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Article

The Locus of Persecution Reconsidered: Risk of Re-Trafficking, Cumulative Harm, and Failure of State Protection

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ABSTRACT

Persecution, a core concept of the 1951 Refugee Convention's definition of 'refugee', is generally thought to entail both serious harm and a failure of State protection. The predominant view in refugee law is that the harm a refugee fears will take place within their country of origin. Yet, trafficked persons who fear (transnational) re-trafficking experience harm mainly outside the country of origin. As such, their asylum claims raise difficult doctrinal issues, in particular regarding how the State of origin can be expected to protect against harm taking place outside its territory. This article seeks to answer this question by examining trafficking-based asylum claims from the United Kingdom and Germany and the relationship between future risk, harm, and State protection. It argues that to understand effective State protection against re-trafficking, it is necessary to pay attention to the individual types of harm experienced in the trafficking context and to their sequence. This allows an understanding of persecution as cumulative, with the State of origin's failure to protect against harm experienced in its territory resulting in additional harm experienced outside the country. This understanding of persecution resolves the doctrinal issues raised by trafficking-based asylum claims and has wider implications for individuals who experience harm in the context of irregular migration.

1. INTRODUCTION

The notion of 'persecution', or rather of 'being persecuted', is one of the key concepts in the 1951 Convention relating to the Status of Refugees (Refugee Convention).[1] Article 1A(2) of

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1 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention). However, the Refugee Convention was not the first refugee law instrument to introduce the concept. See Jane McAdam, 'Rethinking the Origins of "Persecution" in Refugee Law' (2014) 25 International Journal of Refugee Law 667.

the Refugee Convention, as amended by the Convention's 1967 Protocol,[2] defines a refugee as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[3]

Yet, there is no internationally accepted definition of the concept of persecution used in the Refugee Convention and, indeed, the lack of a definition allows the Convention to respond to new and emerging refugee situations.[4] Nevertheless, the concept of persecution has sparked debates as to its meaning and scope, its relationship to human rights law, and to other components of the Refugee Convention's refugee definition.[5] At the same time, there is some agreement as to the main elements of 'persecution'. For example, Hathaway and Foster suggest that it amounts to a 'sustained and systemic denial of basic human rights demonstrative of a failure of state protection'.[6] Goodwin-Gill and McAdam, meanwhile, conceptualize it as measures taken against individuals with Convention ground-related characteristics which harm their human rights,[7] while stating that 'fear of persecution and lack of protection are … interrelated elements'.[8] Thus, persecution entails (serious) harm, whose severity can be measured with reference to human rights standards, and implies a failure of (State) protection against such harm. Another aspect of persecution which appears to be uncontentious in these leading treatises on refugee law is the designation of a refugee's country of nationality (or former habitual residence) as the 'locus of persecution'.[9] In other words, 'the basic inquiry into the existence of a well-founded fear [of being persecuted] focuses squarely on the risks faced in the country of which the individual is a citizen'.[10] Thus, it is assumed that the relevant harm feared by a refugee will take place in their country of origin.

There is, however, one group of refugees who fear harm mainly *outside* their country of origin without this posing an obstacle to their asylum claims. Trafficked persons who fear re-trafficking may be able to claim refugee status (although they frequently face serious difficulties in claiming refugee protection, such as meeting the nexus requirement and – as discussed in detail in this

2 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol) art 1(2).

3 Refugee Convention (n 1) art 1A(2).

4 Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol I (AW Sijthoff 1966) 193; BS Chimni, *International Refugee Law: A Reader* (Sage 2000) 3–4; James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 182; Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014) 26.

5 For example, Grahl-Madsen (n 4); Chimni (n 4); Hathaway and Foster (n 4); Chetail (n 4); Matthew Price, 'Persecution Complex: Justifying Asylum Law's Preference for Persecuted People' (2006) 47 Harvard International Law Journal 413; Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26 International Journal of Refugee Law 272; Jaakko Kuosmanen, 'What's So Special about Persecution?' (2014) 17 Ethical Theory and Moral Practice 129; James C Hathaway and Hugo Storey, 'What Is the Meaning of State Protection in Refugee Law? A Debate' (2016) 28 International Journal of Refugee Law 480; Mathilde Crépin, *Persecution, International Refugee Law and Refugees: A Feminist Approach* (Routledge 2020); Pia Zambelli, 'Knowing Persecution When We See It: Non-State Actors and the Measure of State Protection' (2020) 32 International Journal of Refugee Law 28; Guy S Goodwin-Gill and Jane McAdam (with Emma Dunlop), *The Refugee in International Law* (4th edn, Oxford University Press 2021); Daniel Wilsher, 'Between Martyrdom and Silence: Dissent, Duress, and Persecution as the Suppression of Human Rights under the Refugee Convention' (2021) 33 International Journal of Refugee Law 28; Ciara Smyth, 'The Human Rights Approach to "Persecution" and Its Child Rights Discontents' (2022) 33 International Journal of Refugee Law 238.

6 Hathaway and Foster (n 4) 185.

7 Goodwin-Gill and McAdam (n 5) 156.

8 ibid 70.

9 ibid 92.

10 Hathaway and Foster (n 4) 50.

article – showing that the State of origin does not effectively protect against re-trafficking).[11] Yet, assuming that the trafficking experience is transnational in nature,[12] the majority of the harm experienced in that context will take place outside their country of origin. Of course, trafficked persons may fear types of harm other than re-trafficking, such as reprisals from traffickers entailing serious human rights violations, or 'ostracism, discrimination or punishment' from their local community.[13] For the purposes of this article, however, re-trafficking is of particular interest since the harm experienced in this context usually takes place outside the State of origin.

As this article will argue, it is important to examine what types of harm the (re-)trafficking experience entails exactly, rather than speaking of re-trafficking as the relevant harm. The United Nations High Commissioner for Refugees' (UNHCR) Guidelines on Victims of Trafficking show that harm experienced during (re-)trafficking entails serious human rights violations such as 'abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation [and] the deprivation of medical treatment'.[14] The Guidelines also note that this harm often takes place outside the country of origin, stating that 'even where the exploitation experienced by a victim of trafficking occurs mainly outside the country of origin, this does not preclude the existence of a well-founded fear of persecution in the individual's own country'.[15] This statement raises interesting doctrinal and practical questions with regard to the scope and meaning of 'persecution'. While a wealth of scholarship exists relating to trafficking-based asylum claims, including in regard to obstacles to protecting trafficked persons under the Refugee Convention,[16] there is a lack of engagement with the difficulties trafficking-based asylum claims create for refugee law doctrine. Although it has been acknowledged that in the trafficking context 'harm is inflicted by multiple actors across a temporal and geographical continuum',[17] the implications of this for the concept of persecution and its State protection element remain unexplored. This article seeks to close this gap in the scholarship by examining how courts approach the persecution element of asylum claims based on a fear of re-trafficking.

11 Anna Dorevitch and Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 Melbourne Journal of International Law 1; Idil Atak and James C Simeon, 'Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice' (2014) 12 Journal of International Criminal Justice 1019. For a discussion of the difficulties male trafficked persons face when claiming asylum, see Noemi Magugliani, 'Trafficked Adult Males as (Un)Gendered Protection Seekers: Between Presumption of Invulnerability and Exclusion from Membership of a Particular Social Group' (2022) 34 International Journal of Refugee Law 353.

12 The United Nations (UN) Trafficking Protocol conceives of 'trafficking in persons' as a transnational crime. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking Protocol) art 4. However, trafficking can also occur within the borders of one State. See eg Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) ETS No 197 (ECAT) art 2.

13 United Nations High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked', HCR/GIP/06/07 (7 April 2006) (Guidelines on Victims of Trafficking) paras 17, 18.

14 ibid para 15.

15 ibid para 27.

