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## **Human trafficking and the position of ‘vulnerability’ for victims in Europe**

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**Abstract:** In the light of the key findings of a recent EU project, this paper examines the complex phenomenon of human trafficking in Europe. The analysis investigates the extent to which human trafficking legislation assists legal and judicial authorities in recognising and protecting victims. Following a review of the various confounding issues around victims’ identification, the paper promptly targets the concept of ‘vulnerability’ as a decisive tool for effective intervention in human trafficking. Finally, this paper offers interesting insights into the role of Directive 2011/36/EU and its system of enforcement towards enhanced protection for victims of human trafficking.

**Keywords:** human trafficking; vulnerability; identification of victims; court proceedings; Trafficking Directive 2011/36/EU; role of legal and judicial authorities.

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### **1 Introduction<sup>1</sup>**

Trafficking in human beings has gained momentum in recent years alongside an increase in the global migration flow. The scale of the phenomenon is much greater than that shown by statistics, which report victims as being in the range of millions of persons (excluding those who are non-identified) [UNODC, 2014; Harvey et al., (2015), p.496]. Many victims go undetected because of difficulties faced by the legal systems. Hence,

victims' identification is essential to combat human trafficking and protect individuals and societies.

Victims of trafficking are usually people who are exposed to particular adverse living conditions such as poverty, lack of education, harsh traditional upbringing, domestic abuse, abandonment from childhood, or as a result of age, learning disability or substance addiction [ATMG, (2009), p.21]. In other words, they are particularly 'vulnerable' people. In fact, the concept of 'vulnerability' is widely applicable to a broad context and wide range of persons. Its use, to identify or constrain legal issues, is limited and therefore 'vulnerability' is often seen as a concept with fuzzy meaning in legal theory. However, in relation to human trafficking, this notion acquires a stronger and more defined meaning, enabling robust handling of potential trafficking situations. Traffickers tend to select carefully persons who possess particular traits which render them more 'vulnerable' to exploitation and control [UNODC, (2014), pp.29–34]. The immigration status contributes, itself, to 'victims' vulnerability' as it often results in the absence of any rights to remain in the host country or to take up employment [*Hounga v Allen and Anor*, 2014, para 18 (d)]. Thus, acknowledging that an individual is 'vulnerable' constitutes the pre-requisite for determining his/her susceptibility to trafficking. For example, when an individual is a migrant fleeing from wars, famine or other disasters; a person with severe cognitive difficulties [*Hounga v Allen and Anor*, 2014, para 8; *EK v SSHD*, 2013, paras. 51 and 23),<sup>2</sup> a minor or otherwise susceptible to criminal conduct (*Jankovic v Croatia*, 2009; *X and Y v Netherlands*, (1985), p.235; Pearsall and Hanks, 2001), he/she is particularly vulnerable to being trafficked. Abusing the position of vulnerability is a means by which trafficking is perpetrated. This also represents an essential legal tool in identifying victims and criminalising perpetrators [UNODC, (2013), pp.15–16].<sup>3</sup>

The status quo reveals that 'vulnerability' in trafficking disputes has not always been accorded the proper weight by national authorities, including the judiciary (*FM v SSHD*, 2015; *AS (Afghanistan) v SSHD*, 2013).<sup>4</sup> Often the individual has to go through all the stages of legal proceedings before being recognised, and at times he/she is not even identified as a victim of trafficking. Legal systems often fail victims and the determinants can be found in their functioning. As human trafficking is a phenomenon that can transcend national borders, legislation has been introduced by the two overlapping pan-European legal orders – the European Union (EU) and the Council of Europe (CoE) – and their Member States. European nations have either adopted their own national legislation including international measures, which often differ across Europe, or have implemented regional instruments. Thus, identification of a victim of trafficking can be obscured by conflicting norms or even inadequate implementation of regional agreements at national level. A lack of coordination across the distinct layers paralyses actions and produces dramatic consequences for undetected victims. Difficulties in identifying victims are exacerbated by the national legal system's complexities which are related to the domestic organisation of justice, the lack of legal expertise in human trafficking's matters and the role of authorities in dealing with victims' identification.<sup>5</sup> A high level of fluidity between the various national laws on 'means' by which trafficking occurs, the absence of definitions and the manner in which the concept of vulnerability is reflected in the legal framework, have all been identified as essential shortcomings [UNODC, (2013), p.4].

This paper contributes to legal scholarship by arguing that the abuse of the position of vulnerability should be considered as an essential tool in human trafficking victims'

identification and protection. Accordingly, this paper is divided into three parts. The *first* part outlines the legal definitions and framework relating to human trafficking within Europe. The *second* reflects on the concept of 'vulnerability' for effective intervention in human trafficking cases and its application in UK case law. The *third* part argues that Directive 2011/36/EU and its system of enforcement represent a robust development of the law towards enhanced protection of victims of human trafficking.

## 2 The *problématiques* of dealing with trafficking in human beings: terminology and legal framework

The terminology used to refer to human trafficking is open to two main misconceptions. *Firstly*, smuggling and trafficking in human beings are, at times, used synonymously [Lee, (2011), p.7].<sup>6</sup> *Secondly*, national legislation, media and policy makers tend to use 'modern slavery' and 'human trafficking' interchangeably [Hope for Children Organization, (2014), p.13; Winterdyk et al., (2011), p.7].

The *first* misconception relates to the assumption that smuggling and human trafficking are the same phenomenon. The problem here is far more complex, as smuggling and trafficking could be either two aspects of the same offence or alternative crimes.

