

HUMAN TRAFFICKING PROJECT

by

OXFORD PRO BONO PUBLICO*

for

UK JOINT COMMITTEE OF HUMAN RIGHTS

Legal Opinion on the UK legislation on Human Trafficking

University of Oxford, January 2006

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INTRODUCTION

This opinion evaluates the adequacy of UK law on human trafficking, which is defined by international instruments examined in this opinion as ‘recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’.

The adequacy of UK law will be evaluated firstly by introducing the relevant UK legislation on human trafficking; and secondly, by comparing the compliance of UK law and practice with binding and non-binding international instruments, while drawing on experience of other states, various NGOs and international organisations.

In the first chapter, on the relevant UK legislation, the opinion will present only those laws that are specifically applicable to human trafficking (or those that could be) and will not extend to material that more broadly covers human trafficking, such as human rights materials or international law materials.

The second chapter of the opinion on adequacy of UK law will rely on the arrangements provided by different international instruments, **binding** on the UK: 1. the *Convention on the Rights of the Child*, which provides that the UK must undertake to protect the child from all forms of sexual exploitation and sexual abuse; 2. the *Convention on the Elimination of Discrimination against Women*, which requires the UK to institute measures to suppress all forms of trafficking in women and to prevent exploitative prostitution; 3. the *Convention against Torture*, prohibiting the return of individuals to States where there are substantial grounds for believing that he/she might face torture upon return and would not receive sufficient protection against future trafficking; 4. *Convention Relating to the Status of Refugees*, obliging the UK to protect any individual found to have a well-founded fear of persecution on account of membership in a particular social group; 5. the *ILO Conventions*, prohibiting slavery and forced labour and referring to trafficking, as one of the worst forms of child labour.

Also analysed will be international instruments that **do not impose a binding obligation on the UK** either because they have not been signed or have not yet been ratified. These instruments, the *Council of Europe Convention on Action Against Trafficking in Human Beings*, the *United Nations Trafficking Protocol* and the *European Union Directive on Short-Term Residence Permits* provide for a comprehensive and detailed framework on law and policy relevant to human trafficking and will be used as an example of how UK legislation should be amended.

Three relevant areas are reviewed under each chapter: **prohibition of human trafficking** and its scope, which directly influence the other two

areas - **prevention, investigation and prosecution** and **victim protection**. In this context, 'victim protection' will focus on issues such as entry and identification of victims, assistance while on the territory, recovery and reflection period, residency and repatriation, compensation and legal redress, and protection during criminal proceedings.

In conclusion, the opinion points to a lack of coherent policy and law on trafficking in the UK legislation. Especially problematic is the non-existent legislation for protection of victims of trafficking. The recommendation of this opinion is that the UK should either sign and ratify the *Council of Europe Convention* or adopt similar domestic legislation, which would resolve many of the problems that now arise in the UK.

DOMESTIC LEGISLATION

1. PROHIBITION

UK law on human trafficking was marked with the introduction of three statutes in 2003 and 2004: the Nationality, Asylum and Immigration Act 2003, the Sexual Offences Act 2003, and the Immigration and Asylum Act 2004. Prior to the introduction of these three statutes, there were no specific laws regulating human trafficking. There was no clear distinction between trafficking, smuggling migrants and prostitution, and traffickers were prosecuted under the general criminal law related to pimping and immigration offences.¹ Offences such as rape, kidnapping, assault, unlawful imprisonment and the like were rarely used to prosecute traffickers due to the lack of evidence and the time and expense incurred by the prosecuting agencies.² Also used was sec 25 (1) of the Immigration Act 1971 dealing with facilitation of illegal immigrants. For facilitation of illegal immigration it was necessary to catch the facilitator with the immigrant at the entry point;³ this was difficult due to problems of identification and non-cooperation by the victims. Other legislation like the Sexual Offences Act 1956 was also used to prosecute traffickers.⁴

A. *The Nationality, Immigration and Asylum Act, 2002 and the Sexual Offences Act, 2003*

In February 2002, the Government proposed to introduce a new law on trafficking of human beings, which would establish an offence of trafficking for the first time in the country.⁵ The **Nationality, Immigration and Asylum Bill** was introduced to Parliament in April 2002 and passed at the end of the year, coming into force in February 2003.

In accordance with UK's international obligations,⁶ the **Nationality, Immigration and Asylum Act, 2002 (NIAA)** prohibits trafficking for prostitution and imposes a penalty for this offence as fourteen years' imprisonment,⁷ which is much higher than many European jurisdictions.⁸

¹ E Pearson *Human Trafficking, Human Rights: Redefining Victim Protection* (Anti-Slavery International London 2002) 105, www.antislavery.org/homepage/resources/humantraffic/Hum%20Traff%20Hum%20Rights,%20redef%2ovic%2oprotec%2ofinal%2ofull.pdf, last visited 9 January 2006.

² ibid.

³ ibid.

⁴ Secs 30 and 31 dealt with living off immoral earnings and prostitution.

⁵ Home Office *Secure Border, Safe Haven: Integration with Diversity in Modern Britain* Cmd 5387 (2002), <http://www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.pdf>, last visited 9 January 2006.

⁶ *Convention on the Elimination of All forms of Discrimination against Women*, 18 December 1979 (1981), 1259 UNTS 13, art 6; ratified by the UK in 1986.

⁷ Sec 4(5) of the Immigration and Asylum Act 2004.

The provision having the greatest relevance in respect of trafficking is sec 145, which criminalizes the following acts:⁹

- a) Arranging or facilitating the arrival in or departure from the United Kingdom of a person (the ‘passenger’) with the intent of exercising control over prostitution by the passenger within or outside the United Kingdom respectively; or doing the above acts with the belief that another person will exercise control over prostitution by the passenger within or outside the United Kingdom.¹⁰
- b) Arranging or facilitating the travel within the United Kingdom by the ‘passenger’ in respect of whom the person believes that an offence under subsection (1) may have been committed and such a person intends to exercise control or believes that another person is likely to exercise control over prostitution by the passenger in the United Kingdom or elsewhere.¹¹

Also enacted in 2003 was the **Sexual Offences Act**, which created offences with regard to trafficking for sexual exploitation. The offences relate to trafficking into,¹² out of¹³ and within¹⁴ the United Kingdom. The punishment for these offences is a maximum of 14 years of imprisonment.

B. Immigration and Asylum Act, 2004

The NIAA and the Sexual Offences Act until recently were not entirely in accordance with the UK’s obligations in respect of human trafficking, as they addressed only situations in respect of trafficking for prostitution. The government, however, clarified that this was only a stop gap measure which was to be replaced by more comprehensive legislation later.¹⁵ Thus, in July 2004 the Government enacted the **Immigration and Asylum (Treatment**

⁸ The offence is punishable with 5 to 10 years’ (maximum) imprisonment in Austria (sec 217 of the Criminal Code), Cyprus (Law No.3 (1) of 2000 on Special Protection of Persons Victims of Sexual Exploitation and Related Matters), Luxembourg (art 379 of the Criminal Code, amended by Law of 31 May 1999), Poland (art 174 of the Criminal Code), and Switzerland (art 196 of the Criminal Code). Council of Europe *Trafficking in Human Beings: Compilation of the Main Legal Instruments and Analytical Reports Dealing with Trafficking in Human Beings at International, Regional and National Levels* (Volume II: National Texts) (Council of Europe Strasbourg 2001), http://www.coe.int/T/E/human_rights/Trafficking/3_Documents/National_laws/EG%282002%292VolIII_E.asp#P3806_294580.%20last%20visited%2021%20December%202005, last visited 9 January 2006.

⁹ Sec 145 (5) (a).

¹⁰ Secs 145(1) and (3).

¹¹ Sec 145(2).

¹² Sec 57.

¹³ Sec 58.

¹⁴ Sec 59.

