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'Responding to child trafficking: Rights vs rhetoric'

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Responding to child trafficking: Rights versus rhetoric

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In its Global Report on Trafficking in Persons, UNODC notes that globally, one in three detected victims of trafficking are children. Children are 'easy to target'. Countries in West Africa, South Asia and Central America and the Caribbean typically present a much higher share of children among total victims detected. Trafficked children detected in low income countries are more likely to be exploited in forced labour; this is particularly the case for Sub-Saharan African countries. Conversely, children detected in high income countries are more frequently trafficked for sexual exploitation.

Trafficking of children is often linked to family coping strategies – now an increased risk against the background of COVID-19. Field studies conducted in West Africa revealed the situation of some boys and girls, mostly teenagers, trafficked into sexual exploitation to cover basic needs for food and for a place to sleep. Between 13 and 28 per cent of these children experienced the death of their parents, and between 30 and 80 per cent were not living with their parents. Children deprived of parental care in migratory situations face the same risks. Unaccompanied and separated children migrating, often along irregular migration routes, are exposed to traffickers, both along the route and upon arrival in transit and destination countries. As such, we know that immigration laws and policies, restrictions on family reunification, refugee resettlement, and safe migration pathways, push children and young people into irregular situations, and into the hands of traffickers.

Among children, girls aged between 14 and 17 years old appear to be particularly targeted for trafficking for purposes of sexual exploitation. This age pattern seems to be part of broader patterns of sexual and gender-based violence that results in teenage girls also being particularly targeted as victims of other crimes of gender-based violence. The profile of victims of child trafficking is often characterized by many intersecting vulnerabilities. The risks related to their young age are

compounded by the socio-economic dimensions, absence of parental care, family situations, precarious migration status.

The Global Report specifically refers to the situation in the UK - in the so-called "county lines" cases in the United Kingdom, traffickers target children of separated parents or those looked after by social services, including those with psycho social or intellectual disabilities.

In the foreword to the UK Government 2020 Modern Slavery Statement, Rt Hon Prime Minister Boris Johnson MP states at p.1:

> *"Around the world, something in the region of 40 million innocent men, women and even children have been forced into various forms of modern slavery. Many are here in the UK. Still more are abroad. All are victims of a vile business that has no place in the last century, let alone this one."*[1]

Despite this rhetoric, of a global commitment to combating 'modern slavery', and trafficking in human beings, our laws, policies and practices, continue to push children and young people into situations of vulnerability, where trafficking occurs with impunity.

Recent years have witnessed the adoption of a growing body of anti-trafficking laws and policies at domestic and international levels. Many commentators have responded with concern to this proliferation of laws and to the expansion of sovereigntist power that has accompanied anti-trafficking measures. The unintended consequences of anti-trafficking agendas have included an expansion of state power to regulate border crossings and a further closing off of regular migration pathways.

The intersecting axes of discrimination and power linked to gender, 'race' and migration status are marginalised in in such responses to trafficking in persons, as a crisis governance response takes hold. To borrow Agamben's evocative term, we have seen an 'explosion of laws' , and a continuing circulation of moral panics. This crisis response has negative consequences for migrants, and for longer term

[1] Home Office, *UK government modern slavery statement* (2020) 1.

analysis of the substantive impact of anti-trafficking law on the rights of migrants, including trafficked persons, and on the rights of child victims of trafficking.

Many would argue that the preoccupation with criminalisation of trafficking and related activities has narrowed the space for responses that foreground the human rights of victims of trafficking. With the 'explosion of laws' on human trafficking, migration across borders has become increasingly constrained and regulated.

The trafficked child, though a victim of an egregious harm, may also be perceived as an irregular migrant in the eyes of the state. A migrant child with a possible claim to international protection poses a significant challenge to a state's claim to control who crosses its borders and remains within its territory. The trafficked child's presence is tainted with this perception of irregularity on the part of the State. Her potential claim to 'be here' and to remain within the destination state is one that has been resisted.

Although human rights law contains within it the promise of universal application, the expansion of rights to non-citizens has met with resistance from states. Though citizenship status can no longer be equated with the 'right to have rights', states have proven reluctant to remedy the fundamental irregularity of the trafficked person's presence within the State, or to recognise a right to stay, beyond short-term, conditional residence.