The definition of trafficking included in Directive 2011/36/EU (as inspired by international law) refers to three elements of trafficking, which are

- 1 an 'action', being recruitment, transportation, transfer, harbouring or receipt of persons
- 2 a 'means' by which that action is achieved (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person)
- 3 a 'purpose' (of the intended action/means) namely, exploitation (Article 2 Directive 2011/36).<sup>7</sup>

Article 3 (a) of the Smuggling of Migrants Protocol provides that the term 'smuggling of migrants' means "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" (Article 3 (a) Protocol against the Smuggling of Migrants).

Thus, the line between the trafficking and smuggling is blurred. Many cases of trafficking may have started as smuggling cases. Basically, smuggling is when a person remunerates another in order to migrate illegally to a country of destination and once the destination is reached the agreement ends. In this circumstance, victims are not protected by the law under trafficking legislation, but may be able to claim asylum or humanitarian protection if they flee from wars or other calamities. The 'human trafficking' element kicks in when, for example, the smuggler is dissatisfied with the amount of money received and holds the victim captive for profit against his/her will. In other words, whilst a smuggler facilitates or transports a person across borders generally for payment, a trafficker is someone who controls, uses or exploits the victim for profit [Rodríguez,

(2015), p.364]. Thus, trafficking involves victims' exploitation, the consent is considered irrelevant once the means is established [Elliott, (2015), p.129]. There is no requirement that trafficking occurs transnationally. It can occur within a country, which does not include the crossing of a border. In a migration context, depending on the facts of the case, the migrants may be legal or illicit. By contrast, smuggling of migrants requires a cross-border element, illegal entry of a person into another state and an agreement whereby a person may pay or give some other benefit to another person to facilitate migration [UNODC, (2012a), pp.21–22].

The *second* erroneous expression uses human trafficking and modern slavery interchangeably. In reality, human trafficking is wider than modern slavery as the latter is one form of the phenomenon. This has been clarified by EU secondary legislation which contains an extensive definition of exploitation.<sup>8</sup> This includes sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs and also forced begging, illegal adoption and forced marriage (Article 2 (3) and preamble 11 Directive 2011/36). The Directive incorporated the position of 'vulnerability' in relation to victims' identification in the actual text, as referring to "a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved" (Art. 2 (2) Directive 2011/36).<sup>9</sup>

The human trafficking legislative framework is characterised by a variety of provisions, which encompass International Conventions (such as the UN Convention against Transnational Organized Crime and 1930 International Labour Organisation (ILO)'s Convention No. 29 concerning Forced or Compulsory Labour) and two overlapping regional instruments [the 2005 Council of Europe Anti-Trafficking Convention (CAT) and Directive 2011/36/EU]. In relation to labour or sexual exploitation, the ILO has introduced guidelines to assist authorities in dealing with trafficking and forced labour.

This paper focuses on the regional dimension of trafficking and does not analyse smuggling of migrants and its legislative framework. The CoE Anti-Trafficking (CAT) Convention, adopted in 2005, has the purpose of combating and preventing trafficking in human beings imposing a number of obligations on the CoEs contracting parties. The Directive introduced in 2011 has the purpose not only to combat trafficking crimes but also to provide suitable support for victims. It sets out that human trafficking is a criminal offence. Also inciting, aiding, abetting and attempts to commit human trafficking are considered as wrongdoings and are punishable (Article 3 Directive 2011/36). This legal instrument seems well balanced in that it imposes an obligation on the EU Member States to set up criminal procedures to investigate offences and to prosecute offenders. It levies strong duties on Member States to protect victims even when they have appeared to commit the crime under duress. It stipulates that consent of a victim is irrelevant when means of exploitation can be found; no means needs to be established for child victims (Article 2 (4) and (5) Directive 2011/36).

Applicable norms introduced by the Convention and the Directive are in force nationally within the EU and the CoEs Member States. In the UK, the Convention came into force on 1 April 2009. To comply with it, the UK has not introduced national legislation but met its international obligations by the adoption of policies. Thus, the National Referral Mechanism (NRM)<sup>10</sup> has been created as a system to identify and support victims. In addition, policy guidelines were drafted to regulate the work of the 'Competent Authority' in charge of making decisions on human trafficking issues.<sup>11</sup> Anti-human trafficking statutory instruments came into effect first on 6 April 2013 and

then on 26 March 2015 to implement the EU Directive 2011/36/EU, via the Modern Slavery Act 2015.<sup>12</sup>

Despite the comprehensive international and regional legal framework on trafficking, tensions in the interpretation of legal definitions and anomalies in the national systems represent challenges for domestic agencies and judges dealing with the phenomenon. The way in which discrete elements of the definition are interpreted at national level inevitably influences victims' identification process. Central to the understanding of trafficking and victims' recognition and protection is the concept of vulnerability. A broader discussion on the position of vulnerability is important to delimit the boundaries of the present paper.

### **3 The position of 'vulnerability' as an interpretative tool**

Many fields of studies from social sciences and law through bioethics and medicine to rural development refer to the term 'vulnerability' [Delor and Hubert, (2000), p.1561; Fineman, (2008), p.8]. Part of the academic debate focuses on whether or not 'vulnerability' is a universal capacity for suffering applicable to all individuals, as each of us is "permanently open and exposed to hurts and harms of various kinds" [Neal, (2012), pp.186–187]. Even though in abstract terms this argument can be shared, particularly 'vulnerable' subjects belonging to groups of disadvantaged persons are exposed to specific misfortunes or risks such as human trafficking [Peroni and Timmes, (2013), pp.1056–1085].

Legal and judicial authorities rely on indicators to identify victims of trafficking, such as signs of fear or anxiety, lack of identity documents, injuries, being deprived from medical care, living with and working for an employer or a family in a private home.

The first of 11 indicators proposed by the ILO to identify victims of forced labour is the abuse of vulnerability as a means of coercion [ILO, (2012a), p.3].<sup>13</sup>

Two EU legal instruments on asylum and immigration law and trafficking use the term 'vulnerability' in relation to human trafficking's victims. Article 21 of the Recast Reception Conditions Directive<sup>14</sup> provides for a non-exhaustive list of 'vulnerable' people in accordance with specific factors or circumstances and victims of human trafficking are included therein.

The definition of human trafficking as included in Directive 2011/36/EU lists punishable acts when the means is established, elaborating that the position of 'vulnerability' of victims is one of the key elements to assess [Article 2 (1)]. Then, Article 2 (2) states that "a position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved". Although this definition finds inspiration in the Trafficking in Persons Protocol, the language of the Directive is broader as requires 'no real or acceptable alternative' rather than 'no real and acceptable alternative' to submit to the abuse. Moreover, in relation to penalties the Directive states that "When the offence is committed in certain circumstances, for example against a particularly vulnerable victim, the penalty should be more severe. In the context of this Directive, particularly vulnerable persons should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability" (Recital 12, Directive 2011/36/EU).

This concept also appears in different legal texts at national level on children's rights, fair trial rights in criminal proceedings and rights of victims of crimes, trafficking, asylum and immigration law [Ippolito, (2015), p.38]. It is interesting to note that victims of trafficking are considered 'vulnerable' and consequently subject to special protection or priority consideration and are entitled to some material resources. Clearly, a person who has 'no real or acceptable alternative' other than submitting 'to the abuse involved' is vulnerable. The individual is a potential victim if he/she is subject to exploitation that befell him/her under someone else's control. Means of exploitation includes the elements of 'threat, use of force or other forms of coercion', which is central in determining whether a person is 'vulnerable' or not and to afford protection to victims. For example, if a person is kept captive, obliged to work long hours and sleep on the floor, he/she may be controlled and manipulated by other persons for their benefit (*FM, R (on the application of) v SSHD, 2015; AS (Afghanistan) v SSHD, 2013*). Often, the victim has difficulties proving his/her identity, as the abusers have sequestered his/her identity documents [UNHCR (2006), p.15]. Although this is not necessarily unique to victims of trafficking, in this particular context, it can suggest the victims are being subjugated. Inherent in the trafficking experience are forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation and deprivation of medical treatment [UNHCR, (2006), p.6].

Reflecting on the legal definition of trafficking, there are three elements to consider when identifying victims. The *first* element focuses on *punishable acts* as reported in art 2 (1) Directive 2011/36 such as the recruitment, transportation, transport, harbouring or receptions of persons including the exchange or transfer of control over persons. The *second* element reflects on the *means of exploitation* such as threat, use of force, different forms of coercion, abduction, fraud, deception, abuse of power, a position of vulnerability, and the giving/receiving of payments or benefits. The *third* element is associated with the *purpose of exploitation* which includes prostitution, sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude and removal of organs.

Whilst 'vulnerability' is directly related to the *means of exploitation* as referred to in article 2 (1), and explicitly stated in article 2 (2), its scope can be broadened so to enable legal actors to use it as an indicator of ongoing trafficking. An example, which will be explained later, concerns a young Nigerian national illegally residing and working in the UK. She was recognised as a victim of forced labour later in the proceeding despite the fact that she was a minor and had learning difficulties [*Hounga v Allen, (2014)*, para 49]. If the judges had focused on her 'vulnerability' condition early in the proceeding, rather than her status of an illegal immigrant, her identification as a victim of trafficking would have been recognised earlier. Actually, her status as an illegal immigrant, coupled with other conditions, should have caught the attention of the authorities at an earlier stage of proceedings. The victim's 'exposure' to abuse, his/her 'capacity' to survive or react, and the consequences suffered as a result of the abuse are all conditions or risks that need to be considered [Delor and Hubert, (2000), p.1562].

'Vulnerability' is a condition which applies to any victim of human trafficking in both internal and cross-border situations. However, the individual's foreign origin or nationality constitutes a further layer of complexity in determining 'vulnerability'. Non-nationals face a dual burden when compared with nationals. In addition to being subject to abuse, victims may be unable to prove their identity if traffickers have

confiscated their identity documents. Even if they have regularly entered the country, it is the immigration tribunal that determines whether they can obtain legal status to remain in the country without being removed or required to return to their country of origin (AS (Afghanistan) v SSHD, 2013; EK Tanzania v SSHD 2013 and Atamewan, v SSHD 2013). The climate of insecurity suffered by the victim fearing removal or expulsion reinforces his/her position of 'vulnerability', particularly when the sole legal remedy available against executive authorities' decisions is judicial review (note also its high threshold legal requirements; R (AA Iraq) v SSHD, and AS (Afghanistan) v SSHD, 2013, para 9). Victim's cooperation with the host country or the country of origin's authorities in the investigations may result in a risk of harm from the traffickers upon return, particularly if the trafficking has been perpetrated by international trafficking networks (UNHCR, 2006, p. 7). Thus, special attention should be paid by legal and judicial authorities in relation to this category of 'vulnerable' people.

Once a position of 'vulnerability' is acknowledged [*L and Others*, (2013), paras 5, 12, 53 and 63; *R v N*; *R v L*, (2013) paras 2–6, 46, 52, 56, 89, there is more time to submit evidence [*R v N*; *R v L*, (2013), para 8] and presumably this would facilitate victims' recognition. Criminal convictions (for example, committing a crime or illegally residing in the host country) can be quashed if the victim is recognised as being trafficked.

#### **4 'Vulnerability' and UK case law**

In court proceedings, due care should be given to individuals and steps should be taken to ensure that benefits are available to victims. Generally, research highlights concerns in relation to victims' recognition and protection.<sup>15</sup> Considering abuse of the position of vulnerability can assist in identifying victims of human trafficking. Accordingly, this section reflects on the use of the concept of 'vulnerability' in judicial decisions and argues that even susceptibility to trafficking should be given proper weight by legal and judicial authorities. An analysis of UK case law in relation to human trafficking reveals that 'vulnerability' is often central to decision making in UK, in particular when children are involved (*L and Others*, 2013; Preamble of Directive 2011/36/EU, para 8). However, despite the legal definition in Directive 2011/36, courts have not applied the term consistently and its use and conclusive effects are rather vague. Similar concerns have also been experienced by other EU countries.<sup>16</sup>

Each Member State presents a different approach to trafficking. Some have reproduced their own national definition, including the concept of abuse as a position of vulnerability (e.g., the Netherlands); others have omitted the means element altogether, defining trafficking as an act done for the purpose of exploitation (e.g., Belgium) [UNODC, (2013), p.26].

The UK system presents a piecemeal legal framework, scattered in different acts [UNODC, (2013), p.56]. The recent introduction of the Modern Slavery Act 2015<sup>17</sup> has partially solved this problem, systematising legislation in one main legal instrument.

Several sections of the Modern Slavery Act refer to the term 'vulnerability'. For example, reference is made to personal circumstances which may render a person more 'vulnerable' than others (Section 1 (4) (a)).<sup>18</sup> Alternatively, consideration is given to 'vulnerability' in securing services (Section 3 (6) (a and b))<sup>19</sup> or to particular offences such as domestic violence (Schedule 4 Section 34).<sup>20</sup> However, abuse of a position of

vulnerability is still not clearly defined. Further, this concept is required under some legal measures but not others and has been taken into account in some judicial decisions only [UNODC, (2013), p.65].

To date, most of the UK trafficking case law has mainly relied upon the guidelines introduced by the 2005 CAT Convention. The Convention is often misapplied and defines ‘vulnerability’ not in the main text but in its accompanying Explanatory Report [*EK (Tanzania) v SSHD*, 2013, paras 10 and 49].<sup>21</sup>

In some cases, an individual’s position of ‘vulnerability’ appears to have an influence on the courts in identifying victims of trafficking (*L and Others*, 2013; *R (AA Iraq) v SSHD*, 2012)<sup>22</sup> and subsequently, guaranteeing them assistance and support (*Atamewan v SSHD*, 2013 at paras 53 and 92 and paras 48 and 83).<sup>23</sup> Other times, judges are purely sympathetic towards the victims but such accounts are not, per se, grounds triggering legal defence (*R (AA Iraq) v SSHD*, 2012 at para 110).<sup>24</sup> Sometimes the term ‘vulnerability’ is not even mentioned (*FM v SSHD*, 2015; *AS (Afghanistan) v SSHD*, 2013); in other instances, exploitation of vulnerable individuals is highly condemned (*R v N*; *R v L*, paras 2-6, 46, 52, 56, 89)<sup>25</sup> and generates an abuse of the position of ‘vulnerability’ (*FM v SSHD*, 2015; *AS (Afghanistan) v SSHD*, 2013).

Indeed crucial to victims’ recognition is the extent to which reasonable grounds suggest that an individual is, was or may be a victim of trafficking. When breach of law is or was a consequence of the exploitation suffered, the victim should not be punished (*R v N*; *R v L*, 2013, para. 8).

In *Hounga v Allen*, the judges who applied the definition of trafficking, as laid down by international and European instruments and the ILO guidance,<sup>26</sup> have guaranteed protection to a ‘vulnerable’ individual (minor at the time of entry into the UK), with severe cognitive difficulties and without living family members (*Hounga v Allen*, 2014, para 49).<sup>27</sup> Miss Hounga moved to the UK from Nigeria, at the age of 14 following an agreement between her family and Mrs Allen, her employer. Her entry was achieved by presenting a false identity document to the UK immigration authorities and their granting her a visitor’s visa for six months. Although Miss Hounga had no right to work in the UK and after July 2007, no right to remain in the country, Mrs Allen employed her to look after her children at home. In July 2008, Mrs Allen evicted Miss Hounga from the house and thereby dismissed her from the employment. Miss Hounga claimed unfair dismissal, but her contract of employment was declared void by the Tribunal. Ultimately the case reached the Supreme Court, which declared that her claim could not be defeated by the employer’s defence of illegality (Immigration Act 1971, Section 24(1)(b)(ii); *Hounga v Allen*, 2014, para 50).<sup>28</sup> The victim had to go through all the stages of proceedings before being recognised as a victim of forced labour and domestic servitude, as no trafficking finding was made until the matter was brought before the Supreme Court.

Despite the length of proceedings, public policy considerations in relation to human trafficking triumphed, exemplifying a move towards greater consideration of human rights in private disputes as well as public law cases [*Hounga v Allen*, 2014, paras 42, 49, 52; see also Bogg and Green, (2015), pp.101–102; Bogg and Novitz, (2014), p.370].<sup>29</sup>

In relation to labour or sexual exploitation, judges have considered indicators introduced by the ILO, in addition to relevant international and European instruments. The first of the 11 ILO indicators recently introduced to assist States in measuring the problem of forced labour is abuse of vulnerability [ILO, (2012a), p.3].<sup>30</sup> Abuse of vulnerability has also been identified by the United Nations Office on Drugs and Crime (UNODC) as an indicator of labour or sexual exploitation [UNODC, (2013), p.22,

footnote 48]. Despite the sporadic use of these indicators by the judiciary to date there is no consistent approach adopted by domestic courts in relation to the position of 'vulnerability'. This is because indicators are typically vague and open-ended; the fact that they are guidelines means they have no coercive power. Thus, little or no guidance is available in the context of a criminal investigation or prosecution [UNODC, (2013), p.25].

Ultimately, this paper urges legal and judicial authorities to consider, at any stage of a proceeding, the recognition and protection of victims, and their position of vulnerability. Directive 2011/36/EU, as a binding measure which expressly defines the position of 'vulnerability', has the potential to achieve this outcome.

## **5 Conclusions: towards enhanced protection of victims of human trafficking**

This paper has argued that in claims involving potential or actual victims, the authorities in all member states have the legal and moral responsibilities [Brandl and Czech, (2015), p.247; Peroni and Timmer, 2013] to assess whether an individual was exposed to exploitation (see definition of trafficking and Delor and Hubert, 2000). The three elements of human trafficking, namely *punishable acts*, *means by which the action is achieved*, and *purpose of exploitation*, need to be explored further by legal and judicial authorities during the identification process. The assessment revolves not around the 'credibility test',<sup>31</sup> which determines whether the claim is plausible (*R (AA Iraq) v SSHD*, 2012),<sup>32</sup> but whether the individual claiming to be a victim has or had "no real or acceptable alternative but to submit to the abuse involved" (Article 2 (2) of the Directive 2011/36/EU).

Establishing victims' vulnerability is important to provide support and protection to individuals. Vulnerability is a clear indicator to consider. However, it is the abuse of the position of vulnerability that constitutes a means of exploitation. Examples of such abuse include employers deliberately exploiting the vulnerability of workers to force them to work, for instance by threatening irregular migrants of denunciation; taking undue advantage of workers who have limited understanding of the law or with intellectual disabilities; and threatening female workers with dismissal or forcing them into proposition if they refuse to respond to their employers' unreasonable demands [ILO, (2012b), p.16].

Although the finding of vulnerability is not sufficient to support a case of prosecution, it should be adequately taken into account as part of the victim's identification process. Credible evidence is necessary to prove that the victim's consent is negated and during the investigative phase, access to specialists (e.g., psychologists, social workers, anthropologists and cultural advisers) may be essential [UNODC, (2012b), pp.1–3]. Additional evidence may be available in another jurisdiction, hence the paramountcy of cross-border cooperation between legal and judicial authorities.

Therefore, the legal definition of trafficking, together with the explanation of 'vulnerability', as introduced by the Directive, have the potential to enforce legal and moral obligations to protect trafficking victims and punish perpetrators [Fineman, (2008), pp.8–9; Peroni and Timmes, (2013), pp.1056–1085; others argue that 'vulnerability' is defined by suffering and violence, see Butler (2006)]. The extent to which these

definitions will assist authorities in identifying signs of possible trafficking is yet to be appreciated. To date, insofar as the UK is concerned, trafficking cases have mainly relied upon guidelines introduced to implement the CAT, which have often been misapplied<sup>33</sup> and the Directive was only briefly referred to in a sporadic number of cases (*L & Others*, 2013).<sup>34</sup> Also indicators introduced by the ILO have been considered in sporadic cases (*Hounga v Allen*, 2014, para 49).

Notwithstanding, its limited empirical evidence,<sup>35</sup> the benefits of the EU Directive could not be undermined or denied.

*First of all*, this measure includes a broader definition of trafficking and a notion of ‘vulnerability’, as one of the means of exploitation, and is widely applicable to all victims of trafficking including children. The inclusion of these legal definitions in EU secondary legislation constitutes a robust development. It has been criticised that the lack of a clear definition of the position of vulnerability has resulted in ambiguities and misapplication of the concept compromising victims’ rights to be recognised, and the defendants’ rights to a fair trial [UNODC, (2012b), p.2].

Not only does the Directive introduce this definition in its main text, it also ensures uniform interpretation across the EU through the preliminary ruling procedure. In fact, if a preliminary reference to the Court of Justice of the EU (CJEU) is raised by a national court during national proceedings on victims’ identification, the CJEU can clarify ambiguous points of law or legal issues. Then, the judgement of the Court is binding on all Member States. This would then facilitate a common European interpretation of trafficking and its means, including the position of vulnerability.

*Secondly*, the Directive 2011/36/EU, which aims at creating a common playing field for all Member States, requires the Commission to monitor compliance (Articles 20 and 22 (2) Directive 2011/36/EU).<sup>36</sup> This institution should submit a report to the European Parliament and the Council, assessing the extent to which Member States have taken the necessary measures to comply with the Directive, including a description of actions taken, and, if necessary, accompanied by legislative proposals (Article 23 of the Directive 2011/36/EU). Thus, problems with implementation and interpretation of the Anti-Trafficking Convention (CAT) as affirmed by the UK judiciary (*Atamewan, R (on the application of) v SSHD*, 2013, paras 85 and 103)<sup>37</sup> are overcome by this Directive, which secures compliance at national level; failing to do so, an infringement procedure can be commenced by the Commission.

Indeed, the infringement procedure represents the third benefit of the Directive. The Commission is competent to enforce the law bringing non-compliant Member States before the CJEU. The Court exercises control over judicial cooperation in criminal matters, including human trafficking, and has the power to condemn infringing States, fining them for non-compliance. Such a mechanism is essential to ensure compliance and effectiveness of EU law (European Commission, 2014). By contrast, the CAT provides a system, via a national reporting structure and through the ‘Group of experts on action against trafficking in human beings’ (GRETA) (Articles 36–38 of the Convention), which monitors the implementation of the Convention by the Contracting Parties, but does not necessarily secure observance at national level.

The effectiveness of EU law in relation to protecting victims of trafficking has already emerged in a recent Irish judgement, which represents the first case that deals with the implementation of the Directive in Ireland (*P v Chief Superintendent Garda National Immigration Bureau and ors*, 2015).

The dispute concerns a judicial review following the entry into force of the Directive in Ireland. A claimant's application to be recognised as a victim of human trafficking was dismissed and it was found that the Irish authorities were in breach of the Directive on various grounds. *First of all*, the determination process lasted too long and the claimant was subsequently refused trafficked victim status. The Court decided that the delay (at para 178) breached Article 11 (4) of the Directive<sup>38</sup> which states that authorities must establish appropriate mechanisms aiming at an early identification of victims.

*Secondly*, it decided that the authorities' refusal, based on the fact that the claimant failed to disclose information, was wrong as the non-disclosure should not have affected the granting of leave to the applicant (para 173).

*Thirdly*, in reaching the decision the judge referred to the victim's position of 'vulnerability', stating that account to this concept was not taken into consideration by the authorities (para 174).

The Irish judge ruled that the Directive's transposition was inadequate in Ireland (para 205).

The main legal principle in *P*, relates to the body of the Directive which includes robust requirements of compelling implementation at national level. The judgement confirms the argument that the Directive is well equipped in supporting victims and is likely to advance protection in this field. Its legally binding nature and flexibility of application at national level represent a positive development in this area of law. At the same time, the centralised enforcement procedure available within the EU legal system, via the Commission's infringement actions and the indirect enforcement by the individuals before their national courts (through the application of the direct effect and state liability doctrines), make the system valuable and effective. By introducing a broad definition of vulnerability, which is subject to the interpretation of the CJEU, the Directive solves interpretative problems across and within Member States. It magnifies the role and responsibility of the States and pan-European entities toward individuals and societies and calls for a regime whereby individuals are given central consideration in legal proceedings. It also ensures cross-border cooperation.

Progress in relation to the EU Directive is ongoing as most countries have implemented this instrument; the extent to which it will shed new light into the legal authorities' perspective in their judgement and reasoning is yet to be seen. What is urgent and has been proposed by this paper is a more responsive approach toward the vulnerable position of individuals in claims involving potential or actual victims of trafficking. This tool should be central to legal and judicial authorities' determination in relation to trafficking offences. It constitutes a vital element to be considered in the identification process and is crucial in ensuring effective intervention in human trafficking cases at regional and national levels. This paper urges the Commission, in assessing member states' compliance with the Directive, to give due consideration to the concept of 'vulnerability' in legal proceedings, including, where necessary, to reform the current system so that the 'vulnerability' of migrants is taken into account.<sup>39</sup>

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## Project website

Project entitled 'Combat measures against human trafficking in the Tourist Industry (COMBAT)' [online] <https://www.brookes.ac.uk/microsites/combat-human-trafficking/> (accessed 30 July 2015).

## Notes

- 1 Project entitled ‘Combat measures against Human trafficking in the Tourist Industry (COMBAT)’, Reference number HOME/2013/ISEC/AG/THB/4000005873 is funded by the EC Directorate of Home Affairs under the Internal Security Fund’s targeted call for Trafficking in Human Beings and co-funded by the Prevention of and Fight against Crime Programme of the European Union. This article reflects only the author’s view and not that of the European Commission. The European Commission is not responsible for any use that may be made of information contained in this article.
- 2 In *EK Tanzania v SSHD* [2013] an expert psychologist used the term ‘vulnerability’ to describe a claimant who suffered from mental health and required extensive treatment (see para. 51). This concept has then influenced the UK authority’s policy to prevent exploitation of legitimate domestic workers (see para 23).
- 3 The UNODC Issue Paper on Abuse of a Position of Vulnerability in trafficking is an essential reading to explore the application of this concept as a means by which trafficking occurs or is made possible.
- 4 In *FM v SSHD* [2015] and *AS (Afghanistan) v SSHD* [2013] the term ‘vulnerable’ or position of ‘vulnerability’ is not adopted at all.
- 5 Generally, there is neither a precise order in law that determines which court should hear the human trafficking case at first instance, nor a specialised tribunal that deals with this crime, so depending on the nature, criminal, civil or/and employment tribunals can all be involved. Lack of legal expertise in handling trafficking cases is also evident in case-law. In *L and Others*, 2013 at para 67 the court stated ‘The original grounds of appeal drafted by the solicitor reveal a lack of understanding about the nature of child trafficking. The information plainly required consideration (hence the referral under the NRM) but the solicitor concluded that there was ‘no indication of any issues relating to the possibility that the applicant had been trafficked’. Then, flaws in the decision-making process by the competent authority (*AS (Afghanistan) v SSHD*, 2013) leave victims without proper judicial guarantees as decisions are not appealable except by way of judicial review (*R (AA Iraq) v SSHD*, 2012), unless they are raised alongside an asylum appeal (*AS (Afghanistan) v SSHD*, 2013). Examples of irregularities are the introduction of temporal limitations, i.e., the length of time occurred between the perpetuation of the offence and the trial (*Atamewan v SSHD*, 2013), substantial shortcomings in identifying whether a victim was smuggled or trafficked (*AS (Afghanistan) v SSHD*, 2013), and weaknesses in giving weight to the victim’s position of ‘vulnerability’ (*R (AA Iraq) v SSHD*, 2012).
- 6 For a detailed explanation of the differences between trafficking and smuggling see Lee (2011, p.7).
- 7 The definition contained in Article 2 of Directive 2011/36/EU entitled ‘Offences concerning trafficking in human beings’ states “The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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”. It states that Member States are under an obligation to take the necessary measures to ensure that [the above listed] intentional acts are punishable. This definition originated from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereby the Trafficking Protocol), supplementing the United Nations Convention Against Transnational Organized Crime Article 3 Use of Terms.
- 8 Article 2 (3) Directive 2011/36/EU states “Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs”. See also Preamble 11 which states “Within the context of this Directive, forced begging should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour. Therefore, the exploitation of begging, including the use of a trafficked

dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur [...] The expression 'exploitation of criminal activities' should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain. The definition also covers trafficking in human beings for the purpose of the removal of organs, which constitutes a serious violation of human dignity and physical integrity, as well as, for instance, other behaviour such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings".

- 9 The benefit of the Directive is to bring the definition of 'position of vulnerability' into the mainstream, even if it was originally laid down in the Explanatory report to the 2005 CAT Convention. Paragraph 83 states "By abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce". Also the travaux préparatoires to the Trafficking Protocol include an interpretative note to the effect that reference to the abuse of a position of 'vulnerability' is understood as referring to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved (at 343, note 20).
- 10 The National Referral Mechanisms (NRM) is a system by which the potential victims are brought to the assessment of whether they are victims of human trafficking or not. In the UK, the NRM is based on Articles 10, 12-13, and 16 of the Council of Europe Anti-Trafficking Convention (CAT). For further detail see Review of the National Referral Mechanism for victims of human trafficking, 2014, at page 13.
- 11 There are two different policy guidelines: one which regulates UK and EU citizens and, the other which addresses non-EU nationals who are claiming asylum or fear to return to their country of origin. This is clearly stated in case *AS (Afghanistan) v SSHD*, 2013, at para 2.
- 12 The Modern Slavery Act is coming into force into stages; at the time of writing not all sections are in force.
- 13 The indicators are: abuse of vulnerability; deception; restriction of movement; isolation; physical and sexual violence; intimidation and threats; retention of identity documents; withholding of wages; debt bondage; abusive working and living conditions; excessive overtime.
- 14 Directive 2013/33/EU Article 21 states: "Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, *victims of human trafficking*, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive".
- 15 The paper is based on an EU study as per footnote 1.
- 16 The project coordinators are UK-based academics. The findings go beyond the UK case as illustrated by a number of EU country reports, which adopting the same template, have highlighted similar concerns. Further information can be found on the project website as referred to in the bibliography.
- 17 The major criticisms raised in relation to the Act, refer to its criminal law orientation, which emphasises offences' prosecution rather than victims' support, proper of civil law. It is, therefore, feared that victims may be unprotected by the system again (McCall, 2015; Chandran, 2015) However, it is too early to assess the impact of the Act, which is still not in force in its entirety and will be implemented at different stages.

- 18 Modern Slavery Act 2015, Section 1 (4) (a): “For example, regard may be had – (a) to any of the person’s personal circumstances (such as the person being a child, the person’s family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons; [...]”.
- 19 Modern Slavery Act 2015, Schedule 2, Section 6 “Securing services etc from children and vulnerable persons (6) Another person uses or attempts to use the person for a purpose within paragraph (a), (b) or (c) of subsection (5), having chosen him or her for that purpose on the grounds that— (a) he or she is a child, is mentally or physically ill or disabled, or has a family relationship with a particular person, and (b) an adult, or a person without the illness, disability, or family relationship, would be likely to refuse to be used for that purpose”.
- 20 Modern Slavery Act 2015, Schedule 4, Section 34: Domestic Violence, Crime and Victims Act 2004 (c. 28) “An offence under section 5 of the Domestic Violence, Crime and Victims Act 2004 (causing or allowing a child or vulnerable adult to die or suffer serious physical harm”.
- 21 In *EK (Tanzania) v SSHD* [2013] the Anti-Trafficking Convention (CAT) 2005 applied. At paras 10 and 49 the authority’s failure to consider the claimant’s ‘vulnerability’ in the decision was deemed to be an error of law. See footnote no. 9 for the definition of position of vulnerability as included in the Explanatory Report which accompanies the Convention.
- 22 In the case *L and Others*, 2013, the judge uses the term ‘vulnerable’ to describe a victim of exploitation and following such identification the person is afforded protection from prosecution and granted residence permit.
- 23 In *Atamewan v SSHD*, 2013 at paras 53 and 92, the term ‘vulnerable’ was used. The judge was persuaded by the victim’s position of ‘vulnerability’ in deciding on the support required. At paras 48 and 83, the judges state that Secretary of State failed to comply with CAT 2005’s obligation in this case and the EU Directive 2011 did not apply because at the time of the decision on trafficking and asylum, this instrument was not yet in force in the UK.
- 24 In *R (AA Iraq) v SSHD*, at para 110 the judge stated: she “is young, vulnerable, far from most of her family and .... has both experienced an abortion (albeit as a result of a consensual relationship) and suffered at least some physical assaults. But sympathy alone is not a basis for quashing the decisions by the Competent Authority and the Home Secretary”.
- 25 In *R v N; R v L*, paras 2–6, 46, 52, 56, 89 the judge stated “Every vulnerable victim of exploitation will be protected by the criminal law, ... there is no victim, so vulnerable to exploitation, that he or she ... somehow becomes invisible or unknown to or somehow beyond the protection of the law. Exploitation of fellow human beings... represents deliberate degrading of a fellow human being or human beings”. In this case there was a breach of Article 4 of CAT 2005.
- 26 The judges in *Hounga* applied the definition of trafficking contained in the Trafficking Protocol, the CAT, the ILO Convention on Forced or Compulsory Labour and then reference to Article 4 ECHR and the ECHR case law. They also refer to the ILOs six over-arching indicators of forced labour (physical violence, including sexual violence; restriction of freedom of movement; threats; debt and other forms of bondage; withholding of wages or no payment of wages; retention of identity documents) provided guidance to the legal and judicial authorities [ILO, (2005), pp.20–21].
- 27 The findings confirmed the existence of the first indicator (physical harm or threats of it), the fourth (withholding of wages) and the sixth (threat of denunciation to the authorities where the worker has an irregular immigration status). Uncertainty in relation to the second indicator (restriction of movement) was raised [see para 49, for reference ILO (2005, pp.20–21)].
- 28 Under section 24(1)(b)(ii) of the Immigration Act 1971, it is illegal to work without permission in the UK. See *Hounga v Allen* para 50 for the Court’s statement.
- 29 In *Hounga v Allen* para 52 the Supreme Court states “the decision of the Court of Appeal to uphold Mrs Allen’s defence of illegality to her complaint runs strikingly counter to the prominent strain of current public policy against trafficking and in favour of the protection of its victims. The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront”.

- 30 The 11 indicators are: abuse of vulnerability; deception; restriction of movement; isolation; physical and sexual violence; intimidation and threats; retention of identity documents; withholding of wages; debt bondage; abusive working and living conditions; excessive overtime [ILO, (2012a), p.3].
- 31 The credibility test, which is proper of asylum law and not required by trafficking regulations, refers to the burden of proof required in asylum cases to the claimant. It aims at examining whether the claim is plausible or credible. An asylum claimant, for example, who did not applied for asylum in the first safe country, is considered not to have any basis to claim asylum in the second country. Therefore his claim is false under Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. In *Atamewan*, the SSHD decided that the claimant's case was not credible and in fact it decided to be baseless. Focusing on credibility earlier on in the identification process has proved to be ineffective, as most victims tend not to reveal the truth about their experiences when first questioned, probably because they have only recently escaped the traffickers' control [Rijken and Bosma, (2014), p.81].
- 32 In *R (AA Iraq) v SSHD* 2012, the claimant first arrived in Belgium where she suffered physical assault. The Belgium police did not protect her. She then moved to the UK and informed the UK authorities that she arrived straight from Iraq. She lied as she was afraid of being deported back to Belgium. The victim's position of 'vulnerability' in this case was not considered. Her fear of harm to be returned to Belgium made her a 'vulnerable' victim. This was the sole reason behind her false story and it should have been considered in her favour rather than against her. By concluding she was not a credible person, she was not eligible for protection.
- 33 At times, authorities have erroneously concluded that the claimant's claim was historic, thus failing to complete the victim's identification process and not complying with CATs Convention obligation (*Atamewan v SSHD*, 2013). Then, authorities in accordance to the CAT (Art 27 CAT and also *Atamewan v SSHD* 2013 paras 85 and 103) and its implementing guidelines (UK Home Office, 2013) have the obligation to investigate the claim by referring cases to the police, consulting the police on evidence gathering (Article 10 CAT 2005) and when sufficient evidence is found, protect victims and prosecute perpetrators (Article 2 CAT 2005). By contrast, UK authorities rely prevalently on victims' cooperation (*FM v SSHD*, 2015, para 7), rather than evidence collected via proper legal investigations (*OOO and Ors*, 2011, paras 154; *Atamewan v SSHD*, 2013; *EK (Tanzania) v SSHD*, 2013; *FM, R (on the application of) v SSHD*, 2015, paras 37, 38 and 51). This is a direct consequence of the UK incomplete transposition of the CAT.
- 34 In *L and Others* the EU Directive 2011 and CAT 2005 are both applied (paras 5, 12, 53 and 63).
- 35 The Directive has just been partially implemented in the UK and there is no CJEU case-law to date.
- 36 Article 20 of the Directive 2011/36/EU sets out Member States' duty to coordinate and contribute to the Report prepared by the Commission every two years on the progress of the fight against human trafficking. Article 22 (2) states: "Member States shall transmit to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive".
- 37 At times, authorities have erroneously concluded that the claimant's claim was historic, thus failing to complete the victim's identification process and not complying with CATs obligation (see also *Atamewan v SSHD*, 2013).
- 38 Article 11 (4) Directive 2011/36/EU "Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations".
- 39 One of the outputs of the EU project on which this paper is based is the development of a tool kit of indicators specifically addressed to the hospitality industry, which would assist managers and other staff in identifying victims and perpetrators in order to report suspects to the enforcement authorities.