



The Legal Obligations of the United Kingdom to Identify Victims of Human Trafficking

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Abstract

This article outlines the international obligations of the United Kingdom (UK) to identify victims of human trafficking to guarantee the rights of trafficked victims to have help and support. If victims are not positively identified, victims may be at risk of either being indistinguishable from other types of migrants, or misidentified as an offender and prosecuted instead of being treated as a victim of crime. Currently, there are difficulties associated with victims identifying themselves as victims of crime and authorities misidentifying victims as offenders. This UK case study explores how identification must continue to be facilitated by the UK through the provision of support and help via the National Referral Mechanism (NRM) to ensure the protection of victims in the longer term of aiding the recovery of victims after exploitation.

Keywords

Human trafficking, Modern slavery, Human Smuggling, Identification, Self-identification, Misidentification, Immigration, Coercion.

I. INTRODUCTION

The recent case of a 58 year old male found to have been forced to live in captivity in a shed for 40 years by a 79 year old man in Carlisle, Cumbria¹ further highlights the fact that modern slavery victims are often invisible and remain hidden from society. The case raises the question of what the barriers for victims to self-identify are, and why the victim was not found sooner by authorities. Due to a variety of reasons and primarily the vulnerability of victims, they may not be able to self-identify themselves as victims.

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¹ Jamie Merrill, 'Modern slavery victim rescued from shed he lived in for 40 years,' *The Telegraph*, (London 3 Oct 2018), <<https://www.telegraph.co.uk/news/2018/10/03/modern-slavery-victim-rescued-lived-40-years/>> accessed 6 October 2018.

This article examines these reasons in further detail, and the challenges associated in notifying authorities. Additionally, civil society and the State may have difficulty identifying legitimate trafficked victims from asylum seekers,² smuggled persons,³ economic migrants⁴ or refugees,⁵ and consequently misidentifying them or ignoring the issue of identification altogether. Positive identification of victims enables the facilitation of help and support being guaranteed to survivors of trafficking which explains the rationale of identification. Furthermore:

“An adequate and efficient victim identification procedure is crucial as it guarantees the safety of the victims and removes them from the control of the traffickers.”⁶

This article will introduce what human trafficking is, how it has been legislated for internationally by examining the recent anti-trafficking legislation from the Council of Europe and European Union and how the issue of identification is addressed by highlighting what the obligations of the UK towards trafficked victims are. This discussion will also be complemented by a range of soft law legislation which strengthens the obligations of States to identify victims found in their own country. The article will then discuss how the UK has implemented its international legal obligations to create a National Referral Mechanism (NRM) where victims are referred into an institutional framework system whose purpose is to determine whether an individual is judged to have been trafficked or not.

The final part of the article examines the challenges which trafficked victims have in self-identifying themselves and the difficulties civil society has in referring potential victims of human trafficking to the NRM.

II. TRAFFICKING IN HUMAN BEINGS

Human trafficking is a transnational crime, operating in a tangled web of networked groups operating either within States, or across borders which demonstrate a complex and highly organised form of criminal activity. This global crime trend was highlighted during the end of the 1990s, led by the United States' Administration after the concern that organised crime was becoming a major international issue due to the transnational nature of global crimes including drug trafficking and terrorism. This led to the United Convention against Transnational Organised Crime (UNTOC),⁷ which included two Protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children⁸ (the Palermo Protocol) and the Protocol against the Smuggling of Migrants by Land, Sea and Air.⁹

The UN Protocol (which is often referred to as the 'Palermo Convention') defines human trafficking at Article 3(a) as:

“...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

² A legal process where a person who has left their home country as a political refugee and is seeking to claim asylum in another on the basis that it is not safe to return.

³ A person who is moved illegally into another country for the benefit of material or financial gain.

⁴ A person who travels to another area or country in order to improve their standard of living.

⁵ A person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, 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, as defined in Art. 1(A)(2), Convention relating to the Status of Refugees, Art. 1A(2), 1951 as modified by the 1967 Protocol.

⁶ D. Doyle, C. Murphy, M. Murphy, P.R. Coppari and R. Wechsler, “I felt like she owns me: Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland,” *British Journal of Criminology* (2019) 59, 231 at 236.

⁷ United Nations Convention against Transnational Organised Crime, General Assembly Resolution 55/25, 2000.

⁸ Ibid as part of the United Nations Convention against Transnational Organised Crime, General Assembly Resolution 55/25, 2000.

⁹ Ibid.

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.”¹⁰

The legal definition above is made up of three distinct elements. The first is the ‘action’ which is the way victims are initially recruited, then moved or transferred to one or more locations to be exploited. The second element is the ‘means’ which is how the harm is committed through deception and coercion due to the vulnerability of victims. The third element highlights what the purpose of trafficking is which is ‘exploitation.’ Exploitation includes sexual exploitation, forced labour and services, and organ trafficking. The exploitative nature of human trafficking is the distinct difference separating human trafficking from human smuggling.¹¹ Despite the difference between the two offences, problems remain with distinguishing between the two crimes and treating both acts as one and the same. This confusion problematizes identification of trafficked victims as there is a danger that they may be identified as smuggled or illegal immigrants.

