) because the issues of past and future harm would be clearly separated - the past harm defines the PSG, and the decision makers would then be able to concentrate entirely on the extent to which the fear of future harm is well-founded.

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<sup>258</sup>*Dzhygun (Ukraine)* [2000] UKIAT 00<sup>TH</sup>00728 (UK Immigration Appeal Tribunal).

As UNHCR explains, “[f]ormer victims of trafficking may also be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked.”<sup>259</sup> In other words, “*the past trafficking experience constitutes one of the elements defining the group*, rather than the future persecution feared in the form of ostracism, punishment, reprisals or re-trafficking” (emphasis added).<sup>260</sup> Accordingly, a social group might be based on the victims’ shared experience of being trafficked.

The jurisprudence on whether VHT can constitute a PSG for the purposes of future feared harm is patchy and inconsistent. Some jurisdictions have yet to accept that VHT can constitute a PSG based on the unchangeable, common and historic characteristic of having been trafficked, and the fear of future persecution in the form of discrimination, reprisals, re-trafficking or ostracism. The Immigration Appeal Tribunal of the United Kingdom has held that “trafficked women do not qualify as a PSG, since what defines them is essentially the fact of persecution”.<sup>261</sup> Equally, an American court found that “Albanian women who are forced into prostitution” could not be a social group because it was defined by the fact that it suffered persecution.<sup>262</sup> It was not, however, discussed as a group for the purposes of proving a future fear of persecution.

These judgments show that this interpretation of Article 1A(2) is not always accepted. These judges are equating past trafficking with persecution, whereas they should be looking at the prospect of future persecution.

That Article 1A(2) should be applied in this way can be based on either the *immutability approach* or the *social perception approach* (discussed above in Part 3.2).

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<sup>259</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 39.

<sup>260</sup>Idem.

<sup>261</sup>*JO Nigeria (internal relocation – no risk of re-trafficking) [2004] UKIAT 00251* (UK Immigration Appeal Tribunal), para 18.

<sup>262</sup>*Rreshpja v Gonzales*, 420 F.3d 551 (2006) (US Court of Appeals, Sixth Circuit), para 556.

Turning to the *immutability approach*, the three-step process enumerated above would be correctly applied as follows:

*Does a particular social group exist?* Yes, as the group can be defined through the common, unchangeable past experience of having been trafficked. *Does the claimant belong to the PSG?* Yes if she fits the VHT definition and is a woman trafficked for the purpose of sexual exploitation. *Will the claimant be persecuted on account of her membership of a PSG?* Yes, if the future harm feared stems from her membership of the group of trafficking victims (presumably ostracism, reprisals, or re-trafficking). This satisfies the test that “motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution”:<sup>263</sup> because the trafficking experience creates the group, the group then exists prior to the future persecution of ostracism, reprisals, re-trafficking.

Fear of future persecution was discussed in three cases in the United States. The Court of Appeals for the Third Circuit acknowledged both “children from Northern Uganda who have escaped from involuntary servitude after being abducted and enslaved by the LRA [Lord’s Resistance Army, a group of anti-government guerrillas]”<sup>264</sup> and “women who have escaped involuntary servitude after being abducted and confined by the FARC”.<sup>265</sup> The common characteristic of these two social scenarios is that both applicants produced evidence that they would be persecuted for escaping from their captors. In *Lukwago* it was shown that escaped children of the LRA were killed if captured, and in *Gomez-Zuluaga*, it was shown that the FARC had killed escaped members of the applicant’s family as retribution for escaping.<sup>266</sup>

The third case to discuss this issue was *Sarkisian v. Attorney General of the United States*

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<sup>263</sup>*Sarkisian v Attorney General* 322 F. App’x 136 (2009) (US Court of Appeals, Third Circuit).

<sup>264</sup>*Lukwago v Ashcroft* 329 F.3d 157 (2003) (US Court of Appeals, Third Circuit), paras 174-175.

<sup>265</sup>*Gomez-Zuluaga v Attorney General of US* 527 F.3d 330 (2008) (US Court of Appeals, Third Circuit).