These restrictions and limitations impact even on responses to child trafficking. The core principle of non-discrimination, found in European, International Law, and in domestic law, applies to the rights of the child. Yet, we see that States, including the UK, claim exceptions to the application of the principle in the context of immigration law, with potential negative implications for child victims of trafficking. And although the principle of best interests of the child is a core principle of the UN Convention on the Rights of the Child, its application is limited in immigration and asylum proceedings, including in the context of trafficking proceedings.

The capture of the anti-trafficking agenda by states concerned to close off or at least more strictly control their borders, has limited the space for a response to human trafficking that takes as its primary goal the vindication of the human rights of trafficked persons. This ideological capture is not complete, however. In the practice of human rights law in recent years, we have seen a resistance to the expansion of

criminal law and greater recognition of the complex needs and rights-claims of trafficked persons.

There is some, albeit limited, progress, increasingly visible in the incremental changes occurring in relation to residence claims, recovery periods and restrictions on return of trafficked persons, as well as recognition of states' positive duties to prevent human trafficking and to provide effective remedies to victims. These incremental changes reflect the need to move beyond the stereotypical portrayal of the 'victim subject' that has frequently shaped law's responses to human trafficking and that has sometimes overlooked or marginalised the agency of the trafficked person. In the practice of human rights law, in the claiming and enactment of rights, I would suggest that there is potential for law to move beyond the binary divides that have characterised the crisis governance response to human trafficking to date.

The adoption in 2000 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol), marked a significant moment in the development of international law, and in advocacy for law reform on human trafficking.

The inclusion of an anti-trafficking instrument in the panoply of international legal instruments, through a Protocol to the Convention on Transnational Organised Crime was also significant, reflecting as it did the particular preoccupation that brought human trafficking onto the agenda of international law – the shared interest of states in combating organised crime and in limiting irregular movements across borders. The more limited attention and priority given to the human rights claims of trafficked persons is reflected in the Palermo Protocol's weaker provisions on victim assistance and protection. States are required to 'consider' strengthening assistance to victims. Only very brief reference is made to the need for specific attention to child victims of trafficking. The failure to ensure stronger protections for trafficked persons in the Protocol reflects the reluctance of states to recognise the rights claims that may arise in the context of migration and the continuing dominance of security and sovereignty concerns.

Since then, however, we have seen the adoption of range of specialised legal instruments, and an expansion of case-law in regional human rights courts. These

include: COE Convention on Action against Trafficking 2005, the adoption of the 2004 EU Directive, 2011 EU Directive, 2020 CEDAW GR no.38 on Trafficking of women and girls, case law of the ECHRts. Of particular importance is the CRC, and the work of the Committee on the Rights of the Child, in interpreting and applying Articles 34-39, in its Joint General Comment with the Committee on Migrant Workers, and in its recent General Comment on the Rights of the Child in the Digital Environment, to which I contributed in my capacity as UN Special Rapporteur, to highlight the specific risks of the digital environment in enabling recruitment of children online, for purposes of exploitation.

On this issue, we have been working with the OHCHR through the B Tech project, to engage with the Tech sector, to strengthen their responses to trafficking of persons, in particular children. I have also engaged, with the SR on Sale and Sexual Exploitation of Children, and the UN Working Group on Business and Human Rights, with the Tech sector, and sent formal Communications to Tech companies and to states highlighting human rights concerns, in relation to child trafficking and obligations of states and of businesses.

A key question to address is whether law on human trafficking has the potential to address the continuums of exploitation that are inherent in trafficking in persons. Of relevance here are the findings of the European Court of Human Rights in *Rantsev v Cyprus and Russia,* and the positive obligations recognised under Article 4 ECHR, the prohibition on slavery, servitude, forced and compulsory labour. The case was pursued by the father of Oxana Rantsev, and revealed systemic exploitation in the commercial sex industry in Cyprus. Oxana's death itself was not attributed to either of the respondent states, Cyprus and Russia. However, the Court did find violations of the states' positive obligations under Article 4 ECHR. These failures included failures to regulate employment in the 'cabaret artiste' industry, maintaining a visa regime for cabaret artistes that did not provide effective protection against trafficking, failing to carry out an effective investigation into the death domestically, and transnationally.

