Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

REFERENCE:
OL GBR 11/2021

5 November 2021

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of slavery, including its causes and consequences and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 44/4, 43/6, 42/10 and 40/16.

In this connection, we would like to bring to the attention of your Excellency's Government our concerns about **the Nationality and Borders Bill and its compliance with the State's obligations under international law to prevent trafficking in persons, and assist and protect all victims of trafficking, without discrimination, as well as on the potential impact on the human rights of victims of trafficking and of contemporary forms of slavery**.

We note that the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("the Palermo Protocol") ratified by your Excellency's Government on 9 February 2006 aims to: (i) prevent and combat trafficking in persons, paying particular attention to women and children; (ii) protect and assist the victims of such trafficking, with full respect for their human rights; (iii) promote cooperation among States Parties in order to meet those objectives (Article 2).

Under the terms of the Protocol, State Parties are required to take into account, "the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children". We are concerned that the Nationality and Borders Bill, as it stands now, does not distinguish between adult and child victims of trafficking. Consequently, the special needs of victims of trafficking and contemporary forms of slavery, in particular child victims, would not be recognised in Part 4 of this Bill. We note that the OHCHR *Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1) specifically address the obligations of States concerning child victims of trafficking:

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

We bring to the attention of your Excellency's Government, the obligations arising under the Convention on the Rights of the Child, ratified by your Excellency's Government on 16 December 1991, applicable to child victims of trafficking and contemporary forms of slavery. As is noted in the Joint General Comment No. 3 (2017)

of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, States must ensure the, "primacy of the rights of the child in the context of international migration" (CMW/C/GC/3-CRC/C/GC/22, para.13) States are required to ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases, and to undertake best interests assessments and determination procedures: "as part of, or to inform, migration related and other decisions that affect migrant children" (CMW/C/GC/3-CRC/C/GC/22, para. 31). We are concerned that there is no recognition of the primacy of the rights of the child, or of the State's obligation to ensure the protection of migrant child victims of trafficking and contemporary forms of slavery, including through the implementation of best interests assessments and determination procedures in migration related decisions.

Clauses in the Bill relating to the identification of victims of trafficking and contemporary forms of slavery

At the outset, we are concerned that moving regulatory power to define 'victim of slavery' and 'victim of human trafficking' to the Nationality and Borders Bill from the Modern Slavery Act 2015 would suggest that human trafficking and contemporary forms of slavery are exclusively linked to immigration, and may further add to difficulties in recognizing the scale and nature of internal trafficking and exploitation. The European Court of Human Rights, in *S.M. v Croatia,* confirmed that internal trafficking in persons comes within the scope of Article 4 ECHR.[1]

We are also concerned that Part 5 of the Bill would not fulfil the State's obligation to identify victims of trafficking and contemporary forms of slavery. As is noted in the *Chapeau* to Guideline 2 of the *OHCHR Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1)*:*

> "A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place."

Specifically, clause 57 (Provision of information relating to being a victim of slavery or human trafficking); Clause 58 (Late compliance with slavery or trafficking information notice: damage to credibility) of the Bill would raise concerns in relation to the State's obligations to identify and assist migrant victims of trafficking and contemporary forms of slavery under international law, and to recognise the impact of trauma on them. Immigration and modern slavery decision-making processes would be conflated which potentially puts the effectiveness of ongoing antislavery efforts in the United Kingdom at risk. Furthermore, the provisions would apply only to those who have made a protection claim or human rights claim and would be therefore discriminatory between victims.

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

[1] S.M. v. Croatia, Application no. 60561/14 (Judgment of 25 June 2020), para 260.

> "Victims are often unwilling to come forward to law enforcement or public protection agencies, not seeing themselves as victims, or fearing further reprisals from their abusers. In particular, there may be particular social and cultural barriers to men identifying themselves as victims. Victims may also not always be recognised as victims of modern slavery by those who come into contact with them."

The special needs of victims of trafficking and contemporary forms of slavery, in particular child victims, would not be recognised in Clauses 57 and 58 of the Bill.