III. RATIONALE OF IDENTIFICATION

It has been estimated that 21 million victims¹² are currently exploited worldwide with the estimated profits made by traffickers equating to \$150 billion per year.¹³ Whilst the method of combatting human trafficking has mainly concentrated on advancing a crime control approach,¹⁴ this strategy often overlooks the fact that the crime also produces many additional invisible victims while vast profits are continued to be made by traffickers with impunity. Identification remains an important issue as it brings victims out from the shadows by authorities firstly recognising victims of crime, and then secondly ensuring that there are adequate provision of care and services to help victims recover. Positive identification for example, can also provide the opportunity for identified victims to stay in the country through the obligation of States to guarantee residence permits.¹⁵

In terms of the provision of States guaranteeing services and support to victims through international obligations, Article 6(3) of the UN Trafficking Protocol provides:

“...each State shall consider implementing measures to provide for the physical, psychological and social recovery of victims including the provision of:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, educational and training opportunities.”¹⁶

¹⁰ Article 3(a) UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

¹¹ See Tom Obokata, ‘Trafficking of Human Beings from a Human Perspective; Towards a Holistic Approach,’ (Martinus Nijhoff, 2006) at 21.

¹² Michael B. Gerrard, ‘Climate Change and Human Trafficking after the Paris Agreement,’ [2018] University of Miami Law Review, Vol 72, 345 at 346.

¹³ Polaris is an anti- human trafficking NGO who use data-driven strategies to prevent and disrupt human trafficking. See <https://polarisproject.org/human-trafficking/facts>.

¹⁴ This usually involves criminalising the offence of human trafficking as the first primary response to combatting the crime.

¹⁵ Council of Europe Convention on Action against Trafficking in Human Beings 2005, Article 14.

¹⁶ UN Trafficking Protocol 2000, Article 6(3).

Furthermore, the Council of Europe Convention on Action against Human Trafficking 2005 (CofE) provides:

"...each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

- (a) standards of living capable of ensuring their substance, through such measures as appropriate and secure accommodation, psychological and material assistance;
- (b) access to emergency medical treatment;
- (c) translation and interpretation services, when 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;
- (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."¹⁷

The provision of services (as expressed in both Treaties) and the issue of identification of victims are issues which illustrate that they go hand in hand with one another. Identification guarantees the safety and protection of trafficked victims which can lead to the start of a recovery process to take place free from the exploitative environment which they have been accustomed to. In particular, assistance given to victims is important to protecting them during criminal proceedings:

"assistance and support should be available to them before, during and for an appropriate time after criminal proceedings. Member States should provide for resources to support victim assistance, support and protection."¹⁸

Therefore, before the victim has support, it is vital for victims to be firstly identified and not regarded simply as either a witness to a crime or being solely used in an investigation as a means to help in a criminal prosecution of a trafficker. Consequently, the two links of 1) identification and 2) help and assistance are shown to co-exist simultaneously. In practical terms, this should happen when public authorities come into contact with a potential trafficked victim:

"A person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness."¹⁹

So, we return to an underlying question, what are the legal obligations of a State to identify victims in its own territory? This will be the subject of the next part of this article.

IV. OBLIGATIONS TO IDENTIFY VICTIMS IN INTERNATIONAL LAW

The previous section explained how the provision of care and support is guaranteed under international law. However, it is important to establish whether there are specific legal obligations upon States to refer and identify victims in the first place, before the issue of services and support is addressed. As we will see, there are different legal obligations on

¹⁷ Council of Europe Convention on Action against Trafficking in Human Beings 2005, Article 12(1).

¹⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA EU Directive, Article 11(1).

¹⁹ EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, Article 11(2).

States to identify trafficked victims, along with one United Nations (UN) Treaty which does not impose any specific obligation upon States.

a) *Treaty Law*

UNTOC illustrated how States focussed on adopting a crime control approach to transnational crime, by criminalising participation in an organized criminal group,²⁰ criminalization of the laundering of proceeds of crime,²¹ money laundering,²² and criminalising corruption.²³ Primarily, this is achieved by States cooperating with one another, namely through mutual legal assistance.²⁴ In terms of offering a victim centred approach to victims of transnational crime, the Convention offers very little holistic protection, as attention is concentrated on granting protection and assistance from retaliation and threats,²⁵ along with establishing appropriate procedures to provide access to compensation and restitution for victims of offences,²⁶ rather than specific help and protection. Moreover, UNTOC is silent regards the issue of identification of trafficked victims. The importance of identifying trafficked victims has not been acknowledged within the Palermo Protocol either.

Specifically, in Article 6 of the UN Protocol, it details the nature of protection and assistance required to be given to trafficked victims.²⁷ However, States are not under an obligation to identify victims or set up a framework or mechanism to identify victims and therefore this negates the need for States to distinguish trafficked victims from other types of migrants. Essentially, from a practical perspective victims must firstly be identified as a victim of crime which requires a formal identification process before victims are granted protection. Additionally, once a trafficked victim is positively identified the UN Protocol obligates States to guarantee the possibility of staying and/or remaining in the State either on a temporary or permanent basis.²⁸

In contrast to the UN Palermo Protocol, explicit recognition of identification of trafficked victims comes from the Council of Europe Convention on Action against Human Trafficking.²⁹ Article 10 states:

“Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits.”³⁰

In contrast, the regional approach from Europe demonstrates a victim centred approach to combatting human trafficking, rather than the crime control strategy seen from UNTOC. This has been achieved by imposing the legal obligation on States to encourage cooperation

²⁰ UNTOC, Article 5.

²¹ UNTOC, Article 6.

²² UNTOC, Article 7.

²³ UNTOC, Article 8.

²⁴ UNTOC, Article 18.