¹⁵ T Obokata ‘Human Trafficking, Human Rights And The Nationality, Immigration And Asylum Act’ (2003) 4 EHRLR 410, 420.

of Claimants, etc.) Act (IAA). The IAA criminalizes the practice of human trafficking for exploitation, which is broad enough to include all types of exploitation of trafficked victims and is in line with many of the international obligations of the United Kingdom, specifically with regard to prevention of forced labour and exploitation.¹⁶ The government had earlier argued that the reason for not having a comprehensive provision was a lack of law on slavery and forced labour, ‘which would serve as a legal basis for establishing trafficking for other purposes’.¹⁷ The IAA however goes beyond these arguments and has created offences regarding trafficking for all other forms of exploitation:

Section 4 of the IAA creates an offence of trafficking for exploitation. The offences are defined in terms of arranging and facilitating the arrival of individuals in,¹⁸ departure of persons from,¹⁹ and travel within the UK²⁰ with the intention to exploit such persons or with the belief that the persons will be exploited by other persons in the UK or elsewhere.

The term ‘exploited’ is defined as including situations:

- a) of forced labour and servitude under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR);²¹
- b) when the person is required to do anything which makes him or the other person commit an offence under the Human Organ Transplants Act 1989 or under sections 32 or 33 of the Human Tissue Act 2004;
- c) when the person is coerced or induced to provide services or benefit or to enable another person to acquire benefits of any kind;
- d) when the person is requested or induced to carry on any activity on the ground that s/he is mentally or physically ill or disabled, young or has a family relationship with a person; or if s/he would not have done it if none of the above existed.

This definition, coupled with the provisions in the NIAA and the Sexual Offences Act 2003, criminalizes all kinds of exploitation with regard to trafficking. It seems to cover all the aspects of the definition of trafficking in the Palermo Trafficking Protocol,²² the major elements being ‘transfer’ by ‘coercion’ for ‘control’ in order to ‘exploit’.²³

¹⁶ See heading 1 (Prohibition) of the next chapter on adequacy of legislation.

¹⁷ Obokata (n 15) 419.

¹⁸ Sec 4(1).

¹⁹ Sec 4(3).

²⁰ Sec 4(2).

²¹ 4 November 1950 (1953), ETS no. 005, 213 UNTS 222, ratified by UK in 1951.

²² United Nations *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 (2003), A/55/383, http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf#search='Protocol%20to%20Prevention%20Suppress%20and%20Punish%20Trafficking%20in%20Persons%2C%20Especially%20Women%20and%20Children%2C%20Supplementing%20the%20United%20Nations%20Protocol'

2. PREVENTION, INVESTIGATION AND PROSECUTION

The major complaints of the police, before the coming into force of the IAA 2004 were that there was no specific law regarding human trafficking.²⁴ With the coming into force of the IAA, the police and immigration officials have specific legislation to rely on in order to prosecute traffickers. The introduction of the IAA has also provided immigration officials with the power of arrest without warrant if they have a reasonable suspicion to believe that a crime had been committed under sec 4 of the IAA.²⁵ Moreover, since usually immigration officials are the first to come in contact with traffickers and victims of trafficking, the IAA also requires the director of public prosecutions to provide appropriate advice to immigration officials²⁶ so that they do not have to rely on the police for every action.

While the IAA has clarified the powers of the police and thus increased the possibility of prevention, prosecution and conviction of traffickers, in practice, the identification of victims represents an important obstacle: the failure to identify trafficked persons as victims of trafficking results in them being identified as illegal migrants which consequently leads to their deportation.²⁷ Without the cooperation of the victims, the identification of traffickers and their subsequent prosecution becomes very difficult, if not impossible. Thus an important link is lost in the chain of identifying and prosecuting the traffickers.

Even though the efforts of the police in developing new strategies and programmes to combat human trafficking have been commendable,²⁸ at the moment, there is not much data available on the prosecutions under this Act.²⁹

²³ Convention Against Transnational Organized Crime', last visited 9 January 2006. Protocol was signed by the UK 14 December 2000.

²⁴ Art 3 of the Palermo Trafficking Protocol.

²⁵ Pearson (n 1) 107.

²⁶ Sec 14.

²⁷ Sec 7.

²⁸ Antislavery NGOS Statement On Protection Measures For Trafficked Persons In Western Europe, <http://www.antislavery.org/homepage/resources/WETraffickingNGOstatement2003.pdf>, last visited on 9 January 2006.

²⁹ Women's Commission for Refugee Women and Children *The Struggle Between Migration Control and Victim Protection: The UK Approach to Human Trafficking*, http://www.womenscommission.org/pdf/UK_Trafficking.pdf, last visited on 9 January 2006. This report discusses a number of such initiatives taken by the police in order to combat trafficking.

³⁰ Home Office Asylum and Immigration Act 2004-Implementation Factsheet, http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/legislation/asylum_and_treatment/act_implementation.html, last visited on 9 January 2006; Refugee Council Asylum and Immigration Act 2004: An Update, <http://www.refugeecouncil.org.uk/downloads/AIActo4updateMarch05.pdf>, last visited on 9 January 2006.

3. VICTIM PROTECTION

As has been shown in the previous section, victims' protection is extremely important for successful identification of victims, prosecution and conviction of traffickers and eventual eradication of human trafficking.³⁰

Generally, the legislation in force in the United Kingdom regulating human trafficking has focused more on prohibition of the crime and its prevention rather than protection of victims. Since the UK has opted out of the EU Directive 2004/81/EC of 29 April 2004 on Short-Stay Residence Permits (EU directive) and has not signed the Council of Europe Convention Against Trafficking in Human Beings (COE Convention),³¹ there is no legislation allowing for residency or reflection periods for victims. The only legislation applicable to victims of trafficking refers to **evidentiary protection** and rules of **deportation**.

A. *In court evidentiary protection*

There is no legislation directly regulating trafficking victims who appear as witnesses in proceedings before the court. Special witness protection measures are available in the UK under the **Youth, Justice and Criminal Evidence Act, 1999** in cases where the quality of the evidence may be diminished due to fear or distress about testifying.³² A number of special measures are also provided for screening witnesses,³³ evidence by live link,³⁴ evidence given in private,³⁵ video recorded evidence,³⁶ video recorded cross-examination or re-examination³⁷ and examination through an intermediary.³⁸ In criminal proceedings regarding sexual offences, the person charged with the offence is not allowed to cross-examine the witness if s/he is the complainant.³⁹ Although these measures are available on application to the

³⁰ International Labour Organisation *A Global Alliance Against Forced Labour, Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (93rd Session International Labour Conference Geneva 2005) 82.

³¹ European Union Council Directive on the Short-term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings Who Cooperate with the Competent Authority, 29 April 2004, OJ L261/19; Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS no. 197, http://www.coe.int/T/E/human_rights/trafficking/PDF_Conv_197_Trafficking_E.pdf, last visited 9 January 2006. The UK opted out of the EU Directive (para 21) and has not signed the COE Convention.

³² Sec 17.

³³ Sec 23.

³⁴ Sec 24.

³⁵ Sec 25.

³⁶ Sec 27.

³⁷ Sec 28.

³⁸ Sec 29.

³⁹ Sec 34.

court, they have been rarely used in trafficking cases⁴⁰ and the Act makes no mention of the use of these measures in trafficking cases.

B. Residency and repatriation

The question under this heading is whether trafficking victims can be deported to the country of origin, where they might again fall into the trafficking hands. In the UK, according to the legislation at present, trafficked persons can qualify for **asylum, humanitarian protection or discretionary leave**. These are the only legal options for obtaining protection.⁴¹

i. Asylum

The procedure for granting asylum in the UK has become stringent over the years. The NIAA 2002 (and later the IAA 2004) narrowed down the eligibility for asylum seekers, where only persons qualifying under the *Convention Relating to the Status of Refugees, 1951* (the Refugee Convention)⁴² as refugees are eligible for asylum. The most important protection stems from Article 33 of the Refugee Convention (the principle of non-refoulement/non-return), which prohibits the deportation of refugees to a country in which he/she may be at risk of persecution.