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

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

The obligation on States to identify victims of trafficking is stated in CEDAW General Recommendation no.38, 2020, on trafficking in women and girls in the context of global migration, which specifically states:

> "International human rights law imposes positive obligations on States to identify victims of trafficking. This duty is placed firmly on States irrespective of the lack of self-identification by a victim". (CEDAW /C / GC/ 38, para 38)

Further, CEDAW highlights the specific obstacles to reporting and disclosure for survivors of trafficking:

> "Survivors are often reluctant to self-identify and disclose their traffickers for fear of retaliation, due to lack of information on the crime and where to report it, and fear of engaging with authorities, including being detained, prosecuted, punished and deported." (CEDAW /C / GC/ 38, para 38)

The Special Rapporteur on the human rights of migrants also highlighted in his report on access to justice for migrant persons that migrants who are victims of trafficking are deeply distrustful of the justice system and afraid of the police, and reminded that, under international law, States have a duty to protect migrants at all stages of the migratory process and to provide them with access to justice to obtain redress for any human rights violations that they experience. In this regard, the Special Rapporteur recommended to establish firewalls between immigration enforcement and public services to allow access to justice for all migrants without fear of being reported, detained and deported (A/73/178/Rev.1, par. 75 (h)).

The positive obligation on states to identify victims of trafficking and contemporary forms of slavery has been set out in a series of cases arising under Article

4 European Convention on Human Rights (ECHR), ratified by Your Excellency's government on 8 March 1953, (see, *inter alia*, *LE v Greece* App No 71545/12 (ECtHR, 21 January 2016). The consequences of the failure of the State to identify, assist, and protect victims were highlighted in the recent judgment in *V.C.L. and A.N. v. the United Kingdom*,[2] where the failure to identify the victims resulted in a breach of the non-punishment principle, and violations of Articles 4 (prohibition of slavery, servitude and forced or compulsory labour) and Article 6 (right to fair trial) of ECHR, In *V.C.L. and A.N.* the European Court of Human Rights held that:

> "The State cannot, … rely on any failings by a legal representative or indeed by the failure of a defendant – especially a minor defendant – to tell the police or his legal representative that he was a victim of trafficking. As the 2009 CPS guidance itself states, child victims of trafficking are a particularly vulnerable group who may not be aware that they have been trafficked, or who may be too afraid to disclose this information to the authorities […]. Consequently, they cannot be required to self-identify or be penalised for failing to do so."[3]

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

> "When the SCA assesses the credibility of a claim, there may be mitigating reasons why a potential victim of modern slavery is incoherent, inconsistent or delays giving details of material facts" (p. 71).

As has been highlighted repeatedly by the European Court of Human Rights, Article 4 ECHR entails both substantive and procedural obligations, including the obligations to identify victims and to investigate situations of trafficking and contemporary forms of slavery. In *Rantsev v. Cyprus and Russia,* the Court highlighted that this obligation is not dependent on a complaint from a victim, and stated at para 288:

> "Like Articles 2 and 3, Article 4 also entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next of kin: once the matter has come to the attention of the authorities they must act of their own motion […] For an investigation to be effective, it must be independent from those implicated in the events. It must also be capable of leading to the identification

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2 *V.C.L. and A.N.* v. U.K. (applications nos. 77587/12 and 74603/12), Judgment of 16 February 2021. paras. 163-183, 194-210.

3 V.C.L. and A.N. v. U.K. (applications nos. 77587/12 and 74603/12), Judgment of 16 February 2021, para 199.

and punishment of individuals responsible, an obligation not of result but of means."

Again, in *S.M v Croatia,* the Court set out the positive obligations placed upon the State, and the importance of not placing responsibility on the victim:

> "In this connection it is important to stress that, in accordance with their procedural obligation, the authorities must act of their own motion once the matter has come to their attention. In particular, they cannot leave it to the initiative of the victim to take responsibility for the conduct of any investigatory procedures."[4]

Further, in *S.M. v. Croatia*, the Court highlighted the specific impact of trauma on victims of trafficking and contemporary forms of slavery, citing the conclusions of the Council of Europe monitoring body, the Group of Experts on Action against Trafficking (GRETA):

> "[…] it has already been recognised in the work of GRETA and other expert bodies that there may be different reasons why victims of human trafficking and different forms of sexual abuse may be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma must be taken into account."[5]

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

> "[…] victims were sometimes afraid or reluctant to make depositions because of threats of revenge from the perpetrators or lack of trust in the effectiveness of the criminal justice system."[6]

We note that 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 ("the Anti-trafficking Directive") also requires States to recognize the specific difficulties faced by victims of trafficking in disclosing information and cooperating with authorities. Article 9 of the Anti-Trafficking Directive provides:

> "1. Member States shall ensure that investigation into or prosecution of offences referred to in Articles 2 and 3 is not dependent on reporting or accusation by a victim and that criminal proceedings may continue even if the victim has withdrawn his or her statement."