The case was the first in which the Court recognised trafficking in persons coming within the scope of Article 4, and of the ECHR. Trafficking in persons, the Court said, treats persons as commodities, to be bought and sold, and was incompatible with

the democratic values of the Council of Europe. The Court found that Russia had failed to fulfil its obligation of international cooperation. This case followed on from Siliadin v France, in which a young Togolese woman, brought to France as a 15 year old child, was found to be a victim of domestic servitude, and the State was found to be in violation of Article 4 ECHR. The Court's judgment, though significant in recognising for the first time that Article 4 could give rise to positive obligations on the part of states, has been criticised for failing to recognise that such obligations could extend to regularisation of a victim's migration status, even where the victim was a child. The Court's focus on a criminal justice response fits within the predominantly prosecutorial model that has tended to shape international legal developments on human trafficking.

To quote Audrey Macklin, on remedies and responses to trafficking: If we take trafficking seriously as a human rights violation, and we admit the contributory role played by receiving countries, […]the option of secure immigration status could be viewed as human rights remedy and not merely as munificence on the part of the host country, or as a contingent benefit conditional upon cooperation with legal authorities in the prosecution of traffickers.'

Secure immigration status would mitigate a significant cause of the vulnerability of the trafficked child. That it would not resolve it completely speaks to the multiple sources of the disempowerment that generate the migrant child's vulnerability, including gender, class and race/ ethnicity.'

Again, the potential for anti-trafficking laws to recognise continuums of exploitation, and the structural vulnerability of migrant workers arising from failings of destination states is seen in Chowdhury v Greece, where the Court found a violation of Article 4(2) of the ECHR in relation to 42 undocumented migrant workers from Bangladesh who worked on a strawberry farm in Manolada, Greece, and who were subjected to forced labour and trafficking.

Greece was in violation of its positive obligations under Article 4 to take protective operational measures and to conduct an effective investigation. This is an important judgment because the Court found that the men were victims of trafficking, although they could freely move and leave the employment. The reason that they continued to

work was that they were afraid that they would never not receive payment. Their specific vulnerability as migrant workers was recognised, including more subtle forms of coercion that they experienced. The State's obligation to identify victims was not dependent on complaint by a victim. It was not a victim's duty to 'self-identify' – this was a positive obligation on the State.

Of particular importance to the State's obligations in relation to child trafficking, is the 2021 judgment of the ECt of Human Rights, in VCL and AN v UK (which concerned two Vietnamese boys, victims of trafficking for the purpose of forced criminality – in this case, cannibas cultivation).

The gender dimension of both cases is important to note here – adult men in Chowdhury, and adolescent boys in VCL AND AN. I note this, because men and boys, are often presumed less vulnerable and the credibility of their testimonies is often doubted. Labour exploitation, and forced criminality, are also less well recognised, not only in the UK, but globally. In *AN and VCL v. UK,* the Court reiterated the positive obligations for the State arising under Article 4 ECHR: (1) the State's duty to put in place a legislative and administrative framework to prohibit and punish trafficking; (2) the State's duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking, including respecting the principle of non-punishment of victims of trafficking; and (3) a procedural obligation to investigate situations of potential trafficking.(*V.C.L. AND A.N. v. THE UNITED KINGDOM*, (Applications nos. 77587/12 and 74603/12) (Judgment of 16 February 2021), para. 156).

This was the first case, where the Court addressed the principle of non-punishment of trafficked persons. Specifically on the obligation of non-punishment (for unlawful acts committed as a direct consequence of being trafficked), the Court noted that:

> "[…] the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, be at odds with the State's duty to take operational measures to protect them where they are aware, or ought to be aware, of

> circumstances giving rise to a credible suspicion that an individual has been trafficked."[2]

The Court found that the failure to conduct a timely assessment of whether the applicants had in fact been trafficked amounted to a breach of their positive obligations under Article 4 of the Convention and that:[3]

> "In the context of Article 6 of the Convention it considers that the lack of such an assessment prevented them from securing evidence which may have constituted a fundamental aspect of their defence."