Additional restrictions under the UK law include the ‘introduction of reporting requirements for asylum seekers, restrictions on multiple appeals, allowing certain applicants to be deported prior to consideration of their appeals and the introduction of a list of “safe countries.”’⁴³

In practice, victims of trafficking are rarely granted asylum: In *Lyudmyla Dzhygyn*,⁴⁴ a Ukrainian woman, a victim of trafficking for the purposes of prostitution, was granted asylum because ‘it was held that the inability of the government of the Ukraine to protect her made it more likely for her to be persecuted by traffickers if she was returned to Ukraine’.⁴⁵

ii. Humanitarian protection

In the light of the strict conditions for grant of asylum, more often than not, the victims of trafficking would not qualify for asylum. Rather, they could be

⁴⁰ Pearson (n 1) 112.

⁴¹ These two forms have replaced the former Exceptional Leave to Remain which was a discretionary power vested with the Secretary of State under sec 3(1) (b) of the 1971 Immigration Act.

⁴² 28 July 1951 (1954), 189 UNTS 137. The UK signed the Convention in 1951 and ratified it in 1954.

⁴³ Women’s Commission (n 28) 11.

⁴⁴ *Secretary of State for the Home Department v Lyudmyla Dzhygyn* (Immigration Appeals Tribunal) Appeal no. CC-50627-99 (ooTH00728) 13 April 2000. The Immigration Appeals Tribunal recognised that the respondent belonged to a particular social group under the definition of a refugee. Obokata (n 15) 409.

⁴⁵ Obokata (n 15) 416.

eligible for humanitarian protection, which is granted to those who, though not refugees, would, if removed, face in the country of return⁴⁶ a serious risk to life or person arising from the death penalty, unlawful killing or torture, inhuman or degrading treatment or punishment.⁴⁷ It is granted where the Home Office recognises that the risks fall outside the strict terms of the Refugee Convention but come within the scope of Article 3 of the ECHR prohibition of torture.⁴⁸ Therefore, this principle of non-refoulement ‘applies to cases where people are likely to face torture, inhuman or degrading treatments perpetrated by non-State actors’.⁴⁹ It has further been held that deportation of a person to a State ‘where he/she would be subjected to slavery or forced labour might raise issues under the prohibition of torture’.⁵⁰

Even though they do not qualify as refugees, victims of human trafficking to whom Article 3 of the ECHR applies are entitled to remain on the UK territory. One way of securing this is by issuing temporary/ permanent residence permits so that those trafficked can legally reside in a given state, eg those granted humanitarian protection are given leave to remain for five years (since 30th August 2005).⁵¹

iii. Discretionary leave

Those who are refused humanitarian protection may be granted discretionary leave for a period of three years or less.⁵² One of the major considerations in granting humanitarian protection or discretionary protection may still be the willingness of the victims to cooperate with the investigating agencies.⁵³ If they refuse to cooperate in the investigation, they might not be granted discretionary protection.

⁴⁶ ibid.: ‘It has been accepted that an obligation of states to respect this principle extends to cases where persecution is attributed to non-state actors when states are unwilling or unable to punish them.’

⁴⁷ Hansard, House of Commons (1 April 2003): Column 54SW, cited in Migration Watch UK *A Review of Exceptional Leave to Remain and Humanitarian Protection* http://www.migrationwatchuk.org/pdfs/Exceptional_leave_to_remain.pdf, last visited 9 January 2006.

⁴⁸ *Barar v Sweden* (App. 42367/98) unreported, Case Comment (1999) 3 EHRLR 330; also *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 (1987), 1465 UNTS 85, art 3; ratified by the UK in 1988.

⁴⁹ Obokata (n 15) 417-8; *In re Lyudmyla Dzhygun* (n 44) 410; *H.L.R. v France* (1998) 26 EHRR 29; *Ahmed v Austria* (1997) 24 EHRR 278.

⁵⁰ Obokata (n 15) 418; *Barar v Sweden* (n 48).

⁵¹ Refugee Council *UK Asylum law and process* http://www.refugeecouncil.org.uk/infocentre/asylumlaw/seeking_asylum.htm, last visited 9 January 2006.

⁵² Home Office Circular 12/97.

⁵³ Obokata (n 15) 421.

ADEQUACY OF EXISTING LEGISLATION

1. PROHIBITION

The prohibition of human trafficking legislated by the NIAA, IAA and the Sexual Offences Act in accordance with UK's international obligations adequately covers all forms of exploitation.

A. *Forced labour – ILO Conventions*

Among international organisations involved in the prevention of human trafficking, the International Labour Organisation, in particular, appears to be content with the recent attempts to combat trafficking.⁵⁴ The 2005 Report welcomes new laws on trafficking (covering both forced labour and sexual exploitation) and changes to immigration and law enforcement measures in the context of migration. The Director-General observes that the UK 'demonstrates a firm commitment to treating trafficking as a serious offence'. Significantly and in addition to the introduction of new laws, the UK is to be credited with providing accompanying appropriate and dissuasive sanctions, in the form of 14-year maximum imprisonment sentences for trafficking offences.

Having expanded the definition of human trafficking to all forms of exploitation, the UK has now responded to the ILO's concern about forced labour expressed in the *Forced Labour Convention*, No 29 (Convention 29) and the *Abolition of Forced Labour Convention*, No 105.⁵⁵ Trafficking for economic purposes other than sexual exploitation, among them also forced labour, represents at least one third of all trafficking.⁵⁶ According to ILO global statistics, aside from the sex industry, those sectors most prone to trafficking include the labour-intensive activities of agriculture and construction.⁵⁷ In other words, trafficking is just as likely to be motivated by the demand for cheap/forced labour on building or farming projects amongst others, as it is to supply sexual trade.

However, with regard to the new UK legislation, the ILO indicated four major points:

⁵⁴ *A Global Alliance Against Forced Labour* (n 30) 22-23.

⁵⁵ 28 June 30 (1932), 14th session ILO Conference, ratified by UK in 1931; 25 June 1957 (1959), 40th session ILO Conference, ratified by UK in 1957.

Article 2(1) of the Convention 29 defines forced labour as 'all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. Forced labour occurs wherever there is the threat by an employer of denunciation of the victim to immigration authorities and also, significantly, where deception manifests at a later stage. In other words, workers can become victims subsequently, either on the way to their destination or even at their destination.

⁵⁶ *A Global Alliance Against Forced Labour* (n 30) 14.

⁵⁷ *ibid.*, 47.

- a) The organisation emphasised that new UK measures on trafficking must be actively enforced.⁵⁸ Consequently, law enforcement agents must be equipped with the necessary capacity and resources.
- b) With regard to the UK and its status as a country of destination, the ILO stressed the urgent need for improved and more rational migration management, in addition to critical assessment of the needs of the UK labour market more generally. The UK must find alternative means of satisfying the clear demand for low-paid and insecure jobs, in view of the domestic population's apparent unwillingness to undertake such work. Bilateral migration agreements may provide at least a partial solution.⁵⁹
- c) Also, the UK must take further preventative and rehabilitative action in order to fully combat and eradicate trafficking. Such action might include a critical reappraisal of potentially restrictive migration policy and labour market failures, to the extent that these phenomena create a demand for trafficking.
- d) Finally, the ILO suggested that strengthened victim protection schemes be introduced in UK.⁶⁰

B. Children – Rights of the Child Convention

When dealing with trafficking, the *Palermo Trafficking Protocol* distinguishes between trafficking in children (minors below 18 years of age), where no coercion is required in order to commit the crime, and in adults where, on the contrary, some kind of violence, threat of violence, deception, etc. are a necessary condition for the crime to happen. The UK, though not signatory to the Protocol, takes into account this distinction in sec 145(4) of the IAA, 2004: 'when the person is requested or induced to carry on any activity on the ground that s/he is ... young...'

Other international instruments provide for more specific protection of trafficked children:

The *Convention on Rights of the Child, 1989*⁶¹ in the relevant parts of Article 34 provides that 'state parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national bilateral and multilateral measures to prevent

⁵⁸ Art 25 of the Convention 29.