²⁵ UNTOC, Article 25(1).

²⁶ UNTOC, Article 25(2).

²⁷ Assistance given to victims include the provision of housing is found in UN Palermo Protocol 6(3)(a), counselling 6(3)(b), medical and psychological assistance 6(3)(c), and education and employment training opportunities 6(3)(d).

²⁸ UN Palermo Protocol, Article 7.

²⁹ Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

³⁰ Council of Europe Convention on Action against Trafficking in Human Beings 2005, Article 10.

between public and competent authorities and to create and implement a framework to train persons to identify victims. The UK satisfied this legal obligation in 2009 by creating the National Referral Mechanism (NRM).³¹ Identification provides for the gateway for victims to access help and services, guaranteed under the Council of Europe (CofE) Trafficking Convention on Action against Trafficking in Human Beings.³² These include specific services necessary to assist victims in their physical, psychological and social recovery.³³ This illustrates a practical approach to implementing international legal obligations.

Furthermore, the European Union (EU) takes the view that it is important to identify a potential trafficked victim as quickly as possible, in order to provide the earliest available support to victims. Article 11(4) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA states that:

“Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.”³⁴

Domestically, the Modern Slavery Act 2015 states that the Secretary of State must issue guidance to such public authorities about spotting that a person may be a victim of human trafficking.³⁵ In contrast to other domestic legislation in the UK, the issue of identification is not mentioned in either the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 or the Human Trafficking and Exploitation (Scotland) Act 2015. However, all of the domestic legislation do guarantee help and support to individuals where there is a reasonable possibility of them being trafficked victims, and promises the support will continue until a decision is arrived at by decision makers within the NRM.

b) Guidelines and Recommendations

In addition to existing Treaty Law, there is a range of soft law relating to the issue of identification. The first type of soft law is seen from the United Nations Office of Drugs and Crime (UNODC) Model Law against Trafficking in Persons which “was developed in response to the request of the General Assembly to the Secretary-General to promote and assist States in implementing the provisions contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.”³⁶ From similar wording found in Directive 2011/36/EU highlighted above, the Model Law also stresses “the timely and proper identification of victims is of paramount importance to ensure that victims receive the assistance they are entitled to.”³⁷

A second type of soft law comes from ‘The Recommended Principles and Guidelines on Human Rights and Human Trafficking’ which “provide practical, rights-based policy guidance on the prevention of trafficking and the protection of victims of trafficking. Their purpose is to promote and facilitate the integration of a human rights perspective into

³¹ The NRM’s objective is to identify victims and collect statistics on the numbers of adult and children referred to them.

³² Under Article 13(1) each State shall provide a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim.

³³ Council of Europe Convention, Article 12(1).

³⁴ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 11(4).

³⁵ See Section 49 Modern Slavery Act 2015.

³⁶ The United Nations Office of Drugs and Crime (UNODC) Model Law against Trafficking in Persons (2009) at 1.

³⁷ United Nations Model Law against Trafficking in Persons, Article 18.

national, regional and international anti-trafficking laws, policies and interventions.”³⁸ Guideline 2 states it is for States to distinguish between trafficked victims and traffickers whilst understanding the difference between trafficked victims and irregular migrants, especially smuggled persons and economic migrants. It also requires States to ensure that identification does and can take place within States.

Trafficking is a process of enslaving people, coercing them into a situation with no way out and exploiting them regardless of their migration status. In response, States are under a legal duty to identify victims, because the alternative would be to deny victims the right to have support which identification facilitates under the UN Protocol. However, States also have a dual responsibility towards their citizens by ensuring border security whilst honouring their international legal obligations to criminalise human trafficking. A potential solution to achieving both aims is to have a rigorous identification mechanism which guarantees safety and support to victims who can then provide information, evidence and intelligence to law enforcement and prosecutors to help convict more traffickers. A starting point of any investigation is to establish what country the potential victim is originally from, and establish whether the person concerned is either a smuggled person, an economic migrant, a refugee or indeed a State national.

Practically, it is difficult to distinguish between people from some of these groups, especially where there is a lack of a formal identification process in existence. Even where there is an institutional framework such as the National Referral Mechanism (NRM), there may be defects within the operation of the framework, preventing the successful identification of *bona fide* trafficked victims at the expense of being stereotyped as irregular migrants.

To guarantee the safety and protection of trafficked victims through positive identification, a thorough investigation of a person’s circumstances must take place. One such case highlighting the importance of establishing the background circumstances of a person’s involvement in trafficking can be evidenced from the European Court of Human Rights case of *Rantsev v Russia*.³⁹ This involved a Russian national who was deceived into travelling to Cyprus believing that she would be working in the entertainment industry, but was held in sexual servitude by her employer. She was later found dead (and it is believed that she committed suicide) after being handed back to her employer after the police had questioned her at the request of her employer who stated that she was illegally in Cyprus and her ‘Employer’ wished her to be expelled from the country. It was held that the authorities had:

“...failed to make immediate further inquiries into whether Ms Rantseva had been trafficked. The police made no further inquiries into the background facts. They simply checked whether Ms Rantseva's name was on a list of persons wanted by the police and, on finding that it was not, called her employer and asked him to return and collect her.”⁴⁰

Consequently, the failures of authorities to closely examine the background facts of the victim to decide whether she required protection were evident and consequently there “had been a procedural breach as a result of the continuing failure of the Cypriot authorities to conduct any effective investigation into the applicant's allegations that his daughter was trafficked.”⁴¹ One year before the *Rantsev* case was heard, the UK had satisfied their international legal

³⁸ Introduction to UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (UN Doc E/2002/68).