<sup>266</sup>*Idem*, para 347.

in which an Armenian VHT claimed asylum on the basis that she feared retribution for escaping her traffickers and would be persecuted if returned to Armenia. The Court rejected her asylum claim and held that she “does not explain how her past persecution will motivate her abductors to target her” and distinguished this case from *Lukewago* and *Gomez-Zuluaga*.<sup>267</sup> Although the decision is only short, the judge made no reference to the following issues. Firstly, the UNHCR guidelines note that reprisals by traffickers could be inflicted on victims’ family members. The applicant in this case was an orphan with no family (a fact which contributed to her abduction in the first place) however an expert testifying in her hearing before the Immigration Judge held that both she and her children could be vulnerable to trafficking if sent back to Armenia.<sup>268</sup> The fact that the reprisals had not yet occurred were not necessarily proof that they would not occur in future, when she – and her children – returned to the midst of the traffickers. Secondly, the lack of social support networks – which a trafficked orphan who fled to the United States but was subsequently returned to Armenia would undoubtedly face – can “heighten the risk of being re-trafficked or of being exposed to retaliation, which could then give rise to a well-founded fear of persecution”.<sup>269</sup> Finally, asylum claims must be decided on individual facts and circumstances. One must query the legitimacy of comparing Ugandan child soldiers and women kidnapped by the FARC in Colombia with the altogether different situation of an orphaned human trafficking victim facing return to Armenia.

Solution three provides an extremely useful way for asylum authorities to incorporate VHT into Article 1A(2)’s definition, thus enabling VHT to qualify for refugee status under Article 1A(2). It is a novel approach but a logical one – it is merely a creative interpretation of the Refugee Convention in light of the *immutability* approach identified by UNHCR. It may be the key to providing VHT with the protection some VHT so badly need. As noted at the start of this chapter, in asylum cases involving VHT, judges often believed the

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<sup>267</sup>*Sarkisian v Attorney General* 322 F. App’x 136 (2009) (US Court of Appeals, Third Circuit), para 13.

<sup>268</sup>*Idem*, para 4.

<sup>269</sup>*Idem*.



women were being persecuted and found the VHT to be credible. The principal reason for rejecting the asylum claims was an inability to prove the women belonged to a PSG. Interpreting Article 1A(2) in this way would thus shift the analysis of the asylum claim to the crucial issue: the determination of whether a VHT would face persecution if returned to her country of origin, rather than a tedious debate over the PSG definition.

### **3.3.6 Solution four: domestic legislation that recognises VHT as a particular social group**

Solution four is, in effect, a variant of Solution three: a state could enact legislation specifying that VHT constitute a particular social group for the purposes of the Refugee Convention. Norway has acknowledged the need for greater certainty for VHT claiming asylum and in doing so has accepted that VHT are a PSG defined by their persecution.<sup>270</sup> In 2008, the Norwegian Government enacted legislation stating that VHT constitute a particular social group for the purposes of Article 1A(2) of the Refugee Convention.<sup>271</sup> Accordingly, asylum-seeking VHT in Norway will not need to go through the rigmarole of formulating a PSG definition; they will be able to focus their application on the central issue: whether the VHT would face persecution if returned to her country of origin.

## **3.4 Conclusion**

This chapter has evidenced the lack of clarity and certainty involved when a VHT claims asylum on the basis of her membership of a particular social group. The meaning of PSG is interpreted differently across jurisdictions and even within jurisdictions. This has worrying effects for VHT who are forced to draft their asylum claim in the hope of hitting the proverbial bull's eye with the particular asylum authority examining her claim. Greater

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<sup>270</sup>PPLAS/2009/03 (UNHCR), 1 October 2009, para 19.

<sup>271</sup>Norwegian Ministry of Labour and Social Inclusion, 2008 *Draft Bill on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Act)*.

clarity and consistency is required to better protect VHT with international protection needs.

This chapter has developed four arguments that asylum-authorities could use to solve this issue, and to interpret Article 1A(2) to allow VHT to claim asylum as members of a PSG.

Firstly, asylum authorities could interpret PSG widely and accept ‘women’ as a particular social group. Secondly, they could more narrowly define the particular social group, but come to some kind of consensus, through recognizing the decisions and legal reasoning of other jurisdictions on this issue. Thirdly, states could assist their asylum authorities to better understand the *immutability* approach and its application to VHT when the trafficking experience defines the group, and future harm is feared in the form of ostracism, reprisals, discrimination or re-trafficking. Fourthly, states could enact legislation that specifies that VHT constitute a PSG for the purposes of the Refugee Convention.

The frequency with which claims for asylum by VHT are being turned down is an issue requiring attention. Human trafficking is a growing phenomenon and asylum law must progress to protect those with valid protection needs. The development of asylum law does not appear to have progressed to the stage where VHT are receiving the protection they so desperately need and the Refugee Convention does not appear to be being interpreted in light of the changing nature of groups and the changing risks they face. The findings in this chapter provide states with the opportunity to develop Article 1A(2)’s application in a gender-sensitive way and to shift the analysis of the asylum claim to the determination of whether a VHT would face persecution if returned to her country of origin.