⁵⁹ A *Global Alliance Against Forced Labour* (n 30) 84.

⁶⁰ Discussed under heading 3. of the next chapter.

⁶¹ 20 November 1989 (1990), 1577 UNTS 3; signed by UK 19 April 1990 , ratified 16 December 1991.

- a) The inducement or coercion of a child to engage in any unlawful sexual activity,
- b) The exploitative use of children in prostitution or other unlawful sexual practices.'

In addition, the *Worst forms of Child Labour Convention, No 182*⁶² is significant for its express reference to trafficking: the worst forms of child labour are defined *inter alia* as 'all forms of slavery or practices similar to slavery, such as the sale and trafficking in children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for armed conflict'.

While both conventions have been ratified in the UK, the provisions and principles of the Convention of the Rights of the Child have not yet been incorporated into domestic law, a fact which concerned the Committee on the Rights of the Child in their most recent report.⁶³ Indeed, the Committee encouraged the UK to incorporate into domestic law the rights, principles and provisions of the Convention in 'order to ensure that all legislation complies with the Convention and that the provisions and principles of the Convention are widely applied in legal and administrative proceedings'.⁶⁴

Firstly, if in the identification process the age of the victim is uncertain and there are reasons to believe that the victim is a child, then, according to the COE Convention, he/she shall be presumed to be a child pending verification of the victim's age. The purpose of this presumption is that the victim should be afforded special protection measures as defined by the Convention on the Rights of the Child.⁶⁵

Secondly, the COE Convention also suggest that as soon as an unaccompanied child is identified as a victim under Article 18 then Parties must provide representation for the child by a legal guardian, organization or authority which is responsible to act in the best interests of that child; take necessary steps to establish the child's identity and nationality; and make every effort to locate the child's family when this is in the best interests of the child — as it may well be the case that the family of the child victim is the source of the trafficking.⁶⁶

Thirdly, special legislation prohibiting trafficking children should be enacted with tougher penalties for child traffickers. In the US, for example, special legislation exists to combat sex tourism by Americans abroad. The

⁶² 17 June 1999 (2000), 87th session ILO Conference; ratified by UK 22 March 2000.

⁶³ The Committee on the Rights of the Child *Consideration of reports submitted by States Parties under article 44 of the Convention* (31st session Committee on Rights of Child 2002) [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/2f2744b7e0d015d6c1256c76004b3ab7/\\$FILE/G0245381.doc](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/2f2744b7e0d015d6c1256c76004b3ab7/$FILE/G0245381.doc), last visited 9 January 2006.

⁶⁴ ibid., 3.

⁶⁵ Council of Europe *Explanatory Report on the Council of Europe Convention on Action Against Trafficking in Human Beings* (Council of Europe Strasbourg 2005), para 136, http://www.coe.int/T/E/human_rights/trafficking/PDF_Conv_197_Trafficking_E.pdf, last visited 9 January 2006.

⁶⁶ ibid., para 134 and Art 10(4) of the COE Convention.

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act makes it a crime for any person to enter the US, or for a US citizen or permanent resident to travel abroad, to sexually abuse children.⁶⁷ Unlike previous legislation, the PROTECT Act does not require prosecutors to prove prior intent. It also increases the maximum penalty to thirty years, from a previous maximum of fifteen.⁶⁸

Apart from toughening the penalty, the PROTECT Act makes several other changes as well, such as

- i. extending the statute of limitations for federal crimes involving the abduction or physical or sexual abuse of a child for the lifetime of the child;
- ii. expanding the potential reach of federal sex trafficking prosecutions by extending federal jurisdiction to crimes committed in foreign commerce;
- iii. establishing parallel penalty enhancements for the production of child pornography overseas; and
- iv. criminalizing actions to arrange or facilitate the travel of child sex tourists.

Fourthly, the Committee outlined further concerns that ‘sexually exploited children are still criminalised by law’.⁶⁹ Significantly, the Committee recommended that the UK review its legislation so as not to criminalise children who are sexually exploited and ensure protection for children as, victims of trafficking. This was done in India, where the Immoral Traffic Prevention Act (ITPA) on human trafficking does not criminalize prostitution and in this way protects sexually exploited children.⁷⁰ The ITPA toughened penalties for trafficking in children, particularly by focusing on traffickers, pimps, landlords, and brothel operators, while protecting underage girls as victims. The ITPA also required police to use only female police officers to interrogate girls rescued from brothels. Finally, the ITPA required the Government to provide protection and rehabilitation for these rescued girls.

At the moment, UK legislation provides for care and accommodation for trafficked children under the Children’s Act:

Those under 16 years of age are accommodated under Section 20 of the Act and are termed ‘looked after’, whilst those over 16 years are supported under Section 17.

⁶⁷ US State Department *Fighting Human Trafficking in the United States* <http://usinfo.state.gov/gi/Archive/2004/May/12-381449.html>, last visited 9 January 2006.

⁶⁸ US State Department *Trafficking in Persons Report* <http://www.state.gov/g/tip/rls/tiprpt/2005/46618.htm>, last visited 9 January 2006.

⁶⁹ The Committee on the Rights of the Child *Report* (n 63) 3.

⁷⁰ Prostitution is not criminalized. Rather, the ITPA prohibits only solicitation or engaging in sex acts in or near a public place. This provision, which was intended to protect trafficking victims, instead protects the sex industry.

Children who are over 16 but have been assessed as being vulnerable, will often be accommodated under Section 20.

In relation to accommodation, those under 16 are placed into foster care, or residential care homes. Over 16s are placed in accommodation according to their needs and how independent they are. This type of accommodation is often semi-independent in shared houses, hostels or bed and breakfast.

In the case of over 16s (or sometimes over 15s in shared housing), most boroughs assign a social worker to every child to provide support for registering with education and health services etc, and can contact the social worker at any time. One social worker stated that some boroughs do not provide support to unaccompanied minors once they have received an asylum decision, whereas they provided help right up until they are 18 years old whether they had received a decision or not.⁷¹

In conclusion, the UK does not have laws that impose tougher penalties on those trafficking and exploiting children nor does it decriminalise children's behaviour.

2. PREVENTION, INVESTIGATION AND PROSECUTION

With regards to prevention of crime, the UK has not set up specific schemes. Examples of measures that can be taken can be found in Articles 5 and 6 of the COE Convention:

A. *Prevention – Article 5 COE Convention*

Article 5 of the COE Convention provides for several measures that can be taken in order to prevent and combat trafficking in human beings:

- a) establish or strengthen national coordination between the various responsible bodies;
- b) establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings;
- c) promote a Human Rights-based approach and use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to under b);

⁷¹ C Somerset *Cause for Concern? London social services and child trafficking (End Child Prostitution, Pornography and Trafficking London 2004)* 32, <http://www.antislavery.org/homepage/antislavery/Cause%20for%20Concern.pdf>, last visited 9 January 2006.

- d) take appropriate measures, as may be necessary, to enable migration to take place legally, in particular through dissemination of accurate information by relevant offices, on the conditions enabling the legal entry in and stay on its territory;
- e) take specific measures to reduce children's vulnerability to trafficking, notably by creating protective enforcement for them.

These measures should involve NGOs and other civil society organizations.

B. Discouraging demand – Article 6 COE Convention

On the other hand, Article 6 requires that Parties adopt measures so as to discourage the demand that fosters all forms of exploitation of persons that leads to trafficking. The article aims is to effectively dissuade trafficking, tackling the demand side of the phenomenon in order to prevent its recurrence.

Article 6 stipulates that each Party must adopt or strengthen legislative, administrative, educational, social, cultural or other measures including;

- a) research on best practices, methods and strategies;
- b) raising awareness of the responsibility and important role of the media and civil society in identifying the demand as one of the root causes of trafficking in human beings;
- c) target information campaigns involving, as appropriate, *inter alia*, public authorities and policy makers;
- d) preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being.

