

# ADDRESSING THE FAILURES OF INTERNATIONAL ASYLUM LAW IN REGARD TO VICTIMS OF HUMAN TRAFFICKING

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## I. INTRODUCTION

One of the most horrific and exceedingly pervasive human rights violations today is human trafficking—otherwise known as modern slavery. The United Nations Office on Drugs and Crime (UNODC) has admitted that it is not only one of the largest sources of income for organized crime, but also the fastest growing.<sup>1</sup> Despite heightened attention by activist groups and the international community as a whole, victims continue to be exploited at alarmingly high rates.<sup>2</sup> In fact, with upwards of 21 million victims worldwide, it has become one of the largest illegal industries, second only to drug trafficking.<sup>3</sup> Human trafficking earns roughly \$150 billion USD a year (\$99 billion of which comes from

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<sup>1</sup> See *Human Trafficking: Organized Crime and the Multibillion Dollar Sale of People*, U.N. OFFICE ON DRUGS AND CRIME (July 19, 2012), [http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking\\_organized-crime-and-the-multibillion-dollar-sale-of-people.html](http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking_organized-crime-and-the-multibillion-dollar-sale-of-people.html).

<sup>2</sup> See *The Scale of The Issue*, STOP THE TRAFFIK, <https://www.stophetraffik.org/about-human-trafficking/the-scale-of-human-trafficking/> (last visited Jan. 26, 2018).

<sup>3</sup> See *id.*; CAL. DEP'T OF JUSTICE, THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA 3 (2012), <http://www.courts.ca.gov/documents/BTB24-4L-4.pdf>.

sexual exploitation alone).<sup>4</sup> To put that into perspective: the enslavement of human beings earns well over the annual revenue of Microsoft, Nike and Starbucks combined.<sup>5</sup> Yet despite the blatant human rights crisis implied by these gut wrenching numbers, survivors of human trafficking are often unfairly overlooked as deserving recipients of international asylum protection.<sup>6</sup>

So what exactly is human trafficking, and why has it been allowed to fester into such a global atrocity? Although the term trafficking may imply movement, it is not required by definition, and in fact is much more inclusive in its scope.<sup>7</sup> Article 3(a) of the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children ("Trafficking Protocol") defines trafficking in persons as:

[T]he 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.<sup>8</sup>

This definition comprises three essential elements: action, means, and purpose. The *actus reus* (action) of recruiting, transporting, transferring, harbouring, or receiving can normally be neutral on its own, but when combined with the *mens rea* (purpose) of exploitation any innocence in the behavior itself is distorted.<sup>9</sup> In most cases all three

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<sup>4</sup> *Human Trafficking by the Numbers*, HUM. RTS. FIRST (Jan. 7, 2017), <http://www.humanrightsfirst.org/resource/human-trafficking-numbers>.

<sup>5</sup> The combined revenue of Microsoft, Nike, and Starbucks in 2017 totaled \$146.03 billion. See *Microsoft Corp.*, MARKETWATCH, <http://www.marketwatch.com/investing/stock/msft/financials> (last visited Apr. 29, 2018); *Starbucks Corp.*, MARKETWATCH, <http://www.marketwatch.com/investing/stock/sbux/financials> (last visited Apr. 29, 2018); *Nike Inc.*, MARKETWATCH, <http://www.marketwatch.com/investing/stock/nke/financials> (last visited Apr. 29, 2018).

<sup>6</sup> See *Smuggling and Trafficking*, RIGHTS IN EXILE PROGRAMME, <http://www.refugeelegalaidinformation.org/smuggling-and-trafficking> (last visited Feb. 14, 2018).

<sup>7</sup> See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 3(a), Dec. 25, 2003, 2237 U.N.T.S. 319, 344 [hereinafter Trafficking Protocol].

<sup>8</sup> *Id.*

<sup>9</sup> U.N. Office of Drugs & Crime, The Role of 'Consent' in the Trafficking in Persons Protocol 2, 24 (2014), <http://www.unodc.org/documents/human->

elements must be present before finding that trafficking in persons has occurred, yet in instances where the victim is a minor, the means requirement is vacated and courts focus solely on the action and the purpose.<sup>10</sup>

The means of exploitation, as evidenced by the lengthy list offered in Article 3(a), can be numerous. Although abduction or sale by a family member is not uncommon, one of the most prevalent approaches used by traffickers is to recruit individuals using false pretenses of lavish jobs with better earning capabilities.<sup>11</sup> Presented with the promise of a better life, these often poor and uneducated individuals leave home with their recruiter only to find themselves in situations drastically different than they expected.<sup>12</sup> Additionally, because the recruiter typically covers the cost of travel, victims are considered indebted and forced to work without compensation in order to pay off the recruiter's fees and other travel expenses.<sup>13</sup> Furthermore, although the Trafficking Protocol provides no definition of exploitation, international law recognizes that it can be carried out in many ways.<sup>14</sup> The most common are through sexual slavery, which makes up 72% of all trafficking occurrences, and forced labor, which makes up 20% of all trafficking occurrences.<sup>15</sup> The remaining 8% is a conglomeration of equally appalling methods, including trafficking children to be used as soldiers or for forced and sham marriages, as well as pornography, street begging, and even organ removal.<sup>16</sup> Once enslaved, victims face repeated rape and sexual abuse, violent beatings, humiliation, degradation and other forms of psychological manipulation.<sup>17</sup> Additionally, in order to assert control, traffickers often implement forced drug use in order to keep the victim in a weakened state and, once addiction takes hold, dependent on the traffickers themselves.<sup>18</sup>

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trafficking/2014/UNODC\_2014\_Issue\_Paper\_Consent.pdf [hereinafter 'The Role of Consent'].

<sup>10</sup> See *id.* at 25.

<sup>11</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 15 (2015), <http://www.state.gov/documents/organization/245365.pdf>.

<sup>12</sup> See *id.*

<sup>13</sup> *Id.* at 15, 17.

<sup>14</sup> U.N. Office of Drugs & Crime, The Role of 'Exploitation' in the Trafficking in Persons Protocol 2, 21, 23–24 (2014), [https://www.unodc.org/documents/congress/background-information/Human\\_Trafficking/UNODC\\_2015\\_Issue\\_Paper\\_Exploitation.pdf](https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf) [hereinafter 'The Role of Exploitation'].

<sup>15</sup> U.N. Office of Drugs & Crime, Global Report on Trafficking in Persons 1, 28 (2016), [https://www.unodc.org/documents/data-and-analysis/glotip/2016\\_Global\\_Report\\_on\\_Trafficking\\_in\\_Persons.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf) [hereinafter 'Global Report on Trafficking in Persons'].

<sup>16</sup> See *id.* at 8, 28.

<sup>17</sup> Kelly Karvelis, *The Asylum Claim for Victims of Attempted Trafficking*, 8 NW. J. L. & SOC. POL'Y 274, 277 (2013).

<sup>18</sup> *Id.*

It was estimated by the U.S. Department of State in 2010 that only 0.4% of trafficking victims worldwide are ever identified.<sup>19</sup> Rescue is unlikely and escape is dangerous.<sup>20</sup> After victims have been recruited or abducted, they are generally taken to a different location where they know no one and are unable to speak the local language.<sup>21</sup> Passports, visas, and other identification documents are confiscated leaving the victim stranded.<sup>22</sup> Even for those few who do manage to evade their captors and flee, their options remain bleak.<sup>23</sup> Many victims will not want to return home, either because of shame and mental anguish, a fear of retaliation from their traffickers, or a brutal combination of both.<sup>24</sup> To offer reprieve, in lieu of returning home a claim may be presented for international protection in the form of asylum.<sup>25</sup> However, although seeking asylum is typically the safer and more favorable option, it proves to be exceptionally difficult for survivors of trafficking.<sup>26</sup>

In order to seek asylum the applicant must comply with the 1951 Convention Relating to the Status of Refugees, which was created by the United Nations shortly after the close of World War II.<sup>27</sup> Given the current affairs at the time of its drafting, the Convention had the very narrow focus of protecting the millions of Europeans seeking refuge in the wake of both World Wars.<sup>28</sup> Thus, the language decided upon characterized a refugee as any person who:

As a result of events occurring before 1 January 1951 and  
owing to well-founded fear of being persecuted for reasons

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<sup>19</sup> U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2010), <https://www.state.gov/documents/organization/142979.pdf> [hereinafter TIP REPORT].

<sup>20</sup> See U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 35 (2017), <https://www.state.gov/documents/organization/271339.pdf> [hereinafter TIP REPORT 2017].

<sup>21</sup> U.N. High Comm'r for Refugees, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked ¶ 10 (Apr. 7, 2006), <http://www.unhcr.org/uk/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html> [hereinafter Guidelines on International Protection].

<sup>22</sup> See TIP REPORT 2017, *supra* note 20, at 25.

<sup>23</sup> See Idil Atak & James C. Simeon, *Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice*, 12 J. INT'L CRIM. JUST. 1019, 1026 (2014).

<sup>24</sup> See Guidelines on International Protection, *supra* note 21, ¶ 48.

<sup>25</sup> See *id.* ¶¶ 45, 48, 50.

<sup>26</sup> See *id.* ¶¶ 17, 18, 23.

<sup>27</sup> See *id.* ¶¶ 5, 6; see also U.N. High Comm'r for Refugees, The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 1, 1 (2011), <http://www.unhcr.org/4ec262df9.pdf> [hereinafter The 1951 Convention and Its 1967 Protocol].