In its first report on the progress made in the fight against trafficking in human beings dated 19 May 2016, the European Commission noted that placing an "excessive

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4 *S.M. v Croatia* Application no. 60561/14, (Judgment of 25 June 2020), para 314
5 S.M. v Croatia Application no. 60561/14, (Judgment of 25 June 2020), para 344
6 S.M. v Croatia Application no. 60561/14, (Judgment of 25 June 2020), para 260

burden" on victims hinders the effectiveness of criminal investigations and may cause secondary trauma:

> "Increasing the number of investigations and prosecutions is one of the key priorities of the EU legal and policy framework addressing trafficking in human beings. However, it is also one of the key challenges reported by the Member States. […] In particular, practitioners note that excessive burden is placed on victims and their testimonies both before and during criminal proceedings for evidence gathering, while, according to the Anti-trafficking Directive, **investigative tools and approaches should ensure that victims, either acting as witness or not, are not burdened excessively during procedures that can cause secondary trauma to them**." [7]

We are concerned that Clauses 57 and 58 of the Bill would not recognise the rights of victims of trafficking and contemporary forms of slavery with disabilities who may face additional barriers to reporting of trafficking, and to identification as victims. The trafficking process and resulting exploitation may themselves be a cause of disability. The Report of the Special Rapporteur on Trafficking in Persons, especially women and children, on the *Implementation of the Non-Punishment Principle* (2021), provides that:

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

The trauma suffered by many survivors of trafficking and contemporary forms of slavery is well documented.[8] Placing the burden of identification – or self-identification – on victims, fails to fulfil the State's positive obligations arising under international human rights law, and under Article 4 of the ECHR, read in conjunction with the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), ratified by Your Excellency's government on 17 December 2008, specifically Article 10 (Identification of the Victims). Article 10(2) provides:

> "[e]ach Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of … (trafficking in human beings) has been completed by the competent authorities …".

We also note that Clause 59 would change the threshold for reasonable grounds decision-making within the national referral mechanism (NRM), from reasonable

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[7] *Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims* COM(2016) 267 final, para 206.

[8] Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking (2010) at p.72

grounds to believe that a person 'may be a victim' to, 'is a victim'. This increase in the threshold for identification of victims would not address the difficulties of identification of victims of trafficking, already highlighted by the UN Committee on the Elimination of Discrimination against Women, the UN Committee Against Torture,[9] and GRETA. Clause 59 may exacerbate the problem of low NRM referrals compared to the estimated prevalence of trafficking and contemporary forms of slavery in the United Kingdom. Furthermore, it is unclear why regulations defining victims would be included in immigration law rather than in the Modern Slavery Act.

"Timely identification of victims is essential to ensuring effective access to assistance and protection, and to ensuring that effective investigations are undertaken and access to justice ensured. The lower rate of identification of victims of trafficking for purposes of labour exploitation has previously been highlighted by GRETA, who have called upon the UK authorities to ensure a "proactive approach to the identification of victims of trafficking for the purpose of labour exploitation."[10]

We are concerned that Clause 60 would reduce the minimum period of assistance before issuance of a conclusive grounds decision from 45 to 30 days. It is important to note that the period of 30 days referred to in ECAT, Article 13(1), is a specified minimum, "a recovery and reflection period of at least 30 days".

The Explanatory Report to ECAT highlights the purpose of the recovery and reflection period:

> "As an important guarantee for victims and serves a number of purposes. One of the purposes of this period is to allow victims to recover and escape the influence of traffickers. Victims' recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability. […] the period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal."[11]

We are concerned that the reduction from 45 days to 30 days would be a regressive measure, lowering the standard of human rights protection and protection afforded to potential victims of trafficking or contemporary forms of slavery currently provided by the State. As such, it would be contrary to the objective and purpose of international law on human trafficking and contemporary forms of slavery, to ensure effective protection of the human rights of victims and to ensure non-regression in human rights protection.