While the UK's enactment of the IAA in 2004 represents an important step allowing the police and immigration officials to rely on new legislation in order to prosecute traffickers, additional measures should be taken as suggested by the COE Convention.

In Canada, for example, the authorities have focused on increasing border controls to restrict immigration and criminal sanctions for traffickers.⁷² The Government of Canada has made significant efforts to implement prevention projects, by making efforts to prevent trafficking from

⁷² O Martinez 'Canadian Policy on Human Trafficking: A Four-year Analysis' (2005) 43(4) *International Migration* 21.

occurring in the first place in sources countries, stopping trafficking through border controls and through cooperation with other countries.⁷³

C. Investigation and prosecution

As already mentioned, identification of victims of trafficking represents an important hurdle in preventing trafficking and also in its investigation and prosecution. Thus, effective schemes of protection of trafficking victims have to be put in place to ensure that investigation and prosecution can take place. These obligations may carry the force of law: In *Velasquez Rodriguez v Honduras*,⁷⁴ the Inter-American Court of Human Rights held that States are required to investigate, prosecute and punish traffickers with ‘due diligence’.⁷⁵ A similar view has been endorsed by the European Court of Human Rights in *Z v United Kingdom*⁷⁶ and also by the Special Rapporteur on Violence against Women.⁷⁷

Since investigation and prosecution are so closely linked to victims’ cooperation, this heading is analysed below in the next section on victim protection.

3. VICTIM PROTECTION

Without the cooperation of the victims, the identification of traffickers and their subsequent investigation, prosecution and punishment becomes very difficult, if not impossible. If the goal is to achieve eradication of human trafficking as suggested by the ILO,⁷⁸ States should aim to protect trafficking victims. The obligation to protect is not new; it was mentioned already in human rights instruments as early as 1950, in the *Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*.⁷⁹ Today Articles 1 and 13 of the ECHR also envisage an obligation of the State to protect persons whose rights and freedoms are recognised therein and to provide effective remedies where the same are violated.

The most comprehensive and detailed framework which addresses all the important issues related to human trafficking and victim protection are

⁷³ ibid., 10.

⁷⁴ (1989) 28 ILM 294.

⁷⁵ An illegal act which violates human rights and which is initially not directly imputable to the State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by international instruments.

⁷⁶ *Z v United Kingdom* (2002) 34 EHRR 3, para 109; *Osman v United Kingdom* (2000) 29 EHRR 245, paras 115-116.

⁷⁷ R Cook ‘State Responsibility for Violation of Women’s Human Rights’ (1994) 7 Harvard Human Rights Journal 125.

⁷⁸ *A Global Alliance Against Forced Labour* (n 30) 82.

⁷⁹ 21 March 1950 (1951), 96 UNTS 271, arts 16, 17 and 19. This Convention has not been signed by the UK.

contained in the *COE Convention*, which builds on the *Palermo Trafficking Protocol* and the *EU Directive* and extends them both. The COE Convention provides for protection of victims in several areas: identification of victims, in court evidentiary protection, temporary residency and reflection periods, rules on deportation.

A. Identification of victims – Article 10 COE Convention

As has already been mentioned,⁸⁰ identification of victims is crucial:

Failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights and the prosecution to be denied the necessary witness in criminal proceedings to gain a conviction of the perpetrator for trafficking in human beings.⁸¹

Thus, competent authorities must seek and evaluate different circumstances in the identification process, according to which they can consider a person to be a victim of trafficking.

Article 10(1) of the COE Convention requires Member States to provide their authorities with persons who are trained and qualified in preventing and combating trafficking, identifying and helping victims including children. Further, the Member States must ensure that the relevant authorities collaborate with each other and with other relevant support organizations such that victims of trafficking can be identified. Such identification must take particular account of the situation of women and children and, where appropriate, victims must be issued with residence permits under the terms of Article 14 COE Convention.

The Explanatory notes state the State Parties are often insufficiently aware of the problem of trafficking and that victims often have their documentation taken away or destroyed by the traffickers. Where this happens, victims risk being treated as illegal immigrants, prostitutes, or illegal workers and being punished without any offer of help. Article 10(1) is designed to avoid that situation.

Even where the identification process has not been fully completed, as soon as the competent authorities consider that there are reasonable grounds to believe that the person is a victim then they must not remove that individual from the territory of the receiving state.⁸² Such a removal must not take place until the identification process as a victim of the offence under Article 18 has taken place.

The Explanatory notes to the COE Convention stress the importance of the identification process set out in Article 10:

Identifying a trafficking victim is a process which takes time. It may require exchange of information with other countries or Parties or

⁸⁰ Text to n 27.

⁸¹ *Explanatory Report to the COE Convention* (n 65) para 127.

⁸² *ibid.*, para 131 and article 10(2) COE Convention.

with victim-support organizations, and this may well lengthen the identification process. Many victims, however, are illegally present in the country where they are being exploited. Paragraph 2 seeks to avoid their being immediately removed from the country before they can be identified as victims. Chapter III of the Convention secures various rights to people who are victims of trafficking in human beings. Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible.⁸³

At the moment there is no scheme in force enabling the identification of victims according to the COE Convention. Since the UK has not signed or ratified the Convention, this might be a good time to do so and to incorporate it into domestic law.

B. Assistance irrespective of residency – Article 12 COE Convention⁸⁴

The assistance guaranteed under Article 12 applies to victims of either national or transnational trafficking and applies irrespective of whether they have been granted a residence permit.⁸⁵

In order to receive all of the assistance measures under article 12, the individual must have been identified as a victim under the Article 10 process.⁸⁶ He/she is entitled to the measures under Article 12(1) during the identification process⁸⁷ and during the recovery and reflection period.⁸⁸

Article 12 (1) requires that Parties adopt legislation to assist victims in the ‘physical, psychological and social recovery’. The requirement to provide ‘assistance’ requires that Parties provide the means of subsistence to victims who are without means. It is to be distinguished from financial aid in that it may take the form of aid in kind (e.g. food, clothing) rather than money.

At a minimum, such assistance shall include:

- a) standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
- b) access to emergency medical treatment;
- c) translation and interpretation services where appropriate;
- d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;

⁸³ *Explanatory Report to the COE Convention* (n 65) para 131.

⁸⁴ Palermo Trafficking Protocol (n 22) art 6, EU Directive (n 31) art 7.

⁸⁵ Under the condition established under arts 10(2) and 13(2).

⁸⁶ For the purposes of the assistance measures, each Party is responsible for those victims within its territory. *Explanatory Report to the COE Convention* (n 65) para 147.

⁸⁷ Where there are ‘reasonable grounds to believe’ that an individual is a victim, then that person is solely entitled to those assistance measures set out in article 12(1) and (2).

⁸⁸ An individual is similarly entitled to measures set out in article 12(1) and 12(2).

- e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
- f) access to education for children.

The assistance provided for under article 12 (1) are minimum standards. Parties are free to grant additional assistance.

Paragraph (a) reminds the Parties that while Article 31 of the Revised European Social Charter recognises everyone's **right to housing**, the particular circumstances of the victims of trafficking call for particular measures to assist them in their physical, psychological and social recovery.⁸⁹ It follows that victims might need secure and/or adapted accommodation in which they can feel safe from traffickers. The individual circumstances of each individual victim need to be taken into consideration. Specialised protected shelters or refuges are 'especially suitable'⁹⁰ where they are staffed by people qualified to deal with questions of assistance to trafficking victims, provide continuous victim reception and are able to respond to emergencies. Such refuges must be kept secure from visits from outsiders, especially where there is a threat of reprisals against the victim.

Where the victim is a child, then accommodation must pay special attention to his or her needs. The placement of such victims in detention centers, which results occasionally from a lack of space in specialist institutions, can never be regarded as appropriate accommodation for the purposes of Article 12 (1)(a).⁹¹

Paragraph (b) requires that emergency **medical treatment** be available to victims. Due care must be take to preserve any evidence which might be adduced in later criminal proceedings. Full medical assistance is only available for those victims lawfully resident in the Party's territory under Article 12(3).