#### **4. Other grounds under Article 1A(2): Race, Religion, Nationality, Political Opinion**

VHT may have been persecuted due to their race, religion, nationality, political opinion or other cultural beliefs. These characteristics need not be individual to the VHT; if the VHT were targeted due to her family or husband's beliefs or characteristics, the VHT may still be eligible for asylum.<sup>272</sup>In some circumstances the VHT may be able to provide direct evidence she was (or will be) targeted or punished for one of these grounds, for example, following her direct participation in a rally or protest. As noted above, it may be difficult to prove a VHT was targeted *for reasons of* these convention grounds and circumstantial evidence may be extremely important. Asylum claims based on race, religion, nationality, or political opinion may overlap with claims that persecution is based on membership of a particular social group. All relevant grounds should be argued.

##### **4.1 Double-pronged potential for persecution**

Persecution of VHT on account of their race, religion, nationality or political opinion is relatively rare, but not impossible, and the persecution can arise in two ways. Firstly, persecution may be the chosen method to harm members of a particular faith, race, nationality or political affiliation. However, persecution may also arise where authorities are not willing to provide adequate protection to a particular religious/political/racial group or nationality. This would be particularly relevant in an inter-ethnic conflict, where a state might be less likely to protect particular subsets of society.

##### **4.2 Race or nationality**

It is rare that VHT are granted asylum on the basis that they are targeted or punished due to their nationality or race. In the context of VHT, the two grounds are commonly discussed

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<sup>272</sup>World Organization for Human Rights USA, 2011.

together. Nationality “has a wider meaning than citizenship [and] can equally refer to membership of an ethnic or linguistic group and may overlap with the term “race””.<sup>273</sup> Equally race, in the context of Article 1A(2) can incorporate “all kinds of ethnic groups that are referred to as ‘races’ in common usage”.<sup>274</sup> Ethnicity is thus included in the term ‘nationality’ and the term ‘race’.<sup>275</sup>

Race or nationality can be particularly relevant in VHT’s asylum claims where race or nationality increases the VHT’s vulnerability, and decreases the protection afforded by the state. This would be particularly relevant where inter-ethnic conflict is occurring within a state. Even where armed conflict is not occurring, however, VHT might still be targeted for reasons of race or religion. For example, “members of one racial group may still be particularly targeted for trafficking for varied ends, if the State is unable or unwilling to protect members of that group. In the context of trafficking for the purposes of sexual exploitation, women and girls may also be especially targeted as a result of market demands for a particular race (or nationality)”.<sup>276</sup>

An immigration judge in the US granted asylum to a Thai woman who had been subjected to sexual violence from a young age and was eventually trafficked. The judge found her to be stateless and “a member of an ethnic group in Thailand, who has been forced into indentured servitude and deprived of the right of citizenship”.<sup>277</sup> This case demonstrates the importance of arguing membership of a particular social group in addition to nationality/racial claims.

The Australian Refugee Review tribunal accepted that Shan women had a well-founded fear of persecution for reasons of race, after evidence was adduced showing systematic rape

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<sup>273</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 35.

<sup>274</sup>HCR/IP/4/Eng/REV.1 (UNHCR Handbook) 1979, para 68.

<sup>275</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 36.

<sup>276</sup>Idem, para 34

<sup>277</sup>CGRS Case #560, *Matter of S-*, A# redacted, 18 June 2001 (Chicago, IL, Immigration Court). Cited in Knight, 2007, p 13.

of Shan women and girls by the Burmese military. It was further accepted that the military were responsible for trafficking Shan women into sexual servitude in Thailand and surrounding countries.<sup>278</sup> In contrast, the United Kingdom Immigration Appeals Tribunal rejected a claim by an ethnic Kyrgyz woman that she was targeted based on her ethnicity in Tajikistan. It held there to be insufficient evidence to prove the discrimination against her ethnicity amounted to persecution.

The two cases can be distinguished, as the Shan applicant adduced a plethora of information proving the widespread sexual harm practised against Shan women. Accordingly, it appears that for a VHT to successfully prove she is persecuted on account of her nationality/race, ample evidence must be adduced of a widespread mistreatment of her race or nationality.

### 4.3 Religion

Religion, as a basis for an asylum claim by VHT is rarely argued, however it is nevertheless a valid basis for asylum. It is worth quoting at length UNHCR's position on the topic:

*[individuals] may be targeted because their faith or belief identifies them as a member of a vulnerable group in the particular circumstances, if, for instance, the authorities are known not to provide adequate protection to certain religious groups. Again the profit motive may be an overriding factor, but this does not obviate the relevance of religion as a factor in the profiling and selection of victims. Alternatively, trafficking may be the method chosen to persecute members of a particular faith.*<sup>279</sup>

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<sup>278</sup>Decision N03/45573 [2003] RRTA 160 (Refugee Review Tribunal of Australia).