³⁹ *Rantsev v Russia* (Application no. 25965/04), 7 January 2010.

⁴⁰ *Rantsev v Russia* (Application no. 25965/04), 7 January 2010 at 297 - 298.

⁴¹ *Rantsev v Russia* (Application no. 25965/04), 7 January 2010 at 299.

obligations to create a formal identification referral mechanism with competent persons trained who are trained and qualified in identifying and helping victims.⁴² The introduction of the NRM in the UK is designed to assist in positive identification in order to avoid cases similar to the *Rantsev* case.

V. IDENTIFYING VICTIMS OF TRAFFICKING IN ENGLAND AND WALES

As referred to above, the UK created the National Referral Mechanism (NRM) in 2009 in response to the legal obligations set out in Article 10 arising from the CoFE Convention on Action against Human Trafficking:

“Article 10(1) places an obligation on each Party to CAT to provide trained persons for their Competent Authorities “so that victims may be identified...”. In other words, the first task envisaged for these specially trained people is the identification of those who have been the victim of trafficking. This point is reinforced by the first sentence of Article 10(2), which places an obligation on Parties to CAT to adopt legislative or other measures “to identify victims as appropriate...” The aim identified in this sentence is, therefore, the identification of “victims,” but no more.”⁴³

A referral of an individual to the NRM in the UK is seen as the “official gateway for adult victims to access safe houses and other houses provided under the Government contract for victims of modern slavery.”⁴⁴ The operation of the NRM covers all jurisdictions in the UK (England and Wales, Scotland and Northern Ireland).

The latest statistics from the National Crime Agency (NCA) in 2017 show that 4,714 victims in England were referred to the NRM, 207 from Scotland, 193 from Wales and 31 from Northern Ireland.⁴⁵ Despite the total numbers of referrals through the NRM have been increasing,⁴⁶ the numbers of victims being positively identified have halved from 2016 – 2017.⁴⁷

Prior to any formal referral to the NRM, there must have been the possibility of civil society spotting that a vulnerable person may be a potential victim of human trafficking. Often, Third Sector Organisations (TSO) act as First Responders (FR) whilst Public Authorities (PA) such as the police and NHS whilst fulfilling their duties come into contact with vulnerable groups of people such as refugees, economic and undocumented migrants, homeless people, domestic violence victims and victims of historical sexual abuse.⁴⁸ Consequently, the likelihood is that all agencies and authorities are being drawn into more situations where trafficked victims potentially exist and are therefore starting to play an increased and more significant role in referring potential victims to the NRM. Therefore, victims are becoming more reliant on civil society to spot them as potential victims, especially where victims are unable to either recognise themselves as trafficked victims or fearing authorities who may

⁴² Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Article 10(1).

⁴³ *R (Atamewan) and The Secretary of State for the Home Department* [2013] EWHC 2727 (Admin) at para 71.

⁴⁴ Christine Beddoe, Lara Bundock, Tatiana Jordan, 'Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,' (Human Trafficking Foundation, July 2015) at 12.

⁴⁵ National Referral Mechanism Statistics – End of Year Summary 2017, published 26th March 2018 at 1.

⁴⁶ National Referral Mechanism Statistics – End of Year Summary 2017, published 26th March 2018 at 5.

⁴⁷ National Referral Mechanism Statistics – End of Year Summary 2017, published 26th March 2018 at 5. In 2016, 1,133 individuals were positively identified by the NRM. In 2017, only 665 individuals were positively identified.

⁴⁸ Historical victims of abuse are victims who have suffered past abuse but did not report the abuse at the time when it happened but have since spoken out about what they have experienced. Historical victims of trafficking are those victims who are no longer in an exploitative environment, but may still be experiencing mental health effects as a result of what they experienced.

either misidentify them or place them at risk of not being believed or deported out of the country by not being believed by authorities.

The importance of identification has been examined and remains essential for a number of reasons. Primarily, the main benefit of being referred and identified means that the victim is removed from the exploitative environment which has caused the harm. In case law, the rights of victims and how important identification is has been acknowledged, particularly in the case of *R on the application of K and SSHD*,⁴⁹ where it can be assumed that the rights of victims are directly tied to the issue of identification:

“The judge referred to paragraph 127 of the Explanatory Report to the Trafficking Convention, specifically its reference to a “failure to identify a trafficking victim correctly will probably mean that victim’s continuing to be denied his or her fundamental rights.”⁵⁰

Situations where either non-identification or misidentification occurs continues to deny victims from being able to access help and support to recover from their ordeal. Recovery can only start after a referral to the NRM has been made:

“These agencies are charged with the identification of persons who have “reasonable grounds for being treated as a victim of trafficking”. That test is derived directly from Article 10. When a person is identified as meeting that threshold test, he or she will be eligible for a number of forms of assistance, including a period of not less than 30 days for recovery and reflection during which no steps may be taken to repatriate or remove him.”⁵¹

As part of the domestic anti-slavery legislation within England and Wales, Northern Ireland and Scotland during 2015, there is now a statutory duty of Public Authorities (PA) to inform a Competent Authority (CA).⁵² For example, Section 52 of the Modern Slavery Act 2015 states:

“If a public authority to which this section applies has reasonable grounds to believe that a person may be a victim of slavery or human trafficking it must notify –