Paragraph (c) requires that the **language aid** extend beyond merely the right to an interpreter in judicial proceedings.⁹² As the explanatory notes suggest:

Ignorance of the language adds to [the victim's] isolation and is one of the factors preventing them from claiming their rights. In such cases language aid is needed to help them with formalities. This is an essential measure for guaranteeing access to rights, which is a prerequisite for access to justice.

⁸⁹ *Explanatory Report to the COE Convention* (n 65) para 153; *European Social Charter*, 18 October 1961 (1965) ETS no. 035, (revised) 5 May 1996 ETS no. 163.

⁹⁰ *ibid.*, para 154.

⁹¹ *ibid.*, para 155.

⁹² As guaranteed by art 6 of the ECHR.

Paragraph (d) requires that **counselling and information** be provided to victims and stipulates that it should deal with such matters as the availability of protection and assistance arrangements, the various options open to the victim, the risks they run, the requirements for legalising their presence in the Party's territory, the various possible forms of legal redress, and detailed information on how the criminal law system operates. The purpose of such information is that victims should be able to evaluate their situation and make an informed choice from the various possibilities open to them. Advice dealing with their 'legal rights' under Article 12(1)(d) of the COE Convention does not include the appointment of a lawyer in order to claim compensation, which is specifically covered by Article 15(2).

In short, Article 12 requires that the Party must take due account of the victim's safety and protection needs in implementing the assistance measures. This should be done in a consensual and informed manner taking into account the interests of the victim (the country of origin, the age of the victim, the type of exploitation and language skills) with special attention paid to the needs of child victims.

Finally, victim assistance cannot be made conditional on his or her willingness to act as a witness in any criminal proceeding.⁹³ However, where there is a legal requirement to act as a witness then a victim may not rely on this provision to refuse to do so.

i. The Poppy Project⁹⁴

In the UK, there are few schemes relating to victim assistance: In March 2003, a 6-month pilot project was established in London with the aim of prosecuting traffickers of women and at the same time providing the victims with safe housing, counselling, medical and other services.

One of the aims of the pilot was to enable UK enforcement authorities to gather information on traffickers and to consider its impact on intelligence leads, prosecutions and disruption to trafficking activity.⁹⁵

The victims were offered assistance with initial counselling, they were given suitable accommodation to return to (temporary shelters) and helped to re-integrate into their own community and find employment. When the police interviews finished and, if applicable, the judicial process completed, victims were returned to their country of origin:

Where such people are willing to come forward to the authorities, we shall, where necessary, make special arrangements for their protection. We must acknowledge that if they do cooperate with the authorities, they may risk reprisals against themselves or their loved

⁹³ art 12(6).

⁹⁴ Eaves Housing for Women *The Poppy Project - Stop the Traffick*, <http://www.poppyproject.org/>, last visited 9 January 2006.

⁹⁵ Home Office *Victims of trafficking – Guidance*, http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis/victims_of_trafficking.html, last visited 9 January 2006.

ones in their own countries. We will consider, in the light of individual circumstances, whether it would be appropriate to allow them to remain here. But, if they are not entitled to remain here, and it is not appropriate to let them stay, they must be returned to their own country wherever possible. To do otherwise would undermine the UK's immigration law and open the door for traffickers to exploit more victims. But we will assist them to return by providing them with initial counselling, ensuring they have suitable accommodation to return to and helping them to reintegrate into their own community and find employment.⁹⁶

The project, later named 'The Poppy Scheme', was placed on a more formal basis and is approved on a regular basis by the Home Office.⁹⁷

C. Recovery and Reflection period - Article 13 COE Convention⁹⁸

Article 13 requires Parties to provide for a **recovery and reflection period** during which it is not possible to expel the victim and the Parties must authorise him/her to stay in their territory.

The purposes of this guarantee period are, amongst others, to allow the victim to recover physically and psychologically such that there is some minimum of psychological stability; to escape the influence of traffickers; and to decide whether to cooperate with the relevant law enforcement authorities. It applies to victims who are illegally present or who are legally resident with a short-term residence permit.

Article 13(1) requires Parties to provide for a recovery and reflection period of at least 30 days where there are reasonable grounds to believe that the individual is a victim. The 30-day period is a minimum guarantee and must be adequate for that individual to recover and escape the influence of traffickers and/or take an informed decision on cooperating with the competent authorities. However, it should be noted that the recommendations of both the Ministerial Forum of the Stability Pact for South-Eastern Europe and the European Commission's Group of Experts suggested a period of at least three months.

The 30-day minimum may be extended if a victim is in a state of shock or distress. This guarantee applies until an 'informed decision' can be taken by the victim. This means that the victim must be in a reasonably calm frame of mind and that when the decision is made, the victim is not under any continuing influence of the trafficker.

However, even if the reflection period prevents deportation of victims from the country, the provision is without prejudice to relevant national proceedings. This last provision means that where there is an obligation to testify before a judge, a victim may not use article 13 to refuse to do so.

⁹⁶ *Secure Border, Safe Haven* (n 5) 82.

⁹⁷ Poppy Project (n 94).

⁹⁸ EU Directive (n 31) art 6.

Since the Parties cannot enforce any expulsion order against the victim, they need to create a legal framework allowing the victim to remain on their territory for the duration of the period providing all such victims with relevant documents to remain without delay.

While there is no comprehensive framework providing for reflection periods in UK, Glasgow City Council has obtained an exemption from the current Home Office policy such that ‘foreign women caught up in the sex trade’ are being offered a 30-day reflection period and assistance along the lines of both the Poppy Project and Article 12 of the Convention.⁹⁹

Since the UK opted out of the EU Directive, it is not required to provide for recovery and reflection periods. Moreover, projects like the Poppy Project and the Glasgow City Council are rare. In future, the UK should adopt a coherent policy on reflection periods and legislate accordingly.

D. Residency – Article 14 COE Convention¹⁰⁰

Article 14 provides that each Party shall provide victims with renewable residence permits where either the competent authorities consider that their stay is necessary owing to their personal situation¹⁰¹ and/or the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings.¹⁰²

The aim of article 14 is stated thus:

Immediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic. For the victims this means having to start again from scratch—a failure, in most cases, they will keep quiet about, with the result that nothing will be done to prevent other victims falling prey to the same trap. A further factor is fear of reprisals by the traffickers, either against the victims themselves or against family or friends in the country of origin. For the law-enforcement authorities, if the victims continue clandestinely in the country or are removed immediately they cannot give information for effectively combating the traffic. The greater victims’ confidence that their rights and interests are protected, the better the information they will give. Availability of residence permits is a measure calculated to encourage them to cooperate.¹⁰³

The personal situation requirement under article 14(1)(a) must take account of, amongst others, the victim’s safety, state of health, and family situation. The test for granting a permit under this head is that the victim’s

⁹⁹ J Johnston ‘Sex-trafficked victims to be offered refuge’ Sunday Herald (6 November 2005).

¹⁰⁰ Palermo Trafficking Protocol (n 22) art 7; EU Directive (n 31) art 8.

¹⁰¹ art 14(1)(a).

¹⁰² art 14(1)(b).

¹⁰³ *Explanatory Report to the COE Convention* (n 65) para 181.

circumstances must be such that it would be unreasonable to compel them to leave the national territory.¹⁰⁴

Where children are involved, Article 14(2) requires that residence permits are issued to child victims in accordance with the best interests of the child and, where appropriate, renewed under the same conditions. In such circumstances, the child's best interests take precedence over the conditions set out for adult victims.¹⁰⁵

While the Convention does not specify a particular length of residence permit, it does require that it be renewable. The permit may be withdrawn or renewal denied in accordance with the domestic law of the Party.

The COE Convention provisions do not condition residency permits upon cooperation with the relevant authorities. However, other instruments do:

The *EU Directive 2004/81/EC*¹⁰⁶ provides for residence permits to be issued to third-country nationals who are victims of human trafficking who cooperate with the competent authorities trying to track down perpetrators. The Directive stipulates that the authorities should give a short-term residence permit of at least six months, which is subject to renewal if victims are willing to co-operate¹⁰⁷.