16 Kaori Saito, 'International Protection for Trafficked Persons and Those Who Fear Being Trafficked', UNHCR New Issues in Refugee Research, Research Paper No 149 (2007) <https://www.unhcr.org/research/working/476652742/international-protection-trafficked-persons-fear-trafficked-kaori-saito.html> accessed 15 August 2022; Dorevitch and Foster (n 11); Martina Pomeroy, 'Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement' (2010) 16 Michigan Journal of Gender and Law 453; Udara Jayasinghe and Sasha Baglay, 'Protecting Victims of Human Trafficking within a "Non-Refoulement" Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?' (2011) 23 International Journal of Refugee Law 489; Susan Kneebone, 'Protecting Trafficked Persons from Refoulement: Re-Examining the Nexus' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing 2013); Jean-Pierre Gauci, 'Trafficked Persons as Refugees' (PhD thesis, King's College London 2013); Atak and Simeon (n 11); Magugliani (n 11).

17 Dorevitch and Foster (n 11) 40.

Drawing on case law from the United Kingdom (UK) and Germany – two jurisdictions that operate under the same overarching legal frameworks regarding the protection of refugees and trafficked persons[18] – this article analyses how persecution and State protection are conceptualized in asylum claims based on a risk of re-trafficking. As such, the article is concerned only with how the two jurisdictions approach the protection of trafficked persons under refugee law and does not examine their obligations under human rights law or international and regional anti-trafficking instruments.[19] The two countries were selected to conduct a variation of 'most similar case design', that is, an evaluation of 'whether similar legal frameworks are used in the same way, or produce similar effects, across contexts'.[20] Indeed, in both jurisdictions, the case law does not engage with the more difficult doctrinal issues that trafficking-based asylum claims raise, but does entail similar approaches to establishing future risk and State protection. This allows the article to explore the relevant doctrinal issues in detail and to propose a solution to the problems raised. In particular, the article considers how a State of origin can protect an individual against harm experienced outside that State's territory. As such, it adds to the understanding of the role of refugee law as a tool for effective State protection against human trafficking (and re-trafficking, in particular). The article finds that to understand effective State protection against re-trafficking, it is necessary to pay attention to the individual types of harm experienced in the trafficking context and to their sequence. This allows an understanding of persecution as cumulative, with the State of origin's failure to protect against harm experienced in its territory resulting in additional harm experienced outside the country. This understanding of persecution resolves the doctrinal issues raised by trafficking-based asylum claims and has wider implications for individuals who experience harm in the context of irregular migration.

The article is divided into two main parts. Part 2 considers how risk of re-trafficking is approached in the case law. While courts conceive of re-trafficking as a harm in itself, this article demonstrates that this approach leads to a lack of engagement with trafficked persons' experiences and therefore with the effectiveness of protection. Thus, part 2 analyses in detail how the case law approaches harm and State protection in the trafficking context, distinguishing between the 'law enforcement' and the 'reception and reintegration' approaches to State protection, while showing that neither approach details what effective protection against re-trafficking looks like.

Part 3 then engages with the question of the effectiveness of protection by discussing the main problem raised by trafficking-based asylum claims – the fact that harm is experienced largely outside the country of origin, while State protection is limited to the State of origin's territory. This part of the article begins by considering the relationship between harm experienced

18 Both countries are parties to the Refugee Convention (n 1), the Trafficking Protocol (n 12), and the ECAT (n 12). Prior to the UK's exit from the EU, when the majority of the cases discussed in this article were decided, both also applied the EU Trafficking Directive: Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1 (EU Trafficking Directive), as well as the EU Qualification Directive. The UK applied the 2004 version: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (2004 Qualification Directive); Germany applied the 2011 recast version: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (recast Qualification Directive).

19 Such as the European Convention for the Protection of Human Rights and Fundamental Freedoms Rights, as amended (adopted 4 November 1950, entered into force 3 September 1953) CETS No 5 (ECHR), as well as the Trafficking Protocol (n 12) and the ECAT (n 12). For a discussion of States' obligations towards trafficked persons under human rights law and anti-trafficking instruments, see eg Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017); Marija Jovanovic, *State Responsibility for 'Modern Slavery' in Human Rights Law* (Oxford University Press 2023).

20 Katerina Linos and Melissa Carlson, 'Qualitative Methods for Law Review Writing' (2017) 84 The University of Chicago Law Review 229.

outside the country of origin, State protection, and future risk. It then explores States' ability to offer protection outside their territory. Based on this, it is proposed that approaching persecution in the trafficking context as a sequence of harms can resolve the tension between harm taking place outside the country of origin and State protection being territorially limited. More specifically, part 3 relies on the cumulative nature of persecution to argue that harm in the trafficking context is a combination of harms taking place inside and outside the country of origin, with the State of origin's failure to protect against harm experienced in its territory resulting in additional harm experienced outside the country.

The article concludes by examining the wider implications of the idea that harm experienced outside the country of origin can amount to persecution in refugee law. It suggests that reconsidering the locus of persecution leads to a shift in how we think about harm experienced during irregular (re-)migration.

2. RISK OF RE-TRAFFICKING AS PERSECUTION

2.1 The concept of persecution

When discussing re-trafficking as a form of persecution, it is necessary to consider how the relevant case law approaches the concept and its individual elements. The approach of UK and German courts to the persecution enquiry in the trafficking context is summed up neatly by the UK Upper Tribunal in the case of *HD*: '[i]t is not generally in dispute that a victim of trafficking … will have sustained serious harm', so that '[t]he key issues … are the availability of sufficiency of protection and the option of safe/reasonable internal relocation'.[21] Thus, the courts accept that (re-)trafficking entails serious harm and that it therefore amounts to persecution in the absence of State protection.

Both UK and German courts appear to follow Hathaway and Foster's understanding of persecution, conceptualizing it as a combination of serious harm and a failure of State protection (while also focusing on internal protection alternatives, which this article touches on briefly in discussing the relevant case law). This may be so because both countries' understanding of persecution is informed by the European Union's (EU) Qualification Directive,[22] which mirrors Hathaway and Foster's definition. The Directive states that an 'act of persecution' must be 'sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights',[23] while listing 'the State' or 'parties or organisations … controlling the State …' as 'actors of protection', who must be 'willing and able' to offer protection.[24]

Indeed, it is generally accepted that 'harm is at the core of persecution',[25] and that such harm has to reach a certain threshold of severity.[26] Relevant types of harm include physical harms, such as 'beatings, sexual abuse, and mutilation', deprivation of liberty and privacy, including

21 *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC) paras 66–67.

22 Although the UK has left the EU and therefore no longer applies EU law, at the time most of the cases discussed below were decided, it still applied the 2004 Qualification Directive (n 18). Following its exit from the EU, the UK codified parts of that Directive in domestic law. Like the Qualification Directive, s 31 of the Nationality and Borders Act 2022 describes persecution as a combination of human rights violations and a failure of State protection.

23 Recast Qualification Directive (n 18) art 9(1)(a). For a critical analysis of this provision, see Steve Peers and others (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume 3: EU Asylum Law* (Martinus Nijhoff Publishers 2015) 105–10.

24 Recast Qualification Directive (n 18) art 7(1). For a critical analysis of the idea that non-State entities can be actors of protection, see Maria O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection under International Refugee Law?' (2012) 24 International Journal of Refugee Law 85.

25 Scott Rempell, 'Defining Persecution' (2013) 1 Utah Law Review 283, 292; Goodwin-Gill and McAdam (n 5) 78.

26 Jean-Yves Carlier, 'The Geneva Refugee Definition and the "Theory of the Three Scales"' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 49–50; Rempell (n 25) 310.