- (a) The Secretary of State, or
- (b) If regulations made by the Secretary of State require it to notify a public authority other than the Secretary of State, that public authority.”⁵³

There are two issues associated with the present statutory duty. Firstly, the term ‘reasonable grounds’ implies that the PA must take practical steps to obtain more information from the potential victim. This amounts to making an assessment, which is more alike to identifying a victim, rather than making a referral. This shows the difficulties of making a referral which ultimately involves having to conduct some sort of identification. Secondly, the statutory duty applies only to PAs, not First Responders (FRs). When the legislation was drafted it failed to distinguish the between the duties and roles of PAs and FRs. As a result, unlike PAs, FRs were not included within the statutory duty and this may result in them having discretion whether to inform a PA or not. If they do refer potential victims to the NRM, the PA would then have the duty of informing the CA. The present situation exposes victims to the possibility of potential victims coming into contact with a FR who does not either want to either refer or misidentifies the individual, leaving genuine trafficked victims left by not being referred to PAs.

⁴⁹ *R on the application of K and SSHD* [2015] EWHC 3668 (Admin).

⁵⁰ *R on the application of K and SSHD* [2015] EWHC 3668 (Admin) at para 73.

⁵¹ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327 at para 6.

⁵² See Section 52 Modern Slavery Act 2015, Section 13 Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland 2015, and Section 38 Human Trafficking and Exploitation Act (Scotland) Act 2015.

⁵³ Section 52 Modern Slavery Act 2015.

VI. THE DIFFICULTIES ASSOCIATED WITH IDENTIFYING VICTIMS OF TRAFFICKING

Where States adopt a victim centred approach to identification, combined with the implementation of a referral and identification mechanism, there are significant benefits for trafficked victims to be positively identified by the NRM in terms of protection and support. These will prove to be extremely beneficial. Specifically, the positive effects include the following:

- 1) Where victims are recognised as trafficked, this protects the victims from further exploitation;
- 2) During the process of identification, victims will be entitled to help and support to help them recover from the physical and mental harm which victims have suffered;
- 3) The victim may feel empowered to cooperate with law enforcement for the possibility of a future prosecution against the trafficker and for the victim to get justice, and
- 4) Identification presents the opportunity for victims to regularise their immigration status, through Discretionary Leave to Remain (DLR) or Asylum.

However, there are two barriers to identification which presently exist. The first is the difficulties of victims to self-identify, because they are unable to either acknowledge that they are being exploited, or in circumstances when they understand that are being exploited, or know how and where to escape to because of a fear of authorities. The second challenge associated with identification is understanding the role which civil society can play in referring more potential victims of trafficking. Both challenges will be examined below.

a) *Self-identification of Victims*

Often, victims will experience internal barriers to self-identification, subjective to their own situation which they find themselves in. For example, victims are often manipulated and unable to recognise that they are victims because of the psychological damage which victims are exposed to by traffickers.⁵⁴ The way in which the psychological harm by traffickers is inflicted upon victims may prevent victims from either acknowledging that they are a trafficked victim, or have difficulty in being able to escape from the exploitation because of fear from repercussions from their capture or from the fear of authorities.⁵⁵ These will be the issues which stop victims from coming forward, and to disclose to authorities that they have been trafficked and require help and ensure protection.

Coercion, and the control over another person are two primary methods which traffickers use to facilitate trafficking. In both situations, victims are often coerced and controlled resulting in victims being kept in the same exploitative environments, affecting the ability of some victims to safely leave the exploitative environment or reach out to trust authorities to help rescue them.

Understanding the effects of coercion requires a careful examination of how traffickers create an environment where the choices of victims may be severely restricted,

⁵⁴ Victims suffer serious complex issues as a result of their trafficking experiences, which require care and support. See B. Johnson, "Aftercare for Survivors of Human Trafficking," (2012) *Social Work and Christianity*, Vol 39, No 4, 370.

⁵⁵ See D. Doyle, C. Murphy, M. Murphy, P.R. Coppari and R. Wechsler, "I felt like she owns me: Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland," *British Journal of Criminology* (2019) 59, 231 at 241.

preventing the possibility of the victim escaping the exploitation.⁵⁶ Victims experience non-physical threats which are carefully hidden, demoralising and demeaning the victim. This behaviour is otherwise known as 'psychological coercion.' It involves making victims become too scared to speak out, because of repercussions from their trafficker:

"...even where escape is physically possible, [trafficking] victims may be psychologically incapable of escape due to their constant terror."⁵⁷

Furthermore, victims are often isolated by their traffickers, moving them around locations which make victims vulnerable if they do not know where they are. Over time, traffickers start to exert their control and power over victims by manipulating their victims, making victims depend on them for food and safety because victims start to perceive that nobody would rescue them:

"Isolation includes the trafficker emphasising that no one other than the pimp cared about them, no one would come to rescue them, and if they were to try to escape, no one would be there to help."⁵⁸

Furthermore, victims can start to form emotional relationships with their traffickers, creating a phenomenon known as 'trauma bonding.' The emotional attachments which are created from various dynamics existing between the victim and abuser, facilitating a range of controlling behaviour.⁵⁹

Traffickers tend to restrict the physical movements of victims by keeping them trapped in the same exploitative environment. This demonstrates ownership and control over their victims. This makes it very difficult for victims to escape. Typically, victims have described "difficulties gaining access to outside contacts since every move is monitored by their traffickers."⁶⁰ Over a period of time, the cycle of restricting movements and access to the outside world with other people resign some victims to accepting the exploitation. This further reduces the possibility of self-identification:

"An individual may appear helpless because of a sense of hopelessness, because of an absence of alternative options. And the victim perceives no reasonable escape."⁶¹

A victim's immigration status is often used as a way of psychologically controlling victims. Often, victims have entered a country illegally and will not have a legal status in the country or may have had their identification documents confiscated by traffickers. If victims were to self-identify themselves they are at risk of being criminalised for illegal entry. The criminalisation of trafficked victims overshadows the individual being seen as a trafficked victim. This situation makes victims reluctant to contact authorities for the fear of not being believed and/or being at risk of being deported:

⁵⁶ For an explanation of Albert Biderman's Theory of Coercion, see S. Baldwin, A. Fehrenbacher, A and D. Eisenman, "Psychological Coercion in Human Trafficking: An Application of Biderman's Framework," *Qualitative Health Research* (2015), Vol 25(9), 1171.

⁵⁷ Hussein Sadruddin, 'Human Trafficking in the United States: Expanding Victim Protection beyond Prosecution Witnesses,' [2005] 16 *Stanford Law and Policy Review*, 379 at 405.

⁵⁸ K. Hom and S. Woods, 'Trauma and its Aftermath for Commercially Sexually Exploited Women as told by Front-line Service Providers,' [2013] *Issues in Mental Health Nursing*, Vol 34, Issue 2, 75 at 77.

⁵⁹ See S. Crabb and G. Schinina, 'Mental Health of Victims of Trafficking: a right, a need and a service,' [2016], *Epidemiology and Psychiatric Services*, Vol 25, Issue 4 at 345.

⁶⁰ Judith Lewis Herman, 'Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma,' *Journal of Traumatic Stress* [1992] Vol 5, No 3, 377 at 377 – 378.

⁶¹ Raymond Flannery and Mary Harvey, "Psychological Trauma and Learned Helplessness: Seligman's Paradigm Reconsidered," [1991] *Psychotherapy*, Vol 28, No 2 374 at 377.

“Trafficked persons are reluctant to seek help in countries of destination or transit, for fear of being arrested for engaging in prostitution or deported for violating immigration laws.”⁶²

In addition to the confiscation of identity documents, other forms of psychological control include the use and threat of violence, and the threat to harm other family members of the victim. They also manipulate victims by making them dependent on drugs and alcohol provided by the trafficker. These methods of control create a sense of hopelessness and powerlessness which victims endure on a cyclical basis which restricts their means of escape. From the perspective of victims, it reduces the possibility of victims empowering themselves to escape from the cyclical exploitation which transpires from the actions of traffickers.

b) Challenges for Civil Society to prevent Misidentification of Victims

In addition to the challenges which victims have self-identifying themselves, there are challenges which civil society has becoming aware of distinguishing between trafficked victims and from other groups of migrants. Primarily, some victims are misidentified and therefore not positively identified by the NRM as trafficked which would entitle victims to access help and support. Commonly, there are two types of misidentification which victims are exposed to. The first is victims being misidentified as an offender, for offences committed under duress, rather than as a victim of crime. The second is misidentifying the victim as either a smuggled person, or an economic migrant, not a trafficked victim. The latter type of misidentification will be examined in more detail first.

Trafficked victims are often confused with other types of migrants including economic migrants, refugees and smuggled persons. Whilst the specific purpose of human trafficking is ‘exploitation.’ In contrast, smuggling is a criminal act which often amounts to a crime against the State, often facilitated by non-state actors. The legal definition of human smuggling has been adopted as:

“...the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a State of which the person is not a national or a permanent resident.”⁶³

Organised criminal networks have been able to take advantage of the present migrant crisis by deceiving many people into paying them large sums of money for passage to Europe. Whilst many refugees have died in the Mediterranean Sea, those who have survived the perilous journey are facing issues when States are having difficulties processing their asylum claims and knowing how to protect them. Consequently, without protection this has had unintended consequences for vulnerable individuals in situations where they become trafficked later in the future:

“Even though they may never plan for them to be trafficked for the purpose of exploitation, they could end up in that situation because they are exposed to risks criminals see as an opportunity.”⁶⁴

⁶² D. Francesca Hayes, “Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and secure the Prosecution of Traffickers,” [2004] Human Rights Quarterly, Vol 26, Number 2 at 261.

⁶³ UN Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organised Crime, GA Res 55/25, 2000, Article 3(a).

⁶⁴ James Nickerson, “Traffickers v Smugglers: The Refugee Crisis is changing how migrants are moved,” New Statesman, 12 May 2016 at <<http://newstatesman.com/world/europe/2016/05/traffickers-v-smugglers-refugee-crisis-changing-how-migrants-are-moved>>, accessed 6 October 2018.

Where vulnerable migrants have been smuggled and in situations where they are not adequately protected by States, criminal groups are able to exploit them and deceive them as a means of offering safety. The financial appeal for smugglers to engage in these criminal acts is accredited to the large amount of profits available. Substantial profits can also be made in trafficking smuggled persons, where demand exists for cheap labour and sexual services across the world. Evidently, with many more displaced persons from the present civil wars existing across the globe since the Second World War, smugglers are able to expand their services to specific areas of the world to recruit more victims, and to take advantage of vulnerable groups of people for their own means.