Similarly, in the US, under the Trafficking Victims Protection Act (TVPA)¹⁰⁸ victims of trafficking may apply for a 'T visa' which entitles them to benefits similar to refugees. In order to qualify, victims must 1) have complied with any reasonable request for assistance in the investigation or prosecution of the acts of trafficking, and 2) would suffer extreme hardship involving unusual and severe harm upon removal from the US.¹⁰⁹

The second condition is important since residency permits are helpful in cases where the anti-deportation principle of refoulement/non-return should be applied. There, they prevent the deportation of victims of human trafficking and enable them to reside (legally) in a particular State.¹¹⁰ Such temporary or permanent residence permits have already been incorporated

¹⁰⁴ ibid., paras 182 and 184.

¹⁰⁵ under art 14 (1)(a) and (b).

¹⁰⁶ EU Directive (n 31).

¹⁰⁷ Art 8(3) of the Directive.

¹⁰⁸ Fighting Human Trafficking in the United States (n 67).

¹⁰⁹ ibid.

¹¹⁰ 'One of the ways traffickers keep women and girls enslaved is by telling them they will be arrested and deported if they try and run away. We're removing that tool of coercion by treating the victims of trafficking not as illegal aliens but as refugees.' Transcript of speech of President Bush (Tampa, Florida 16 July 2004).

<http://www.whitehouse.gov/news/releases/2004/07/20040716-11.html>, last visited 9 January 2006.

into the national legislation of Belgium, Italy, the Netherlands and the United States.¹¹¹

Canada solves the problem by extending refugee status to women on the basis of gender-related persecution in their home countries. Refugee status has been granted to certain victims of trafficking on the basis of their ‘membership of a particular social group’.¹¹² This treatment is similar to that used by UK courts in a case involving a Ukrainian woman, Lyudmyla Dzhygun, who was granted asylum on the basis of inability of the Ukrainian government to protect the applicant if she returned to Ukraine.¹¹³

However, the Canadian Council of Refugees has gone further suggesting legislative changes, ie recommending the inclusion of a category of ‘trafficked persons’ in the Immigration and Refugee Protection Act’s definition of ‘person in need of protection’,¹¹⁴ creation of temporary visa for trafficked persons and regulatory class to allow application for permanent residency.¹¹⁵

In the UK, apart from legislation concerning asylum, humanitarian protection and discretionary leave, which enables the respect of the principle of non-refoulement, temporary residence permits are provided on the basis that victims co-operate with law enforcement authorities to investigate, prosecute and punish traffickers.¹¹⁶ However, this is done only in practice since no legislation exists stipulating the grounds upon which such temporary permits may be awarded in cases of trafficking. Legislating the current practice would remedy the situation and provide protection to trafficking victims.¹¹⁷

E. Repatriation – Article 16 COE Convention¹¹⁸

Article 16 concerns the voluntary and non-voluntary return of victims of trafficking. Article 16(1) places an obligation on the Party in which a victim is a national or in which the person had the right to permanent residence to facilitate and accept the return of the victim without undue or unreasonable delay.

¹¹¹ Pearson (n 1) examines the national laws of the Netherlands, Belgium, United Kingdom, United States, Italy, Nigeria, Thailand, Colombia, Ukraine and Poland.

¹¹² Martinez (n 72) 15.

¹¹³ Text to n 44.

¹¹⁴ Sec 97 of IRPA: A person who has been determined by Canada to be either a Convention Refugee or a person in need of protection (a person who may not meet the Convention definition but is in refugee like situation defined in Canadian law as deserving of protection, e.g. in danger of being tortured).

¹¹⁵ Martinez (n 82) 16.

¹¹⁶ Pearson (n 1).

¹¹⁷ Feldman (n 56) 498.

¹¹⁸ Palermo Trafficking Protocol (n 22) art 8.

Noting the risks associated with the return of a victim (to the victim, primarily), both Article 16(1) and 16(2) make explicit that importance of the safety and dignity of the victim in the context of his or her return.¹¹⁹

Article 16(5) obliges each Party to establish repatriation programmes by legislation or some other measure aimed at avoiding re-victimisation. Further, each Party should make its best effort to reintegrate the victim into society of the State of return, with a particular emphasis of labour market and education opportunities and the acquisition of professional skills.

Article 16(6) requires each Party to adopt measures to make information on relevant services and organizations available to victims on their return.

Finally, Article 16(7) requires States to take account of the best interests of the child when deciding whether to return him or her to a State following a risk and security assessment.

F. Compensation and legal redress - Article 15 COE Convention

Article 15 ensures that victims of trafficking are compensated for damages suffered. Article 15(3) establishes a victim's right to compensation from the perpetrators of the trafficking and Article 15(4) requires Parties to guarantee compensation for victims in accordance with national law, for instance through the establishment of a fund for victim compensation or other measures aimed at social assistance or social integration of the victim which might be paid for as the result of article 23 COE Convention ('Sanctions and measures').

In the UK, legislation allowing for compensation and legal redress has not been developed nor applied in trafficking cases.¹²⁰

G. In court evidentiary protection – Article 28 COE Convention

State parties are required to adopt measures to produce effective and appropriate protection from potential retaliation or intimidation, especially during and after both the investigation and prosecution of perpetrators. Such protection must be afforded to:

- a) victims;
- b) those who report criminal offences or otherwise cooperate with the prosecuting authorities;
- c) witnesses who give evidence concerned with offences established under Article 18 of the Convention;

¹¹⁹ Articles 16(3) and (4) concern international cooperation with regards to return of the victims, taking into consideration Article 3 of the ECHR and its jurisprudence, eg *Soering v UK* 14038/88 [1989] ECHR 14.

¹²⁰ Pearson (n 1) 115.

d) and where necessary, the family members of the above.¹²¹

Protection measures include various kinds of protection, including physical protection, relocation, identity change and assistance in obtaining jobs.¹²² Similar protection must be afforded, where necessary, to NGOs and relevant others involved in the investigation of prosecution of perpetrators to avoid potential retaliation or intimidation.¹²³ Child victims must be afforded special protection measures taking into account the best interests of the child.¹²⁴

State parties must consider entering into agreements or arrangements with other States for the implementation of Article 28.

¹²¹ art 28(1).

¹²² art 28(2).

¹²³ art 28(4).

¹²⁴ art 28(3).

CONCLUSION

The present opinion evaluated the adequacy of UK legislation on human trafficking and its compliance with UK's international obligations.

Firstly, in the area of **prohibition**, the definition of human trafficking accepted by the UK has been expanded in 2004 with the IAA. The offence of human trafficking is now no longer limited only to sexual exploitation, but extends to all forms of exploitation (including slavery and forced labour), which is consistent with obligations arising from the *Convention on the Elimination of Discrimination of Women* and the *ILO Conventions*. The accepted definition is important as it determines the scope within which law enforcement officials will work for prevention, investigation, prosecution, and punishment of traffickers as well as protection of victims of trafficking.

Secondly, international instruments (*Convention on Rights of the Child* and the *ILO Convention on Worst forms of child labour*) require that special protection be assured for children victims of trafficking. While some local protection schemes are provided for children in the UK, laws should be amended imposing tougher penalties on children traffickers and decriminalising children's behaviour.

In the area of **prevention, investigation and prosecution**, the UK has not set up specific schemes for prevention of human trafficking or discouraging its demand. Examples of measures to be taken are suggested by the *COE Convention*, which at the moment has not been signed by the UK. This opinion suggests that the *COE Convention* be signed and ratified or that the measures provided for in Articles 5 and 6 be enacted by the UK through domestic legislation as was the case in Canada.