'arrests, interrogations, imprisonment, and other means of detention', as well as slavery, economic harms, and psychological harm.[27]

What exactly constitutes 'protection' in refugee law, however, continues to be debated,[28] both in terms of the scope and content of protection offered in countries of asylum,[29] and in terms of protection in the country of origin. With regard to the latter, Lehmann has dedicated an entire volume to unpacking the term 'protection' in EU asylum law.[30] Again, it is not within the scope of this article to examine the notion of protection generally in detail. Rather, the focus is on the apparent disconnect between conceptualizing State protection as internal protection by the country of origin,[31] and the fact that harm during re-trafficking largely takes place outside that country. As such, a main focus of this article is the standard of State protection and the related question of how protection plays out in practice. The EU Qualification Directive requires that protection 'must be *effective* and of a non-temporary nature'.[32] Although the 'effectiveness' of protection is not further defined in the Directive, UNHCR, using an almost identical phrase to describe the required standard of protection, elaborates that protection 'must be provided by an organised and stable authority exercising full control over the territory and population in question'.[33] While the term 'effective protection' has been criticized as shifting in meaning depending on the context in which it is employed,[34] in this article, it is used to denote measures that, in fact, reduce risk of re-trafficking, as opposed to measures seen to address the problem of trafficking, but that, from the trafficked person's perspective, have no actual impact. In this context, it is worth noting that the Qualification Directive goes on to state that:

> protection is generally provided when [actors of protection] *take reasonable steps* to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.[35]

Thus, in a single paragraph, the Directive appears to set two different standards of protection: an effectiveness standard on the one hand, and a standard that has been referred to as the '"due diligence"' test[36] or the '"sufficiency of protection"' test, on the other.[37] Lehmann argues that this apparent discrepancy can be reconciled by considering that 'the legal obligations of the authorities in the State of nationality are only of evidentiary value, rather than circumscribing what is or is not "effective" in the individual case'.[38] Indeed, while the State of origin cannot be expected to eliminate all risk of harm, 'any efforts by the state to provide protection are only relevant to the extent that they reduce a risk of serious harm below the well-founded fear standard'.[39] In this

27 Rempell (n 25) 293–97.
28 See eg Dallal Stevens, 'What Do We Mean by Protection?' (2013) 20 International Journal on Minority and Group Rights 233.
29 Kate Ogg, *Protection from Refuge: From Refugee Rights to Migration Management* (Cambridge University Press 2022).
30 Julian M Lehmann, *'Protection' in European Union Asylum Law: International and European Law Requirements for Assessing Available Protection as a Criterion for Refugee and Subsidiary Status* (Brill 2020).
31 David James Cantor, 'Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 354.
32 Recast Qualification Directive (n 18) art 7(2) (emphasis added).
33 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) (Handbook) para 17.
34 Stevens (n 28) 249.
35 Recast Qualification Directive (n 18) art 7(2) (emphasis added).
36 Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary* (2nd edn, CH Beck, Hart, Nomos 2016) 1156.
37 Stevens (n 28) 253; cf *Horvath v SSHD* [2000] UKHL 37, [2000] Imm AR 552.
38 Lehmann (n 30) 105.
39 Hathaway and Foster (n 4) 321.

context, it is worth looking at the UNHCR Guidelines on Victims of Trafficking, which state that:

> The mere existence of a law prohibiting trafficking in persons will not of itself be sufficient to exclude the possibility of persecution. If the law exists but is not effectively implemented, or if administrative mechanisms are in place to provide protection and assistance to victims, but the individual concerned is unable to gain access to such mechanisms, the State may be deemed unable to extend protection to the victim, or potential victim, of trafficking.[40]

As such, effective protection is protection which is in fact available, that is, accessible and exercisable both in law and in practice.[41] In this assessment, 'the laws and regulations of the country of origin *and the manner in which they are applied*' must be taken into account.[42] In short, there must be 'access to such protection'.[43] Markard makes a similar point with reference to the text of the Refugee Convention's refugee definition. She argues that since article 1A(2) speaks of the country of nationality's protection, rather than that country's *efforts* to provide protection, and of refugees' inability to avail themselves of such protection, the protection in question must be *de facto* available.[44]

Questions concerning the effectiveness of protection are discussed further in section 2.3. First, however, this article briefly discusses what harm experienced in the trafficking context entails, looking at how courts conceptualize this harm, while suggesting that to understand what effective State protection against such harm ought to look like, it is necessary to deviate from the courts' approach.

2.2 Harm experienced in the trafficking context

The fact that (re-)trafficking amounts to persecution is a widely accepted view in a wide range of jurisdictions and (scholarly) commentary.[45] As mentioned above, UK and German case law is no exception to this, with the case law discussed below working from the assumption that, in the absence of State protection, re-trafficking amounts to persecution. As such, the view that trafficking itself is harmful has made its way into refugee law jurisprudence.

Yet, when examining the international law definition of human trafficking, it becomes clear that this definition does not reveal much about trafficked persons' experiences. 'Trafficking in persons' is defined as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of 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 purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[46]

40 UNHCR, 'Guidelines on Victims of Trafficking' (n 13) para 23.
41 cf Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 406.
42 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla v Bundesrepublik Deutschland* [2010] ECR I-1493, para 71 (emphasis added).
43 ibid para 70.
44 Nora Markard, *Kriegsflüchtlinge: Gewalt gegen Zivilpersonen in bewaffneten Konflikten als Herausforderung für das Flüchtlingsrecht und den subsidiären Schutz* [War Refugees: Violence against Civilians in Armed Conflicts as a Challenge to Refugee Law and Subsidiary Protection] (Mohr Siebeck 2012) 200.
45 Crépin (n 5) 134. See also Saito (n 16) 9.
46 Trafficking Protocol (n 12) art 3(a).

In this definition, Gallagher distinguishes three separate elements: action, means, and purpose.[47] The action element is the 'recruitment, transportation, transfer, harbouring or receipt of persons'; the means is 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'; and the purpose is exploitation.[48] As such, the definition largely focuses on the intentions and actions of traffickers, rather than the experiences of trafficked persons. Indeed, when examining trafficked persons' (potential) experiences as presented by the trafficking definition, it is not at all clear that trafficking *necessarily* entails serious harm. First and foremost, trafficking describes the process of recruiting and transporting a person. None of the actions described in the trafficking definition can be said to constitute harm. However, this process may be achieved through certain means, which do imply harm – in particular, 'use of force' comes to mind. Nevertheless, this is only one of a number of possible means. Indeed, the case law discussed below suggests that the means most often employed are 'deception' and 'abuse of a position of vulnerability', neither of which implies harming the trafficked person. This, of course, leaves the purpose element of the definition and it is here that harm, such as sexual exploitation or forced labour, is found. However, since only intent to exploit must be shown to meet the trafficking definition, there is no requirement that exploitation must actually occur. Thus, if a trafficked person escapes before any exploitation takes place, their entire experience may consist of being recruited and transported by deception. It is doubtful whether this constitutes serious harm, not to mention persecution, for the purposes of refugee law. Therefore, treating trafficking itself as a type of harm is unprincipled because a risk of (re-)trafficking cannot be assumed to be synonymous with a risk of persecution.

The above is not intended to deny that many trafficked persons *do* experience serious harm, are at risk of experiencing such harm again in the future, and are very much in need of refugee protection. Indeed, it is important to keep in mind that the trafficking process, if uninterrupted, will result in exploitation and therefore serious harm. However, for the purposes of refugee law, it is essential to understand what harm exactly is experienced during trafficking and at what point in the trafficking process, as this will inform the State protection enquiry. UK and German courts do detail the harm experienced by applicants, which includes sexual exploitation in the majority of cases,[49] but also abduction, beatings and rape,[50] deprivation of liberty,[51] starvation and forced injection of drugs,[52] deprivation of medical treatment,[53] and forced labour or domestic servitude.[54] A human rights analysis of these harms shows that they are indeed serious. Rape,[55]

47 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 29.

48 ibid.

49 This applies to men as well as women. For example, in *FK v SSHD* [2015] UKUT (IAC) AA/08453/2014, a male Albanian minor was trafficked to Italy for sexual exploitation.

50 See eg *AM and BM (Trafficked women) Albania* CG [2010] UKUT 80 (IAC) paras 7, 22; *AZ (Trafficked women) Thailand* CG [2010] UKUT 118 (IAC) para 5; *ES (s82 NIA 2002, Negative NRM)* [2018] UKUT 335 (IAC) para 3; *MP (Trafficking–Sufficiency of Protection) Romania* [2005] UKIAT 00086 para 6; VG Aachen, 28 December 2017, 2 K 2224/15.A, para 9; VG Augsburg, 13 December 2017, Au 7 K 17.30060, para 18; VG München, 30 September 2013, M 23 K 11.30389, para 2.