<sup>279</sup>HCR/GIP/06/07 (UNHCR Trafficking Guidelines), 7 April 2006, para 35.

There is no universal definition of ‘religion’ and UNHCR has dedicated 12 pages to explaining religion in the context of Article 1A(2) in its Guidelines on Religion-Based Claims.<sup>280</sup> These guidelines state that the use of religion in Article 1A(2) can encompass:

*“freedom of thought, conscience or belief. As the Human Rights Committee notes, “religion” is “not limited ... to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions”. It also broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief.”<sup>281</sup>*

Further:

*“Claims based on “religion” may involve one or more of the following elements:*

- a) religion as belief (including non-belief);*
- b) religion as identity;*
- c) religion as a way of life.”<sup>282</sup>*

It is questionable whether asylum officers/judges are aware of the breadth of the term in the refugee context. Research published by UNHCR on asylum jurisprudence in the US, UK, Australia and Canada found only one case where VHT successfully claimed asylum based on religion. A Hindu asylum-seeker was granted asylum in the United States on the basis that, if returned, she would be subjected to a life of prostitution, linked to her religion and membership of a low caste.<sup>283</sup>

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<sup>280</sup>HCR/GIP/04/06 (UNHCR Guidelines on Religious Persecution), 28 April 2004.

<sup>281</sup>Idem, para 4.

<sup>282</sup>Idem, para 5.

<sup>283</sup>CGRS Case # 365. Cited in Knight, 2007, p 20.

#### 4.4 Political opinion

VHT may be targeted for trafficking or punished due to their political opinion. Similarly, they may be particularly vulnerable to being trafficked as the state may be reluctant to protect particular political affiliations. As with religion, political opinion has been broadly interpreted. UNHCR holds political opinion to include:

*any matter in which the machinery of State, government, society or policy may be engaged. This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature.*<sup>284</sup>

This broad interpretation can be illustrated through *Matter of M-J- 2001* in which the US Board of Immigration Appeals accepted a well-founded fear of persecution “on account of imputed political opinion or membership in a particular social group of women in China who oppose coerced involvement in government sanctioned prostitution”.<sup>285</sup>

It is not necessary for the VHT to hold the political opinion herself, but a perception that she holds it may suffice. Women are often attributed with the political opinions of their family or husbands and subject to persecution due to their family or husband’s political activities.<sup>286</sup> In this situation, VHT should also submit a complementary argument that they are targeted as members of a particular social group of women or some subset of women.

Research published by UNHCR shows the nexus often fails in political opinion cases, i.e. courts recognize a fear of persecution but consider it unrelated to the applicant’s political

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<sup>284</sup>HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002, para 32.

<sup>285</sup>*Matter of M-J- 2001*, Board of Immigration Appeals (San Pedro, California), *Matter of M-J-*, 30 March 2001.

<sup>286</sup>HCR/GIP/02/01 (UNHCR Gender Guidelines), 7 May 2002, para 32.

opinion.<sup>287</sup>

That being said, political opinion was accepted in one case where traffickers specifically told their victim they had targeted her due to her affiliation with the Democratic Party of Albania.<sup>288</sup> The applicant attended a political demonstration and was then kidnapped by armed men, including a police officer, and forced into prostitution. She was specifically told that she was being targeted due to her membership of the Democratic Party. The court found her sufficiently compelling and granted her asylum on the basis that she was forced into sexual servitude due to her political beliefs. This case provides another valid example where arguing a combination of convention grounds - fear of persecution based on membership of a particular social group and political opinion – will increase the chances of the judge accepting one or both of the grounds.

#### **4.5 Conclusion**

In theory, these categories are open to VHT claiming asylum. However it would be rare for such a claim to arise simply due to the unlikelihood of a woman being trafficked due to her race, religion, nationality or political opinion.

VHT claiming asylum on these grounds might not always be able to produce direct evidence to prove the nexus - circumstantial evidence will be particularly important to prove the person is targeted on account of these grounds. As noted in Chapter I, a VHT does not need to prove her persecutors explicitly stated they were harming her on the basis of a convention ground - it should be sufficient to prove the future persecution will be for reasons of a convention ground by drawing together all the circumstances surrounding the events, including the social, political and religious contexts.

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<sup>287</sup>Saito, 2007.

<sup>288</sup>Decision of the Immigration Judge, #A79-607-478; CGRS Case No. 3438, Immigration Court, 20 December 2005.