As was noted by the Court*.,* "an individual's status as a victim of trafficking may affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so."[4] The Court emphasised that it was the obligation of the State to identify the victim, not an obligation on the victim to self-identify, particularly not a child victim. On the scope of the positive obligations on States arising from Article 4 ECHR, the Court emphasised that the duty to take operational measures under Article 4 of the Convention has two principal aims:

> "[…] to protect the victim of trafficking from further harm; and to facilitate his or her recovery. It is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future." [5]

In its Third Country Evaluation Report on the UK (2021), the Group of Experts on Action against Trafficking in Human Beings (GRETA), expressed concern that difficulties arose in practice in applying the principle of non-punishment of victims of trafficking. Recalling the recommendations made in its third report, GRETA urged the UK authorities to:

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[2] *V.C.L. and A.N* (n**Error! Bookmark not defined.**) para. 159.

[3] ibid, para 200.

[4] ibid, para 161.

[5] *V.C.L. and A.N* (n**Error! Bookmark not defined.**) para. 159.

"[…] ensure that the non-punishment provision is capable of being applied to all offences that victims of trafficking were compelled to commit, by ensuring that victims are promptly identified as such and receive adequate support from their first contact with law enforcement agencies;[6]

ensure that the allocation of the burden of proof does not substantially hinder the application of the non-punishment provision.

The Council of Europe's monitoring body (GRETA) identified child trafficking as a key priority in its second round of country evaluations. Many of its recommendations on child trafficking are repeated in its recent 3rd country evaluation report on the UK (published Oct 2021).

An essential part of my role as UN Special Rapporteur, is to work with States on legislation, policy and practice to ensure the effective protection of the human rights of victims of trafficking, without discrimination.

Related to this role, I have recently given oral evidence to the Public Bill Committee on the UK's Nationality and Borders Bill, and followed up on this engagement with a Letter to the UK Government, co-signed by three other UN Special Rapporteurs, the SR on Human Rights of Migrants, the SR on Human Rights in Counter Terrorism, and the SR on Contemporary Forms of Slavery.

Our Letter to the UK authorities, and my oral evidence to the Public Bill Committee, raised specific concerns in relation to the compliance of the Bill with international and regional human rights law, and indicated several provisions that in my opinion, fail to comply with the UK's legal obligations to ensure that the rights of victims of human trafficking are protected and fulfilled.

Given the United Kingdom's repeated commitments to combating modern slavery and human trafficking, it is essential that the legislative and policy framework in place supports that objective, and provides a model of good practice on ensuring the human rights of victims, and of effectively preventing and combating trafficking in persons.

[6] Group of Experts on Action against Trafficking in Human Beings (GRETA) Third Evaluation Report on The United Kingdom (20 October 2021) GRETA(2021)12, para. 177.

There are several provisions of the current Bill that raise concerns in relation to the rights of child victims of trafficking, and as to compliance with international law on trafficking in persons, and international law on the rights of the child.

Under the terms of the Palermo Protocol, State Parties are required to take into account, “the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children”. I am concerned that the Nationality and Borders Bill, as it stands now, does not distinguish between adult and child victims of trafficking.

Consequently, the special needs of child victims of trafficking and contemporary forms of slavery would not be recognised in Part 5 of this Bill. First and foremost it is essential to recognise that Identifying, protecting, and supporting child victims of trafficking is not an immigration matter but a child protection matter. All decisions about children, including that of immigration leave, and protection of child victims of trafficking, must be made in their best interests, as the primary consideration, and without discrimination.

I note that the OHCHR Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add. 1) specifically address the obligations of States concerning child victims of trafficking:

> “Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs”. (Principle 10)

According to the Joint GC of the CRC and the Committee on Migrant Workers, No. 22 (2017) States are required to ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases, and to undertake best interests assessments and determination procedures: “as part of, or to inform, migration related and other decisions that affect migrant children” (CMW/C/GC/3-CRC/C/GC/22, para. 31). I am concerned that there is no recognition of the primacy of the rights of the child, or of the State’s obligation to ensure the protection of

migrant child victims of trafficking, including through the implementation of best interests assessments and determination procedures in migration related decisions.