51 See eg *AM and BM* (n 50) paras 7, 22; *AZ* (n 50) para 5; *ES* (n 50) para 3; *MP* (n 50) para 6.

52 See eg *AZ* (n 50) para 5.

53 See eg *EK (Article 4 ECHR – Anti-Trafficking Convention) Tanzania v SSHD* [2013] UKUT 00313 (IAC) para 27; VG Augsburg, 18 September 2012, Au 7 K 12.30184, 3.

54 See eg *MS (Pakistan) v SSHD* [2020] UKSC 9, [2020] Imm AR 967 para 4; *EK* (n 53) para 59; *HD* (n 21) para 206; *TT (Vietnam)* [2019] EWCA Civ 248, [2019] 2 WLUK 401 para 6; VG München, 17 November 2016, M 10 K 16.30286, para 7; M 23 K 11.30389 (n 46) para 2. For a discussion of how forced labour is distinguished from servitude and other related concepts, such as slavery, see Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 218–91.

55 In *Aydin v Turkey* App No 57/1996/676/866 (ECtHR, 25 September 1997) para 86, in the context of the rape of an applicant in detention, it was held that rape can amount to torture.

beatings,[56] and starvation[57] violate the right not to be subjected to torture, inhuman or degrading treatment.[58] The deprivation of medical treatment may violate the right to life[59] or may amount to inhuman or degrading treatment.[60] Forced injection of drugs can constitute a violation of the right to private and family life.[61] Deprivation of liberty[62] and forced labour[63] are themselves human rights violations.

A focus on the actual types of harm experienced during trafficking is important because it shows that (in the case of transnational trafficking) the majority of these harms are likely to take place outside the country of origin. As already mentioned, this raises difficult questions about the State's ability to protect against such harms. The courts, however, neglect to engage with these difficulties by relying on re-trafficking itself as the relevant harm, rather than considering the precise types of harm individuals face at different points during their trafficking experience. Since smuggling and trafficking exist along a spectrum and the former can turn into the latter,[64] re-trafficking does not necessarily begin in the country of origin. Yet, courts appear to conceive of re-trafficking itself as a harm which begins in the country of origin, an assumption that, in turn, informs their approach to State protection. As the next section shows, the resulting approaches to the State protection enquiry are unsatisfactory because they fail to engage sufficiently with the underlying reasons for re-trafficking.

2.3 State protection against re-trafficking

In UK and German case law, States are seen to be able to protect against re-trafficking in two main ways: first, by having anti-trafficking legislation in place and applying this effectively, and, secondly, by offering reception and reintegration measures for returning trafficked persons. This section refers to the former as the 'law enforcement' approach and to the latter as the 'reception and reintegration' approach to State protection.

The 'law enforcement' approach evaluates the State of origin's willingness and ability to implement anti-trafficking legislation, particularly with regard to prevention, investigation, and prosecution of trafficking. This approach was adopted, for example, in a 2004 judgment of the German Administrative Court (AC) Aachen (Verwaltungsgericht, VG), which concerned a Moldovan applicant who claimed to have lost her job due to the political activities of her mother.[65] To make ends meet, she was forced to take out a loan with an organization that would force her into prostitution if she defaulted on her repayments. The court found that there was sufficient State protection available since 'the Republic of Moldova prosecutes criminal acts of third parties according to its capacity' and the State could not be said to be unwilling or unable to protect since prosecutions of trafficking in women and forced prostitution had been

56 In *Tyrer v UK* App No 5856/72 (ECtHR, 25 April 1978) para 33, the court held that art 3 protects 'a person's dignity and physical integrity'. In the *Greek Case* App Nos 3321/67, 3322/67, 3323/67, 3344/67 (European Commission of Human Rights, 5 November 1969) 186, the European Commission of Human Rights, as it was at the time, held that 'inhuman treatment covers at least such treatment as deliberately causing severe suffering, mental or physical, which, in a particular situation, is unjustifiable'.

57 In *Ireland v United Kingdom* App No 5310/71 (ECtHR, 13 December 1977) para 167, deprivation of food and drink, together with other 'interrogation techniques', amounted to inhuman or degrading treatment.

58 ECHR (n 19) art 3.

59 In *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001) (para 219), the European Court of Human Rights held that this is the case 'where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally'.

60 *Paposhvili v Belgium* App No 41738/10 (ECtHR, 13 December 2016) para 206.

61 *X v Finland* App No 34806/04 (ECtHR, 3 July 2012) para 222.

62 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 9(1); ECHR (n 19) art 5.

63 ICCPR (n 62) art 8(3)(a); ECHR (n 19) art 4.

64 Angeliki Dimitriadi, 'The Interrelationship between Trafficking and Irregular Migration' in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (*Centre for European Policy Studies*, 2016) 66 <https://www.ceps.eu/wp-content/uploads/2016/02/Irregular%20Migration,%20Trafficking%20and%20SmugglingwithCovers.pdf> accessed 18 August 2022.

65 VG Aachen, 21 January 2004, 8 K 1220/02.A.

increasing.[66] UK judgments from around the same time took a similar stance. In *VD*, also a 2004 case, concerning an applicant who was kidnapped for the purpose of being sold into marriage, the court found a sufficiency of protection despite a need for 'further improvements' with regard to combating trafficking.[67] Meanwhile, in *MP*, a 2005 case concerning a Romanian woman who was kidnapped and forced into sexual exploitation, the court showed itself satisfied with a similar 'reasonable level of protection', based on the Romanian government's efforts to combat trafficking.[68] Similarly, in its 2010 judgment in *AM and BM*, a case concerning two Albanian women trafficked for sexual exploitation, the UK Upper Tribunal pointed to the mere existence, rather than the effectiveness, of reintegration programmes, police training, and the prosecution of traffickers, stating that '[a]lthough we accept that there is little in the way of witness protection that is effective, there is evidence that there have been prosecutions of police involved in trafficking'.[69]

In contrast, another judgment from the same year emphasized the importance of '*effectiveness*' of protection, which must 'be judged by its ability to deter and/or to prevent the form of persecution of which there was a risk, *not just punishment of it after the event*'.[70] Indeed, courts have come to recognize that the mere fact that a country of origin has outlawed human trafficking and prosecutes traffickers is not enough to establish State protection. In fact, the Upper Tribunal's 2016 judgment in *HD* questioned the relationship between anti-trafficking efforts and protection against re-trafficking, stating that 'there was inadequate evidence … to support a finding that [the anti-trafficking] measures were having a significant effect either on the number of victims trafficked for the first time or on the risk of returned victims of trafficking being trafficked again'.[71] The judgment stated further that '[m]erely because Nigeria is "doing its best" to meet its international obligations to prevent trafficking does not necessarily result in a finding that there is sufficiency of protection for those identified as being at risk of being trafficked'.[72] The same approach was reflected in a 2020 German judgment, in which the AC Magdeburg found that passing anti-trafficking legislation and prosecuting traffickers is not enough to protect against re-trafficking.[73] In another 2020 judgment, however, the AC Aachen insisted on the same reasoning employed in 2004 in discussing the case of a Nigerian woman who was trafficked to Italy for the purposes of prostitution, in the course of which she was locked up and beaten.[74] The court found that sufficient State protection existed, based on Nigeria having passed anti-trafficking legislation and prosecuting traffickers. The court also stated that the effectiveness of protection was not weakened by the fact that not all perpetrators are prosecuted or that women are discriminated against in Nigeria, including by being victimized rather than helped by police when seeking protection.[75]

As this statement from this rather problematic judgment shows, because the 'law enforcement' approach to State protection focuses on State efforts to punish perpetrators, rather than on ensuring protection for the individual trafficked person, it is unlikely to be effective. Against this background, it is necessary to delve into another aspect of the case law: the future risk enquiry. While it is not within the scope of this article to discuss in detail how risk of re-trafficking is established in UK and German case law, it is worth noting that courts in both countries rely on

66 ibid para 38 (author translation).
67 *VD (Trafficking) Albania* CG [2004] UKIAT 00115, para 16.3.
68 *MP* (n 50) para 106.
69 *AM and BM* (n 50) para 182.
70 *AZ* (n 50) para 59 (emphasis added).
71 *HD* (n 21) para 141.
72 ibid para 172.
73 VG Madgeburg, 28 January 2020, 6 A 40/19.
74 VG Aachen, 10 November 2020, 2 K 2521/18.A.
75 ibid para 56.