Secondly, misidentification can occur where trafficked victims are treated as an offender and prosecuted for offences committed under duress by traffickers. Although many offences will be less serious in nature and will be victimless, victims are still prosecuted. Crimes include obtaining false documents and cultivating cannabis. In other situations, there may be circumstances where victims are being coerced into committing more serious crimes such as murder. Whilst there is no question that victims will often be made culpable for the crimes committed by way of prosecution, victims cannot be made morally culpable due to the duress traffickers place victims under. In most circumstances, victims are being forced to commit criminal acts by traffickers.

There have been instances where trafficked victims have been prosecuted for offences committed under duress without the question of whether the individual concerned is a victim of human trafficking and should be referred to the NRM.⁶⁵ Broadly speaking, there is a need for additional training to be given to legal representatives who may come into contact with victims of trafficking. In one such case “the quality of representation had fallen below any acceptable standard of competence and well below any satisfactory standard of procedural protection.”⁶⁶ Elsewhere, in many cases, trafficked victims who have been prosecuted and convicted of offences have relied on the help from third parties (who are often charities and anti-trafficking organisations)⁶⁷ who have advocated for victims. They have done this by raising the issue of the clients being a victim of trafficking which has led to the criminal acts being committed in the first place. They also argue that they have not been given the opportunity to be referred to the NRM as a diversion away from criminal prosecution.

The case of *R v L*⁶⁸ showed how the Anti Trafficking charity, Poppy Project, was an advocate for a woman who had been prosecuted, convicted and sentenced to six months imprisonment for producing a forged passport had experienced trafficking. By enlisting the help of a consultant psychiatrist, the Poppy Project was able to show that the victim was suffering from Post-traumatic Stress Disorder (PTSD) after being a victim of international trafficking for sexual exploitation.⁶⁹ It was acknowledged by the Judge in this case and reiterated in *R v THN*⁷⁰ that if the “Crown accepted that had the evidence which was available at the time when the original to prosecute was made, on the basis of the public interest test, there would have been no prosecution.”⁷¹ The timing in which the suspicion that the individual

⁶⁵ See *R v O* [2008] EWCA Crim 2835.

⁶⁶ *R v O* [2008] EWCA Crim 2835 at para 26.

⁶⁷ For example The Poppy Project who ran outreaches in prison to help and advocate for trafficked women. The project started to provide the CPS with information from those in prison as part of their appeals. For more information about the work that Poppy Project does, see <http://www.eavesforwomen.org.uk/about-eaves/our-projects/the-poppy-project/>

⁶⁸ *R v L and other appeals* [2013] EWCA Crim 991.

⁶⁹ *R v L and other appeals* [2013] EWCA Crim 991 at para 74.

⁷⁰ *R v THN* [2014] 1 All ER.

⁷¹ *R v THN* [2014] 1 All ER at para 45.

who is on trial may be a trafficked victim occurred very late in the criminal justice system process, often at the appeal stage. This has resulted in some victims being given custodial sentences at the expense of being referred to the NRM to be positively identified.

In *R v T*⁷² it transpired that a victim disclosed that he had been trafficked a day before his trial and had been positively identified through the NRM. Unfortunately, this information was not presented to the Court until later in the proceedings.⁷³

The absence of any communication or cooperation between the CA at the NRM and the defence solicitors, CPS and Court was evident in *R v HVN*.⁷⁴ Therefore, the most appropriate time to decide whether a suspect has been coerced into committing an offence may be a victim of human trafficking or not should be taken at the time when the CPS makes a decision to prosecute or not. The onus would be on the CPS or the defence raising the question of trafficking and then making a referral to the NRM if necessary.

There have been instances where the police have had concerns that the defendant may be trafficked but the potential victim was not referred to the NRM. This defence solicitors in the case of *R v LM, MB, DG, Betti Tabot and Yutunde Tijani*,⁷⁵ argued that because there was no referral, this was a violation of Article 10 of the CoFE Convention which required States to provide trained personnel as a means to identify and assist victims. This argument failed on the basis that even in circumstances where there was a failure to refer, this does not automatically mean that the victim would have been prosecuted. Disappointingly, in the cases above, prosecutions did still take place. What was more important from the judgement was the acknowledgement of the Court stating that where identifications do take place, other possible measures such as protection and help and support follow, rather than the alternative where victims are being exposed to the risk of prosecution.⁷⁶

Where victims are prosecuted for offences, the Modern Slavery Act 2015 and the Northern Ireland Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act 2015 offers a defence for victims of trafficking from prosecution. Section 45(1) states that a person is not guilty of an offence if the act is performed under duress as part of their exploitation as long as:

“(a) the person is aged 18 or over when the person does the act which constitutes the offence, (b) the person does that act because the person is compelled to do it, (c) the compulsion is attributable to slavery or to relevant exploitation, and (d) a reasonable person in the same situation as the person and having the person’s relevant characteristics would have no realistic alternative to doing that act.”⁷⁷

The intention of introducing the statutory defence was “to provide further encouragement to victims to come forward and give evidence without fear of being convicted for offences connected to their slavery or trafficking situation.”⁷⁸ Expecting victims to come forward on their volition remains a difficult challenge because of the barriers that victims have in self-identifying which was examined earlier.

Despite a statutory defence being in force for victims to rely upon, the defence is extremely rigid as to when it can be applied. This is seen from the exclusion offences listed in

⁷² *R v T* from *R v L and other appeals* [2013] EWCA Crim 991.

⁷³ *R v T* from *R v L and other appeals* [2013] EWCA Crim 991 at para 54.

⁷⁴ *R v HVN* from *R v L and other appeals* [2013] EWCA Crim 991.

⁷⁵ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327.

⁷⁶ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327 at 32.

⁷⁷ Modern Slavery Act 2015, Section 45(1).

⁷⁸ Modern Slavery Act 2015 – Explanatory Notes.

Schedule 4 of the Act which lists as many as 100 offences which victims are unable to rely on the defence. Specifically, the restricted offences are those which victims are usually forced to commit, or are involved in an accessory to as a result of their exploitation. Most notably, these are offences against the person,⁷⁹ sexual offences,⁸⁰ crime, terrorism and security offences.⁸¹ In Northern Ireland, offences which carry more than 5 years in prison are excluded.⁸²

Arguments can be made that trafficked victims should not be prosecuted in any circumstances. Many victims may have escaped exploitation and are living independently without any help or assistance. These individuals are to be regarded as 'historical victims of trafficking,' many of which were still prosecuted for offences but the period of time has since elapsed before their prosecution had taken place. The period (which may be months or years) in which they were exploited may have since passed. Victims are often identified as being trafficked in the past tense, but do not qualify for protection on the fact that the exploitation has since ended as seen from *R (Atamewan) and The Secretary of State for the Home Office*⁸³.

"Although it is accepted that Ms Atamewan was brought to the UK and then exploited by her aunt for domestic servitude, it is considered that the exploitation ended in December 2007 when Ms Atamewan absented herself from her aunt's home. She has had minimal contact with her aunt since then, and her aunt has shown no interest in trying to trace Ms Atamewan. Ms Atamewan has moved on with her life since leaving her aunt, she has formed friends and had a relationship during the three years at liberty in the UK and has found casual work when needed to support herself. It is therefore considered that there is sufficient distance in time since the period of exploitation such that Ms Atamewan is no longer considered to be a victim of trafficking in need of protection under the Convention."⁸⁴

This situation implies that once a victim leaves exploitation the law no longer regards the individual as a victim any longer. Arguably, this may not be correct to state because a victim will still have the physical and psychological repercussions of being trafficked which show through the onset of mental health conditions which may require medical help. Where victims are treated in this manner, it prevents more historical victims from being able to come forward to be recognised and therefore at risk of being re-trafficked in the future if they are not adequately protected from further harm.

VII. CONCLUSION

This article has identified what the existing legal obligations of States are to identifying victims of human trafficking. It has also examined the current challenges for victims to self-identify are and for civil society to refer potential victims through the NRM.

This article has highlighted that there are similarities between groups of vulnerable people affected by modern slavery, such as refugees, economic migrants and smuggled persons who are susceptible to being exploited by traffickers.

As trafficking becoming more prevalent in terms of being recognised as a global crime problem, the need to focus on victims must not be overlooked. The issue of identification is the key for victims to be recognised so that they can receive support from the State. As we

⁷⁹ Offences against the Person Act 1861.

⁸⁰ Sexual Offences Act 2003.

⁸¹ Anti-Terrorism, Crime and Security Act 2001 and the Terrorism Act 2006.

⁸² These include drug offences, immigration offences, forgery of identification documents and asylum offences.

⁸³ *R (Atamewan) and The Secretary of State for the Home Department* [2013] EWHC 2727 (Admin).

⁸⁴ *R (Atamewan) & The Secretary of State for the Home Department* [2013] EWHC 2727 (Admin) at para 15.

have seen from the UN Protocol, the issue often leaves States with the discretion whether to identify victims or not. The Council of Europe Convention and EU law have shown a more victim centred approach to protecting victims through better identification, obliging States to implement frameworks with Competent Authorities being trained to identify trafficked victims.

The article examined how the UK has taken their legal obligations seriously by taking the lead in identifying victims through the implementation of the National Referral Mechanism in 2009. However, despite there being institutional defects within the present system, it shows how the UK on an international level takes the issue of identification seriously by acting on the legal obligations as highlighted from the Council of Europe Convention.

As the article has outlined, there are two perspectives to look from when identifying victims of human trafficking. The main issue of concern remains understanding the difficulties victims have in self-identifying due to how the means element of the crime is acted out by traffickers. The harm which is primarily how coercion and control of the victim take place makes it difficult for victims to either acknowledge that they are being exploited or if they do realise they have limited means of escape due to a fear of authorities. These issues need to be better understood by agencies and authorities who come into contact with potential trafficked victims.

Secondly, the difficulties civil society have in being able to refer victims to the NRM were examined. This issue was discussed in terms of misidentifying trafficked victims as offenders who are often prosecuted by the Crown Prosecution Service at the expense of being referred to the NRM. It has been seen how the issue of identification has been systematically overlooked by Courts, the CPS and defence solicitors. Trafficked victims have been reliant on third party organisations that are often charities who have advocated on behalf of victims by raising the issue that the individual concerned is a victim of human trafficking.

In summary, due to the way traffickers continue to inflict harm on their victims, this situation creates difficulties for victims to self-identify themselves, making it increasingly difficult to address and combat the problem, either by referring trafficked victims to the NRM, providing safe houses to those domestically abused or offering adequate shelter to the homeless. Whilst some of the possible reasons why the present situation is as it is, further research is required from victims to explain the specific reasons why persons do not consider themselves to be victims, and what can be done to encourage more victims to come forward earlier to either prevent further abuse and exploitation.

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