Although it is rare that cases are brought by VHT claiming asylum on the basis of race, religion, nationality or political opinions, successful claims have been brought under all four grounds. The limited number of cases brought by VHT under these categories appears to be due to the factual rarity of VHT being targeted for these reasons, rather than due to any particular limitation in the Refugee Convention's application in these fields.

## 5. Practical Obstacles in accessing the asylum system

The previous chapters have examined one obstacle for victims claiming asylum: the inconsistent and unclear application of the Refugee Convention to VHT. This chapter will focus on another significant barrier: whether VHT can access the asylum procedure in practice. Although many practical barriers exist, this chapter will analyse only some of the practical impediments, including a lack of knowledge by authorities on VHT-specific issues and the non-penalisation requirements, a lack of training for asylum authorities, and the importance of access to information and legal representation for VHT. This chapter aims to provide a general insight into the context in which some VHT claim asylum.

As UNHCR has explained, “there appears to be a significant lacuna in the scholarly work on the precise topic of comprehensive procedures for trafficked persons’ identification and referral to the asylum procedure. A literature search yielded no evidence of systematic research or reliable data collection on this general question”.<sup>289</sup>

Although this paper has not focused on regional mechanisms, European examples will be used in this chapter. This is because the *Council of Europe Convention on Action Against Trafficking in Human Beings*<sup>290</sup> (the Council of Europe Convention) has established a monitoring system to supervise the implementation of the Council of Europe Convention through the *Group of Experts on Action against Trafficking in Human Beings* (GRETA). It thus provides an important and unique source of information on how states are protecting VHT in practice.

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<sup>289</sup>PPLAS/2009/03 (UNHCR), 1 October 2009, para 12.

<sup>290</sup>Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197.

## **5.1 Lack of knowledge within the trafficking and asylum systems of VHT-specific issues, including non-penalisation**

In Chapter I, certain legal specificities were explained in relation to asylum-claims made by VHT. These included the confusion that surrounds the definitions of trafficking and smuggling, the mistaken assumption that VHT can consent to being trafficked where they consented to take part in sex work (where the ‘means’ identified in Article 3(a) are used, consent is rendered irrelevant), and the non-penalisation requirement that exists in both systems. In practice, these legal specificities are not always observed. As a result, not all VHT are being identified as VHT (nor as asylum-seekers).

In Chapter I, it was explained that both the trafficking system and the asylum-system provide for the non-penalisation of VHT or asylum-seekers. This issue was raised in a review of the Trafficking Protocol’s success, 10 years after its adoption by the General Assembly in 2000. The review concluded that penalisation of VHT may be a common occurrence:

*Trafficked persons are misidentified most frequently as either unauthorized migrants or as criminals who have committed offenses that the trafficker forced them to perform, despite the Protocol’s policy of non-culpability. Even recognized trafficked victims are knowingly jailed. This practice manifests in three ways. First, they are detained in preparation for deportation. In some countries, trafficked persons are detained alongside criminals, thereby equating the two and instilling the trafficked person with fear, shame, and a false sense of wrongdoing... In these cases, the law masquerades as temporary residence, shelter, and return, but the reality is incarceration, detention, and deportation...*

*Ironically, these government practices validate traffickers' threats that law enforcement will arrest, detain, and deport them [VHT] if they escape.*<sup>291</sup>

Firstly, with regard to the issue of non-penalisation, GRETA has found that in some French *préfectures*, women were refused residence permits on the basis that they were working as a prostitute and thus constituted a threat to public order.<sup>292</sup> In another case, a woman trafficked for the purposes of sexual exploitation was held in a brothel for a year, drugged, starved and forced to have sex with as many as 20 men each day; upon finally escaping and contacting the police she was “promptly jailed” for prostitution.<sup>293</sup>

In making these findings, it is questionable to what extent asylum authorities are aware of the distinction between prostitution and human trafficking for the purposes of sexual exploitation. As one Austrian NGO has explained, “a clear line must be drawn between trafficking in women [...] on the one hand, and voluntary sex work on the other hand”.<sup>294</sup> This is a vital distinction, as misidentification on this point will leave women VHT vulnerable to further exploitation and protection measures will be inaccessible to her. This is of particular concern in France, given that the GRETA report also notes that a “fact-finding mission on prostitution organised by the National Assembly in 2011 stressed that the vast majority of prostitutes on French territory are supplied by trafficking networks”.<sup>295</sup> Accordingly, a woman’s engagement in sex work should be a possible indicator that she is a VHT, rather than an immediate ground for refusing her a residence permit.

GRETA has recently stressed the importance of the non-penalisation of VHT. It calls for France to better train its police and gendarmerie forces to “avoid confusion between

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<sup>291</sup>Heinrich, 2010, p 3.

<sup>292</sup>GRETA(2012)16 (France), 28 January 2013, para 170.

<sup>293</sup>Haynes, 2004, p 222.

<sup>294</sup>Frauen: Rechte jetzt! NGO-Forum CEDAW in Österreich, 2012, p 18.

<sup>295</sup>GRETA(2012)16 (France), 28 January 2013, para 170.

trafficking victims... and offenders or irregular migrants”.<sup>296</sup> GRETA suggests that legislative reform may be required to ensure the non-penalisation of VHT “for their involvement in unlawful activities, to the extent that they have been compelled to do so... having regard to the serious human rights violation victims have suffered”.<sup>297</sup>

Secondly, with regard to the correct application of Article 3(a) of the Trafficking Protocol, some trafficking authorities do not seem aware that the means identified in Article 3(a) render consent irrelevant. GRETA has recently reported on cases where the authorities concluded that the person could not be a VHT “as the person concerned agreed to come to the UK for work”.<sup>298</sup> In making this assumption the asylum authorities misapplied the Trafficking Convention, because “according to the Convention, deception and abuse should render such consent irrelevant”.<sup>299</sup>

Accordingly, it appears that the issues discussed in Part 1.3.2. of this paper are not being recognized in practice. Asylum authorities are misapplying Article 3 of the Trafficking Protocol to a VHT’s detriment, or penalizing her for engaging in activities that result from her trafficking experience, when in fact, the activities provide an indication that she may be a VHT.

## **5.2 Lack of training of authorities**

The above findings may reflect a general lack of training of authorities. For example, in the UK Border Agency’s 2013 guidance document for frontline staff which “tells all UK Border Agency frontline staff on [sic] how to identify and help potential victims of human

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<sup>296</sup>GRETA(2012)16 (France), 28 January 2013, para 137.

<sup>297</sup>Idem, para 216.

<sup>298</sup>GRETA(2012)6 (UK), 12 September 2012, para 223.

<sup>299</sup>Idem, para 223.

trafficking”,<sup>300</sup> a total of four bullet points are dedicated to explaining how to differentiate between a victim of human trafficking and a smuggled migrant. The description is extremely limited and cannot sufficiently explain the differences between the two categories of persons. Although more information may be available to frontline staff than this document alone, it is a concern that such a crucial and complicated issue is being explained in four lines of text, when it is a key issue for some VHTs’ correct identification.

The issue of lack of knowledge by asylum and trafficking authorities has been recently addressed by the *Committee on the Elimination of Discrimination against Women*. In March 2013 in its concluding observations on Austria it expressed its concern that:

*Officers who are in charge of asylum applications in [Austria] are not sufficiently trained to identify victims of trafficking... and ... The Committee urges [Austria] to continue to provide training to officers who are in charge of asylum applications to ensure that they adopt a gender-sensitive approach in the system for the identification of victims of trafficking.*<sup>301</sup>

GRETA has made similar recommendations to France:

*The French authorities should ensure that all personnel concerned periodically attend training courses, in order to improve the detection of potential trafficking victims ... these courses should be aimed at members of law enforcement agencies... staff working in reception centres for refugees and holding centres for irregular migrants, [and] staff working in accommodation centres for trafficking victims.*<sup>302</sup>

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<sup>300</sup>United Kingdom Border Agency, 2013, p 7.

<sup>301</sup>CEDAW/C/AUT/CO7-8, 1 March 2013, paras 46-47.

<sup>302</sup>GRETA(2012)16 (France), 28 January 2013, para 81.

International authorities are thus highlighting the need for training on these important issues of identification. However, even where a national action plan foresees training sessions for authorities, the trainings might not occur in practice. As one NGO has explained to the *Committee on the Elimination of Discrimination against Women*, “[t]raining sessions for authorities rarely take place [... and the] knowledge of how to recognize and treat victims is still limited to a small circle of persons”.<sup>303</sup>

### 5.3 Access to information

A UK charity working directly with VHT has recently reported that the “explanation of the asylum process to those applying for asylum is generally inadequate. Often women are unaware of the process and unsure how to apply or what is expected of them as applicants”.<sup>304</sup>

The European Court of Human Rights (the Court) has recently turned its attention to this very issue. Although not binding on non Council of Europe member states, recent judgments by the Court have shown the increasing importance given to the effectiveness of access in practice.<sup>305</sup> As explained by Oliver and Kautzmann:

*Access to the asylum procedure is a key factor ... States are required to establish ‘a reliable system of communication between the authorities and the asylum-seekers’ so the latter can follow and access the procedure effectively.*<sup>306</sup> States must also ensure that it is realistic for applicants to

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<sup>303</sup>Frauen: Rechte jetzt! NGO-Forum CEDAW in Österreich, 2012, p 18.