'indicators of vulnerability' in this context.[76] These indicators include, for example, '[r]ejection by [the applicant's] family', 'being psychologically damaged', which 'may render [the applicant] less able to find work or access employment and result in her being at enhanced risk of destitution', '[b]eing stigmatised and ostracised', '[h]aving been subjected to sexual abuse/exploitation during domestic servitude', experiencing destitution or poverty, as well as 'pressure from [the applicant's] family … to provide an income from sexual exploitation'.[77] Thus, factors such as lack of family support, mental health issues, lack of employment opportunities, societal stigma connected to a past trafficking experience, and general poverty make it 'difficult [for the applicant] to reintegrate into her home community' and to make a livelihood.[78] In short, socio-economic deprivation, brought about by a range of vulnerabilities, ultimately leads to re-trafficking.

It is important to understand the factors leading to re-trafficking in the context of the State protection enquiry because even where trafficking has been outlawed and traffickers are prosecuted, this does not address the underlying reasons that drive people to seek out traffickers. Thus, it is more appropriate for State protection to focus on trafficked persons themselves and to aim to reduce their demand for traffickers' 'services'. Rather than focusing only on States' efforts to deter or prosecute persecutors, the focus must be on what else the State can do to meaningfully protect individuals.

This is done, to an extent, with regard to the second type of State protection discussed in the case law, that is, the provision of reception and reintegration measures for returned trafficked persons. Under this approach, there is no State protection where there is a lack of rehabilitation and reintegration measures for trafficked persons. In *AM and BM*, the UK Upper Tribunal noted that such reception and reintegration measures include 'support to returned victims of trafficking … by support for shelters … [as well as] the rehabilitation of the victims of trafficking [through] the provision of micro loans and procedures to place former victims of trafficking into the job market'.[79] Thus, one aspect of the 'reception and reintegration' approach to State protection for trafficked persons is reception through dedicated shelters. In *PO*, it was held that protection was available in the form of a 'shelter where [the claimant] will be provided with the care and protection she needs'.[80] The AC Munich made a similar finding in refusing the protection claim of an Albanian applicant who had fled domestic violence and forced marriage by leaving the country with a man who had promised to marry her; once in Germany, however, he forced her into prostitution. The court decided that an internal protection alternative (IPA) was available to the claimant, since two shelters for trafficked women exist in Albania, one run by the State and the other by an non-governmental organization (NGO).[81] Thus, State protection may take the form of protection in shelters for trafficked persons (where the State itself runs or supports these shelters), or protection from non-State actors, usually NGOs. However, whether NGO-run shelters for trafficked persons should constitute protection against re-trafficking is questionable.[82] Even though EU law provides for the possibility of protection being delivered by 'parties or organisations, including international organisations', these must be entities that 'control[] the State or a substantial part of the territory of the State'.[83] In addition, where this type of

76 *HD* (n 21) para 169. The author has discussed the role of vulnerability indicators in establishing future risk of re-trafficking in detail elsewhere: Maja Grundler, '"Route Causes" and Consequences of Irregular (Re-)Migration: Vulnerability as an Indicator of Future Risk in Refugee Law' (2024) 20 International Journal of Law in Context 35.

77 *HD* (n 21) para 168. For similar vulnerability indicators, see also *AZ* (n 50); *AM and BM* (n 50); *TD and AD (trafficked women)* CG [2016] UKUT 92; *BT v SSHD* [2019] UKUT (IAC) PA/07306/2017; VG Stuttgart, 16 May 2014, A 7 K 1405/12; VG Stuttgart, 16 November 2020, A 1 K 8819/18, S770443.

78 *AZ* (n 50) para 148.

79 *AM and BM* (n 50) para 180.

80 *PO (Trafficked Women) Nigeria* CG [2009] UKAIT 00046, para 201.

81 VG München, 11 September 2007, M 11 K 06.51323, para 35.

82 O'Sullivan (n 24).

83 Recast Qualification Directive (n 18) art 7(1)(b). For a critical analysis of this provision, see Peers and others (n 23) 100–01.

protection is proposed, it must be assessed in more detail whether an individual will, in fact, be able to obtain a place in a shelter, how long they will be able to stay, and whether the 'care and protection' provided by a shelter, in fact, effectively protects against re-trafficking. Further, shelters specifically for trafficked women can cause them to be exposed to harm, as traffickers may try to recruit women from these shelters or women can be stigmatized if it becomes known that they live in such a shelter.[84] It is also worth noting that, since in many countries trafficking is still seen as an issue affecting only women, States may have reception and reintegration measures in place for women but not for men, and thus there may be a lack of State protection for male claimants.[85] Generally, the small number and poor quality of such shelters is seen as indicative of a failure of State protection,[86] and protection is ineffective if the trafficked person can stay only for a short period of time.[87]

The second aspect of the 'reception and reintegration' approach to State protection for trafficked persons concerns reintegration support. In a number of trafficking-based asylum claims, it has been suggested that reintegration assistance could negate the risk of experiencing destitution and/or of being re-trafficked. For example, in 2020, the AC Düsseldorf speculated that a Nigerian woman who had been trafficked to Italy for the purposes of prostitution would be eligible for a number of different government or NGO-run reintegration programmes on return to Nigeria.[88] However, the court failed to assess whether the appellant would have access to such support *in practice*. Similarly, the AC Cottbus suggested in a 2021 judgment that a Nigerian couple who had twice been kidnapped for ransom would be able to improve their economic situation in Nigeria by returning 'voluntarily' and thus making themselves eligible for reintegration programmes.[89] Likewise, in a number of UK cases, reintegration support has been seen as neutralizing the risk of re-trafficking. Thus, in *LTD*, the Upper Tribunal decided that an appellant who was trafficked to France, and later to the UK, could benefit from a UK 'resettlement package', which would reduce the risk of re-trafficking.[90] Similarly, in *NX*, a case concerning a trafficked woman from Albania with a young child, the appellant's claim failed, since internal relocation was found to be feasible, due to a '[reintegration] package provided by the IOM [International Organization for Migration] [which] clearly makes provision for individuals being returned with children'.[91] However, the 2019 case of *TSN*, a Vietnamese man trafficked to the UK, showed that protection through reintegration support may not be such a straightforward matter after all.[92] TSN was first trafficked to the UK in 2009 and then removed in 2014. By 2015, he was back in the UK, having once again been trafficked. The Upper Tribunal found that 'the appellant had received money under the [Facilitated Returns Scheme] on a previous return to Vietnam but this had not assisted him as he had been re-trafficked', and thus held that he was eligible for refugee status.[93] As Kelly notes, 'effective re-integration programmes' will 'address issues of housing, education, health, employment, substance abuse, and trauma' and the lack of such assistance 'plays an important part in re-trafficking'.[94] Thus, as the *TSN*

84 *AM and BM* (n 50) paras 42, 63, 97, 144.
85 See eg *BT* (n 77) paras 45, 50; *TVP v SSHD* [2018] UKUT (IAC) PA/02997/2018, para 24; *HVT v SSHD* [2018] UKUT (IAC) PA/03104/2017, para 6; *HC v SSHD* [2021] UKUT (IAC) PA/05060/2019, para 37.
86 A 7 K 1405/12 (n 77) 13; VG Wiesbaden, 14 March 2011, 3 K 1465/09.WI.A, 13–14.
87 The Upper Tribunal has noted that 'vulnerability is not … reduced following a six week stay in a … shelter'. *HD* (n 21) para 141. Even a two-year stay in a shelter may be insufficient to reduce risk. *MD v SSHD* [2021] UKUT (IAC) PA/12142/2019, para 63.
88 VG Düsseldorf, 15 December 2020, 27 K 2264/18.A, paras 55–60. See also 2 K 2521/18.A (n 74) para 88.
89 VG Cottbus, 11 January 2021, 9 K 1516/18.A, para 26. See also 2 K 2521/18.A (n 74) para 90.
90 *LTD v SSHD* [2015] UKUT (IAC) AA/13630/2011, paras 30–33.
91 *NX v SSHD* [2014] UKUT (IAC) AA/01621/2013, para 45.
92 *TSN v SSHD* [2019] UKUT (IAC) PA/07665/2017.
93 ibid para 3.
94 Elizabeth Kelly, *Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe* (*IOM*, 2002) 39 <https://publications.iom.int/system/files/pdf/mrs_11_2002.pdf> accessed 29 April 2020.

case shows, reintegration support, on its own, is unlikely to constitute effective protection against re-trafficking. In addition, where such support is provided by the sending State or an international organization, it should not be considered to constitute protection. By providing integration support, the sending country effectively acknowledges that there is a failure of State protection in the country of origin (since this country does not provide the requisite support). However, rather than granting refugee status based on this finding, it seeks to provide protection itself, through a grant of financial assistance. This goes against the principle that protection must be provided by the country of origin (or, according to EU law, entities controlling substantial parts of its territory),[95] and that it needs to be durable and meaningful in character.

Overall, the approaches taken by the UK and German courts to State protection against re-trafficking are unsatisfactory. The 'law enforcement' approach is unlikely to reduce risk below the 'well-founded fear' standard, as it does not address trafficked persons' need to rely on traffickers. While the 'reception and reintegration' approach does (partially) address this need, this approach, too, is ineffective as it fails to acknowledge the complexities underlying the decision to be re-trafficked and fails to investigate in more detail whether shelters for trafficked persons and reintegration assistance can really counter trafficked persons' vulnerabilities. Indeed, despite its prominence in the future risk enquiry, the vulnerability analysis is conspicuously absent from the State protection enquiry. It seems illogical to first identify the factors that put a person at risk of being re-trafficked, only to largely disregard them when it comes to the question of the availability of protection.

This article contends that this discrepancy stems from approaching (re-)trafficking as the relevant harm for the purposes of the persecution enquiry. Doing so puts the focus on the 'crime' of trafficking and leads courts to consider a 'law enforcement' approach to State protection, which is ineffective for addressing the individual's need for protection and countering the concomitant risk of being re-trafficked. The 'reception and reintegration' approach, meanwhile, is reductive. It focuses on (mainly female) 'victims' and their ability to access shelters, but does not enquire which services are, in fact, available in those shelters, and whether they address trafficked persons' vulnerabilities. Alternatively, it focuses on socio-economic deprivation, which is addressed through reintegration support (often provided by NGOs or the sending country, rather than the country of origin), but without taking account of trafficked persons' specific vulnerabilities that lead to such destitution and their need for *effective* protection in this context. As a result, these approaches to State protection are ill-suited to reducing risk for trafficked persons.

In light of these unsatisfactory approaches to State protection in the trafficking context, it is necessary to examine what effective protection against re-trafficking would look like. In this context, attention needs to be paid to the sequence and interplay of different types of harm, which, in turn, requires engaging with the fact that much of the harm experienced will take place outside the country of origin. Thus, the next part considers the points at which harm is experienced in the trafficking context and what this means for the State protection enquiry.

3. THE LOCUS OF PERSECUTION

3.1 Harm experienced outside the country of origin, State protection, and future risk

The judgments discussed above, and indeed the UNHCR Guidelines on Victims of Trafficking, show that fearing harm outside the country of origin presents no obstacle to an asylum claim. Yet, courts have struggled at times to comprehend how harm experienced outside the country of origin relates to future risk on return to that country. For example, in 2019, the UK Upper

95 Recast Qualification Directive (n 18) art 7(1).

Tribunal, in considering the case of an Ethiopian woman who was trafficked to Sudan, Lebanon, and France, stated that:

> After the appellant left Ethiopia around 2013 she endured almost unimaginable abuse as a domestic slave until she was brought to the UK in November 2016. The abuse she suffered was not in her home country but in Sudan and Lebanon and, finally, in France. The issue in her appeal, however, was whether she is currently at risk of persecution or serious harm in Ethiopia. Even taken at its highest, the evidence does not establish a real risk of persecution or serious harm in Ethiopia.[96]

Thus, the Tribunal failed to engage with how a previous trafficking experience might contribute to and exacerbate the vulnerabilities that lead to re-trafficking. Similarly, in a 2018 decision, the Bavarian Higher AC stated that 'inhuman treatment outside the country of origin is without relevance for asylum proceedings'.[97] The case concerned a request for permission to appeal, also by an Ethiopian woman, who was seeking protection based on having been 'treated like a slave' by her employer in Dubai. Even though the (somewhat scarce) facts of the case suggested that the applicant had been trafficked, the court did not discuss the possibility of re-trafficking or the applicant's circumstances upon return to Ethiopia and their effects.

The real difficulty in the cases discussed above is not that past harm (an indicator of future risk[98]) was experienced outside the country of origin. Trafficking-based asylum claims show that harm experienced outside the country of origin is clearly not 'without relevance for asylum proceedings'. Yet, the courts' confusion is understandable because the relationship between harm, State protection, and future risk is not immediately obvious. The courts' unwillingness to engage with harm that takes place outside the country of origin may stem from their understanding of State sovereignty and the resulting limitations on States' ability to protect their nationals once they are outside the State's territory.

Indeed, the principle of non-intervention limits States' ability to interfere with the way other States treat those within the latter's territory, including where the host State commits human rights violations.[99] Thus, destination States cannot intervene in the way countries of origin treat their citizens, nor can countries of origin intervene in the treatment encountered by their nationals once they have left the State's territory. Where a national is outside their country of origin, all that the State of origin is realistically able to do is to provide diplomatic protection.[100] However, this is only possible where another State is responsible for the injury of the State of origin's national and where 'all available and effective local legal remedies in the State alleged to be responsible for the injury' have been exhausted.[101] For the trafficking context, this means that, unless another State can be held responsible for harm experienced by a trafficked person on its territory or within its jurisdiction (and unless that person then makes their case in the courts of that State), the State of origin will not be able to provide protection. Discussing the responsibility of States of transit and destination for harm experienced by trafficked persons is not within the scope of this article. However, for the purposes of the State protection enquiry in refugee law, it should be noted that the diplomatic 'protection' in question merely entails that the 'protecting State may claim reparation from the respondent State in the form of restitution,

96 *HG v SSHD* [2019] UKUT (IAC) PA/10947/2018, para 19.
97 Bayerischer Verwaltungsgerichtshof, 9 August 2018, 8 ZB 18.31141, Headnote (author translation). See also 27 K 2264/18.A (n 88) para 3.
98 Hathaway and Foster (n 4) 165. See also Grahl-Madsen (n 4) 176–77; recast Qualification Directive (n 18) art 4(4).
99 Naeem Inayatullah, 'Beyond the Sovereignty Dilemma: Quasi-States as Social Construct' in Thomas J Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge University Press 2011) 50.
100 See individual opinion by Christian Tomuschat, *Lopez Burgos v Uruguay*, UN doc CCPR/C/13/D/52/1979 (29 July 1981).
101 John Dugard, 'Diplomatic Protection' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 1061.

compensation or satisfaction',[102] part of which should be 'transfer[red] to the injured person … subject to any reasonable deductions'.[103] Thus, this is a reparatory, backward-looking form of protection, available only once an injury has already occurred outside the State of origin's territory and thus unsuitable for addressing future risk under the Refugee Convention.

It is not clear from the case law whether courts which view harm experienced outside the country of origin as irrelevant to refugee status determination (RSD) do so because they have these difficulties in mind. What is clear, however, is that those courts which do accept that harm (in the form of re-trafficking) that occurs outside the country of origin can be taken into account during RSD do not engage with the difficulties this raises for the State protection enquiry. The remainder of this part attempts to tackle this problem which the courts conveniently ignore. Thus, section 3.2 examines the relationship between State protection and jurisdiction, and considers whether State action outside the country of origin, in the shape of consular assistance, constitutes effective protection for the purposes of refugee law.