Specifically, clause 57 (Provision of information relating to being a victim of slavery or human trafficking); Clause 58 (Late compliance with slavery or trafficking information notice: damage to credibility) raise concerns in relation to the State's obligations to identify and assist migrant victims of trafficking, and to recognise the impact of trauma on them. Immigration trafficking decision-making processes would be conflated which potentially puts the effectiveness of ongoing anti-trafficking efforts in the UK at risk.

As is noted in the explanatory notes that accompany the Modern Slavery Act 2015 state (under the heading "Background"):

"Victims are often unwilling to come forward to law enforcement or public protection agencies, not seeing themselves as victims, or fearing further reprisals from their abusers."

The Concluding Observations of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland, specifically addressed failures to identify victims:

> "While appreciating the ongoing reforms to improve the national referral mechanism, the Committee remains concerned that many victims of trafficking and modern forms of slavery remain unidentified and that the support provided to victims is inadequate, putting victims at risk of homelessness, destitution and further exploitation". (CEDAW/C/GBR/CO/8, para 33)

In V.C.L. and A.N. the European Court of Human Rights held that:

"The State cannot, … rely on any failings by a legal representative or indeed by the failure of a defendant – especially a minor defendant – to tell the police or his legal representative that he was a victim of trafficking. As the 2009 CPS guidance itself states, child victims of trafficking are a particularly vulnerable group who may not be

aware that they have been trafficked, or who may be too afraid to disclose this information to the authorities […]. Consequently, they cannot be required to self-identify or be penalised for failing to do so."

I am concerned that the requirement stated in Clause 58(2), to view the late provision of status information as, "damaging to credibility", would fail to acknowledge the positive obligation on the State to identify victims of trafficking, and would fail to recognize the impact of trauma on the provision of information relating to the status of being a victim, including for child victims. It is widely recognized that victims may not disclose their status as victims for a range of reasons, including because they may not recognize their situation of exploitation, or because they fear reprisals for themselves or their families. A lack of trust or familiarity with public bodies, law enforcement or Government officials, may also hinder the disclosure of information and the establishment of a relationship of trust. These difficulties are recognized in the Home Office 'Victims of modern slavery – Competent Authority guidance'.

In S.M. v. Croatia, the European Court of Human Rights highlighted the specific impact of trauma on victims of trafficking and contemporary forms of slavery, citing the conclusions of GRETA:

"[…] it has already been recognised in the work of GRETA and other expert bodies that there may be different reasons why victims of human trafficking and different forms of sexual abuse may be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma must be taken into account."

Overreliance on victims' statements in situations of trafficking is recognised as one of the reasons that leads to failures to identify victims and to effectively investigate and prosecute crimes of trafficking and contemporary forms of slavery. Also, in the absence of a clear separation between immigration control and other law enforcement entities, crimes such as trafficking or contemporary forms of slavery may not be reported out of fear of immigration detention or return to the victim's country of origin. In its Third Party Intervention in S.M. v Croatia, GRETA pointed out that:

"[…] victims were sometimes afraid or reluctant to make depositions because of threats of revenge from the perpetrators or lack of trust in the effectiveness of the criminal justice system."

In its first report on the progress made in the fight against trafficking in human beings dated 19 May 2016, the European Commission noted that placing an "excessive burden" on victims hinders the effectiveness of criminal investigations and may cause secondary trauma".

I am also concerned that Clauses 57 and 58 of the Bill would not recognise the rights of victims of trafficking and contemporary forms of slavery with disabilities, including children with disabilities (physical, intellectual, psycho-social) who may face additional barriers to reporting of trafficking, and to identification as victims. The trafficking process and resulting exploitation may themselves be a cause of disability. My Report on the Implementation of the Non-Punishment Principle (2021),

provides that:

"States must take all appropriate steps to ensure non-discrimination on the basis of disability and to ensure that reasonable accommodation is provided, including the provision of procedural and age-appropriate accommodations, in order to facilitate effective access to justice and the participation of trafficked persons with disabilities in all legal proceedings, including identification procedures and at the investigative and other preliminary stages." (A/HRC/47/34, para.61)

The trauma suffered by many survivors of trafficking and contemporary forms of slavery is well documented. Placing the burden of identification – or self identification – on victims, fails to fulfil the State's positive obligations arising under international human rights law, and under Article 4 of the ECHR, read in conjunction with the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), specifically Article 10 (Identification of the Victims).

Specifically I would also highlight the State's positive obligations to identify, assist and protect victims of trafficking under the ECHR, the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), – without discrimination – as

well as heightened obligations of protection and assistance to child victims (recognised recently again in VCL and AN v UK by the ECtHRts).

I also note that Clause 59 would change the threshold for reasonable grounds decision-making within the national referral mechanism (NRM), from reasonable grounds to believe that a person 'may be a victim' to, 'is a victim'. This increase in the threshold for identification of victims would not address the difficulties of identification of child victims of trafficking. Clause 59 may exacerbate the problem of low NRM referrals compared to the estimated prevalence of trafficking and contemporary forms of slavery in the United Kingdom. Furthermore, it is unclear why regulations defining victims would be included in immigration law rather than in the Modern Slavery Act.

I am concerned that Clause 60 would reduce the minimum period of assistance before issuance of a conclusive grounds decision from 45 to 30 days. It is important to note that the period of 30 days referred to in ECAT, Article 13(1), is a specified minimum, "a recovery and reflection period of at least 30 days". The Explanatory Report to ECAT highlights the purpose of the recovery and reflection period: "One of the purposes of this period is to allow victims to recover and escape the influence of traffickers. Victims' recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability. […] the period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal."

I am concerned that the reduction from 45 days to 30 days would be a regressive measure, lowering the standard of human rights protection. As such, it would be contrary to the objective and purpose of international law on human trafficking and contemporary forms of slavery, to ensure effective protection of the human rights of victims and to ensure non-regression in human rights protection.

The recognition of only one period of exploitation is also particularly problematic for child victims, who may be subject to repeated periods of exploitation, and to increased risks of re-trafficking.

Of particular concern is the Public order grounds exemption: Identified potential victims: disqualification from protection. This provision raises two main points of concern. On the one hand, it raises the issue of compatibility with Article 10 ECAT (Council of Europe Convention on Action against Trafficking in Human Beings), which provides for a **duty on States to identify trafficked persons**. On the other hand, it raises the issue of the **application of the non-punishment principle** to trafficked persons as set out both in Article 26 ECAT, and in s. 45 of the 2015 Modern Slavery Act. It raises questions as to compliance with Article 4 ECHR – VCL and AN judgment of the ECtHRts (Article 4 and Article 6 – right to a fair trial and positive obligations of identification). It is also unclear whether this provision would apply to children. No specific exclusion of children from this clause is provided.

Clause 62, as it stands now, provides that where a person is deemed to be a "threat to public order" or has claimed to be a victim of trafficking in "bad faith", the requirement to make a conclusive grounds decision in relation to the person is removed, as is any prohibition on removing the person from, or requiring them to leave, the United Kingdom (Clause 62(1)-(2)). In our Letter to the UK authorities, we noted particular concern that the 'threat to public order' provision would exclude protection to victims of trafficking groomed online or in person who may have travelled to conflict sites - particularly those where designated terrorist groups are active - and experience a range of human rights violations as a victim of trafficking, but will be denied protection based on the status of the trafficker with whom he/she was associated.

I note in particular the State's obligation to ensure that children recruited into armed conflict are recognised as victims of grave violations of human rights and humanitarian law, and provided with protection as children (including identification and referral for assistance and protection, as child victims of trafficking). The disqualification from protection clause, raises specific concerns in this regard, as not complying with such obligations, and the obligations of non-discrimination. (Of particular relevance here also are the obligations on the State arising under the CRC and the Protocol on Children in Armed Conflict, ratified by the UK, as well as ILO Convention no.182 on Worst Forms of Child Labour).

Here, it is important to note that where children are recruited online, for purposes of exploitation, it is not necessary to establish the 'means' element of the offence of trafficking (force, coercion, deception etc). Consent is also irrelevant, where the victim is a child. As such, the 'act' (recruitment, transfer etc.), and the purpose of exploitation, are sufficient to bring the impugned conduct within the legal definition of trafficking. This triggers the State's positive obligations of assistance and protection, including of identification, protection and non-punishment (and of repatriation, where relevant).

I am concerned that Clause 62 would be in violation of the State's obligation to identify victims of trafficking or contemporary forms of slavery and note that this obligation applies in all situations of trafficking and exploitation, and in respect of all victims, without exception. Article 10 of ECAT imposes a duty on State Parties to identify victims of trafficking. This obligation does not permit of any exceptions.

The Bill would remove the obligation to make a conclusive grounds decision where the claim is made in "bad faith". I note that the procedures in place for identifying victims of trafficking or contemporary forms of slavery can already ensure that unfounded claims are not recognised. I am concerned that if delays in disclosure and/or difficulties in providing a full and consistent account of the trafficking or slavery experience were considered as evidencing bad faith, there would be a serious risk that victims would not be identified and would be denied assistance, and protection.

The obligation of non-refoulement, which includes risks of trafficking and re-trafficking on return, is an absolute one, as provided for under Article 3 EHCR, and international human rights law. Yet, the obligations to protect against refoulement, are not met – disqualification giving rise to a serious risk of trafficking, and re-trafficking. As an inherent element of the prohibition of torture and other forms of ill-treatment, the prohibition of refoulement under international human rights law is characterized by its absolute nature without any exception. The Convention on the Rights of the Child provides that:

"[…] non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or

whether such violations are directly intended or are the indirect consequence of States parties' action or inaction." (CMW/C/GC/3-CRC/C/GC/22, para 46).

Clause 62 appears to apply also to child victims of trafficking and contemporary forms of slavery and children at risk of trafficking, contrary to the State's obligation to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind. (Article 2).

I would like to highlight also the State's obligations under ECAT to ensure that: "Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child." (Article 16(7)) I am concerned that Clause 62(3) would be in violation of the State's obligation to ensure non-punishment of victims of trafficking or contemporary forms of slavery for any unlawful acts that that are a direct consequence of trafficking.

A range of punishments applied to victims or potential victims of trafficking linked to UN designated terrorist groups have been highlighted in recent communications to 57 states by several UN Special Procedures, led by SR CT, and including my mandate as SR Trafficking – including to the UK Government. These Communications highlight the positive obligations on States to repatriate victims of trafficking from camps in NE Syria, many of whom were recruited as children, and to provide assistance and protection, without discrimination. Many of those victims, were recruited as children, for purposes of exploitation (sexual, forced marriage, servitude and forced labour). Despite the rhetoric of combating modern slavery, and trafficking as a form of contemporary slavery, these victims are currently being denied protection.

The principle of non-punishment of victims of trafficking is critical to the recognition of trafficking in persons as a serious human rights violation. Punishment of a victim marks a rupture with the commitments made by states to recognising the priority of victims' rights to assistance, protection, and to effective remedies. At its core, the non-punishment principle seeks to ensure that a victim of trafficking is not punished for unlawful acts committed as a consequence of trafficking.

Given the trauma already endured and the fear of reprisals by traffickers, “the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.” Punishment of victims also undermines the fight to combat impunity for trafficking in persons as it targets victims rather than perpetrators, both limiting the effectiveness of investigations and the promise of accountability.

The Bill also undermines the right to seek and enjoy asylum. Of note here, is Article 31 of the Refugee Convention, and the obligation of non-penalisation of asylum seekers. In our Letter to the UK authorities, we note that In accordance with the provisions of international human rights law, irregular or clandestine entries should not be treated as criminal offences: the act of seeking asylum is legal, as the right to seek and enjoy asylum is a human right recognised in Article 14 of the Universal Declaration of Human Rights of 1948. The exercise of this right is not subject to the regularity of arrival, and in reality, asylum-seekers are often forced by their circumstances to arrive at or enter a territory without prior authorization. As is stated in the Explanatory Report to ECAT states:

“The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of non-refoulement.”

I am concerned that Clauses 21 (damage to credibility) and 25 (late provisionof evidence), may be particularly harmful to victims of trafficking seeking asylum. As noted above, victims of trafficking may face particular difficulties in disclosing information on their experiences of trafficking, including fear of reprisals from traffickers, against victims and their families.

As has been noted by UNHCR in its Note on the Bill, “the attempt to create two different classes of recognised refugees is inconsistent with the Refugee Convention and has no basis in international law.”