<sup>304</sup>Richards, Steel and Singer, 2006, p 21.

<sup>305</sup> See, for example, *Hirsi Jamaa and Others v Italy*, ECtHR, (Appl. No. 27765/09, 23 February 2012); *I.M. v France*, ECtHR, (Appl. No. 9152/09, 2 February 2012), *M.S.S. v Belgium and Greece*, ECtHR, (Appl. No. 30696/09, 21 January 2011).

<sup>306</sup>*M.S.S. v Belgium and Greece*, ECtHR, (Appl. No. 30696/09, 21 January 2011), para 301.

*access procedures.*<sup>307</sup>

In the trafficking context, the problem seems to be two-fold. Firstly, information on the asylum procedure may not be being sufficiently provided to VHT. As explained in Chapter I, there is a sufficient suspicion that VHT are not being informed of their rights to claim asylum that international bodies are calling for states to ensure the asylum system is open to VHT. Secondly, and in addition to VHT not being informed of their rights, it appears that in some states, the authorities themselves are uninformed of their obligations towards VHT.<sup>308</sup>

Accordingly, information on the asylum procedure, and information on accessing the trafficking system, is not always provided to the VHT, nor known about by the authorities responsible for providing the information.

#### **5.4 Importance of legal advice**

Chapters I to IV of this paper demonstrated that the application of the Refugee Convention to VHT is extremely complex and that asylum authorities themselves may not always apply it correctly. Given the tendency of judges to misapply the Refugee Convention to VHT in particular, the role of legal assistance in asylum claims made by VHT may be even more important than for other types of asylum-seekers.

Furthermore, in the Norwegian system explained in Chapter I, the legal representative is the key player in the referral mechanism directing VHT to a structure where their international protection needs can be assessed.

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<sup>307</sup>Oliver and Kautzmann, 2012, p 38.

<sup>308</sup>GRETA(2012)6 (UK), 12 September 2012.



Pursuant to Article 6(3)(b) of the Trafficking Protocol, states “shall consider” providing counselling and information to VHT. The weak wording provides no obligation for states to do so and it is questionable to what extent legal advice is available to VHT in practice. Although regional mechanisms are largely outside the scope of this paper, it is worth noting that parties to the Council of Europe Convention are under a duty to provide legal advice to VHT,<sup>309</sup> however GRETA has expressed concerns over whether the services are effectively implemented in practice.<sup>310</sup>

Research has shown that of 32 female VHT who claimed asylum in the United Kingdom over a two year-period, only one was accepted to be a refugee. However, on appeal, 80% were granted asylum or humanitarian protection.<sup>311</sup> It is striking, that at first instance, such a high number of genuine refugees were refused protection. The lack of training for asylum-authorities, discussed above, may play a role in these incorrect first-instance decisions.

The same research shows UK asylum authorities misapplying both the Refugee Convention and the UK Home Office guidance documents.<sup>312</sup> 63% of cases were refused on the basis that the claim was not linked to a Convention ground. The research includes extracts from various refusal letters typified in the following two examples:

*Women trafficked for the purposes of prostitution do not form a social group within the terms of the 1951 United Nations Convention.*<sup>313</sup>

and

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<sup>309</sup> Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, Article 12(1)(d).

<sup>310</sup> See, for example, GRETA(2012)16 (France), 28 January 2013, para 145.

<sup>311</sup> Richards, Steel and Singer, 2006 p 3.

<sup>312</sup> Idem.

<sup>313</sup> Reasons for Refusal Letter dated 24 June 2003. Cited in Richards, Steel and Singer, 2006, p 16.

*The reason you have given for claiming a well-founded fear of persecution... is not one that engages the United Kingdom's obligations under the Convention.*<sup>314</sup>

Interestingly, on appeal, authorities were more willing to find the nexus with a particular social group. For example, one appeal authority held:

*The appellant's gender and her history are put forward as immutable characteristics which amount to membership of a particular social group, namely women from Albania who have been trafficked into prostitution. I accept this submission.*<sup>315</sup>

Although the sample size of this research is too small to draw definitive conclusions, a key factor in the eventual recognition of these women's protection needs was the provision of legal advice.<sup>316</sup> Access to free legal representation may thus be a key priority for VHT claiming asylum. This is a logical conclusion following the preceding four chapters. To correctly apply the Refugee Convention to VHT is difficult for judges and lawyers – to expect a VHT to draft a successful asylum claim, which reflects the nuanced interpretations of the Refugee Convention, without legal assistance and support, is potentially unrealistic.