3.2 State protection outside the country of origin?

Even though Grahl-Madsen, like other refugee law scholars, emphasizes that the decisive factor in the persecution enquiry is 'the place of the offensive acts or atrocities in the general situation prevailing in the country of origin',[104] persecution *can* take place with the individual in question located outside their country of origin. While the EU Qualification Directive in article 15(b), which deals with subsidiary protection, explicitly excludes this possibility by stating that the provision only applies to situations of 'torture or inhuman or degrading treatment or punishment of an applicant *in the country of origin*',[105] the Refugee Convention is not limited in a similar way. Hathaway and Foster note that although 'the basic inquiry into the existence of a well-founded fear [of being persecuted] focuses squarely on the risks faced *in the country of which the individual is a citizen*',[106] there is 'no need to find that the harm feared is one that would actually take place *inside* the home State, but simply that the risk of being persecuted *accounts* for the inability to return there'.[107] In this context, they give the example of the prohibition of re-entry, a 'denial of the right to freedom of movement and thus a serious harm',[108] which would take place with the person in question outside the country of origin.

The prohibition of re-entry example is relevant to better understanding the relationship between the location of the individual who experiences harm and the (protective) role of the State. If the prohibition of re-entry can be linked to a Convention ground, the individual in question will be a refugee *sur place*.[109] While in the context of re-trafficking, the persecutors are non-State actors, where a State prohibits a national's re-entry, the State itself is the persecutor. As such, failure of State protection is automatically established. Nevertheless, the prohibition of re-entry example is useful for understanding State protection in the context of trafficking because it illustrates that the State, which has the capacity to persecute or protect the individual, has this capacity only because it retains jurisdiction over the individual who is located outside its territory and whose re-entry is denied.[110]

102 ibid 1068.
103 'Draft Articles on Diplomatic Protection' (UN 2006) art 19(c).
104 Grahl-Madsen (n 4) 192.
105 Recast Qualification Directive (n 18) art 15(b). Notably, arts 15(a) and (c) of the Directive do not mention the country of origin, which suggests that the location of the harm feared is not significant where there is a risk of the death penalty or harm during armed conflict, respectively.
106 Hathaway and Foster (n 4) 50 (emphasis added).
107 ibid 250.
108 ibid 249.
109 UNHCR, 'Handbook' (n 33) paras 94–95.
110 The UN Human Rights Committee has established that issuing a passport to citizens is 'clearly a matter within the jurisdiction' of a State and refusal to do so interferes with the right to leave any country, including one's own. See eg *Vidal Martins v Uruguay*, UN doc CCPR/C/15/D/57/1979 (23 March 1982) para 7. By analogy, this reasoning may also be applied to cancelling an individual's passport, thus preventing re-entry, and the right to *enter* one's own country.

State protection against harm experienced in the context of re-trafficking, then, would require a link to the State of origin's jurisdiction. More specifically, it would require jurisdiction in the public international law sense of the term, since the State would have to be able to enforce its domestic law with regard to its national.[111] The State has jurisdiction to do this within its territory, but extraterritorially only in exceptional circumstances, for example, on diplomatic premises, or on board 'craft and vessels registered in, or flying the flag of, that State'.[112] Thus, persons already outside their country of origin and experiencing harm are normally only able to bring themselves under their State of origin's jurisdiction by approaching one of its embassies or consulates. In this context, it has been suggested that 'unwilling[ness] to avail [one]self of the protection of [one's] country [of nationality]' in the Refugee Convention's refugee definition should be interpreted as an unwillingness to take advantage of that country's diplomatic protection.[113] Fortin argues that 'the very wording of the definition clearly indicates that the protection that it alludes to is that exercised *outside the State's territory*'.[114] In this context, he conceives 'diplomatic protection' broadly to include consular assistance.[115] He argues that a failure of State protection would be established where:

> either the diplomatic or consular authorities refuse to intervene on behalf of nationals of their country when their rights are not respected by the authorities of the foreign country in which they are, or that, owing to well-founded fear of being persecuted, the nationals in question do not want to seek or to accept the protection of their diplomatic or consular authorities.[116]

As explained above, since 'refugee law is not concerned with assessing State responsibility, and is not retrospective but rather prospective in nature',[117] diplomatic protection is not the type of protection envisaged by the Refugee Convention. This leaves the question whether consular assistance constitutes effective protection against harm experienced outside the country of origin. Consular functions include rendering (immediate) help and assistance,[118] as well as 'issuing passports and travel documents to nationals of the sending State'.[119] Thus, in theory, a trafficked person could seek assistance from their State of origin's consulate (assuming that they can escape), bringing themselves within their home State's jurisdiction for the purposes of protection from harm. In this context, it is conceivable that a person at risk of harm outside the country of origin would be unable to avail themselves of the consular protection of their country – for example, due to a lack of consular relations between the country of origin and the host State[120] – or would be unwilling to do so. This unwillingness might stem from the fact that, on a practical level, availing oneself of consular assistance implies obtaining help in returning to the country of origin.[121] Thus, in the context of re-trafficking, protection in the form of consular assistance

111 Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 289–90.
112 *Banković v Belgium* App No 52207/99 (ECtHR, 12 December 2001) para 73.
113 Grahl-Madsen (n 4) 255; Antonio Fortin, 'The Meaning of Protection in the Refugee Definition' (2000) 12 International Journal of Refugee Law 548; *Januzi v SSHD* [2006] UKHL 5, [2006] 2 WLR 397 para 66.
114 Fortin (n 113) 564 (emphasis added).
115 Indeed, the two are sometimes confused and may partially overlap. See Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance' (2006) 66 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law 321.
116 Fortin (n 113) 565.
117 Hathaway and Foster (n 4) 301. On why it is unnecessary to establish State responsibility for persecution, see Goodwin-Gill and McAdam (n 5) 77.
118 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, art 5(e).
119 ibid art 5(d).
120 Grahl-Madsen (n 4) 256.
121 Walter Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15 Georgetown Immigration Law Journal 415, 428. See also Grahl-Madsen (n 4) 257. See further Goodwin-Gill and McAdam (n 5) 70.

is not effective because it does not resolve the question of what, precisely, the State can do to counter the risk of re-trafficking. Assuming a trafficked person is able to approach their country of origin's consulate in order to be issued with a passport which would, in theory, allow them to travel back to that country, they may not wish to return for fear of being trafficked again.

In summary, where harm is experienced outside the country of origin, approaching the concept of protection in the refugee definition as diplomatic or consular protection is unsatisfactory. Section 3.3 explores how harm taking place outside the country of origin and State protection being provided within that country can be reconciled with the requirement that the State of origin must have jurisdiction over the individual in question, without resorting to the 'external' consular protection option.

3.3 Sequential harms and the cumulative nature of persecution

What emerges from the discussion above is that the State of origin can only protect an individual as long as that individual is within the State's jurisdictional domain. This section considers the sequential nature of harm experienced in the context of trafficking and draws on the cumulative nature of persecution to argue that a State's failure to protect an individual while they are still within its territory leads to that individual experiencing additional harm outside the country of origin.

As explained above, reception and reintegration measures are seen as a type of State protection against re-trafficking. Thus, in addition to the 'law enforcement' approach, protection against socio-economic deprivation plays a major role in trafficking-based asylum claims. Indeed, this makes sense because, as mentioned in section 2.3, socio-economic deprivation brought about by vulnerabilities may lead to re-trafficking. While the 'law enforcement' approach focuses on punishing perpetrators, which cannot guarantee safety for an individual applicant, with the 'reception and reintegration' approach to protection, it is easier to determine whether such protection will be available to and effective for the individual in question.

Thus, although socio-economic deprivation is not normally a reason for refugee status in itself,[122] in the trafficking context, protecting against it is seen to also protect against re-trafficking. This can be explained with reference to the cumulative nature of persecution. According to the EU Qualification Directive, an act of persecution can 'be an accumulation of various measures'.[123] Similarly, Foster notes that a '"risk of 'being persecuted'" [is assessed] on the basis of an accumulation of all harm feared, even if some elements of harm would not individually be considered sufficiently serious to amount [to] persecution'.[124] Particularly in the case of asylum claims based on socio-economic deprivation, 'a fear of being persecuted may be established by an accumulation of a number of less serious violations'.[125] Significantly, socio-economic harm can also be found to be persecutory when 'combined with more "traditional" (ie, civil and political) forms of persecution'.[126] This should not detract from the fact that, under certain circumstances, socio-economic deprivation itself can form the basis of an asylum claim.[127] Rather, the cumulative nature of persecution is important where socio-economic deprivation in the country of origin simply does not reach the threshold of serious harm.