The area of greatest relevance and where most of the work still has to be done is **victim protection**. The protection of victims is essential for successful identification of victims, prosecution and conviction of traffickers and eventual eradication of human trafficking. Presently, however, there is no legislation in force in the UK that would provide coherent protection for victims of trafficking. Schemes like the Poppy Project are approved only on an individual basis and they address only certain aspects of victim protection (assistance with accommodation, provision of a reflection period). Thus, legislation needs to be enacted comprehensively addressing all relevant issues of victim protection: identification of victims, in court evidentiary protection, temporary residency and reflection periods, and rules on deportation. Since the most comprehensive and detailed framework on human trafficking is provided in the *COE Convention*, which builds both on the *Palermo Trafficking Protocol* and the *EU Directive*, this opinion recommends that the UK signs and ratifies the Convention.

In conclusion, signature and ratification of the COE Convention would resolve the major flaw of UK law, which is the lack of a coherent policy and law on trafficking. The effective manner in which the COE Convention addresses all major issues of human trafficking and the inclusion of a useful monitoring mechanism (GRETA) would benefit the UK in its quest to eradicate human trafficking from its territory.

BIBLIOGRAPHY

International instruments

UN

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (1987), 1465 UNTS 85.

Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 21 March 1950 (1951), 96 UNTS 271.

Convention on the Elimination of All forms of Discrimination against Women, 18 December 1979 (1981), 1259 UNTS 13.

Convention on Rights of the Child, 20 November 1989 (1990), 1577 UNTS 3.

Convention Relating to the Status of Refugees, 28 July 1951 (1954), 189 UNTS 137.

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 (2003), A/55/383.

ILO

Abolition of Forced Labour Convention, No 105, 25 June 1957 (1959), 40th session ILO Conference.

Forced Labour Convention, No 29 , 28 June 30 (1932), 14th session ILO Conference.

Worst forms of child labour Convention, No 182, 17 June 1999 (2000), 87th session ILO Conference.

COE

Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS no. 197.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (1953), ETS no. 005, 213 UNTS 222.

European Social Charter, 18 October 1961 (1965) ETS no. 035, (*revised*) 5 May 1996 ETS no. 163.

EU

Council Directive on the Short-term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings Who Cooperate with the Competent Authority, 29 April 2004, OJ L261/19.

UK legislation

Asylum and Immigration Tribunal (Fast Track Procedure) Rules, 2005.

Children Act 1989.

Human Organ Transplants Act 1989.

Human Rights Act 1998.

Human Tissue Act 2004.

Immigration Act 1971 .

Immigration and Asylum (Treatment of Claimants, etc.) Act (IAA) 2004.

Immigration Rules 1994.

Nationality, Asylum and Immigration Act 2003.

Sexual Offences Act 1956.

Sexual Offences Act 2003.

Youth, Justice and Criminal Evidence Act 1999.

International and domestic reports

Antislavery NGOS Statement On Protection Measures For Trafficked Persons In Western Europe, <http://www.antislavery.org/homepage/resources/WETraffickingNGOstatement2003.pdf>.

Council of Europe Explanatory Report on the Council of Europe Convention on Action Against Trafficking in Human Beings (Council of Europe Strasbourg 2005), http://www.coe.int/T/E/human_rights/trafficking/PDF_Conv_197_Trafficking_E.pdf.

-- Trafficking in Human Beings: Compilation of the Main Legal Instruments and Analytical Reports Dealing with Trafficking in Human Beings at International, Regional and National Levels (Volume II: National Texts) (Council of Europe Strasbourg 2001), http://www.coe.int/T/E/human_rights/Trafficking/3_Documents/National_laws/EG%282002%292VolIII_E.asp#P3806_294580,%20last%20visited%2021%20December%202005.

Eaves Housing for Women The Poppy Project, Stop the Traffick, <http://www.poppyproject.org/>.

Home Office Asylum and Immigration Act 2004-Implementation Factsheet, http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/legislation/asylum_and_treatment/act_implementation.html.

Home Office Secure Border, Safe Haven: Integration with Diversity in Modern Britain Cmd 5387 (2002), <http://www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.pdf>.

-- Victims of trafficking - Guidance, http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis/victims_of_trafficking.html.

International Labour Organisation A Global Alliance Against Forced Labour, Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (93rd Session International Labour Conference Geneva 2005).

Migration Watch UK A Review of Exceptional Leave to Remain and Humanitarian Protection, http://www.migrationwatchuk.org/pdfs/Exceptional_leave_to_remain.pdf.

Refugee Council Asylum and Immigration Act 2004: An Update, <http://www.refugeecouncil.org.uk/downloads/AIActo4updateMarch05.pdf>.

Refugee Council UK Asylum law and process http://www.refugeecouncil.org.uk/infocentre/asylumlaw/seeking_asylum.htm.

The Committee on the Rights of the Child Consideration of reports submitted by States Parties under article 44 of the Convention (31st session Committee on Rights of Child 2002) [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/2f2744b7eodo15d6c1256c76004b3ab7/\\$FILE/G0245381.doc](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/2f2744b7eodo15d6c1256c76004b3ab7/$FILE/G0245381.doc).

US State Department Fighting Human Trafficking in the United States <http://usinfo.state.gov/gi/Archive/2004/May/12-381449.html>.

-- Trafficking in Persons Report <http://www.state.gov/g/tip/rls/tiprpt/2005/46618.htm>.

Women's Commission for Refugee Women and Children The Struggle Between Migration Control and Victim Protection: The UK Approach to Human Trafficking, http://www.womenscommission.org/pdf/UK_Trafficking.pdf.

White House *Transcript of speech of President Bush* (Tampa, Florida 16 July 2004).
<http://www.whitehouse.gov/news/releases/2004/07/20040716-11.html>.

Cases

Ahmed v Austria (1997) 24 EHRR 278.

Barar v Sweden (App. 42367/98) unreported, Case Comment (1999) 3 EHRLR 330.

H.L.R. v France (1998) 26 EHRR 29.

Osman v United Kingdom (2000) 29 EHRR 245.

Secretary of State for the Home Department v Lyudmyla Dzhygyn (Immigration Appeals Tribunal) Appeal no. CC-50627-99 (00TH00728) 13 April 2000.

Soering v UK 14038/88 [1989] ECHR 1.

Velasquez Rodriguez v Honduras (1989) 28 ILM 294.

Z v United Kingdom (2002) 34 EHRR 3, para 109.

Articles

C Somerset *Cause for Concern? London social services and child trafficking* (End Child Prostitution, Pornography and Trafficking London 2004)
<http://www.antislavery.org/homepage/antislavery/Cause%20for%20Concern.pdf>.

D Feldman *Civil Liberties and Human Rights in England and Wales* (2nd ed Oxford University Press 2002).

E Pearson *Human Trafficking, Human Rights: Redefining Victim Protection* (Anti-Slavery International London 2002) 105,
www.antislavery.org/homepage/resources/humantraffic/Hum%20Traff%20Hum%20Rights_%20red%20vic%20protec%20final%20full.pdf.

J Johnston 'Sex-trafficked victims to be offered refuge' Sunday Herald (6 November 2005).

O Martinez 'Canadian Policy on Human Trafficking: A Four-year Analysis' (2005) 43(4) *International Migration* 21.

R Cook 'State Responsibility for Violation of Women's Human Rights' (1994) 7 *Harvard Human Rights Journal* 125.

T Obokata 'Human Trafficking, Human Rights And The Nationality, Immigration And Asylum Act' (2003) 4 EHRLR 410, 420.

THE OXFORD PRO BONO PUBLICO TEAM

The legal research on this project was conducted by a group of postgraduate law students, supervised by Dr Guy Goodwin-Gill, under the auspices of the Oxford Pro Bono Publico programme. The students are: Veronika Fikfak (student co-ordinator), Kriti Avasthi, Pritam Baruah, Miluse Kindlova, Konrad Rodgers, Adam Rushworth, Astrid Sanders, Gabriel Swiney, Ravinder Thukral, Brenda Tronson, Alexis Wallace, Fouzia Zafar (project members). For additional information please contact OPBP at opbp@law.ox.ac.uk.