It has been suggested that the UK Border Agency has refused 'difficult' asylum claims on the basis that the appeals tribunal can "sort it out".<sup>317</sup> In the face of funding cuts for charities providing legal aid to asylum-seekers, such as the Refugee and Migrant Justice (RMJ) charity that was forced to close due to funding cuts in 2010, one author has explained that where asylum claims are refused at first instance "the safety net of the

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<sup>314</sup> Reasons for Refusal Letter dated 24 May 2004. Cited in Richards, Steel and Singer, 2006, p 16.

<sup>315</sup> Determination of 9 September 2004. Cited in Richards, Steel and Singer, 2006, p 17.

<sup>316</sup> PPLAS/2009/03 (UNHCR), 1 October 2009, para 36; Richards, Steel and Singer, 2006.

<sup>317</sup> Johnston, Connor, 'It's not just asylum-seekers who need to make a case for legal aid', *The Guardian*, 17 June 2010, at <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/17/refugee-migrant-justice-asylum-seekers> (consulted on 28 July 2013).

tribunal is the only hope in such cases. But without the assistance [of] groups like RMJ to help argue the complex legal points, it is easy to see how miscarriages of justice could come about”.<sup>318</sup> As the same author aptly summarizes, “the asylum appeals process is a vital safety net. Anyone who slips through, by virtue of the legal definition of a refugee, faces ... persecution in their home country”.<sup>319</sup>

By creating a complicated and diverse application of the Refugee Convention to VHT, but by not providing legal assistance to VHT, states are creating a clear barrier for VHT claiming asylum.

## 5.5 Conclusion

This chapter has built on the preceding chapters to emphasize two issues that exist for VHT claiming asylum. Firstly, the application of the Refugee Convention to VHT is a complex barrier within itself. And secondly, that VHT may face difficulties in accessing the procedures to be able to make their claims at all.

Although there is a lacuna of data on this topic, this chapter has demonstrated some practical obstacles. Firstly, the issues discussed in Part 1.3.2 of this paper are not being correctly applied in practice. Some authorities are penalizing VHT for engaging in activities that result from their trafficking experience or are misapplying Article 3 of the Trafficking Protocol to potential VHT. Secondly, lack of knowledge by asylum-authorities has become apparent in this chapter; international and regional bodies such as CEDAW and GRETA are urging states to broaden the knowledge of those responsible for identifying VHT. Thirdly, a double barrier exists as regards information for VHT who may wish to

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<sup>318</sup>Johnston, Connor, ‘It’s not just asylum-seekers who need to make a case for legal aid’, *The Guardian*, 17 June 2010, at <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/17/refugee-migrant-justice-asylum-seekers> (consulted on 28 July 2013).

<sup>319</sup>Idem.

claim asylum; VHT are not always provided with information on claiming asylum and authorities themselves may not be aware of their own obligations towards VHT or asylum-seekers. Finally, the importance of legal advice for VHT claiming asylum must not be underestimated. Lack of legal advice, coupled with the complex application of the Refugee Convention to VHT explained in the preceding chapters, creates a clear barrier for VHT needing protection under the Refugee Convention.

## 6. Conclusion

Women trafficked for the purposes of sexual exploitation can claim asylum. This paper has established that in addition to numerous procedural obstacles, there are three very fundamental obstacles for VHT to *successfully* claim asylum: a lack of effective linkage between the trafficking system and the asylum system, a lack of understanding of the forms of future persecution which may be legitimately feared by VHT, and a lack of effective definition of the PSG concept as it applies to VHT.

It is likely that the first and second of these will not be resolved by any single strategy - rather, they require processes of education and increased awareness that will evolve over time, hopefully under the guidance and initiative of bodies such as UNHCR.

The third – the lack of consistent definitions of PSG - is amenable to quite direct action. The four solutions discussed in this paper are all viable, and could be implemented very rapidly if there is a collective will to do so - the single requirement is that agreement must be reached amongst states as to *which* of the options should be adopted.

The solutions provide asylum-authorities with the opportunity to develop the application of Article 1A(2) of the Refugee Convention in a gender-sensitive way, and to shift the analysis of the asylum claim to the crucial issue: the determination of whether a VHT would face persecution if returned to her country of origin. The Refugee Convention is a living instrument, and the definitions of ‘particular social group’ and ‘persecution’ are not static ones. Accordingly, the Convention must develop to protect women’s current protection needs.

Human trafficking is a continuing and growing phenomenon, yet asylum law does not appear to have progressed to the stage where VHT are receiving the protection that they need and deserve. The author hopes that this paper will encourage action to better protect women who have been trafficked for the purposes of sexual exploitation.

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