122 UNHCR, 'Handbook' (n 33) para 62.
123 Recast Qualification Directive (n 18) art 9(1)(b).
124 Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007) 93.
125 ibid 104.
126 ibid 132. See also Kate Jastram, 'Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution' in James C Simeon (ed), *Critical Issues in International Refugee Law* (Cambridge University Press 2010) 154.
127 Foster (n 124).

Based on the above, it is proposed that socio-economic deprivation experienced in the country of origin, which, in itself, does not amount to serious harm, can 'anchor' serious harm experienced *outside* the country of origin (as the result of leaving that country, in order to escape socio-economic deprivation) for the purpose of establishing a failure of State protection. Risk of (re-)trafficking can be inferred from risk of socio-economic deprivation (caused by intersecting vulnerabilities). This requires considering risks that may not materialize imminently. As Foster and others demonstrate with regard to establishing future risk in the context of armed conflict, 'while a fear of persecution must be current, the ill-treatment feared may occur in the present or the future. The test is whether it is reasonably foreseeable, which necessarily embodies a degree of speculation'.[128]

The relevant risk in the trafficking context, then, is one of persecution because the harm experienced is sequential and cumulative. The harm experienced outside the country of origin is likely to entail violations of civil and political rights, and thus more easily satisfies the serious harm threshold. Meanwhile, socio-economic deprivation provides the 'jurisdictional anchor' in the country of origin. A failure to protect against the (lesser) harm in the country of origin leads to additional (more severe) harm outside the country. This allows an understanding of persecution under which the State of origin's failure to protect against harm experienced in its territory results in additional harm experienced outside the country. A similar approach to protection has been accepted in the context of the IPA enquiry, which acknowledges a link between socio-economic deprivation and subsequent harm. UNCHR notes that '[if] the situation [in the proposed area of relocation] is such that the claimant will be unable to earn a living or to access accommodation or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative'.[129] Further, 'if the conditions [in the proposed area of relocation] are such that the claimant may be compelled to go back to the original area of persecution, or indeed to another part of the country where persecution or other forms of serious harm may be a possibility', an IPA is not viable.[130] While the IPA enquiry concerns the availability of protection against socio-economic deprivation in the same country in which persecution is feared, socio-economic deprivation may also drive people across borders. Both in the context of the IPA enquiry and in the trafficking context, as a consequence of escaping socio-economic harm, individuals experience other types of serious harm, so that a failure to protect against the former results in the latter.

Effective protection against re-trafficking, then, would entail guaranteeing individuals' socio-economic rights in a manner that takes account of their individual vulnerabilities and obviates the need for seeking economic security through (re-)trafficking. Thus, the level at which protection can be considered effective should not be measured with reference to whether socio-economic rights are guaranteed in the country of origin generally, since economic, social and cultural rights are subject to progressive realization.[131] Likewise, effective protection should not be measured by reference to the (high) level of socio-economic rights guaranteed to nationals of the country of destination generally, nor against the (low) level of such rights foreseen for asylum seekers.[132] Rather, what constitutes effective protection will depend on the

128 Michelle Foster and others, '"Time" in Refugee Status Determination in Australia and the United Kingdom: A Clear and Present Danger from Armed Conflict?' (2022) 34 International Journal of Refugee Law 163, 177.

129 UNHCR, 'Guidelines on International Protection No 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/03/04 (23 July 2003) para 29.

130 ibid para 21; cf Jessica Schultz, *The Internal Protection Alternative in Refugee Law: Treaty Basis and Scope of Application under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (Brill Nijhoff 2019) 167. See also Hathaway and Foster (n 4) 348–49.

131 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 2(1).

132 See eg Case C-179/11 *CIMADE, GISTI v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, EU:C:2012:594; Case C-79/13 *Saciri* EU:C:2014:103.

vulnerabilities of the individual protection seeker. If the State of origin can address (the cumulative effects of) an individual's mental health issues, stigmatization and so forth, and the resulting socio-economic deprivation, State protection will be established. If, however, one or several vulnerabilities cannot be effectively addressed through reception and reintegration measures, and thus the risk of re-trafficking remains, there will be a failure of State protection.

This constitutes a high threshold for effective State protection, which many countries of origin are unlikely to be able to meet. As a result, courts in countries of destination may be reluctant to accept this high threshold. Indeed, in the context of cases dealing with a risk of destitution under article 3 of the European Convention on Human Rights,[133] and also in cases dealing with the availability of an IPA,[134] courts have returned applicants to face extreme poverty. However, what distinguishes the present argument from cases in which protection was refused, despite a risk of destitution, is that socio-economic deprivation (caused by a range of vulnerabilities) is material to the risk of re-trafficking, and thus to the question of persecution. Failure by the country of origin to provide effective protection against socio-economic deprivation not only leads to poverty, but may lead to violations of civil and political rights as a consequence. Courts must take this into account when making their assessment.

4. CONCLUSION

The case law discussed in this article shows that courts fail to tackle a number of difficult questions raised in asylum claims based on a risk of re-trafficking. Although the courts accept that, where such a risk exists, it may form the basis for refugee status, they do not engage sufficiently with the relationship between future risk, harm, and State protection. Although the courts do examine risk factors for re-trafficking in detail and explain that this risk can be established based on a range of vulnerability indicators, they do not return to these indicators in the context of discussing harm and State protection. Instead, the courts designate re-trafficking itself as the relevant harm feared, without exploring exactly what types of harm re-trafficking entails and the points in the trafficking experience at which the different types of harm manifest. As a result, the State protection enquiry focuses on State responses to the crime of trafficking and only marginally on measures that can be taken to reduce trafficked persons' vulnerability to re-trafficking.

This article proposed that to gain a better understanding of effective State protection in the trafficking context, it is necessary to consider the vulnerabilities that lead to re-trafficking as relevant to the State protection enquiry. These vulnerabilities cause trafficked persons to experience socio-economic deprivation, which, in itself, is unlikely to afford them refugee status. Thus, this article suggested that persecutory harm in the trafficking context should be understood as a sequence of harms. Socio-economic deprivation (caused by vulnerabilities) leads to re-trafficking and thus to violations of civil and political rights outside the country of origin. Cumulatively, these different types of harm amount to persecution because the State's failure to address trafficked persons' vulnerabilities while they are still within that State's jurisdiction causes them to experience additional harm outside the country of origin.

This approach reconciles the apparent difficulties created by harm being experienced outside the country of origin and protection being limited to that country's jurisdictional domain. Since the relevant harm experienced is not 're-trafficking', but a sequence of harms in the State of origin and outside it, this approach to persecution also opens up the possibility of considering harm experienced outside the country of origin in contexts other than that of re-trafficking. Indeed, it is conceivable that individuals with no prior trafficking experience are similarly vulnerable

133 For example, *SSHD v Said* [2016] EWCA Civ 442, [2016] 5 WLUK 88.
134 For example, *Januzi v SSHD* [2006] UKHL 5, [2006] 2 WLR 397.

to trafficked persons,[135] but turn to smugglers rather than traffickers in order to address these vulnerabilities through migration. What is more, irregular migration is extremely dangerous and entails types of harm strikingly similar to those experienced in the trafficking context, such as physical and sexual violence, deprivation of liberty, and forced labour.[136] Thus, individuals normally considered to be 'economic migrants' or simply 'irregular migrants' might instead be reconceptualized as 'refugees', provided they can meet all elements of the refugee definition. In summary, reconsidering the locus of persecution may lead to a broader class of claimants being included as refugees under the Refugee Convention.

135 Grundler (n 76).
136 UNHCR, 'Desperate Journeys: Refugees and Migrants Entering and Crossing Europe via the Mediterranean and Western Balkans Routes' (February 2017) <https://www.unhcr.org/58b449f54> accessed 19 August 2022.