The positive obligations arising under Article 4 ECHR, to ensure that victims of trafficking and contemporary forms of slavery are provided with assistance and protection, have been recognised in domestic courts in the United Kingdom in K & AM v SSHD:

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9 UN Doc. CAT/C/GBR/CO/6, para.58

10 See Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom: Second Evaluation Report, GRETA(2016)21, para.167

11 Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, 2005, para 174

"[…] I am in no doubt Article 4 does indeed carry with it the positive obligations to provide appropriate support and assistance to the victims". [12]

As stated in Recital 18 of the Anti-Trafficking Directive, and cited in K & AM v SSHD:

"The assistance and support provided should include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers."[13]

We also highlight the obligation on the UK authorities to ensure that the specific rights of victims of trafficking or contemporary forms of slavery with disabilities are addressed, taking account of rights to assistance and reasonable accommodation required. Reducing the period of recovery and reflection from 45 to 30 days, would further reduce the time ensured to victims of trafficking with disabilities, limiting their possibility of recovery, and failing to fulfil their rights to assistance and protection, without discrimination.

We are concerned that Clause 62 of the Bill would be in breach of the State's international legal obligations to identify, assist and protect all victims of trafficking or contemporary forms of slavery, without discrimination and without exception.

Clause 62, as it stands now, provides that where a person is deemed to be a "threat to public order" or has claimed to be a victim of slavery or trafficking in "bad faith", the requirement to make a conclusive grounds decision in relation to the person is removed, as is any prohibition on removing the person from, or requiring them to leave, the United Kingdom (Clause 62(1)-(2)). We are particularly concerned that the 'threat to public order' provision would exclude protection to victims of trafficking groomed online or in person who may have traveled to conflict sites - particularly those where designated terrorist groups are active - and experience a range of human rights violations as a victim of trafficking but be denied protection based on the status of the trafficker with whom he/she was associated. Clause 62(3) would set out a non-exhaustive list of circumstances in which a person is a threat to public order.

We remind your Excellency's Government of the Concluding Observations of the UN Committee Against Torture (2019):

"[…] the State party should ensure that any legislative changes do not diminish the State party's current level of legal protections regarding the prohibition of torture and other ill-treatment." (CAT/C/GBR/CO/6, para 11)

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

[12] UK High Court of Justice Queen's Bench Division Administrative Court, [2018] EWHC 2951 (Admin), (per Mostyn J) at para 37

[13] UK High Court of Justice Queen's Bench Division Administrative Court, [2018] EWHC 2951 (Admin), per Mostyn J, at para 26

explanatory report to ECAT reaffirms the crucial role of identification, providing that, "failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights".[14] As was noted by the European Court of Human Rights in *V.C.L. and A.N. v* UK:

> "The member States' positive obligations under Article 4 of the Convention must be construed in light of the Council of Europe's Anti-Trafficking Convention and be seen as requiring not only prevention but also victim protection and investigation. The Court is guided by the Anti-Trafficking Convention and the manner in which it has been interpreted by GRETA." [15]

Again, as the Court noted at para 151, (citing *Siliadin v. France,*[16] and *Rantsev v. Cyprus and Russia)*:[17]

> "Article 4 entails a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour […]. In order to comply with this obligation, member States are required to put in place a legislative and administrative framework to prevent and punish trafficking and to protect victims" (see Rantsev, cited above, § 285).

The obligation to identify victims of trafficking or contemporary forms of slavery is required under the State's positive obligations to take protective operational measures under Article 4 ECHR, as recognised by the European Court of Human Rights. We note that the obligation to identify victims of trafficking or contemporary forms of slavery does not impose an "impossible burden" on the State, and, as such, comes within the scope of protective operational measures that must be taken by States to meet their obligations under the procedural limb of Article 4 ECHR.

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

We highlight the State's obligation of non-refoulement, a principle of customary international law, and the obligations accepted under the *Palermo Protocol,* specifically Article 14, which states:

> "1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

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14 Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Explanatory report, para 127.
15 V.C.L. and A.N. v. U.K. (applications nos. 77587/12 and 74603/12), Judgment of 16 February 2021 para 150
16 Siliadin v. France, Application no 73316/01 (Judgment of 26 October 2005)
17 Rantsev v. Cyprus and Russia, Application no. 25965/04 (Judgment of 7 January 2010)

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination."