To conclude, I would like to note the recent recommendations of GRETA **specifically relating to children – 3rd UK Report (2021)**

- Legal Assistance (Art 15) – particularly relevant to the important work of the Children's Law Centre

para 92: "Noting that access to legal assistance and free legal aid is essential for victims' access to justice, GRETA urges the UK authorities to take further steps to ensure that: - victims, and in particular children, receive legal assistance during the identification process and are properly informed of their rights and options before entering the NRM;"

- Non-punishment provision (Article 26)

para 177: "Recalling the recommendations made in its second report, GRETA urges the UK authorities to: (…) - remove the requirement to apply the "reasonable person" test in the framework of the statutory defence of child victims pursuant to section 45 of the MSA;"

- Cross Cutting Issues

para 226: "GRETA invites the authorities to ensure that the NRM process is child-friendly and adapted to the specific needs and vulnerability of children (see also paragraph 300)."

- Identification of, and assistance to, child victims of trafficking

para 301: "GRETA notes that significant commitments remain unmet and considers that the UK authorities should take further steps to improve child victims' identification and assistance, and in particular:

- ensure that the NRM process is in line with trafficked children specific needs, by providing specific training among professionals about the NRM, ensuring information sharing and adequate co-ordination between the NRM and local child protection processes;

- ensure that the identification process has a reasonable duration, including by providing appropriate funding for the recruitment of new staff and for making the process more efficient;

- make the Independent Child Trafficking Guardianship (ICTG) scheme operational across the whole territory in England and Wales;

- ensure that long-term support and adequate assistance are provided to children in the transition to adulthood, in order to reduce the risk of re-victimisation and to ensure their effective access to justice and facilitate their social reintegration and recovery;

- continue to take actions for reducing the risk of children going missing from care and to set up a system for tracking re-trafficked children, in order to understand the extent of this issue and react adequately;

- provide training to all professionals working with child victims of trafficking, by paying particular attention to children who are potential victims of criminal exploitation and online sexual exploitation, and ensure that child victims are not prosecuted for their involvement in crimes committed as a result of their exploitation;

- ensure that sufficient long-term funding is provided to enable local authorities to carry out their work and to face the emergency related to the COVID-19 pandemic."

- Residence Permit

para 313: "GRETA is concerned that DL is granted only in a small number of cases and for a short period, which does not ensure the needed stability and does not provide victims of trafficking, especially children, with a durable solution. Concerning children, GRETA recalls that Article 14, paragraph 2, of the Convention provides that residence permits for child victims are to be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions. GRETA considers that the UK authorities should collect data on the number of residence permits granted to both adults and child victims of trafficking and investigate the reasons for the low number of residence permits granted."

para 314: "Recalling the recommendations made in its second report, GRETA urges the UK authorities to: (…) -ensure that all child victims are issued such residence permits, in accordance with the best interests of the child, pursuant to Article 14(2) of the Convention."

- Repatriation of Victims

para 322: “ensuring that the best interests of the child are effectively respected, protected and fulfilled, including through pre-removal risk and security assessments, in particular for unaccompanied children, by specialised bodies working with relevant partners in countries of return; such assessments should also ensure effective enjoyment of the child’s right to education and measures to secure adequate care or receipt by the family or appropriate care structures in countries of return (Article 16 (5) of the Convention).”

At the core of law, policy and practice on human trafficking, is the principle of non-discrimination, and the priority of ensuring the human rights of victims. Child victims are among the most vulnerable, yet continue to be denied protection. Adolescent migrant children, in particular, are often viewed first as irregular migrants. Discrimination on grounds of race, ethnicity, migration status, limits the protection given – in violation of the State’s obligations under International and European human rights law. It is critical that through the work of the Children’s Law Centre, and others, that we continue to shine a light on the State’s obligations of prevention and protection, and to take meaningful action to ensure vindication of rights – beyond the rhetoric of combating modern slavery.

The Children's Law Centre would like to thank Professor Mullally for delivering the 2021 Annual Lecture and Mr Justice Scoffield for kindly agreeing to chair the lecture. We would also like to thank the Bar Council for sponsoring the event, as well as the Bar Library for hosting.