<sup>28</sup> The 1951 Convention and Its 1967 Protocol, *supra* note 27, at 1.

of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>29</sup>

This definition comprises five elements that must be met in order for an individual to be considered a refugee. First, the events giving rise to the need for international protection must have occurred prior to 1951.<sup>30</sup> Second, there must exist a well-founded fear of persecution; and third, that persecution must be based on one of the five enumerated grounds.<sup>31</sup> Fourth, the individual is no longer in his country of nationality; and fifth, the home country is either unable or unwilling to provide protection for the individual.<sup>32</sup>

Since the focus of the Refugee Convention had been specifically on war refugees of European descent, trafficking victims (among many other groups) were not given explicit attention or consideration.<sup>33</sup> More importantly, the requirement that asylum be sought for reasons arising prior to 1951 posed an insurmountable barrier. However, due to the persistence of refugee inducing situations beyond the World Wars, the temporal requirement within the Refugee Convention was eventually eliminated by the 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”).<sup>34</sup> Despite this one important change, no other aspect of the original definition was modified to increase inclusivity.<sup>35</sup> Nevertheless, as a result of greater access to international transport, the continued abundance of conflicts, and an overall increase in globalization near the turn of the century, there was a vast increase in global migration.<sup>36</sup> This brought greater attention to the specific issue of trafficking, and the United Nations Convention Against Transnational Organized Crime (“CTOC”) was adopted along with three additional protocols—the relevant ones being the Protocol to Prevent, Suppress and Punish Trafficking in

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<sup>29</sup> Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at 2–3 (Introductory Note by the U.N. High Comm’r for Refugees).

<sup>34</sup> *See* Protocol Relating to the Status of Refugees pmbl., Jan. 31, 1967, 606 U.N.T.S. 267; *see also id.* art. 1.

<sup>35</sup> *See id.*; Convention Relating to the Status of Refugees, *supra* note 29, art. 1.

<sup>36</sup> Bridget Anderson, *Trafficking*, in *THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES*, 355, 356 (Elena Fiddian-Qasmiyeh et al. eds., 2014).

Persons (“Trafficking Protocol”) and the Protocol Against the Smuggling of Migrants (“Smuggling Protocol”).<sup>37</sup>

The Trafficking Protocol was successful in satisfying the need for an internationally accepted definition of human trafficking, yet it placed great emphasis on migration and border control, which were at the forefront of concern at the time of drafting.<sup>38</sup> Although it was once again another positive step forward for trafficking victims, it is clear that the Protocol was “designed to facilitate cooperation between states to combat organized crime” and not as a humanitarian instrument.<sup>39</sup> In fact, only three of the twenty articles are dedicated to the protection of victims.<sup>40</sup> Nonetheless, it remains the primary human trafficking instrument on an international level with 173 party states to date.<sup>41</sup> Although the Protocol itself does not make any specific declarations regarding asylum sought by victims of trafficking, it does contain a savings clause, which states:

Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.<sup>42</sup>

Alas, as long as a trafficking victim fulfils the four prevailing Refugee Convention requirements, she ought to be granted protection. However, despite the temporal modification made in the 1967 Protocol, as well as the attention placed on the issue of human trafficking by the Trafficking Protocol, the general lack of human rights based interpretation and application of modern asylum law still creates unwarranted obstacles for trafficking survivors in need of asylum. First, although presumably straightforward, trafficking victims nonetheless face heightened scrutiny when establishing their well-founded fear of

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<sup>37</sup> *Id.* at 356.

<sup>38</sup> *Id.* at 357.

<sup>39</sup> *Id.*

<sup>40</sup> See Trafficking Protocol, *supra* note 7, arts. 6–8.

<sup>41</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en) (last visited Feb. 18, 2018).

<sup>42</sup> Trafficking Protocol, *supra* note 7, art. 14(1).

persecution.<sup>43</sup> Second—and the place where most applications fail—courts struggle to recognize the nexus between the victim’s persecution and a valid Convention ground.<sup>44</sup> Third, courts and border agencies too often fail to properly identify victims of trafficking, instead categorizing them as perpetrators of crime or as illegal migrants.<sup>45</sup>

This Article will address these three major shortcomings in international asylum law that prevent trafficking victims from being granted the protection they so desperately need and deserve. Sections II and III will bring to light the errors in interpretation and application of, respectively, the well-founded fear of persecution and nexus requirements found in the Refugee Convention. Section IV will highlight the issues states have in failing to properly identify victims of trafficking as opposed to perpetrators of crime. Then, Section V will offer practical solutions—via a human rights emphasis—for a more appropriate application of the Refugee Convention as well as proper identification and treatment of victims. It will be established that these survivors *do* face a well-founded fear of persecution; they *do* meet the nexus test; and they are definitely *not* criminals. Finally, a brief conclusion will be provided in Section VI.

## II. OBSTACLE ONE: WELL-FOUNDED FEAR OF PERSECUTION

The first hurdle for an individual seeking asylum is to establish a well-founded fear of persecution.<sup>46</sup> The Refugee Convention, however, fails to define what precisely constitutes persecution, nor does it provide guidance on the numerous and dissonant forms of possible manifestation.<sup>47</sup> Although several definitions have emerged over the years from various sources, the absence of a universal consensus is still painfully obvious.<sup>48</sup> Many states have proffered their own understandings into domestic legislation,<sup>49</sup> yet, undoubtedly, relying on varying state definitions encourages incongruity in both law and practice. Furthermore, any attempt to rely on the surrounding text of the Refugee Convention itself in order to ascertain an understanding of persecution proves futile. While discussing non-refoulement, Article 33 replaces mention of persecution in favor of threats to “life or freedom”, which many have argued is indicative of a definition.<sup>50</sup> Yet in reality, threats to “life or freedom” construes just as much ambiguity as “persecution”, and, when

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<sup>43</sup> See Atak & Simeon, *supra* note 23, at 1025.

<sup>44</sup> See *id.* at 1027.

<sup>45</sup> See *id.* at 1023.

<sup>46</sup> See *id.* at 1025.

<sup>47</sup> See Atak & Simeon, *supra* note 23, at 1025–26.

<sup>48</sup> Hugo Storey, *What Constitutes Persecution? Towards a Working Definition*, 26 INT’L J. REFUGEE L. 272, 273 (2014).

<sup>49</sup> *Id.* at 274.

<sup>50</sup> Convention Relating to the Status of Refugees, *supra* note 29, art. 33.

given a strictly narrow interpretation, is not sufficient in encompassing the vast world of persecutory acts.<sup>51</sup> Thus, looking to another international treaty source for guidance, the Rome Statute of the International Criminal Court defines persecution for its purposes as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>52</sup> While this construction provides more insight than the Refugee Convention, it nonetheless remains disappointingly vague.

Due to the numerous possible definitions and manifestations of persecution, many have argued against defining it altogether—instead opting for a case by case analysis.<sup>53</sup> One such theory commonly proffered by scholars is known as the circumstantial approach.<sup>54</sup> This method identifies persecution on a case by case basis, giving due weight to the cumulative effect of discriminatory or otherwise adverse influences.<sup>55</sup> The benefit of this approach is that it is not limited to attacks against a specific collection of rights, and thus is capable of extending protection to all forms of persecution, even those that have yet to be identified or codified by law.<sup>56</sup> Its downfall however, is that individualized discretion inadvertently lends itself to personal bias and disjointed application among states and tribunals.<sup>57</sup>

On the other hand, another popular approach centers around an explicit human rights theory.<sup>58</sup> James Hathaway has proposed that persecution be viewed as the “‘sustained or systemic violation of basic human rights demonstrative of a failure of State protection.’”<sup>59</sup> The benefit of this approach is that it brings refugee law into alignment with international law and, more specifically, human rights law.<sup>60</sup> This thereby “aids judges and other [asylum] decision makers in: (a) avoiding or minimising subjective decision making, and (b) avoiding parochial *renvoi* to national or regional law, or to each country’s unique ‘dictionary definition’.”<sup>61</sup> The disadvantage is that it limits persecution to notions of

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<sup>51</sup> See *id.*; see also Storey, *supra* note 48, at 275–76.

<sup>52</sup> Rome Statute of the International Criminal Court art. 7(2)(g), July 17, 1998, 2187 U.N.T.S. 3.

<sup>53</sup> GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 93–94 (3d ed. 2007).

<sup>54</sup> Storey, *supra* note 48, at 276–77.

<sup>55</sup> *Id.* at 276–78.

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

<sup>57</sup> *Id.* at 273, 277–78.

<sup>58</sup> *Id.* at 276.

<sup>59</sup> *Id.* at 278; JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 104–105 (1991).

<sup>60</sup> Storey, *supra* note 48, at 276.

<sup>61</sup> *Id.*



*basic* human rights which may be understood differently in different contexts.<sup>62</sup>

Furthermore, on a regional level, both the circumstantial and human rights approaches were combined in the European Union's 2004 Council Directive regarding minimum standards for the qualification of refugees ("Qualification Directive").<sup>63</sup> Article 9 of the Directive provides that acts of persecution must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).<sup>64</sup>

Furthermore, according to the Qualification Directive, acts of persecution can, *inter alia*, consist of:

- (a) acts of physical or mental violence, including acts of sexual violence;
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) prosecution or punishment, which is disproportionate or discriminatory;
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

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<sup>62</sup> *Id.* at 277.

<sup>63</sup> See generally Council Directive 2004/83, of the European Union and of the Council of 30 September 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304/12–304/23) [hereinafter Qualification Directive].

<sup>64</sup> *Id.* art. 9(1).

(f) acts of a gender-specific or child-specific nature.<sup>65</sup>

Due to the overall lack of coherence when it comes to understanding what persecution actually entails, many asylum decision makers attempt to classify the effects of human trafficking as criminal rather than persecutory.<sup>66</sup> Meaning that, for example, sex servitude would be understood as a crime inflicted on the victim, not as persecution. Such categorization effectively prevents the first element of the post-1967 refugee definition from being met—thus blocking international asylum protection. In an attempt to address this, the United Nations High Commissioner for Refugees (“UNHCR”) issued Guidelines on International Protection which indicates that the forms of exploitation commonly utilized in trafficking scenarios such as “abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, [and] the deprivation of medical treatment . . . constitute serious violations of human rights which will generally amount to persecution.”<sup>67</sup> Although this statement guides nations to consider the severity of exploitation and its correlation to persecution, use of the word “generally” does little to mandate a uniform decision.

In addition to the lack of consensus in defining persecution, an added challenge is the requirement that the asylum applicant’s fear of persecution must be well-founded.<sup>68</sup> This inherently requires both subjective and objective elements: actual fear (subjective) that is well-founded or believable (objective).<sup>69</sup> For several reasons this poses problems for both survivors of trafficking as well as those who have not yet been victimized but are nonetheless susceptible to it. First, this type of credibility assessment is not conducive to an individual who has just been through—undoubtedly—the worst experience of her life. The interview process can be intimidating and stressful, and a victim may be reluctant to provide full disclosure while battling a host of emotions—not

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<sup>65</sup> *Id.* art. 9(2).

<sup>66</sup> Atak & Simeon, *supra* note 23, at 1026.

<sup>67</sup> Guidelines on International Protection, *supra* note 21, ¶ 15.

<sup>68</sup> *Id.* ¶¶ 13, 14.

<sup>69</sup> U.N. High Comm’r for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ¶ 38 (2011), <http://www.unhcr.org/uk/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [hereinafter Handbook for Determining Refugee Status].

the least of which are fear and shame.<sup>70</sup> Some victims of sex trafficking may not feel comfortable discussing the details of their rapes and other abuse with the interviewer, particularly if the applicant is female and the interviewer is male.<sup>71</sup> Everyone handles trauma differently and not all who possess a legitimate fear will display that outwardly.<sup>72</sup> Nonetheless, factors commonly considered in establishing whether the applicant has an actual subjective fear are “demeanor, responsiveness, detail, inconsistencies, government reports, counterfeit documents, and voluntary return to the country from which the applicant seeks asylum.”<sup>73</sup> Additionally, unwillingness to surrender one’s passport counts as a mark against the credibility of genuine fear, no matter if every single one of the applicant’s possessions and family members remain in the country of origin.<sup>74</sup> Moreover, language barriers and translation can cause confusion for the applicant during questioning, as well as in the asylum application itself, which may produce a suspicious response in the eyes of others.<sup>75</sup>

Second, the objective determination is left up to the interviewer during the asylum process and is thus contingent on whatever views of the world and opinions on emotion he or she may have.<sup>76</sup> Although people are trafficked from every corner of the world, data suggests that the most prevalent source regions are Sub-Saharan Africa and East Asia;<sup>77</sup> yet because many applicants seek protection in European and North American nations, the interviewers are inevitably guided by a Western-centric understanding of fear.<sup>78</sup> This cultural clash can be detrimental to objectivity assessments.

Additionally, the applicant’s well-founded fear must be forward-looking; essentially meaning that past persecution does not satisfy the Convention requirement.<sup>79</sup> This leads authorities to assume that since the

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<sup>70</sup> See Meghan Casey, Note, *Refugee Women as Cultural Others: Constructing Social Group and Nexus for FGM, Sex Trafficking, and Domestic Violence Asylum Claims in the United States*, 10 SEATTLE J. SOC. JUST. 981, 1042 (2012).

<sup>71</sup> *Id.*

<sup>72</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., A TREATMENT IMPROVEMENT PROTOCOL: TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 13-14 (2014).

<sup>73</sup> Tina Javaherian, Comment, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423, 430-31 (2012).

<sup>74</sup> See Handbook for Determining Refugee Status, *supra* note 69, ¶¶ 47-50.

<sup>75</sup> See Casey, *supra* note 70, at 1044-45.

<sup>76</sup> See *id.* at 1042.

<sup>77</sup> Global Report on Trafficking in Persons, *supra* note 15, at 39.

<sup>78</sup> Jie Zong and Jeanne Batalova, *Refugee and Asylees in the United States*, MIGRATION POLICY INST. (June, 7, 2017), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states>.

<sup>79</sup> Karvelis, *supra* note 17, at 288-89.

individual has escaped his traffickers, he no longer has a future fear.<sup>80</sup> However, the UNHCR Handbook for Determining Refugee Status indicates that: “It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention.”<sup>81</sup> Accordingly, the UNHCR Guidelines also specify that in addition to any past persecution that occurred during the actual trafficking experience, victims may also still fear re-trafficking and other future consequences if they are forced to return home.<sup>82</sup> It is possible that even absent a strong likelihood of re-trafficking or physical retaliation, the impact of the persecution previously suffered may “render return to the country of origin intolerable.”<sup>83</sup> This can be indicated by “ostracism, discrimination or punishment” from family or community members,<sup>84</sup> especially in instances of sexual servitude where the victim is seen to have brought shame or dishonor upon herself and her family. This problem is unfortunately more common and more severe than the Western world often likes to admit. Take for example, Lydia, a young Eastern European woman, who was rescued in a raid after being trafficked and forced to work as a sex slave.<sup>85</sup> Although Lydia sought asylum, her claim was denied, and she was told she must return home.<sup>86</sup> “Rather than face the shame and stigma of returning as a criminal and a prostitute, she hanged herself.”<sup>87</sup>

Sadly, states continuously fail to grasp the gravity of danger facing those susceptible to trafficking and re-trafficking, as well as the ongoing mental and emotional consequences barraging those who have already escaped their traffickers.<sup>88</sup> A prime example is the Australian case of *SZBPG v. Minister for Immigration and Multicultural & Indigenous Affairs*.<sup>89</sup> Here, a young Ukrainian woman was approached about waitressing work abroad, but when she refused the offer the traffickers threatened to kidnap her and forcibly take her overseas as a sex slave.<sup>90</sup> Although the court accepted the veracity of her claim, it nonetheless

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<sup>80</sup> *See id.* at 289–90.

<sup>81</sup> Handbook for Determining Refugee Status, *supra* note 69, ¶ 45.

<sup>82</sup> Guidelines on International Protection, *supra* note 21, ¶ 17.

<sup>83</sup> *Id.* ¶ 16.

<sup>84</sup> *Id.* ¶ 18.

<sup>85</sup> U.N. Office on Drugs and Crime, An Introduction to Human Trafficking: Vulnerability, Impact and Action 70 (2008), [https://www.unodc.org/documents/human-trafficking/An\\_Introduction\\_to\\_Human\\_Trafficking\\_-\\_Background\\_Paper.pdf](https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf) [hereinafter An Introduction to Human Trafficking].

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See id.* at 78.

<sup>89</sup> *See generally* *SZBPG v. Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1726 (Austl.).

<sup>90</sup> *Id.* ¶ 4.

rejected the fact that she was at risk because she “was an educated woman who was aware of the dangers of accepting unsolicited overseas job offers.”<sup>91</sup> It is cases like this one that exemplify the misunderstanding of trafficking victims and the dangerous and pervasive cartels that are often involved in carrying out the abuse.

However, even if the dangers posed by the traffickers are understood, the final hurdle in establishing a well-founded fear is that the persecution must be perpetuated by the state, or at a minimum, the state must be unwilling or unable to provide protection if it is carried out by non-state actors.<sup>92</sup> Since nearly all instances of human trafficking are a result of non-state action, the lack of state protection must then be proven by the asylum seeker.<sup>93</sup> The state’s ability to protect is often dependent on whether there are mechanisms in place to prevent and combat trafficking, as well as mechanisms to assist identified victims.<sup>94</sup> The mere existence of these instruments, however, is not sufficient in themselves to establish satisfactory state protection; there must be evidence of effective implementation as well.<sup>95</sup> The problem that arises is that a state’s protective measures may seem adequate on their face and the authorities may appear to be cooperative, but in reality, absent a hiding scheme such as a witness protection program, it is difficult to fully provide protection from unknown trafficking cartels.<sup>96</sup>

The United States’ annual Trafficking in Persons Report seeks to analyze the effectiveness of state policy and action in accordance with its Trafficking Victims Protection Act (TVPA).<sup>97</sup> The TVPA outlines minimum standards that states ought to meet regarding the elimination of trafficking in persons, including the investigation and prosecution of perpetrators as well as the protection and proper identification of victims.<sup>98</sup> The Report ranks nations into one of four tiers based on their compliance.<sup>99</sup> The first tier is comprised of countries whose governments are fully compliant with the minimum standards, and only 36 nations, primarily European and North American ones, managed this

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<sup>91</sup> *Id.* ¶ 11.

<sup>92</sup> Atak & Simeon, *supra* note 23 at 1028.

<sup>93</sup> *Id.* at 1029.

<sup>94</sup> *Id.*

<sup>95</sup> Guidelines on International Protection, *supra* note 21, ¶ 22.

<sup>96</sup> *See id.* ¶¶ 23–24.

<sup>97</sup> *See generally* Victims of Trafficking and Violence Protection Act of 2000 § 108, 22 U.S.C. § 7106 (2000).

<sup>98</sup> *See id.*

<sup>99</sup> TIP REPORT 2017, *supra* note 20, at 45. It should be noted that although the middle two tiers are labeled by the Report as “Tier 2” and “Tier 2 Watch List,” they are very much separate categories with separate defining characteristics, which results in four distinct tiers. *Id.*

accomplishment.<sup>100</sup> The second and third tiers are made up of states that despite efforts to enhance compliance continue to fall short of meeting the minimum standards.<sup>101</sup> A total of 125 countries fall into this middle ground.<sup>102</sup> Lastly, the final tier is comprised of states who do not meet minimum TVPA standards and are making no efforts to remedy their shortcomings.<sup>103</sup> 23 states ended up in this category.<sup>104</sup> This data indicates that although many states may claim to offer protection to trafficking victims, in reality less than 20% are capable of adequately backing up their rhetoric.<sup>105</sup>

### III. OBSTACLE TWO: NEXUS REQUIREMENT

If the first hurdle is cleared and the applicant is able to establish a well-founded fear of persecution, the next step is to prove that the persecution is due to either their “race, religion, nationality, membership [in] a particular social group or political opinion.”<sup>106</sup> This link between persecution and one of the five grounds is known as the nexus requirement.<sup>107</sup> Since the Refugee Convention was drafted with a specific and narrow purpose in mind, the absence of other obviously potential reasons for persecution is unsurprising; yet, it poses a significant problem for individuals, such as victims of human trafficking, who do not fit neatly into one of the five enumerated grounds.<sup>108</sup> Because there is no explicit category pertaining to trafficking, most victims seeking asylum have attempted to formulate their nexus as members of a particular social group.<sup>109</sup> Yet just as there is no official definition of persecution, neither is there a definition provided within the Refugee Convention of what constitutes a social group.<sup>110</sup> However, according to the UNHCR, a social group “normally comprises persons of similar background, habits or social status” although it is not necessary that the group members associate with

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<sup>100</sup> *See id.* at 45–46.

<sup>101</sup> *Id.* at 45.

<sup>102</sup> *See id.* at 45–46.

<sup>103</sup> *Id.* at 45.

<sup>104</sup> *See id.* at 46.

<sup>105</sup> *See id.*

<sup>106</sup> Convention Relating to the Status of Refugees, *supra* note 29, art. 1(A)(2).

<sup>107</sup> Eva Nilsson, *The ‘Refugee’ and the ‘Nexus’ Requirement: The Relation Between Subject and Persecution in the United Nations Refugee Convention*, 46 WOMEN’S STUD. INT’L F. 123, 123 (2014).

<sup>108</sup> *See* Guidelines on International Protection, *supra* note 21, ¶¶ 5–6.

<sup>109</sup> *See* Marie-Luise Möller, *Recognizing Victims of Trafficking in Human Beings as Refugees according to the 1951 UN Geneva Refugee Convention 3–4* (June 21–22, 2017), <http://un-act.org/wp-content/uploads/2017/07/Recognizing-Victims-of-Trafficking-in-Human-Beings-as-Refugees-According-to-the-1951-UN-Geneva-Refugee-Convention.pdf>.

<sup>110</sup> *See generally* Convention Relating to the Status of Refugees, *supra* note 29.

or even know one another.<sup>111</sup> Many courts have grappled with defining more specific parameters for membership, which has led to the emergence of two primary methods for identifying a particular social group.<sup>112</sup>

The most common model is known as the protected characteristics approach.<sup>113</sup> It was first proffered by the United States in 1985 and has since been adopted by many other states including Canada and New Zealand.<sup>114</sup> This approach relies on the doctrine of *ejusdem generis* (“of the same kind”), meaning that when words of a general nature are used in conjunction with a list of specific words, the general words are to be “construed in a manner consistent with the specific words.”<sup>115</sup> To elucidate the concept, consider a statutory reference to cars, trucks, motorcycles, tractors, and other modes of transportation. Using *ejusdem generis*, it would be understood that since each of the listed vehicles are motorized, “other modes of transportation” could not also include bicycles or skateboards.<sup>116</sup> In the U.S. case of *Matter of Acosta*, the Board of Immigration Appeals (“BIA”) resolved that race, religion, nationality, and political opinion are each immutable characteristics belonging to a person: meaning that they are either beyond the individual’s ability to change or are so fundamental to the individual’s identity that they should not be required to be changed.<sup>117</sup> Thus, abiding by *ejusdem generis*, the BIA further concluded that in order to conform to the rest of the enumerated grounds, social groups must also revolve around an immutable characteristic.<sup>118</sup>

In the case of *Canada v. Ward*, the Canadian Supreme Court further refined the protected characteristics approach by identifying three instances where a particular social group may be formed for purposes of the Refugee Convention.<sup>119</sup> These are:

- (1) groups defined by an innate, unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the

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<sup>111</sup> Handbook for Determining Refugee Status, *supra* note 69, ¶ 77.

<sup>112</sup> James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*, 15 INT’L J. REFUGEE L. 477, 477–480 (2003).

<sup>113</sup> *Id.* at 480.

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

<sup>115</sup> *Id.* at 480–82; *Legal Dictionary: Ejusdem generis*, FREE DICTIONARY BY FARLEX, <https://legal-dictionary.thefreedictionary.com/Ejusdem+generis> (last visited Feb. 20, 2018) [hereinafter *Ejusdem generis*].

<sup>116</sup> See *Ejusdem generis*, *supra* note 115.

<sup>117</sup> *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

<sup>118</sup> *Id.*

<sup>119</sup> *Can. (Att’y Gen.) v. Ward*, [1993] 2 S.C.R. 689, 692 (Can.).

association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>120</sup>

Many states following the protected characteristics theory have since accepted Canada's interpretation and regard these group formulations as authoritative.<sup>121</sup>

The second method of defining a social group is via the "social perception" approach, used predominately in Australia.<sup>122</sup> This method requires that the group is identifiable by both internal and external characteristics, essentially requiring that the group must be perceived by society—and the persecutor—as being different.<sup>123</sup> Instead of attempting to define in precise terms what a particular social group consists of, the Australian High Court instead opted to identify broad principles to guide adjudication.<sup>124</sup> It held in *Applicant S* that "[a] particular social group . . . is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large . . . making those who share [the characteristic or element] a cognisable group within their society."<sup>125</sup>

With both of these approaches in mind, the European Union used its 2004 Qualification Directive as an attempt to provide coherent guidelines regarding refugees, but in reality made asylum much more elusive for those relying on a social group nexus.<sup>126</sup> Instead of adopting one approach, or even allowing the applicant the option of formulating their claim under either approach, the Qualification Directive instead insists that members of "a particular social group" fulfill *both* definitions.<sup>127</sup> It states that a particular social group will be formed where:

members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and* that group has a distinct

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<sup>120</sup> *Id.*

<sup>121</sup> Hathaway & Foster, *supra* note 112, at 480–81.

<sup>122</sup> *Id.* at 482–83.

<sup>123</sup> *Applicant S v. Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387, *passim* (Austl.).

<sup>124</sup> Hathaway & Foster, *supra* note 112, at 483.

<sup>125</sup> *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387, ¶ 62 (Austl.) (emphasis omitted).

<sup>126</sup> See Qualification Directive, *supra* note 63, ¶¶ 4–7, 10, 17, 21.

<sup>127</sup> See *id.* art. 10(1)(d).



identity in the relevant country, because it is perceived as being different by the surrounding society.<sup>128</sup>

This blended approach creates an often insurmountable barrier when it comes to victims of trafficking. Even the UNHCR recognized the draconian language and recommended that “and” be replaced with “or” in order to reduce the burden on the applicant and avoid gaps in protection.<sup>129</sup> Yet despite this recommendation, the European Commission opted to retain the cumulative requirement when it recast the Directive in 2011.<sup>130</sup>

Unfortunately, victims of human trafficking face serious impediments in formulating their social group, regardless of whether the state in which they seek protection uses the protected characteristics approach, the social visibility approach, or the European combination approach.<sup>131</sup> First, under the protected characteristics model, the primary obstacle is determining what innate and unchangeable characteristics unite the victim with others in her position.<sup>132</sup> As mentioned in the previous section, one of the major problems for survivors of trafficking is that many courts view them as victims of isolated crime as opposed to systemic persecution based on a Convention ground.<sup>133</sup> The reasoning behind this theory is that traffickers do not care who their victim is, they just want to make a profit.<sup>134</sup> Thus, victims are not seen as being targeted for their race, religion, nationality, membership in a particular social group, or political opinion, but instead were simply in the wrong place at the wrong time. When this view is taken, the victim’s asylum application

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<sup>128</sup> *Id.* (emphasis added).

<sup>129</sup> U.N. High Comm’r for Refugees, UNHCR Comments on the European Commission’s Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted 7–8 (2010), <http://www.unhcr.org/4c5037f99.pdf>.

<sup>130</sup> Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), art. 10(1)(d), 2011 O.J. (L 337/9).

<sup>131</sup> See Atak & Simeon, *supra* note 23, at 1027–28.

<sup>132</sup> See Hathaway & Foster, *supra* note 112, at 480.

<sup>133</sup> See *supra* Part I and note 45.

<sup>134</sup> Atak & Simeon, *supra* note 23, at 1026 (noting n.42).

will likely be denied for failure to meet the Convention's nexus requirement.<sup>135</sup>

Additionally, the social perception approach has its own unique barriers. First and foremost, victims of trafficking are typically targeted *because* of their social invisibility.<sup>136</sup> They are chosen because they lack status or protection and thus make easy targets.<sup>137</sup> Effectively, the social perception approach requires those susceptible to trafficking to call attention to their own vulnerabilities.<sup>138</sup> Furthermore, once an individual has already been trafficked and returned home, her social visibility in no way improves.<sup>139</sup> "Human trafficking is a hidden crime, in which perpetrators take advantage of power imbalances and coerce and intimidate their victims into silence."<sup>140</sup> Thus, after a victim has escaped, be it due to feelings of shame, guilt, or fear of retaliation, she will be unlikely to make outward displays of her persecution.<sup>141</sup> Inevitably, she becomes shrouded in an even denser cloud of social invisibility.

The lack of clarity in social group formulation has led to inconsistency in application amongst states as well as within states, and sometimes even within a single court. For example, in Australia the social group of "young females in Albania without male protection" has been accepted while the social group of "single women in Albania without male protection" has been rejected.<sup>142</sup> Aside from the substitution of "single" for "young", the two proposed groups are exactly the same yet produce polar opposite results.<sup>143</sup> Additionally, the EU's double-barreled tactic has caused an extreme lack of coherence within Europe. For instance, a French asylum court heard the case of *Miss E*, a Nigerian woman who had escaped trafficking and was seeking international protection.<sup>144</sup> Miss E's proposed social group was "prostitutes who come from the State of Edo and who are both victims of human trafficking and anxious to extricate

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<sup>135</sup> See Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement*, 16 MICH. J. GENDER & L. 453, 476–78 (2010).

<sup>136</sup> Casey, *supra* note 70, at 1031–32.

<sup>137</sup> See *id.* at 1030–32.

<sup>138</sup> *Id.*

<sup>139</sup> See Atak & Simeon, *supra* note 23, at 1026.

<sup>140</sup> TIP REPORT 2017, *supra* note 20, at 2.

<sup>141</sup> See Bernadette McSherry & Susan Kneebone, *Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights*, 12 INT'L J. HUM. RTS. 67, 80 (2008).

<sup>142</sup> McSherry & Kneebone, *supra* note 141, at 79 (referring to the cases of *SXPB* and *SXQB v. MIMIA* and *RRT*, as well as *SVTB v. MIMIA*).

<sup>143</sup> See *id.*

<sup>144</sup> Case Summary, *France – CDNA, 29 April 2011, Miss E., n°10012810*, EUROPEAN DATABASE ASYLUM L. (EDAL), <http://www.asylumlawdatabase.eu/en/case-law/france-cnda-29-april-2011-miss-e-n%C2%B010012810#content> (last visited Feb. 20, 2018).

themselves actively from these networks.”<sup>145</sup> She was initially granted asylum on the basis that her social group clearly indicated immutability; however, because the Qualification Directive requires perception of difference as well as immutability her case was appealed to the Conseil d'État.<sup>146</sup> The lower court's decision was vacated because there had been no inquiry into whether the group would also have social visibility.<sup>147</sup> The case was remanded, and after a second consideration, the asylum court found that the group did in fact have a visible status—and once again granted asylum.<sup>148</sup>

Yet oddly enough, only a few months later, Miss O, another Nigerian woman who had been trafficked and forced into prostitution, sought asylum before the same court that decided *Miss E*.<sup>149</sup> This time the social group was framed as “young Nigerian women, especially those coming from the region of Benin City (State of Edo), who were forced to prostitute themselves in Europe, and in particular in France, in a transnational network of human trafficking for the purpose of sexual exploitation and who managed to extricate themselves from this network and to stop this forced activity.”<sup>150</sup> Although Miss O's proposal gave explicit reference to immutability, the asylum court rejected this particular formulation on the basis that the proposed group would *not* have social visibility in Nigerian society.<sup>151</sup> These two strikingly similar cases from the exact same court elucidate the confusion and difficulty caused by the Qualification Directive and social group formulation in general.

Furthermore, no matter which approach is ultimately used, one of the primary challenges for survivors of human trafficking is that their persecution cannot be used to define the parameters of their social group.<sup>152</sup> This essentially means that those who are at risk of trafficking cannot constitute a social group without additional unifying traits. For example, in the case of *Rreshpja v. Gonzales*, an applicant's proposed

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<sup>145</sup> *Id.*

<sup>146</sup> Case Summary, *France – National Asylum Court, 24 March 2015, Decision No. 10012810*, EUROPEAN DATABASE ASYLUM L. (EDAL), <http://www.asylumlawdatabase.eu/en/case-law/france-national-asylum-court-24-march-2015-decision-no-10012810> (last visited Feb. 20, 2018).

<sup>147</sup> Case Summary, *France – Council of State, 25 July 2013, n° 350661*, EUROPEAN DATABASE ASYLUM L. (EDAL), <http://www.asylumlawdatabase.eu/en/case-law/france-council-state-25-july-2013-n%C2%B0-350661> (last visited Feb. 20, 2018).

<sup>148</sup> *France – National Asylum Court, supra* note 146.

<sup>149</sup> Case Summary, *France – CDNA, 29 July 2011, Miss O., n°10020534*, European Database Asylum L. (EDAL), <http://www.asylumlawdatabase.eu/en/case-law/france-cnda-29-july-2011-miss-o-n%C2%B010020534> (last visited Feb. 20, 2018).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Guidelines on International Protection, *supra* note 21, ¶ 39.

social group of “young (or those who appear to be young), attractive Albanian women who are forced into prostitution” was denied in a United States circuit court on the grounds that it was circularly defined by persecution.<sup>153</sup> Additionally, despite the inclusion of numerous other unifying factors, in the case of *Kalaj v. Holder*, the same court used similar reasoning for denying the particular social group formulation of “young, impoverished, single, uneducated women who risk kidnapping and forced prostitution.”<sup>154</sup> Yet on the contrary, in the case of *Cece v. Holder*, the asylum applicant’s initial immigration judge allowed the social group formulation of “young women who are targeted for prostitution by traffickers in Albania.”<sup>155</sup> Although the Board of Immigration Appeals overturned the decision, because, in its opinion, the risk of persecution was the only narrowing characteristic, on appeal the federal circuit court held that in fact Cece’s social group was formulated around being “young, female, and living alone in Albania.”<sup>156</sup> The court went on to clarify that even if the group was defined in part by past persecution, it did not negate the other immutable characteristics making it a valid social group.<sup>157</sup> Even though, in this particular instance, there was a favorable interpretation, it is unfortunately not a universal one. States, and even localized tribunals within a state, are commonly free to utilize their interpretive powers how they see fit.<sup>158</sup> This freedom can produce favorable decisions in line with *Cece*, or improper decisions in line with *Rreshpja* and *Kalaj*.

Lastly, an additional hindrance to social group formation is the reluctance of many courts to recognize gender as a valid nexus despite the fact that it is both an immutable and socially visible characteristic.<sup>159</sup> This is injurious for victims of trafficking since although females are certainly not the only ones targeted, they nonetheless remain disproportionately affected.<sup>160</sup> According to the UNODC, 71% of victims are women and

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<sup>153</sup> *Rreshpja v. Gonzales*, 420 F.3d 551, 555–56 (6th Cir. 2005).

<sup>154</sup> *Kalaj v. Holder*, 319 F. App’x. 374, 376–77 (6th Cir. 2009).

<sup>155</sup> *Cece v. Holder*, 733 F.3d 662, 667 (7th Cir. 2013).

<sup>156</sup> *Id.* at 668, 671.

<sup>157</sup> *Id.* at 671.

<sup>158</sup> See, e.g., USCIS Policy Manual, *Volume 7, Part A, Chapter 9*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter9.html#footnote-8> (current as of Aug. 23, 2017). According to the USCIS Policy Manual, Asylum cases “involve discretion, [and] the exercise of favorable discretion . . . is a matter of administrative grace.” *Id.*

<sup>159</sup> Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States*, 23 J. GENDER, SOC. POL’Y & L. 529, 531–32, 548–49 (2015).

<sup>160</sup> See Global Report on Trafficking in Persons, *supra* note 15, at 23.

girls.<sup>161</sup> However, most courts require that the social group be construed with particularity, meaning it is not overly populous or diverse.<sup>162</sup> Presumably there is a fear of a deluge of asylum applications if such a broad trait as gender were to be permitted as a qualifying social group. Yet, given the obviousness of gender as both an immutable and socially visible trait, the UNHCR has stated in its Trafficking Guidelines that women are in fact capable of constituting a social group.<sup>163</sup> Although there have been several states which have accepted this premise, it has thus far done little for aiding the asylum claims of trafficking survivors.<sup>164</sup> For example, although Canada's *Ward* decision recognized gender as capable of constituting a particular social group,<sup>165</sup> the Canadian Refugee Board has ruled on multiple occasions that when there is any form of economic motivation by the trafficker, the relevant Convention nexus at play is overshadowed.<sup>166</sup>

#### IV. OBSTACLE THREE: IMPROPER IDENTIFICATION

The third barrier in obtaining asylum is that the individual's circumstances are conflated with criminal activity.<sup>167</sup> Since illegal border crossing and prostitution are easier to prove than human trafficking, victims are frequently faced with the presumption of criminal behavior instead of treated as victims in their own right.<sup>168</sup> Although some claim that trafficking is a guise for migrant smuggling whereby those trafficked were actually attempting to gain illegal entry to a state, migrant smuggling and human trafficking are two very different things. The UNODC Smuggling Protocol defines migrant smuggling 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 Party of which the person is not a national or a permanent resident."<sup>169</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> Randall, *supra* note 159, at 559.

<sup>163</sup> Guidelines on International Protection, *supra* note 21, ¶ 38; see also Trevor R. Larkin, Note, *Sex and Gender Violence in Asylum Law: Expanding Protection Beyond Domestic Violence*, 9 DREXEL L. REV. 227, 245 (2016).

<sup>164</sup> Larkin, *supra* note 163, at 245. See, e.g., *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 C.L.R. 1 (Austl.); *Can. (Att'y Gen.) v. Ward*, [1993] 2 S.C.R. 689 (Can.); *R. v. Immigration Appeal Tribunal* [1999] 2 AC 629 (HL) (appeal taken from Eng.) (U.K.), for states that have accepted gender.

<sup>165</sup> *Ward*, 2 S.C.R. at 739.

<sup>166</sup> Pomeroy, *supra* note 135, at 487–88.

<sup>167</sup> See Atak & Simeon, *supra* note 23, at 1023–24.

<sup>168</sup> *Id.*

<sup>169</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime art. 3(a), Jan. 28, 2004, 2241 U.N.T.S. 507 [hereinafter Smuggling Protocol].

One element notably missing from this definition that is essential to human trafficking, is the notion of exploitation. Although both smugglers and traffickers prey on the vulnerabilities of those seeking access to better labor markets, the UNHCR has divorced the two by acknowledging that “[v]ictims of trafficking are distinguished from migrants who have been smuggled by the protracted nature of the exploitation they endure, which includes serious and ongoing abuses of their human rights at the hands of their traffickers.”<sup>170</sup> While the relationship between the migrant and her smuggler normally ends after the migrant has reached her destination, for the trafficked individual, the destination is only the beginning to a journey of abuse.<sup>171</sup>

Another notable difference between smuggling and trafficking is the presence of consent.<sup>172</sup> Smuggling is essentially a service that is willingly paid for by the migrant.<sup>173</sup> Trafficking is not a voluntary venture.<sup>174</sup> However, authorities nonetheless place much emphasis on whether initial consent to travel was given by the trafficking victim.<sup>175</sup> Unsurprisingly, this question does not produce a simple yes or no answer. When it comes to human trafficking, consent is a labyrinth. For instance, some victims will have been abducted or kidnapped and never consented at all.<sup>176</sup> Others may have consented to travel to another country but not to the abusive living and working conditions to which they were subjected.<sup>177</sup> Others yet may have consented to accompany a recruiter and begin a new job, but were not aware they would be crossing international borders.<sup>178</sup> Or perhaps even some will have consented to illegal migration under the guise that debts would be forgiven or harm to family members

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<sup>170</sup> Guidelines on International Protection, *supra* note 21, ¶ 4.

<sup>171</sup> *Id.*; *Trafficking in Persons and Migrant Smuggling*, UNITED NATIONS OFF. ON DRUGS & CRIME [UNODC], <https://www.unodc.org/lpo-brazil/en/trafico-de-pressoas/index.html> (last visited Feb. 18, 2018).

<sup>172</sup> *Trafficking in Persons and Migrant Smuggling*, *supra* note 171.

<sup>173</sup> Guidelines on International Protection, *supra* note 21, at ¶ 4.

<sup>174</sup> *Trafficking in Persons and Migrant Smuggling*, *supra* note 171.

<sup>175</sup> Madevi Sun-Suon, *Human Trafficking and the Role of Local Government*, UNITED NATIONS INST. FOR TRAINING & RESEARCH [UNITAR] 7, 13, [https://unitar.org/dcp/sites/unitar.org.dcp/files/uploads/newcoverhuman\\_trafficking\\_final.compressed.compressed.pdf](https://unitar.org/dcp/sites/unitar.org.dcp/files/uploads/newcoverhuman_trafficking_final.compressed.compressed.pdf) (last visited Feb. 21, 2018).

<sup>176</sup> Ryszard Piotrowicz, *Trafficking of Human Beings and their Human Rights in the Migration Context*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 275, 275, 277 (Ryszard Cholewinski et al. eds., 2007).

<sup>177</sup> *Id.* at 275.

<sup>178</sup> See Domingo Fortuna, *Human Trafficking*, CTR. FOR AM. STUD.: FREEDOM & CITIZENSHIP, <https://freedomandcitizenship.columbia.edu/content/human-trafficking-domingo> (last visited Feb. 21, 2018); see also *New ILO Global Estimate of Forced Labour: 20.9 million victims*, INT'L LAB. ORG. [ILO] (June 1, 2012), [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_182109/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_182109/lang--en/index.htm).

would be spared.<sup>179</sup> McSherry and Kneebone provide a prime example of the level of deceit involved even when there may appear to be consent:

Suki was born in Bangkok. After leaving school at 18, she responded to an invitation to work in Macau as a singer, but once there, she was forced to work in a brothel. After being told that she could earn good money in Australia where prostitution was legal, she contacted a person who made all the arrangements for her to be escorted to Australia. She signed papers in English which she could not read and had a new passport obtained on her behalf. She was accompanied to Australia by a female ‘minder’ and entered Australia on a visitor’s visa. Her passport was taken away from her . . . [and s]he was kept under lock and key and forced to work a seven-day week in a brothel. It transpired that she had in fact been sold by the Thai contact to a ‘broker’. She was told that her contract debt was \$40,000. Threats were made against her family in Thailand should she attempt to escape.<sup>180</sup>

Traffickers are well versed in what appeals to their victims and the fewer available alternatives, the more likely an individual is to “consent” to a situation which results in trafficking.<sup>181</sup> When living on less than a few dollars a day, perhaps going days at a time without a meal, or possibly having family members that need expensive medical attention—the promise of a better life is alluring. These vulnerabilities are exploited and used to manipulate the victim.<sup>182</sup> Poverty is one of the easiest factors to target; yet others include age, gender, “[s]ocial and cultural exclusion”, “[l]imited access to education”, and internal conflict.<sup>183</sup> In fact, migrants fleeing their home for other reasons make easy targets for trafficking rings.<sup>184</sup> Take for example the story of Maya.<sup>185</sup> Maya was fleeing her home in Syria when she was targeted and promised factory work in Lebanon.<sup>186</sup> Because she had no other prospects, Maya agreed to

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<sup>179</sup> See McSherry & Kneebone, *supra* note 141, at 68.

<sup>180</sup> *Id.*

<sup>181</sup> Anderson, *supra* note 36, at 361; An Introduction to Human Trafficking, *supra* note 85, at 69.

<sup>182</sup> See An Introduction to Human Trafficking, *supra* note 85, at 69–73.

<sup>183</sup> *Id.* at 71–75.

<sup>184</sup> See TIP REPORT 2017, *supra* note 20, at 4, 6, 11, 13.

<sup>185</sup> See *id.* at 4.

<sup>186</sup> *Id.*

accompany her new recruiter.<sup>187</sup> Yet, upon arrival, she was forced to work as a sex slave instead.<sup>188</sup> In addition to identifying and targeting particular vulnerabilities, traffickers tend to “speak the same language”, “be[] of the same gender”, and of similar age as their victim in order to promote trust.<sup>189</sup> It is this manipulation of the human desire for opportunity and betterment, paired with the vicious attack on personal vulnerabilities that produces a “yes” from these unwitting individuals.

Luckily, the Trafficking Protocol attempts to address this issue by invalidating consent procured by “means of . . . 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.”<sup>190</sup> Yet many states still cling to the idea that consent makes the victim a criminal in her own right, either as a perpetrator of illegal entry, prostitution, or some other offence.<sup>191</sup> Some have even argued that overlooking the issue of consent in instances of trafficking will only open the floodgates for another avenue of evading migration laws.<sup>192</sup> While this argument is a clear avoidance of the serious human rights issues at play, it is nonetheless unsurprising. “Too often the same body that is charged with protecting vulnerable migrants from harm is also charged with creating and policing the boundaries between citizens and non-citizens, and with deporting them if they are found to be in breach of the law.”<sup>193</sup>

This dual responsibility can be difficult to balance, and when one side of the scale demands more attention, it will be the policing duty not the protective duty that prevails. For example, in Cambodia, fourteen girls suspected to be between the ages of twelve and eighteen were “rescued” from a brothel by authorities, only to be subsequently placed under arrest and charged with illegal entry.<sup>194</sup> Although the investigating judge admitted that the girls were initially revealed to be victims of human trafficking, “when the court learned the girls had entered Cambodia without legal documentation, they were no longer considered victims, but

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<sup>187</sup> *See id.* at 4, 250.

<sup>188</sup> *Id.* at 4.

<sup>189</sup> Global Report on Trafficking in Persons, *supra* note 15, at 7.

<sup>190</sup> Trafficking Protocol, *supra* note 7, art. 3(a).

<sup>191</sup> *See* The Role of ‘Consent’, *supra* note 9, at 22–23.

<sup>192</sup> Jean-Pierre Gauci, *Why Trafficked Persons Need Asylum*, in *EXPLORING THE BOUNDARIES OF REFUGEE LAW: CURRENT PROTECTION CHALLENGES* 172, 190 (Jean-Pierre Gauci et al. eds., 2015).

<sup>193</sup> Anderson, *supra* note 36, at 365.

<sup>194</sup> *Cambodia: Young Trafficking Victims Treated as Criminals*, HUM. RTS. WATCH (June 22, 2002, 8:00 PM), <https://www.hrw.org/news/2002/06/22/cambodia-young-trafficking-victims-treated-criminals>.



violators of Cambodian law.”<sup>195</sup> In addition to illegal entry, authorities rely on the existence of criminal behavior while ignoring the fact that it has been forced.<sup>196</sup> For instance, a Vietnamese woman, Ms. P., “was trafficked [in]to Ireland and forced to work in a [marijuana] growhouse.”<sup>197</sup> After a raid on the facility, she was discovered, arrested, and imprisoned for “two and a half years.”<sup>198</sup> After a review, the court held that the garda (police) investigations and state policies were in fact unsatisfactory when it came to identifying and assisting victims of trafficking.<sup>199</sup> Yet another example is that of Nicole, a teenager forced into over a decade of sex trafficking in the United States.<sup>200</sup> Throughout her forced servitude she was charged with various counts of prostitution, drug possession, and loitering—yet never identified as an unwilling victim or given appropriate assistance.<sup>201</sup> Nicole, who is now free and trying to build a life for herself, is unable to find employment due to her criminal record.<sup>202</sup>

## V. REFORMING ASYLUM LAW

Whether it is disbelief about the persecution looming ahead, failure to acknowledge membership in a particular social group, or being labeled as a consenting criminal, there are many hurdles for trafficking survivors to overcome in their quest for asylum. It is evident that the current international framework is unfavorable; yet, it does not have to be. Given the change in social order and globalization since the initial drafting of the Refugee Convention, the instrument is now quite a bit outdated. Although border control ought not be forgotten, it should nonetheless remain ancillary to a more human rights based approach. In fact, three years prior to the introduction of the Refugee Convention, the Universal Declaration of Human Rights (“UDHR”) acknowledged asylum

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<sup>195</sup> *Id.*

<sup>196</sup> See *Landmark High Court Judgment Condemns Garda Failure to Assist Trafficked Woman*, MIGRANT RTS. CTR. IR. (Apr. 15, 2015), <http://www.mrci.ie/press-centre/landmark-high-court-judgment-condemns-garda-failure-to-assist-trafficked-woman/>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *P v. Chief Superintendent Garda Nat'l Immigration Bureau [2015] IEHC 222*, ¶¶ 179–191, 194–199, 201, 205 (H. Ct.) (Ir.).

<sup>200</sup> Eleanor Goldberg, *Sex Trafficking Victims Usually Can't Escape Prostitution Charges. This Lawyer's Working To Change That*, HUFFINGTON POST: IMPACT (May 18, 2015, 9:58 AM), [http://www.huffingtonpost.com/2015/05/18/sex-trafficking-prostitution-charges\\_n\\_7119474.html](http://www.huffingtonpost.com/2015/05/18/sex-trafficking-prostitution-charges_n_7119474.html) (last updated Dec. 6, 2017).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

as a basic human right.<sup>203</sup> Although the UDHR is not a binding international treaty, it is nevertheless regarded as authoritative “customary international law.”<sup>204</sup> Furthermore, asylum and non-refoulement obligations have appropriately been incorporated into regional human rights treaties, including Article 22 of the American Convention on Human Rights and Article 12 of the African Charter on Human and Peoples’ Rights.<sup>205</sup> Yet absent a full-scale re-write of the entire Refugee Convention, there are still several practical ways that trafficking survivors can find relief with modifications in the way the existing law is interpreted and applied.<sup>206</sup>

#### A. *Well-Founded Fear of Persecution*

In order to have proper application of the well-founded fear requirement, the first and most obvious necessity is to establish a universally accepted definition of persecution. There is value in the circumstantial approach since it allows for broad analysis, yet its breadth is also its downfall. In order to ensure adequate protection for all asylum applicants, particularly those who have been trafficked, state decision makers need a more rigid ambit. Identifying all possible forms of persecution in order to force the decision one way or another has a certain appeal, yet an exhaustive list of examples would be at most, impossible, and at least, aggravatingly tedious; while on the contrary, a rudimentary list would serve little purpose. Thus, it is Hathaway’s human rights approach which appears to have a bit more merit. This particular model provides much needed structure as well as brings asylum law into the realm of human rights, which is where it belongs. Whether incorporated by an additional protocol to the Refugee Convention, or through some other means guaranteeing international complicity, persecution ought to be defined and understood as: “The serious and/or systemic violation of human rights as recognized in the Universal Declaration of Human Rights and other regional instruments.”

Formulating the definition in this manner avoids the additional reference that Hathaway makes to the failure of state protection, as it also avoids the Rome Statute’s reference to the group identity of the

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<sup>203</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948) [hereinafter UDHR].

<sup>204</sup> Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, U.N. AUDIOVISUAL LIBR. INT’L L. 1, 2 (2008), [http://legal.un.org/avl/pdf/ha/udhr/udhr\\_e.pdf](http://legal.un.org/avl/pdf/ha/udhr/udhr_e.pdf).

<sup>205</sup> African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982); American Convention on Human Rights “Pact of San Jose, Costa Rica”, Nov. 22, 1969, S. Treaty Doc. No. 95-21, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, 9 I.L.M. 99 (1970).

<sup>206</sup> See *infra* Part V.

persecuted.<sup>207</sup> Neither of these references are necessary in light of the remaining Refugee Convention requirements.<sup>208</sup> Thus, the simplicity and straightforwardness of this definition allows the focus to be placed squarely on the abuse of human rights being perpetrated, and leaves little up to state interpretation.<sup>209</sup> Furthermore, pointing to the Universal Declaration of Human Rights and regional human rights instruments highlights the pre-existing acknowledgment of asylum in these conventions, as well as ensures that all forms of abuse and degradation suffered throughout the trafficking and post-trafficking experience are recognized as forms of persecution. There would no longer be a question of whether victimization rose to the level of persecution or was simply a result of criminality. It would be clear that human trafficking—including rape, torture, deprivation of freedom, etc.—is both a severe and systemic human rights violation deserving of asylum.<sup>210</sup> Furthermore, even absent a showing of likely re-trafficking, the potential ostracism and emotional turmoil experienced by the applicant if returned to her country of origin would still be considered an abuse of fundamental human rights.<sup>211</sup>

Once a common definition of persecution is accepted, the next step with respect to the well-founded fear of persecution requirement is to exercise acumen when it comes to identifying the subjective and objective components. It is often the case that external evidence is limited, leaving the authorities to rely solely on factors such as the applicant's demeanor and responsiveness, as well as the detail and consistency of her story.<sup>212</sup> Although undeniably these factors ought not be ignored completely, it must also be understood that each individual's response to persecution is going to be slightly different. Particular attention must be paid to the background and nationality of each applicant. For example, some cultures may frown upon the outward display of emotion by females, and thus a female applicant may be engrained with the notion to remain quiet and reserved in all circumstances.<sup>213</sup> Or in other instances, the male applicant may come from a culture in which emphasis is placed on the strength and masculinity of men, and thus, may be less likely to emote fear and

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<sup>207</sup> See *supra* text accompanying notes 52, 59.

<sup>208</sup> See Convention Relating to the Status of Refugees, *supra* note 29, at 2–4 (Introductory Note by the U.N. High Comm'r for Refugees).

<sup>209</sup> See *id.* (recognizing the universal applicability of the UDHR provisions and protections to all Member States party to the instrument); see also UDHR, *supra* note 203, pmb.

<sup>210</sup> See, e.g., UDHR, *supra* note 203, arts. 3–5.

<sup>211</sup> See, e.g., *id.* art. 5; see also Guidelines on International Protection, *supra* note 21, ¶¶ 16–18.

<sup>212</sup> Javaherian, *supra* note 73, at 435–36.

<sup>213</sup> See Casey, *supra* note 70, at 1042.

weakness.<sup>214</sup> Moreover, survivors may be desensitized due to “forced drug use” and other psychological trauma caused by their trafficking.<sup>215</sup> This can result in erratic behavior as well as gaps in memory.<sup>216</sup>

The UNHCR has indicated the importance of providing a safe and supportive environment so that once a potential trafficking victim has been identified she is reassured that her disclosures will remain confidential.<sup>217</sup> One simple method is to pair asylum seekers with an interviewer of the same gender in order to facilitate trust and ease apprehension.<sup>218</sup> This is no different than the already common practice of having same gendered security officers perform pat downs or strip searches.<sup>219</sup> In essence, an asylum interview, particularly for a survivor of trafficking, is an emotional strip search.<sup>220</sup> Ultimately, it is important for authorities to respect the victim’s unique situation and employ patience in judging the veracity of her claim. It is crucial that border authorities receive proper training in handling a multitude of responses from the applicant, as well as learn to set aside Western perspectives when judging the objectiveness of the victim’s fear.

### B. Nexus Requirement

When it comes to the nexus requirement, the erraticism with which any given social group formulation is recognized is derisive, no matter which approach is adopted.<sup>221</sup> Thus, it is not only important to produce uniformity among international decisions, but also to ensure that immutability and social visibility are appropriately understood. Undeniably, the primary motivation behind trafficking is economic gain, thus, it may be true that traffickers do not have a vendetta against any one race, religion, nationality, etc.<sup>222</sup> However, it would be fatuous to suggest that individuals with a certain set of innate characteristics are

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<sup>214</sup> See *id.* (noting “that cultural differences and trauma play [an] important role[ ] in determining behavior”).

<sup>215</sup> Karvelis, *supra* note 17, at 277.

<sup>216</sup> Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 464 (2011).

<sup>217</sup> Guidelines on International Protection, *supra* note 21, ¶ 46.

<sup>218</sup> *Id.*; see also Casey, *supra* note 70, at 1042.

<sup>219</sup> See *Performance-Based National Detention Standards*, U.S. IMMIGRATION & CUSTOMS ENFT 1, 121–22 (2016), <https://www.ice.gov/doclib/detention-standards/2011/2-10.pdf>.

<sup>220</sup> Compare *id.* (recognizing that sensitive areas must be inspected by a person of the same gender because these searches are necessary to remove any threats to safety and security), with Casey, *supra* note 70, at 1041–42 (recognizing that sensitive information a refugee is reluctant to share must be discussed in order to give asylum seekers sufficient procedural protections).

<sup>221</sup> See Casey, *supra* note 70, at 1048.

<sup>222</sup> Guidelines on International Protection, *supra* note 21, ¶ 31.

not targeted specifically in order to maximize that economic gain. In reality, males and older females will have less appeal to the main clientele, so sex traffickers will target young women instead. Older and weaker adults will be less able to work under difficult conditions, so labor traffickers will target strong and healthy young people instead. Furthermore, individuals who have high social status or significant education will cause problems for the trafficker either by refusing to initially cooperate or by bringing attention to their disappearance, so traffickers will target the poor and uneducated instead. Thus, although money may be the motivating factor, the UNHCR affirms that it does not “exclude [consideration] of Convention-related grounds” when choosing a victim.<sup>223</sup> Accordingly, “[i]t is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause.”<sup>224</sup> Thus, when courts deny social group formulations based on an underlying economic motive, they are erroneously applying the Refugee Convention’s nexus requirement.

Moreover, in regards to the “social perception approach”, the argument is similar.<sup>225</sup> The innate characteristics that individuals are targeted for are also socially visible in the most obvious sense.<sup>226</sup> Age, gender, and social status are not only visible to the naked eye, but are commonly used as means of describing and categorizing people.<sup>227</sup> This alone should be enough to satisfy the social visibility test. Any requirement to show more specific perception as a vulnerable group is unwarranted and unfairly requires potential victims of persecution to highlight their harrowing past experiences and draw attention to their weakness, thereby circularly increasing the likelihood of persecution.

Therefore, it is crucial that states acknowledge that victims of trafficking are not random; they are very much targeted based on their age, gender, and social status—each being an immutable *and* socially visible characteristic. It should thus be sufficient for any victim, or potential victim, to qualify their social group on these factors alone. Although some argue these traits—particularly gender—are not construed with enough particularity, it is noteworthy that race, nationality, and religion are also each traits with mass membership, but are nonetheless still worthy of explicit protection.<sup>228</sup> Allowing claims

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.* ¶ 29.

<sup>225</sup> See Randall, *supra* note 159, at 549.

<sup>226</sup> See Fatima E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 62 n.69, 64–65, 70, 87 (2008).

<sup>227</sup> See *id.*

<sup>228</sup> Randall, *supra* note 159, at 564.

based on gender will open the floodgates no more than any other protected ground since women would still be required to show a well-founded fear of persecution, as well as a lack of state protection, before qualifying for asylum.

Furthermore, although “young uneducated women” should be a sufficient social group in and of itself, formulating membership with greater particularity is not impossible. The fact that the persecution feared cannot define the social group has been wildly misinterpreted by many courts thus far. The actions of the traffickers and the persecution that victims have suffered before their escape or rescue becomes a defining personal characteristic, and one that makes them a continued target.<sup>229</sup> Essentially, their past persecution is just one more aspect of their identity that increases the risk of future persecution.<sup>230</sup> Thus, “young uneducated women who have escaped their traffickers” would be an equally acceptable social group construction. It is important for courts to understand this critical distinction and rule accordingly.

### C. *Improper Identification*

In order to overcome the identification hurdle, victims cannot continue to be labeled as anything but *victims*. Attempting to place blame on these individuals as perpetrators of illegal migration, prostitution, or any other number of crimes is deplorable. It is essential that authorities recognize that any form of “consent” given by victims of trafficking is invalid and should have no bearing on their application for asylum. Notably, 28% of trafficking victims are under the age of 18, and as such cannot provide adequate consent regardless of whatever their intentions may have been.<sup>231</sup> However, even for adults, UNODC maintains that “no person can consent to slavery, servitude or forced labour.”<sup>232</sup> Genuine consent can only be obtained “when all the relevant facts are known” and the individual chooses to voluntarily proceed in light of those circumstances.<sup>233</sup> As evidenced with the examples given in Section IV, victims of trafficking rarely, if ever, are aware of all of the relevant facts.<sup>234</sup>

Furthermore, hinging an asylum decision on the victim’s consent overlooks the fact that the scope of their consent has been vastly exceeded. Even if there was an initial agreement to travel with the recruiter, surely the individual was not also amenable to remaining captive in an abusive and degrading environment, having their passport withheld indefinitely,

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<sup>229</sup> See Hathaway & Foster, *supra* note 112, at 483.

<sup>230</sup> See *id.*

<sup>231</sup> Global Report on Trafficking in Persons, *supra* note 15, at 6.

<sup>232</sup> The Role of ‘Consent’, *supra* note 9, at 32.

<sup>233</sup> *Id.* at 28.

<sup>234</sup> See *supra* text accompanying notes, 185–92, 194, 197–205.

working 120 hour weeks without pay, and being repeatedly beaten and raped. Moreover, despite any appearance of initial consent, the ability to revoke that consent is taken away very early on in the course of trafficking.<sup>235</sup> Lastly, even if states continue to insist that consent is a valid factor, it does not change the reality that the applicant will face retaliation and the possibility of re-trafficking if she is returned to her home state, which triggers the obligation of non-refoulement.<sup>236</sup>

Additionally, as recognized by the UNHCR guidelines, in light of the complexity of an asylum claim, it is “necessary to ensure that victims of trafficking have access to fair and efficient asylum procedures as appropriate and to proper legal counselling.”<sup>237</sup> As such, border agents must be properly trained in recognizing indicators of trafficking. If states are taking steps to train hospital staff, flight attendants, and even hotel employees in identifying potential victims, then surely those who come into first contact at the border should also undergo specialized instruction.<sup>238</sup> One way to perfect this training is to engage survivors and allow them to share their own experiences as well as the hidden signs of trafficking, because after all, who better to understand what to look for than those who have already lived through it?<sup>239</sup> It is crucial at this stage for the division between border control and human rights to be distinct.

## VI. CONCLUSION

In order to fully respect what the institution of asylum represents—a protection mechanism for those being persecuted—then a shift in perspective from immigration control to human rights is paramount. While the Refugee Convention and even the Trafficking Protocol were created primarily in response to migration control,<sup>240</sup> it is time they succumb to the evolution of the current global order. Although many states still display a general reluctance to accept the cohesion

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<sup>235</sup> The Role of ‘Consent’, *supra* note 9, at 26–27 n.40.

<sup>236</sup> Diana Tietjens Meyers, *Victims of Trafficking, Reproductive Rights, and Asylum*, in THE OXFORD HANDBOOK OF REPRODUCTIVE ETHICS 108 (Leslie Francis ed., 2017).

<sup>237</sup> Guidelines on International Protection, *supra* note 21, ¶ 45.

<sup>238</sup> See *Connecticut Hotel Workers Train to Spot Human Trafficking*, FIN. POST (last updated June 24, 2017, 1:56 PM), <http://business.financialpost.com/business-pmn/connecticut-hotel-workers-train-to-spot-human-trafficking/wcm/b8e9e5ad-b7b5-4ec4-9ca4-98632970b320>; Maureen McKinney, *Hospitals Train Staff to Spot Victims of Human Trafficking*, MOD. HEALTHCARE: PROVIDERS (June 20, 2015), <http://www.modernhealthcare.com/article/20150620/MAGAZINE/306209987>; Kalhan Rosenblatt, *Flight Attendants Train to Spot Human Trafficking*, NBC NEWS (Feb. 4, 2017, 4:07 PM), <http://www.nbcnews.com/news/us-news/flight-attendants-train-spot-human-trafficking-n716181>.

<sup>239</sup> TIP REPORT 2017, *supra* note 20, at 30.

<sup>240</sup> See Convention Relating to the Status of Refugees, *supra* note 29, at 2 (Introductory Note by the U.N. High Comm’r for Refugees).

between refugee law and human rights law, they are actually quite compatible.<sup>241</sup> In fact, Louise Arbour, former United Nations High Commissioner for Human Rights, blatantly advised that both “are cut from the selfsame legal and jurisprudential cloth.”<sup>242</sup> As such, doctrines of human rights ought to be incorporated into the application of international asylum law. The first step is to adopt the proposed human rights focused definition of persecution and acknowledge that victims of human trafficking do in fact suffer serious forms of it. The second, is to reconcile the evolving relationship between principles of human rights and asylum—namely with respect to the nexus requirement and proper identification of victims. Once states accept this inherent relationship, they will be able to properly apply asylum law in the manner it ought to be applied, and survivors of human trafficking can be awarded the protection they deserve.

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<sup>241</sup> See Louise Arbour, International Refugee and Human Rights Law: Sides of the Same Coin, Video Presentation at the 7th World Conference of the International Association of Refugee Law Judges (IARLJ) 110–112 (Nov. 6-9, 2006).

<sup>242</sup> *Id.* at 110.