The principle of non-refoulement is also codified in article 3 of the Convention Against Torture, to which to which the United Kingdom of Great Britain and Northern Ireland is a party since December 1988. Article 3 of the Convention provides that no State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds to believe that he would be in danger of being subjected to torture, ill-treatment or other irreparable harm. As an inherent element of the prohibition of torture and other forms of ill-treatment, the prohibition of refoulement under international human rights law is also more expansive than the protections afforded under refugee law insofar as it applies to any form of removal or transfer of persons, regardless of their status or grounds for seeking protection, and is characterized by its absolute nature without any exception.

We remind your Excellency's Government of the obligation to ensure that the return of a migrant who has been victim of trafficking is safe, and preferably voluntary, and as stated in Article 16(2) of ECAT:

"[…] with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim".

Concerning Clauses 62(3) (g) and (h), we remind Your Excellency's Government that the obligation to identify victims of trafficking or contemporary forms of slavery applies without exception, and regardless of the status or outcome of other migration related decisions. We also highlight the prohibition of *refoulement,* and the obligation on the State under Article 9(1) (b) of the Palermo Protocol:

"To protect victims of trafficking in persons, especially women and children, from revictimization."

As has been noted by GRETA, in its Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection:

"The Convention recognizes that trafficked people may have international protection needs, and it requires Parties to duly assess such protection needs. The essence of international protection is to provide relief from a potential future danger. Accordingly, the duty of international protection applies not only to victims of trafficking, but also to those at risk of being trafficked, should they return to their country of origin. Any removal of a person to a territory where they are at risk of being trafficked will constitute a violation of the principle of non-refoulement."[18]

We remind your Excellency's Government that Article 40(4) of ECAT specifically provides:

[18] GRETA, Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection, 2020, para. 15

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

We are concerned that Clause 62 would appear to apply also to child victims of trafficking and contemporary forms of slavery and children at risk of trafficking. We remind Your Excellency's Government of the obligation under the Convention on the Rights of the Child (CRC), to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind. (Article 2).

The Convention on the Rights of the Child provides that:

> "[…] non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of States parties' action or inaction." (CMW/C/GC/3-CRC/C/GC/22, para 46)[19]

We highlight the State's obligations under ECAT to ensure that:

> "Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child." (Article 16(7))

As is highlighted in the Report of the Special Rapporteur on Trafficking in Persons, especially women and children, on the Implementation of the Principle of Non-Punishment, the principle of non-punishment applies in respect of criminal, civil, administrative and immigration offences, regardless of the gravity or seriousness of the offence committed. (A/HRC/47/34, para 37)

We are concerned that Clause 62(3) would be in violation of the State's obligation to ensure non-punishment of victims of trafficking or contemporary forms of slavery for any unlawful acts that that are a direct consequence of trafficking. The obligation of non-punishment arises under Article 4 ECHR, and is essential to the right to a fair trial (Article 6 ECHR), as recognised recently by the European Court of Human Rights in *V.C.L. and A.N. v United Kingdom.*

The introduction of a "reasonable grounds to suspect" ground, would further lower the human rights protection provided to victims, and would fail to ensure effective protection to victims of trafficking for the purpose of forced criminality.

Clauses relating to trafficked persons seeking asylum

We are concerned that the Bill would make it a criminal offence for an asylum-seeker to arrive in the United Kingdom without an entry clearance. As has been noted by the UN High Commissioner for Refugees, in their *Observations on the Nationality*

[19] See also CRC Articles 5, 22 and 37

and Borders Bill, Bill 141, 2021-22, this provision would apply even where an asylum seeker claims asylum immediately upon arrival, regardless of their mode of travel and would also apply to victims of trafficking seeking asylum. As such, it would fail to ensure respect for the principle of non-punishment, and to ensure the right of victims of trafficking to seek and to enjoy asylum. As a consequence, the Nationality and Borders Bill could penalize those who enter the United Kingdom without having a choice regarding the circumstances under which they enter the country. As a result, migrants seeking protection could be punished for being trafficked to the United Kingdom. This may play into the hands of their exploiters, including of criminal networks. This would seem to contradict the efforts undertaken by your Excellency's Government in addressing trafficking and contemporary forms of slavery.

We remind your Excellency's Government of the obligation to ensure that victims of trafficking, are given full opportunity to make a claim for asylum, and not penalized for their mode of entry to the State. We note that the principle of non-punishment is included in the specific protection afforded under article 31 of the 1951 Convention relating to the Status of Refugees, which protects refugees from being penalized for illegal entry and presence and is applicable to trafficked persons who may be entitled to refugee status or other forms of international protection. (A/HRC/47/34, para 35)

In accordance with the provisions of international human rights law, irregular or clandestine entries should not be treated as criminal offences: the act of seeking asylum is legal, as the right to seek and enjoy asylum is a human right recognised in Article 14 of the Universal Declaration of Human Rights of 1948. The exercise of this right is not subject to the regularity of arrival, and in reality, asylum-seekers are often forced by their circumstances to arrive at or enter a territory without prior authorization. As the Special Rapporteur highlighted in his report on the means to address the human rights impact of pushbacks of migrants on land and at sea, effective access to territory is an essential precondition for exercising the right to seek asylum (A/HRC/47/30, parr. 43). On the other hand, criminalising irregular migrants based on their immigration status can lead to other human rights violations.

As is stated in the Explanatory Report to ECAT states:

> "The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of non-refoulement."[20]

We are concerned that Clauses 21 (damage to credibility) and 25 (late provision of evidence), may be particularly harmful to victims of trafficking seeking asylum. As noted above, victims of trafficking may face particular difficulties in disclosing information on their experiences of trafficking, including fear of reprisals from traffickers, against victims and their families. As is highlighted in the UNHCR *Guidelines on International Protection: The application of Article 1A(2) of the 1951*

[20] Council of Europe Convention on Action against Trafficking in Human Beings 2005, Explanatory Report, para 377

Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (2006):

> "Trafficked women and children can be particularly susceptible to serious reprisals by traffickers after their escape and/or upon return, as well as to a real possibility of being re-trafficked or of being subjected to severe family or community ostracism and/or severe discrimination". (para 19)

The UNHCR Guidelines further provide that assistance to victims of trafficking seeking asylum, should be provided in an age and gender sensitive manner, they note that victims of trafficking may rightly be considered as victims of gender-related persecution:

> "They will have been subjected in many, if not most, cases to severe breaches of their basic human rights, including inhuman or degrading treatment, and in some instances, torture." (para 47)

We remind your Excellency's Government of the obligation to ensure the rights of all victims of trafficking to seek and enjoy asylum, without discrimination. As has been noted by UNHCR in its Note on the Bill, "the attempt to create two different classes of recognised refugees is inconsistent with the Refugee Convention and has no basis in international law."

With regard to Clause 32: Article 1(A)(2): reasons for persecution, we are concerned that the proposed narrowing of the 'particular social group' ground, would have a negative impact on the victims of trafficking seeking asylum. It would depart from established UK jurisprudence, and from UNHCR Guidelines on International Protection 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees".[21] As was clearly articulated by Lord Bingham in Secretary of State for the Home Department v. K [2006] UKHL 46 (K and Fornah):

> "If [Article 10 of the Qualification Directive] were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of subparagraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority."

Trafficked persons have been recognised as a Particular Social Group (PSG) on the basis of their past trafficking experience in a number of cases, including, *inter alia*, *MK (Lesbians) Albania CG* [2009] UKAIT 00036, *SSHD v TAN (Vietnam) PA/04075/2017* (UKUT (IAC), 31 January 2018), *JFK (China) PA/06854/2016* (UKUT (IAC), 8 February 2018), and *HVT (Vietnam) PA/03104/2017* (UKUT (IAC), 8 October 2018). In the former case, *HVT (Vietnam)*, in particular, the judge of the Upper Tribunal found that the shared experience of having been trafficking for the purpose of sexual exploitation amounted to a common immutable characteristic, and that such element was sufficient for the claimant to qualify as a member of a PSG.

[21] HCR/GIP/02/02, 7 May 2002.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the information mentioned

2. Please provide detailed information on how your Excellency's Government intends to proceed with this pending legislation and how its provisions comply with United Kingdom's obligations under the international legal framework of human rights and refugee laws, including in relation to the protection of victims of trafficking in persons and contemporary forms of slavery

3. Please provide information on any measures that your Excellency's Government has taken or intends to take in order to implement the recommendations by human rights bodies, referred to above.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Siobhán Mullally
Special Rapporteur on trafficking in persons, especially women and children

Felipe González Morales
Special Rapporteur on the human rights of migrants

Tomoya Obokata
Special Rapporteur on contemporary forms of slavery, including its causes and consequences

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism