



**UNHCR**

**United Nations High Commissioner for Refugees**  
Haut Commissariat des Nations Unies pour les réfugiés

**LEGAL AND PROTECTION POLICY**

**RESEARCH SERIES**

**The Identification and Referral of Trafficked  
Persons to Procedures for Determining  
International Protection Needs**

**Jacqueline Bhabha and Christina Alfiev**

**External Consultants**

**DIVISION OF INTERNATIONAL PROTECTION SERVICES**

**PPLAS/2009/03**  
**October 2009**

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# 1. Introduction

1. This research paper was commissioned by the Division of International Protection Services, Protection Operations and Legal Advice Section, United Nations High Commissioner for Refugees (UNHCR), Geneva. Its overall purpose is to identify the current gaps in protection mechanisms for trafficked persons,<sup>1</sup> particularly trafficked children, as well as ways to address these lacunae. The study provides background research and information on three connected issues:

- i) the protection challenges that arise out of existing state mechanisms for identifying trafficked persons;
- ii) the establishment of a national referral system<sup>2</sup> that guarantees assessment of the needs for international protection<sup>3</sup> of persons identified as trafficked (including their entitlement to protection against *refoulement* under international refugee and/or human rights law); and
- iii) procedures adopted to address the special protection needs of trafficked children.

2. The paper will *inter alia* be used to guide discussion during an expert meeting on the topic to be convened as one of the outstanding commitments under Goal 2 Objective 2 of the Agenda for Protection. It will also be used for discussions on Chapter V of UNHCR's 10 Point Plan on Refugee Protection and Mixed Migration, which discusses profiling and referral mechanisms.

3. Trafficking in persons, particularly as a means to promote the sexual exploitation of women and girls, has attracted considerable attention in recent years. International efforts to combat trafficking culminated in the adoption of an international treaty which garnered widespread support: the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereafter: "Trafficking Protocol"). This Protocol supplements the UN Convention on Transnational Organized Crime, a comprehensive treaty addressing different aspects of transnational crime, such as corruption, money laundering and drug smuggling. The context for the first global, comprehensive anti-trafficking legislation was crime prevention.

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<sup>1</sup> In contrast to the more commonly used term of victims of trafficking (VOT) among international organizations and government agencies, we prefer to refer persons affected by human trafficking as trafficked persons, respectively trafficked children, thereby avoiding the reference to those persons victimization.

<sup>2</sup> This study does not address referral mechanisms among international organizations.

<sup>3</sup> While it is the state which is primarily responsible for providing protection to its citizens, a need for international protection arises where such protection is lacking with the result that basic human rights are seriously at risk. Such a situation classically comes about in relation to persecution threats to life and personal security, armed conflict, serious public disorder or other man-made disasters, see UN High Commissioner for Refugees, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, available at <http://www.unhcr.org/refworld/docid/47fdfb49d.html>.

4. By adhering to the Trafficking Protocol, state parties expressed their commitment to take action towards the fulfillment of three objectives: the prevention of trafficking, the prosecution of traffickers and the protection of trafficking victims.<sup>4</sup> To date, the prosecution of traffickers and, to a lesser extent, the prevention of trafficking have been the most prominent components of the fight against human trafficking. Nevertheless, efforts to provide protection to trafficked persons are gaining ground, albeit primarily from the perspective of their status as victims of crime. The gradual establishment of national protection systems specifically targeted at trafficked persons during recent years is the most evident sign of this development.

5. Such national protection systems are mostly geared to providing short term protection and support to identified trafficked persons. Some of the most effective amongst these systems are led by an overarching inter-departmental coordination unit that brings together government agencies, international organizations and civil society representatives. For trafficked persons who are trafficked *within* national borders (typically from the rural to the urban areas), obviously no question of regularization of immigration status arises. However, this may be a central concern for trafficked persons trafficked *across* international borders who risk being returned home. For them, the generally short term protection measures, including shelter, counseling and temporary residence permits, may be inadequate as a tool kit guaranteeing protection. Trafficked persons who risk persecution and/or serious human rights violations in their country of origin may therefore benefit very significantly from access to procedures which can determine whether they are entitled to refugee status and/or protection against *refoulement* under international human rights law. Many states grant refugee status<sup>5</sup> or a complementary/subsidiary form of protection<sup>6</sup> in order to implement their international obligations. Refugee protection and complementary protection represent the pillars of the implementation of states' international protection obligations.

6. The Trafficking Protocol contains a saving clause, according to which “*nothing in this Protocol shall affect the rights, obligations, and responsibilities of states and individuals under international law [...], in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.*”<sup>7</sup> UNHCR has issued guidelines outlining the circumstances under which trafficked

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<sup>4</sup> See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (hereafter “*Trafficking Protocol*”).

<sup>5</sup> The definition of persons qualifying for refugee status is set out in art. 1 A (2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (hereafter “1951 Convention”). The latter eliminated the temporal and geographical limitations of the 1951 Convention.

<sup>6</sup> For ease of reference, this paper will use the term “complementary protection” to refer to both complementary and subsidiary (the specific European Union) forms of protection. The Qualification Directive of the European Union provides the most detailed, legally binding definition of subsidiary protection. A person in need of subsidiary protection is defined as “a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country; see art. 1 (2) E of EC 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; See also *UNHCR Annotated Comments on the Directive* of 28 January 2005.

<sup>7</sup> See art. 14 (1) of the Trafficking Protocol.



persons may fall under the scope of the 1951 Convention Relating to the Status of Refugees (hereafter “1951 Convention”).<sup>8</sup> To qualify for refugee status, a trafficked person must fulfill the conditions set out in the refugee definition of the 1951 Convention.<sup>9</sup> This includes demonstrating “a well founded fear of persecution” on one of five grounds specified in the Convention – i.e. persecution on the grounds of race, religion, nationality, political opinion or membership of a particular social group. In addition, to qualify for refugee status, an applicant must be outside his or her country of nationality or habitual residence (this is relevant for people who are stateless) and must demonstrate that the government of the country of origin is unwilling or unable to afford protection. Trafficked persons may qualify for refugee status for different reasons, including those related to the trafficking experience. A need for international protection may, for example, arise where, upon return to the country of origin, trafficked persons face a risk of reprisals or re-trafficking against which the State cannot provide protection.<sup>10</sup> There are no figures documenting how many trafficked persons cannot return because of such risks, though a reasonable presumption is that this situation applies to a considerable percentage. It is likely, therefore, that international protection remains a seriously underused protection tool for trafficked persons.

7. Some progress has been made on two traditional obstacles to securing assistance and protection for trafficked persons. One obstacle has been the absence of a clear understanding of the term “trafficking”: the Trafficking Protocol, as one of its most significant achievements, established an agreed international definition of the term “trafficking”.<sup>11</sup> This followed years of disagreement about the term’s precise boundaries, particularly about the nature of the coercion required to establish trafficking (was physical force necessary? [no]; was psychological pressure or deceit sufficient? [yes]) and the scope of the concept (did trafficking cover non sexual exploitation?[yes] Was prostitution *ipso facto* exploitation? [no] could men be trafficked or did the concept only apply to women and children? [men too]).

8. Despite this important definitional clarification and the consensus established around it, identifying trafficked persons remains a challenge.<sup>12</sup> Some of the most common difficulties are as follows:

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<sup>8</sup> See 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 Trafficked persons and Persons At Risk of Being Trafficked* (7 April 2006).

<sup>9</sup> Art. 1 A (2) of the 1951 Refugee Convention.

<sup>10</sup> UNHCR, *Guidelines on International Protection*; 6-7.

<sup>11</sup> Article 3 of the Trafficking Protocol contains the following definition:

(a) “Trafficking in persons” shall mean 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 purpose 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;

(b) The consent of a trafficked person in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

<sup>12</sup> A recent research carried out by IOM in Central America confirmed difficulties in identifying VOT; IOM, *Research in Central America and the Dominican Republic Confirms the Need for Improved Legislation in Order to Combat Human Trafficking*, IOM Press Briefing Notes, 13 February 2009.

- i) Trafficked persons' unwillingness to report to law enforcement because of their precarious status or absence of status in the country of destination, because of corruption among law enforcement agents in their countries of origin, because of poor conditions in countries of origin which lead them to accept such conditions in the country of destination. Trafficked persons' reluctance to complain is also sometimes caused by cultural differences in attitudes towards authority, in loyalty to employers or in women's status. Their reluctance to come forward may also stem from the fact that they have violated local laws.
- ii) Trafficked persons' difficulties in explaining, even to themselves, why they feel they have been victimized.
- iii) Phenomena allied to the Stockholm Syndrome by which trafficked persons identify with their captors.
- iv) Difficulties experienced by government agencies in distinguishing trafficked persons from foreign workers in general.
- v) Some aspects of trafficked persons' behavior may seem to contradict the fact that they are victims of exploitation: these include returning to the abusers; continuing in situations of horrendous abuse for long periods of time; the absence of evident physical violence; some circumscribed freedom of movement away from the workplace; failing to escape, even where this seems possible without sanctions; family encouragement to continue in the oppressive situation; unwittingly being a legal worker who would incur no immigration risks from complaining; considering the abuser a good friend or not considering oneself a victim at all.
- vi) Inadequate general public ability to pick up signs of victimization.

9. Proper identification of trafficked persons is further complicated by the fact that it is difficult to judge whether someone is being transported across the border for the purposes of exploitation (a future risk), especially if there is no evidence of past exploitation. The victims themselves may have no idea. And yet, the border crossing is one of the key moments of encounter with a state official. Another more practical challenge arises from the lack of resources, political will, or both, allocated to raiding brothels and the investigation of potential sites where victims are trapped. A specific child related problem is the difficulty in identifying whether someone is a trafficker or a parent or other legitimate guardian. Of course, the two roles may overlap.

10. Besides the identification of trafficked persons, a second significant obstacle to their protection has been the lack of clarity about the application of the refugee definition to trafficked persons. Are all trafficked persons who are moved across an international border by definition refugees? Are some? Are none? And why? These questions are beyond the scope of this paper. Some progress in this area has been made in the UNHCR Guidelines.<sup>13</sup> However, several complex legal issues regarding the application of the refugee definition to trafficked persons remain. For example, to what extent does exploitation of a trafficked person constitute "persecution" for the purposes of refugee protection? How can the persecution of a trafficked child be assessed given that all children who are moved across borders for the purpose of exploitation are considered trafficked in international law even if they have not been coerced in any way?

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<sup>13</sup> See note 8.

11. Coordination between the existing protection systems continues to present difficulties, and procedural hurdles continue to complicate the task of predicting whether a trafficked person will be found eligible for refugee or complementary protection. Do the two legal frameworks (the Trafficking Protocol on the one hand and the international refugee protection regime on the other hand) operate in parallel, or do they map onto each other to create a comprehensive system? Once a trafficked person is identified, is there a system for referral to the asylum authorities or other national agencies dealing with international protection procedures in cases where this is relevant? In the absence of a national asylum system, do the entities identifying trafficked persons refer those with potential international protection needs to UNHCR for an assessment?

### **1.1 Reasons for Research Project**

12. There are three reasons why this paper addresses the question of identification and referral of trafficked persons to the asylum procedure for assessment of their international protection needs. First, it is evident that there is a significant mismatch between the deep public concern expressed about the plight of trafficked persons, often referred to as contemporary victims of slavery, and the scant success in effectively impinging on the problem to protect the victims from further harm. There seems, therefore, to be an urgent imperative to explore ways of doing better than we do at present. Second, and closely related, there appears to be a significant lacuna in the scholarly work on the precise topic of comprehensive procedures for trafficked persons' identification and referral to the asylum procedure. A literature search yielded no evidence of systematic research or reliable data collection on this general question.<sup>14</sup> This paper aims to address that shortcoming. Third, and related to the first point, field observation suggests that there are aspects of current state practice regarding trafficked persons' identification and referral to international protection that are unsatisfactory and likely to benefit from attention and change.

### **1.2 Methodology**

13. Our strategy for this paper has been to review the extensive literature on human trafficking in order to identify the key questions and then to survey a diverse group of states known to be affected by the problem of human trafficking. We then proceed to analyze the data collected and to arrive at some provisional conclusions and recommendations. In conducting the research, we solicited information from a wide range of respondents, including government officials, non-governmental organizations (NGOs) working on the issue and professional international experts (Appendix II contains a list of the respondents).

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<sup>14</sup> Some work has, however, been done to address the inadequacy of current systems for effective identification of child VOT. See E. Gozdzik and M. MacDonnell, "Closing the Gaps: The Need to Improve Identification and Services to Trafficked children", *Human Organization* 66 (2007): 171-184. There is also a large body of work on asylum systems in different states and national VOT protection systems including the referral of identified VOT to those national mechanisms. See especially Chapter 7 of United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons*, Vienna, 2008; Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE), *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons: a Practical Handbook*, Warsaw, 2004; Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 2002; Chapter 7 of UNICEF's *Reference Guide on Protecting the Rights of Trafficked children in Europe*, New York, 2006; UNICEF, *Guidelines on the Protection of Trafficked children*, New York, 2006. Research on the links between the two systems, however, has not, to our knowledge, been carried out before.

14. To facilitate collection of data, a questionnaire about current legal obligations and practice was designed. The questionnaire included questions on the following topics:

- i) The national legal framework on trafficking in persons.
- ii) The operationalization of trafficked persons' protection, i.e. how trafficked persons' protection was conducted in practice.
- iii) The referral of internationally trafficked persons to asylum procedures and the consequences of such referral, i.e. whether the identification led to any consideration of international protection needs.
- iv) Child specific protections including details of referral systems, specialist training for relevant personnel, details of legal status allocated, and monitoring of asylum procedures.

The full text of the questionnaire is annexed to this report (see Appendix I).

15. Ten countries<sup>15</sup> spanning five regions with a range of profiles and problems (see Appendix II) were selected. The following criteria guided our choice of surveyed countries:

- i) Countries known to be affected by the problem of international human trafficking.
- ii) Countries that were diverse according to the following indices: developed and developing country; countries thought to have highly articulated and successful and countries with less developed systems of identification and referral; long and recently established democracies; countries with well entrenched, mature NGO presence and countries with little civil society engagement on issues of trafficking; countries known to be source and transit countries for trafficked persons as well as countries thought to be predominantly destination states.<sup>16</sup> In short we aimed to be as comprehensive and representative as possible considering the severe resource limitations governing our research.

16. The questionnaire was sent to government officials, UN and other international organizations, NGOs and independent experts. A total of 32 answers were received either by telephone interview or completed written response. Telephone contact was established with 10 respondents; 22 completed questionnaires were returned by email. Interviews were conducted between 11 September 2008 and 6 November 2008. Despite vigorous efforts by the researchers, it proved difficult to find respondents competent to fully answer all the topics covered in the questionnaire; the majority focused on only one or two topics and was not in the position to provide a comprehensive overview of all identification, referral and international protection assessment mechanisms available in the given country. Some information has been received since the survey was completed and, where possible, this has been incorporated into the paper. In addition to the collection of empirical data, a thorough study of relevant international and domestic law was undertaken and a wide range of scholarly material on human trafficking in

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<sup>15</sup> Ireland, Israel, Italy, Kyrgyzstan, Mexico, Nigeria, Norway, Serbia, South Africa and Thailand.

<sup>16</sup> Note that the attempt to rigidly divide countries into these three categories is problematic, since traffickers are known to exploit their victims at all stages of the journey, thus turning the origin and transit countries into destinations; in turn, so-called "destination" states have also been used as the source or origin for VOT who are trafficked again.

general was reviewed for its relevance to the issues at hand. However empirical data of human trafficking remains scarce and incomplete and this affected our research findings.

17. The paper examines how different state systems deal with the identification and referral of trafficked persons who may have international protection needs to the asylum procedure. It starts with Norway, which has a highly developed identification and referral system. Because of the exemplary nature of this state's systems, they are described in considerable detail. The same approach, albeit in more summary form, is used for reviewing the data collected on the other states surveyed.

18. After analysis of the empirical data, the paper lists some obstacles to achieving predictable and consistent anti-trafficking referral systems, for both adults and children. The paper concludes with some recommendations for legal, institutional and administrative changes that would improve the identification and referral of victims of international trafficking to the asylum procedure. These include the creation of a clear domestic obligation to link the anti-trafficking and the asylum systems so that the current practice of not referring identified trafficked persons on for assessment of their international protection needs (whether or not there are indicators that they may have such needs) ends. Another recommendation is that states develop a well trained professional decision making cadre. Finally, the document recommends the institutionalization of regular and systematic data collection, monitoring and personnel training.

## **2. Existing Modalities of Identification and Referral of Trafficked Persons to the Asylum Procedure – The Good Practice Example of Norway**

### **2.1 General Procedures**

#### *2.1.1 Is there a Legal Framework Underpinning a Consistent Approach to the Identification and Protection of Trafficked Persons?*

19. Norway has ratified all international and regional instruments related to trafficking.<sup>17</sup> The country is also party to the 1951 Refugee Convention, its 1967 Protocol and all important international and regional human rights treaties.<sup>18</sup> Norway has established both an asylum and a trafficking protection system. The 1988 Immigration Act establishes a legal framework for the granting of asylum based on Norway's obligations under the 1951 Convention and international human rights law (with the long term residence and other benefits of that status).<sup>19</sup> Two important clarifications are included in the 2008 Immigration Act, due to enter into force in January 2010.<sup>20</sup> The first, set out in Section 30 d), stipulates that a trafficked person is considered a member of a particular social group, one of the grounds for persecution outlined in the refugee definition of the 1951 Refugee Convention. If the trafficked person is ineligible for refugee status for one reason or another, he or she may still qualify for a form of "subsidiary" protection (which includes "complementary protection" under section 15, and a "residence permit on humanitarian grounds" under Section 8(2) of the Immigration Act.<sup>21</sup>

20. The second distinct system of protection relevant to trafficking protection and parallel to the international protection system just described is the domestic framework for protecting all people who are trafficked persons. The trafficking protection system is founded both on Section 224 of the General Civil Penal Code updated in 2003 and on a National Action Plan highlighting

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<sup>17</sup> These include especially the 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the 2000 Trafficking Protocol (see references in annex). At the regional level, Norway is one of the 20 countries that ratified the 2005 European Convention on Action Against Trafficking in Human Beings.

<sup>18</sup> Including *inter alia* the 1989 Convention on the Rights of the Child (hereafter "CRC"), the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the 1999 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour by the International Labor Organization (ILO), and the 1979 Convention on the Elimination of all Forms of Discrimination Against Women.

<sup>19</sup> *Act Concerning the Entry of Foreign Nationals into the Kingdom of Norway and Their Presence in the Realm (Immigration Act) (last amended 28 July 2002) (No. 64)* [Norway], 24 June 1988, Chapter Three.

<sup>20</sup> Norwegian Ministry of Labour and Social Inclusion, 2008 *Draft Bill on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Act)*.

<sup>21</sup> Subsidiary protection is granted to those who are not refugees but who need protection for reasons similar to the reasons set out in the definition of a refugee.

trafficked persons' specific need for protection.<sup>22</sup> Norway also has a Child Welfare Act that addresses child protection measures regarding trafficked children.<sup>23</sup> This Act is supplemented by a government circular for relevant organizations and institutions drawing attention to the specific needs (including international protection needs) of trafficked children.<sup>24</sup>

### 2.1.2 What are the Procedures for Identification of Trafficked Persons?

21. In compliance with the National Action Plan, Norway instituted a **National Coordination Unit** for the Assistance and the Protection of Trafficked Persons (KOM).<sup>25</sup> KOM is administered by the National Police Directorate and is organized in two groups: the project group assembles the representatives of relevant government agencies dealing with immigration, justice, children, family, labor and welfare, health and the police. The reference group assembles NGOs providing assistance and protection to trafficked persons such as the ROSA project, a government-funded NGO primarily providing shelter,<sup>26</sup> and churches. KOM has developed identification guidelines regarding trafficked persons to assist its partner organizations in their work; it also organizes trainings on issues of trafficking, mainly for the police but also for other government authorities.

22. KOM distinguishes between the identification of possible trafficked persons and the verification of trafficked persons. All organizations, institutions, the police and individuals have the responsibility to refer possible trafficked persons to agencies and support-providing NGOs so that they can be identified. Subsequently, the police, the Directorate of Immigration (UDI), the prosecutor or the Child Protection Service verify the individual's claim to be a trafficking victim in the course of their regular administrative procedures, which include the assessment of work permit eligibility by UDI or ongoing criminal investigations conducted by the police.

23. Services are available to all persons identified as possible trafficked persons.<sup>27</sup> They include shelter, health care and psychological support, social services, free legal aid, counseling, vocational training and assistance with repatriation.<sup>28</sup> Even though there are no gender-discriminatory rules in place, in practice the shelters are primarily for trafficked women. These services are offered during the 6-month "reflection" period (the temporary residence permit) provided by the Norwegian government to all trafficking victims.

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<sup>22</sup> Ministry of Justice and the police, Norway, *Stop Human Trafficking: The Norwegian Government's Plan of Action to Combat Human Trafficking [2006-2009]*, 2006; Section 224 of the General Civil Penal Code came into force in July 2003; Ministry of Labour and Social Inclusion, *Instruks om midlertidig arbeids- eller oppholdstillatelse for utlendinger som antas å være utsatt for menneskehandel*, Circular no. AI-10/06, 15 May 2008; available at: <http://www.regjeringen.no/en/dep/aid/doc/rundskriv/2008/ai-1006.html?id=511459>.

<sup>23</sup> Ministry of Children and Equality, Act of 17 July 1992, no. 100, Relating to Child Welfare Services (Child Welfare Act).

<sup>24</sup> Ministry of Children and Equality, Norway, *Barnevernets ansvar for mindreårige som er utsatt for menneskehandel og samarbeid med andre etater*, Circular, No. Q-11/2006, 3 July 2006; available at: <http://www.regjeringen.no/nb/dep/bld/dok/rundskriv/2006/Barnevernets-ansvar-for-mindrearige-som-.html?id=109626>.

<sup>25</sup> KOM, *Guide to Identification of Possible Trafficked persons*, Politiet, November 2008, 8-9; Birgitte Ellefsen, *Responses to Child Trafficking at Local Level in Norway*, Politiet, 2008; available at: [http://www.osce.org/documents/pdf\\_documents/2008/05/31313-5.pdf](http://www.osce.org/documents/pdf_documents/2008/05/31313-5.pdf).

<sup>26</sup> ROSA is a Norwegian acronym that stands for re-establishment, organizing places to stay safely, and assistance.

<sup>27</sup> KOM, *Guide to Identification of Possible Trafficked persons*, 8.

<sup>28</sup> ROSA, *Guide to Assisting*, Oslo, April 2007, 2-3.

### 2.1.3 What is the Procedure for Referral to the Asylum Procedure?

24. In Norway, all identified trafficking victims receive legal counseling as a matter of course. This includes up to five hours of free legal assistance which covers issues such as whether to make a report to the police and whether to apply for asylum.

25. If the trafficked person decides to seek asylum, he or she is immediately registered as an asylum seeker. A case worker within the asylum authority trained in trafficking cases conducts these asylum interviews and determines whether asylum or leave to remain can be granted. Alternatively, the trafficked person can apply to UDI for a temporary residence permit during the 6-month reflection period once the police have confirmed that the trafficked person's presence in the country is indispensable for the criminal investigation. Both types of permit are assessed by UDI. Trafficked persons have the option of applying for a reflection period first and then lodging an asylum application at the end of the reflection period; the opposite, however is not possible, so that a refused asylum seeker cannot thereafter apply for a reflection period.<sup>29</sup>

## 2.2 Outcomes of Identification and/or Referral

26. While the procedures leading to trafficked persons or refugee protection are complementary and coordinated through KOM and UDI, there are differences in the extent of legal protection provided by the two systems.

27. Trafficked persons have to cooperate with the authorities in providing evidence against the trafficker in order to receive the six month temporary residence status following the reflection period. Once the six months are over, the trafficked person has to continue collaborating to be eligible for the renewable one-year residence permit from UDI. However, temporary residence may be denied if the prosecutor considers the trafficked person's presence unnecessary for the prosecution of the criminal case. Though the Norwegian government still deems repatriation the most appropriate long term solution for trafficking victims, it has started to pay more attention to the risks of re-trafficking upon return. Reflecting this concern, **a decree was passed on 1 November 2008<sup>30</sup> enabling trafficked persons to receive permanent residence under the trafficking system, provided they agree to stand witness in criminal proceedings.** IOM participates in this system by carrying out security assessments in the trafficked person's country of origin and supervising interim shelters where returning trafficked persons can stay temporarily.

28. Under the asylum system, a successful asylum application leads to refugee status, long term residence, and eventually to naturalization, without any obligation to provide evidence against traffickers in criminal proceedings. As already indicated, the asylum system can also lead to subsidiary protection and a long term residence permit.

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<sup>29</sup> Questionnaire, UNHCR Regional Office for the Baltic and Nordic Countries, Stockholm, September 2008.

<sup>30</sup> Norwegian Directorate of Immigration (UDI), *Circular on Residence or Work Permits to Aliens who Have Been a Witness in Criminal Cases of Human Trafficking* (Instruks om oppholds-eller arbeidstillatelse til utlendinger som har vitnet i straffesak om menneskehandel), AI-2008-064, 1 November 2008.



29. Trafficked persons under either protection system may, if successful in their applications, eventually qualify for permanent residence. The route to this integration within the local community is somewhat **more direct** through the asylum than through the trafficking protection system, because the former does not include the obligation to apply for repeated extensions of the residence permit before securing a permanent status.<sup>31</sup> The asylum route also puts less pressure on the victim than the domestic trafficking protection system, because there is no requirement that trafficked persons within the asylum system collaborate with the authorities in providing evidence in criminal proceedings against those accused of trafficking.

30. Whereas a trafficked person can apply for asylum after expiry of the initial reflection period (including if an extension is refused because witness cooperation is no longer required), the converse is not true: trafficked persons denied asylum are not eligible for a reflection period. This policy has been criticized for ignoring the trafficked person's special needs simply because no prosecution advantage accrues from the trafficked person's presence. A trafficked person may, however, withdraw a pending asylum application and apply for a reflection period as well as protection under national trafficking protection system thereafter.

**31. National trafficking protection and the asylum system are thus neither parallel nor mutually exclusive systems.**<sup>32</sup>

32. Our research shows that out of a total of 40 trafficked asylum seekers between 2006 and 2008, 13 were granted refugee status, three were awarded complementary protection (of which two received a residence permit on humanitarian grounds). So, nearly half the trafficked persons' asylum claims were rejected, and some international protection needs arising out of the trafficking situation may have been missed. Responding to the need for improvements in trafficked persons' access to asylum, Norway passed legislation in 2008 establishing that trafficked persons constitute a particular social group for the purposes of the 1951 Refugee Convention definition.<sup>33</sup>

### **2.3 Existing Data Collection Mechanisms for Identifying Trafficked Persons**

33. Data collection and statistics are gathered in a disparate fashion depending on which protection system is operating. Within the trafficking protection system, under well established practice, KOM is responsible for the compilation and evaluation of statistical findings, and for communication of the findings to the relevant Ministry. In addition, a new data collection system will be instituted: Norway will submit regular reports to the monitoring mechanism established under the European Trafficking Convention.<sup>34</sup> Under the international protection system, statistics are gathered by UDI in Norway. Statistics on the number of trafficked persons granted refugee status must however be approached with caution because the record does not specify the

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<sup>31</sup> The new decree, however, provides a short cut for VOT within the trafficking protection system who cooperate in criminal proceedings.

<sup>32</sup> Questionnaire, UNHCR Regional Office for the Baltic and Nordic Countries, Stockholm, September 2008.

<sup>33</sup> Section 30 d) of the 2008 Norwegian Immigration Act.

<sup>34</sup> Questionnaires, IOM Norway and UNHCR Regional Office for the Baltic and Nordic Countries, Stockholm, September 2008.

reasons for which refugee status was granted. Trafficked persons may be approved for asylum on grounds which are not linked to the trafficking experience.<sup>35</sup>

Year	Number of trafficked asylum seekers in Norway	Granted refugee status	Granted subsidiary protection (SP) or residence on humanitarian grounds	No protection
2008	32	3	0	29
2007	16	9	1	6
2006	11	4	2	5
<b>Total</b>	<b>59</b>	<b>16</b>	<b>3</b>	<b>40</b>
Source: Statistics from UDI, Norway and provided by UNHCR Regional Office for the Baltic and Nordic Countries, Stockholm in September 2008.				

34. It is instructive to compare the data collection procedures in Norway with those in existence in other developed destination states. According to our research, asylum statistics in Ireland and Italy are also not subdivided by ground of persecution. Accordingly, it is not possible to state whether or not the status of trafficked person contributed to the grant of asylum.

35. By contrast, there is some published evidence detailing trafficked persons' access to asylum for countries outside our survey. A U.S. study found that out of 93 U.S.-based trafficked asylum applicants, 23 were granted asylum, 39 had their cases denied and 41 did not have published outcomes. In the bulk of cases, the reason for rejection was that the women were not considered members of a particular social group.<sup>36</sup>

36. In the UK, one study found that among 32 trafficked women who had claimed asylum over a two-year period, only one woman was granted refugee status in the first instance procedure. Of those who subsequently appealed, 80 per cent were granted either asylum or humanitarian protection. This figure was six times higher than the overall acceptance rate of asylum appeals. This positive reversal in the appeal procedure was partly attributed to the provision of free legal assistance and better quality preparation of appeal cases.<sup>37</sup>

37. Despite KOM's impressive coordinating and training role, its responsibilities for data collection and monitoring do not seem to have achieved the same level of proficiency or consistency. Thus, at present, there is no systematic mechanism for determining the overall

<sup>35</sup> Questionnaire, UNHCR Regional Office for the Baltic and Nordic Countries.

<sup>36</sup> According to Stephen Knight, among the successful asylum grants, seven concerned applicants who approached the authorities directly to obtain asylum protection, four concerned applicants facing deportation who used their trafficking experience as a defense against removal from the US; see "Asylum from Trafficking: a Failure of Protection", *Immigration Briefings* 7.7 (July 2007): 5-6.

<sup>37</sup> Sarah Richards, *Hope Betrayed: An Analysis of Women Trafficked persons and Their Claims for Asylum*, incl. Mel Steel and Debora Singer Refugee Women's Resource Project at Asylum Aid (London: POPPY Project, February 2006): 1.

number of trafficking victims in the country. Instead, current statistical data rely mainly on the number of legal certificates (such as residence permits) processed or the number of returnees assisted by IOM.

## 2.4 Child Specific Procedures

### 2.4.1 Procedural Aspects

38. Aside from KOM and UDI, the Child Protection Service has the main responsibility for identifying trafficked children and referring them to the asylum procedure where necessary. Save the Children Norway also plays a coordinating role regarding child trafficking, complementing the activities of KOM. Most measures targeting trafficked children are tailored to meet their specific needs. For example, **trafficked children are entitled to legal guardianship as well as education and appropriate health services in keeping with the Convention on the Rights of the Child** (hereafter “CRC”). The Child Protection Service has wide ranging competencies to determine the best interest of the child.

39. **Children have access to the same legal aid services as adult trafficked persons but they also have the same rights as minor nationals under the Child Welfare Act.** The Ministry for Children and Equality recommends additional, child specific measures and acknowledges that social workers need to undergo special training to develop effective screening to detect trafficked children.

### 2.4.2 Legal Status

40. **Trafficked children who are denied asylum are not deported but granted residence on humanitarian grounds.** In particular, the 2008 Immigration Bill stipulates that, by taking into account the principle of “the best interest of the child”, children may be granted residence permits for reasons which would not be deemed serious enough for adults.<sup>38</sup> However, asylum is often preferable to the trafficking protection system for integrating children, because asylum affords children enhanced privileges. For example, due to the temporary nature of trafficked persons’ protection, a child may age out (i.e. turn 18) and lose access to child specific and easier obtained privileges in the process. According to our interlocutors, trafficked children are increasingly applying for asylum and asylum is more readily granted to children than adults.<sup>39</sup> Most identified trafficked children are given long term protection; repatriation is only considered an option in the limited cases where parents/guardians in the home country are clearly identified.

## 2.5 Key Features of the Norwegian System

41. The Norwegian system for identifying trafficked persons and referring them to the asylum system exhibits some strongly positive features. These include:

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<sup>38</sup> Section 38 of the 2008 Norwegian Immigration Act.

<sup>39</sup> Questionnaire, IOM Norway, September 2008.

- i) An integrated, interdisciplinary high level unit linking the different agencies involved in dealing with trafficking victims.
- ii) A cadre of asylum authority caseworkers specially trained on issues of trafficking who conduct the trafficked person's asylum interviews.
- iii) The routine discussion with all trafficked persons, soon after they have been identified, about their potential needs for international protection.
- iv) Trafficked persons who agree to stand witness in criminal proceedings are eligible to receive permanent residence under the trafficking protection system.
- v) Children have access to the same legal aid services as trafficked adults but they also have the same rights (e.g. to legal guardianship, education and appropriate health services) as minor nationals under the Child Welfare Act.
- vi) Trafficked children denied asylum are not deported but granted residence on humanitarian grounds.

### **3. Existing Modalities of Identification and Referral of Trafficked Persons to Asylum Procedures among Other Countries Surveyed – Key Findings**

#### **3.1 General Procedures**

##### *3.1.1 Legal Framework*

42. Referral and protection systems in all other countries in the survey were somewhat less well developed at the time of the survey than the system found in Norway. In fact, in most of the countries surveyed, systems for referring trafficked persons to asylum procedures or other international protection mechanisms are nonexistent or inadequate. The main problem is that the three essential elements of an effective referral mechanism – a functioning domestic procedure for identifying and registering trafficked persons including the provision of free legal counseling, an effective additional system for addressing international protection needs, and a consistent and competent mechanism for referring trafficked persons from the first to the second procedure do not appear to be fully in place. If a country does not have all three elements, then trafficked persons' access to international protection will most likely not be fully effective. Implementing effective protections for trafficked persons presupposes the set-up of a trafficking identification system. Only a trafficked person who has been identified within a domestic trafficking protection system can be referred to international protection procedures. By the same token, a trafficked person can only be referred to the asylum procedure if there is such a mechanism in place.

43. For ease of summary and explanation of our research findings, we identify three, mutually exclusive, categories of countries: (i) those with protection systems both for trafficked persons and for people with international protection needs but weak referral mechanisms between the two systems; (ii) those with an asylum procedure, but no established trafficking protection mechanism and therefore no ability to actually refer trafficked persons to the asylum procedure in practice; (iii) and finally those with trafficking protection but no established asylum system.

##### **i) Dual Protection Systems but Weak Referral Mechanisms**

44. Some countries in the survey,<sup>40</sup> have both anti-trafficking legislation and an asylum law, but the two systems are not linked. In other words, there is no systematic referral mechanism which directs identified trafficked persons to a structure where their international protection needs can be assessed. As a result, despite the laudable enactment of a comprehensive legal framework, trafficked persons in practice have difficulty accessing the asylum system.

45. Within this group of countries surveyed, there are differences in the scope of protection afforded. At one end of the spectrum, protection is very closely tied to the state's primary goal which is the successful criminal prosecution of traffickers: trafficked persons are only given

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<sup>40</sup> Ireland, Italy, Serbia, Nigeria and Kyrgyzstan.

temporary visas if they cooperate in criminal proceedings. Kyrgyzstan's law on the criminalization of human trafficking,<sup>41</sup> for example, demonstrates this prosecution-oriented approach. Although temporary visas are granted to trafficked persons who cooperate in criminal proceedings,<sup>42</sup> those refusing to assist the prosecution risk being penalized for entering the country without authorization.<sup>43</sup> Ireland and Serbia also make temporary protection status conditional upon assistance with the criminal investigation of the trafficker; their legislations provide for reflection periods of 60 days<sup>44</sup> and three months respectively,<sup>45</sup> during which time, the trafficked person can consider his or her options for the future. At the other end of the spectrum, trafficked persons' temporary protection is independent of an agreement to assist with the criminal prosecution of traffickers. Italy, for example, has enacted legislation granting trafficked persons temporary protection status which is unconnected (at least in theory) to the performance of any witness function. This status can even, under certain conditions, lead to long term residence permits.<sup>46</sup>

46. There is also considerable variation, among this group of countries, in the legal framework relating to asylum. For example, while the Serbian asylum law only came into force in 2008 and is still in the process of being implemented,<sup>47</sup> some countries, such as Ireland, have a well established asylum system which provides for refugee and complementary protection as well as leave to remain on humanitarian grounds.<sup>48</sup>

47. In sum, the countries in this group have all established the legal framework for a trafficking protection system, and a system of international protection; but, according to our evidence, these systems are not systematically linked. As a result, there is no effective referral of trafficked persons to a decision making structure where international protection might be granted. Italy and Ireland, for instance, have gone some way to making a systematic dual protection system available in practice (the only countries surveyed apart from Norway to have done this). In Ireland, where domestic trafficking protection includes a reflection period and a 6-month

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<sup>41</sup> Kyrgyz Law on the Prevention and Fight against Trafficking, no. 55, 17 March, 2005; available at: [http://www.mz.kg/ru/law\\_human\\_traffic](http://www.mz.kg/ru/law_human_traffic).

<sup>42</sup> *Ibid.* Art. 28 (3).

<sup>43</sup> U.S. Department of state, *Trafficking in Persons Report – Kyrgyz Republic*, Office to Monitor and Combat Trafficking in Persons, June 2008; available at: <http://www.unhcr.org/refworld/docid/484f9a248.html>.

<sup>44</sup> The current provisions foresee 45 days, although in practice the period has been extended to 60 days; email correspondence with Irish Refugee Council representative, May 2009; see also Irish Naturalisation and Immigration Service (INIS), *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking*, June 2008.

<sup>45</sup> In 2004, Serbia's Interior Ministry issued the *Instruction on conditions for obtaining temporary residence permits for foreign citizens trafficked persons in human beings*; see Sladjana Jovanovic, *Victim Protection in the SEE in a Mirror of the Council of Europe Convention on Action against Trafficking in Human Beings*, Atina, September 2007.

<sup>46</sup> Decreto Legislativo 25 luglio 1998, no. 286, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, Gazzetta Ufficiale, no. 191, 18 agosto 1998.

<sup>47</sup> *Law on Asylum* [Serbia]. 1 April 2008.

<sup>48</sup> Once enacted, Ireland's Immigration, Residence and Protection Bill, 2008 would establish a single procedure for different forms of IP. However, if the Bill is passed in its current form, it would not be possible anymore to apply for leave to remain; see Immigration, Residence and Protection Bill, 2008; and Irish Refugee Council, *Submission on Section 124 of the Immigration, Residence and Protection Bill and Other Provisions Related to the Protection for Suspected Trafficked persons*, March 2008.

temporary visa,<sup>49</sup> international protection needs may not be assessed if the trafficked person does not directly apply for asylum at the Office of the Refugee Applications Commissioner (ORAC). Legal aid is only made available to self-declared adult asylum seekers.<sup>50</sup> If a trafficked person is identified at the state border, then, and only then does the officer in charge have an obligation to inform the trafficked person about the right to seek asylum.<sup>51</sup>

48. Both Italy and Ireland seem to lack a clear referral system or staff instructions about how such a referral process might work, despite their fairly developed asylum systems. As a result, referral is somewhat unpredictable, *ad hoc* and unsystematic, an improvement over a system with no referral at all but still some way from a satisfactory realization of international protection obligations.

## ii) Trafficking Protection Systems in the Process of Being Established

49. Some countries are in the process of establishing dual mechanisms to protect trafficked persons and to make international protection available, but at the time of our survey, these systems were not yet fully functional. Both Mexico and South Africa, for example, aspire to effective systems for trafficked persons and for international protection, but they have not yet completed the process of establishing working procedures. In Mexico, an asylum system providing for refugee as well as complementary protection is in place.<sup>52</sup> In addition, Mexico has passed federal anti-trafficking legislation and implementing regulations.<sup>53</sup> Given its federal structure, some states within Mexico have also adopted state legislation against trafficking.<sup>54</sup> While these measures are important, they are all fairly recent, and further action needs to be taken in order to fully implement the protection provided in the legislation and regulations fully operational. This will only be done once all Mexican states adopt specific regulations harmonizing state and federal law.<sup>55</sup> South Africa, too, has a functioning asylum system, but no trafficking protection framework – its comprehensive trafficking legislation is still in draft form.<sup>56</sup> However, trafficked children can already be granted protection under chapter 18 of the 2005 Children’s Act.<sup>57</sup> Once Mexico and South Africa establish an operational trafficking protection system providing for the identification of trafficked persons, they will have the potential to establish systematic referral procedures to the asylum procedure.

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<sup>49</sup> INIS, *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking*, par. 5 and 11 respectively.

<sup>50</sup> Joint questionnaire UNHCR Ireland and government representatives, September 2008.

<sup>51</sup> Art. 3 (1) of the Irish Refugee Act, 1996 (last amended in 2003) 15 July 2003.

<sup>52</sup> Art. 165 and 166 of the *Reglamento de la Ley General de Población, 2000* [Mexico]. 14 April 2000.

<sup>53</sup> In November 2007, Mexico passed the federal anti-trafficking law; see *Ley para Prevenir y Sancionar la Trata de Personas* [Mexico]. 26 November 2007.

<sup>54</sup> For example, the Federal District of Mexico City passed a Child Trafficking Act in October 2008 (*Ley para prevenir y erradicar la trata de personas, el abuso sexual y la explotación sexual comercial infantil para el distrito federal*).

<sup>55</sup> Due to the obligation of the 31 states and the only federal district to transpose federal laws, the harmonization of laws on the national level is a gradual process. Consequently, the level of protection granted to VOT differs across states; See ECPAT International, *Informe Global Monitoreo de las acciones en contra de la explotación sexual comercial de niños, niñas y adolescentes – México*, Bangkok, 2006, 17.

<sup>56</sup> Questionnaire, IOM South Africa, October 2008.

<sup>57</sup> Chapter 18 of the *Children’s Act (No. 38 of 2005)* [South Africa]. 19 June 2006, available at: <http://www.unhcr.org/refworld/docid/46b82aa62.html>.

### iii) No Asylum System Established Within the Domestic Legal System

50. In other countries surveyed, there is no referral system for trafficked persons because a fully functional international protection system has not been established. In the absence of such a system, UNHCR has worked with the governments to set up an *ad hoc* asylum mechanism to partially fill the protection vacuum that exists.

51. Thailand, for example, is not a party to the 1951 Refugee Convention and it has not passed any asylum legislation at the national level. While it is bound by its obligations under human rights law, it has not set a system in place to implement these. Thailand has, however, recognized UNHCR's competence in designated areas, typically in camps referred to in several agreements signed since the end of the Vietnam War in 1975. Thailand does not use the term "refugee", but instead refers to refugees as "displaced persons",<sup>58</sup> defined as those "escaping dangers due to an uprising, fighting or war, and entering in breach of the Immigration Act." In 1998, the Thai government authorized UNHCR to open field offices along the Burmese border where the latter works with the authorities to register camp populations who are refugees and asylum seekers from Myanmar.<sup>59</sup> UNHCR can also register refugees and conduct refugee status determination (RSD) hearings for asylum seekers from other countries residing in Bangkok. Recognition by UNHCR does not, however, bring with it long term protection for refugees in Thailand. The sole durable solution offered is resettlement<sup>60</sup> which is available only for a limited number of refugees.

52. In contrast to Thailand, Israel has ratified the 1951 Refugee Convention. It has not, however, passed or implemented any domestic asylum legislation. Consequently, asylum seekers in Israel run the risk of detention and expulsion. Under national law, persons entering Israel without authorization are considered illegal, subjected to initial detention and only released immediately if they agree to leave the country.<sup>61</sup> In light of this protection vacuum, UNHCR and the Israeli government have set up an *ad hoc* asylum procedure.

53. In Israel, UNHCR is responsible for first instance refugee status determination (RSD) of non-Jewish asylum seekers<sup>62</sup> and submits its recommendation to the relevant government authority for review and ultimate decision. In the case of detained immigrants seeking asylum, the detention authorities contact UNHCR to conduct the interviews, a precondition for release. Difficulties arise from the fact that relatively few asylum cases are processed per year in this manner and even fewer persons are granted refugee status. According to UNHCR, of some 5,000

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<sup>58</sup> 1954 Regulation Concerning Displaced Persons from Neighboring Countries issued by the Ministry of the Interior.

<sup>59</sup> In the Burmese refugee camps, the Operations Centre for Displaced Persons (OCDP) of the Thai Ministry of Interior (MOI) is formally in charge of refugee registration; Email correspondence with UNHCR Thailand, May 2009; see also W. Courtland Robinson, *Thailand: Background Paper on Human Rights, Refugees and Asylum Seekers*, a Writenet report commissioned by UNHCR, July 2004, 22-23.

<sup>60</sup> Resettlement refers to the relocation of a recognized refugee in a third country.

<sup>61</sup> See Human Rights Watch, *Sinai Perils: Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel* (November 2008): 73-74.

<sup>62</sup> Jewish immigrants qualify for citizenship under the 1950 Law of Return and do not need to avail themselves of IP mechanisms.



persons who applied for asylum in 2007, fewer than 500 cases have been decided. Moreover, less than 1 per cent of asylum applicants have been granted refugee status, a process that may take up to 3 years.<sup>63</sup> What is more, recognized refugees do not receive a permanent legal status in Israel. At best they receive temporary residence permits pending resettlement to a third country. Other possible outcomes are voluntary return to the country of origin or cancellation of refugee status due to a change of situation in the country of origin, an outcome that may ultimately result in forced repatriation.<sup>64</sup> To our knowledge, no trafficked person has so far benefited from Israel's limited system of international protection, although in one case, UNHCR in conjunction with the National Coordinator on Human Trafficking, recommended that the Israeli government grant refugee status to a trafficked person.<sup>65</sup>

### 3.1.2 Identification of Trafficked Persons

54. In contrast to the absence of effective asylum systems, all countries surveyed have passed some formal legislation creating domestic trafficking protection systems (though, apart from the provisions on child trafficking, South Africa's trafficking protection system is still in draft form). Implementation is another matter. As noted above, South Africa and Mexico are in the process of implementing their systems, so their protection mechanisms are not fully functional at the time of this writing.

55. In the framework of Israel's trafficking protection system, the National Coordinator at the Ministry of Justice prepared a trafficking identification tool kit for all actors involved in counter-trafficking activities such as the police, government authorities and civil society representatives. Professionals providing services to trafficked persons such as nurses and doctors are obliged to report suspected crimes of trafficking, a measure aimed at improving the identification of trafficked persons. The National Coordinator also regularly meets with the police, NGOs and other relevant actors to monitor the identification and protection mechanism. Once identified, trafficked persons in Israel have access to extensive services including free legal aid provided for an unlimited period; shelter including psycho-social and medical services, humanitarian visas and work permits usually granted one year at a time, as well as risk assessments regarding the situation the trafficked persons would face upon return to the country of origin. Trafficking protection is not conditional upon the victim's cooperation with the authorities. Should the trafficked person decide to participate in the criminal investigation, a series of measures such as *in camera* proceedings guarantee the victims' protection.<sup>66</sup>

56. Most countries with functional trafficking protection systems, including Ireland, Serbia, Nigeria, Israel, Italy and Thailand, have procedures similar to those described above for Norway. Typically, a government agency coordinates tasks among the police, relevant ministries, NGOs and other institutions. The identification process is often carried out by the police, service providers or other domestic authorities. In countries where the default approach to immigrants is

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<sup>63</sup> UNHCR, 2007 Statistics, Annexes, available at: <http://www.unhcr.org/statistics.html>; see also Human Rights Watch, see footnote 61, 74.

<sup>64</sup> Human Rights Watch, see footnote 61, 76, at footnote no. 242.

<sup>65</sup> Apparently the government declined to grant the VOT asylum because the long term residence implications of such a grant were unclear. Phone interview with UNHCR Liaison Office in Tel Aviv, Israel, November 2008.

<sup>66</sup> Phone interview and email correspondence with government representative in November 2008 and May 2009 respectively; see also Ministry of Justice, *Trafficking in Persons in Israel*, October 2008.

to treat them as irregular migrants, trafficked persons are often only identified in detention centers where they face expulsion. For example, while Israel guarantees extensive services to identified trafficked persons (including transfer from the detention center to a shelter or apartment), unidentified trafficked persons, particularly those who are victims of labor trafficking, risk detention and deportation like those others considered irregular migrant workers.<sup>67</sup> In such cases, training and victim-oriented cooperation are critical for guaranteeing protection to trafficked persons. In Thailand, for instance, immigration officials sometimes accompany the police on raids. Foreigners identified on these raids are typically labelled irregular migrants by default and there is some concern that in these situations neither the police nor the immigration officials have the capacity to identify potentially trafficked persons. In order to mitigate this problem, the Women and Children Protection Unit of the Royal Thai Police Department has received training supported by the United States, a useful capacity-building initiative aimed at improving the officers' understanding of the dynamics of human trafficking and the importance of a human rights approach regarding trafficking protection.<sup>68</sup> In states with large influxes of asylum seekers and established asylum systems, such as South Africa and Italy, trafficked persons tend to apply for asylum before they are identified or considered for domestic trafficking protection status. In Italy, many potential trafficked persons reach Italian soil by boat and are sent from the shoreline to reception centers where they apply for asylum.<sup>69</sup> In South Africa, traffickers reportedly regularly leave victims at UNHCR's field offices along the South African-Zimbabwean border, so that they can register as asylum seekers.<sup>70</sup> This is a device to ensure they secure a legal status pending determination of their case. Given South Africa's sizeable asylum backlog (over 49,000 cases at the beginning of 2008 and 80,000 pending appeals against refusal at the start of 2007),<sup>71</sup> referral to the asylum procedures confers considerable, if precarious benefits. Once the asylum application is lodged and pending its determination, trafficked persons may in theory apply for trafficked person status under domestic protection provisions. Since the South African anti trafficking legislation is still in draft form at the time of this writing, it is too early to evaluate the efficacy of this dual protection system.

57. In all countries surveyed except Norway, the international protection and trafficking protection systems are, at best, separate mechanisms with no systematic linkages, even though in many cases they cater to the same population. *Ad hoc* referrals exist in countries that have an established trafficking identification mechanism and a dual protection system. Currently, such *ad hoc* procedures exist in Ireland, Italy and (depending on one's interpretation of the data), in Serbia, Nigeria and Kyrgyzstan though the evidence is unsatisfactory and tentative. In spite of the rudimentary asylum procedures in Israel, there are signs of promising developments regarding trafficked persons' referral to international protection. For example, in meetings with shelter personnel and judges of the detention tribunal, the National Coordinator has emphasized the importance of making access to the asylum procedure available to trafficked persons and of

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<sup>67</sup> Hotline for Migrant Workers, *Annual Report 2007*, Tel Aviv, 15.

<sup>68</sup> ECPAT International, *Global Monitoring Report on the Status of Action Against Commercial Sexual Exploitation of Children – Thailand*, 2006, 17-18; 31; Phone interview with a representative of the UN Inter-Agency Project on Human Trafficking in the Greater Mekong Sub region (UNIAP), September 2009.

<sup>69</sup> Phone interview with UNHCR Italy representative, September 2008.

<sup>70</sup> Phone interview with representative from UNHCR South Africa, November 2008.

<sup>71</sup> UNHCR, 2007 Statistics.

ensuring adequate training of legal aid providers, so that trafficked persons are systematically informed of their right to seek asylum.<sup>72</sup>

58. As stated earlier, only Italy and Norway provide long term protection under the trafficking protection system. To improve on the short term (if extendable) assistance available in the other countries surveyed, instituting systematic referral procedures to the asylum system is urgently required for those trafficked persons who face risks upon return.

## **3.2 Outcomes of Identification and/or Referral**

### *3.2.1 International Protection*

59. Within the European Union (EU), Norway and Mexico, the international protection system includes both refugee status as well as a range of forms of complementary/subsidiary protection. In the European countries surveyed and Mexico, a grant of asylum generally provides the legal basis for a permanent legal status and the possibility of local integration including naturalization.

60. In other countries under review, international protection does not guarantee systematic access to long term protection. For example, in Nigeria, refugee status implies the right to remain until a durable solution is found or refugee status is cancelled according to the 1951 Refugee Convention. In practice, recognized refugees remain in Nigeria for years without access to a durable solution.<sup>73</sup> In South Africa, grants of asylum are, in theory, reviewed after two years and can be retracted if conditions in the country of origin are deemed to have improved sufficiently.<sup>74</sup> In practice, periodic reviews are delayed due to the backlog of cases.

61. Due to the absence of formal asylum procedures in Thailand, refugees recognized by UNHCR are still technically considered ‘illegal’ and may be subject to arrest by the police and detention at immigration detention centres. UNHCR aims at preventing arrests and detention by offering mobile trainings to police officers; a telephone ‘hotline’ allows arrested refugees to call UNHCR for assistance with release. In 2008 alone, UNHCR successfully intervened in 65 cases. In some cases, trafficked persons who are recognized as refugees may be placed in government trafficking shelters for up to 6 months as they await resettlement.<sup>75</sup>

### *3.2.2 Trafficking Protection*

62. Most trafficking protection mechanisms in the countries surveyed establish a system of short term protection both on humanitarian grounds and in order to improve criminal law enforcement. In Italy, Israel and Nigeria, temporary visas are provided, regardless of whether or not the trafficked person decides to cooperate with the authorities. All other countries including

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<sup>72</sup> Email correspondence with government representative, Israel, May 2009.

<sup>73</sup> Questionnaire and email correspondence, UNHCR Nigeria, October 2008 and email correspondence in May 2009 respectively.

<sup>74</sup> Phone interview, UNHCR South Africa, October 2008.

<sup>75</sup> Email correspondence, UNHCR Thailand, May 2009.

Norway explicitly require the trafficked person's participation in criminal investigations. Among the latter, official reflection periods during which the trafficked person has time to recover and consider options for the future exist within Europe and Mexico, and are foreseen in South Africa once the trafficking legislation is passed. These periods range from 60 days in Ireland to six months in Norway. Upon reaching the end of the reflection period, subsequent conditionalities linking the permission to stay in the country to the trafficked person's agreement to cooperate are applied more or less strictly. For example, if the prosecutor in Norway does not need the trafficked person to stand witness, the latter could lose his or her legal status.

63. Conditionalities also exist in some countries outside of Europe, particularly in Asia (Thailand and Kyrgyzstan) but here they may not be rigidly enforced. For example, in Thailand, the prosecutor can waive the obligation to cooperate and the trafficked person may still access trafficking protection.<sup>76</sup> According to one report about Italy, there are informal conditionalities related to corruption, particularly at the time of application for a residence permit.<sup>77</sup>

64. Just as a form of limited temporary protection is the most common legal status granted for short term protection under the trafficking protection system, so repatriation is the most favored long term solution, particularly in non-European countries. For instance, Nigeria and Thailand have signed Memoranda of Understanding (MOUs) with neighboring countries who accept the repatriation of their nationals.<sup>78</sup> As a result, Nigeria has repatriated trafficked children from its stone quarries to Benin on several occasions.<sup>79</sup> Some European countries, by contrast, do provide possibilities of long term protection, i.e. local integration, although these options are also attached to conditionalities. In Italy, for instance, the extension of the residence permit depends on proof of a job and financial viability.<sup>80</sup>

### **3.3 Existing Data Collection Mechanisms for Identifying Trafficked Persons**

65. Data collection mechanisms remain weak in all the countries surveyed. As in Norway, the most reliable statistics are derived from the issuance of legal permits or the publication of asylum decisions. If those mechanisms are dysfunctional, this has a negative impact on data collection overall.

### **3.4 Child Specific Procedures**

#### *3.4.1 Legal Aspects*

66. Ireland was the only country surveyed, apart from Norway, that provided the researchers with detailed information on the procedures for assessing children's international protection

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<sup>76</sup> Section 33 of the Anti-Trafficking in Persons Act, no. B.E 2551, 2008.

<sup>77</sup> Anti-Slavery International, *Human Traffic, Human Rights: Redefining Victim Protection*, 2002, 143-144.

<sup>78</sup> UNESCO, *Human Trafficking in Nigeria: Root Causes and Recommendations*, Policy Paper Poverty Series, No. 14.2 (E) (Paris, 2006): 47; ECPAT International, *Global Monitoring Report – Thailand*, Bangkok, 2006, 18.

<sup>79</sup> Terre des Hommes, *Little Hands of the Stone Quarries*, December 2005, 20.

<sup>80</sup> Art. 18 (5) of D. Lgs. 25 luglio 1998, n. 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, Pubblicato nella G.U. 1998, n. 191, S.O.

needs. Unlike the more *ad hoc* assessment of adult trafficked persons' international protection needs, those of children are addressed in a fairly systematic way. The legal framework concerning trafficked children is as follows. Ireland has enacted the 1991 Child Care Act, the 1998 Child Trafficking and Pornography Act and the 2004 Child Trafficking and Pornography (Amendment) Act. Not unlike the 2008 Criminal Law (Human Trafficking) Act, the Child Trafficking Acts are prosecution-oriented and do not encompass protection measures for the trafficked child.<sup>81</sup> The 2008 Immigration, Residence and Protection Bill (IRP), expected to be passed in 2009, aims at consolidating different protection laws regarding foreigners in one act. On the positive side, children's application processes might be accelerated and their time waiting for a decision reduced. For example, while children currently apply for asylum, complementary protection and leave to remain on humanitarian grounds through three different individual procedures, all protection needs will in future be considered in one single procedure. On the negative side, critics pointed out that unlike the Administrative Immigration Arrangements, the IRP does not refer to the children's best interest.

### 3.4.2 Procedural Aspects

67. Procedural rules vary considerable among the countries surveyed. In Ireland, for example, there is an identification and referral procedure, albeit a somewhat unsystematic one. Separated children identified as trafficked children by the police are placed in the care of the Health Service Executive (HSE) under the 1991 Child Care Act. The HSE makes a legal assessment about whether the trafficked child should apply for asylum (the child is not eligible for legal aid until a decision has been made to lodge the asylum application). If asylum is applied for, a HSE social worker (or, if unavailable, a non-specialist project worker) accompanies the child through the whole process. If the HSE decides against applying for asylum, the child is theoretically at risk of deportation. In practice, this does not happen to minors but they do face the prospect of expulsion once they turn 18.<sup>82</sup>

68. South Africa has not yet passed a comprehensive trafficking bill; yet, chapter 18 of the 2005 Children's Act<sup>83</sup> includes assistance provisions for trafficked children. Moreover, art. 289 (2) stipulates that if an "*illegal foreign child is brought before the children's court, the court may order that the child be assisted in applying for asylum in terms of the Refugees Act, 1998 [...]*." According to our research, repatriation to the country of origin is in practice the most likely outcome for a trafficked child, even though some children may also have access to other solutions. Two trafficked girls referred to UNHCR, for example, were subsequently resettled in a third country.<sup>84</sup>

69. Child specific protection in other states is also incomplete for a range of reasons. In some countries, such as Nigeria, trafficked persons may simply be granted protection under the child care acts with no particular attention paid to their special needs or vulnerabilities as trafficked persons. In other countries, such as Serbia and Israel, trafficked children are only mentioned in

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<sup>81</sup> Jyothi Kanics, "Child Trafficking and Ireland," *Studies* 97.388 (2008): 390.

<sup>82</sup> Joint Questionnaires UNHCR Ireland and Irish government representative, and Irish Refugee Council, September 2009.

<sup>83</sup> Children's Act (No. 38 of 2005) [South Africa]. No. 38 of 2005, 19 June 2006.

<sup>84</sup> Questionnaire, IOM South Africa, October 2008; Phone interview with UNHCR South Africa, November 2008.

relation to the higher penalty tariff for traffickers convicted of using children.<sup>85</sup> In Mexico, despite the existence of an elaborate child care system for trafficked persons, protection is offered on the understanding that the children will eventually be repatriated. As for international protection, children, including unaccompanied and separated children can apply for asylum in Mexico, but it is not clear whether they are given the information needed to make their access to asylum meaningful. A recent initiative by the Mexican government to designate certain immigration officials as Child Protection Officers was established in part to increase the access of children to the asylum procedure. Trafficked children should, therefore, be able to obtain international protection in Mexico provided they meet the refugee definition.

70. The answers to questions about child specific procedures in the questionnaire for this research were sparse and incomplete. It seems that some countries deal with trafficked children under specific domestic child care legislation, while other countries (merely) refer to trafficked children in their (adult focused) trafficking legislation. In practice, personnel dealing with trafficked children are either (domestic) child welfare experts with little understanding of trafficking or migration related issues, or trafficking and migration experts with no child specific expertise. There appears to be some need for enhanced training across this disciplinary divide.

71. One problem emerging from the research that the countries surveyed are grappling with is how to fit children into the larger picture of criminal prosecution and protection, given that specific issues of re-traumatization and intimidation may arise in getting children to testify in court against their traffickers. An issue might also be raised in relation to the policy of some countries, such as for example Israel, which wait for children to age out (i.e. turn 18 and thus lose their special protection status). Although Israel has no formal asylum system and does not always differentiate sufficiently between pre-identified trafficked persons and irregular immigrants, unaccompanied and separated minors are placed in school and cared for until they reach 18. However, since their long term legal status is unresolved, they risk deportation on majority. The law regarding regularization of status for undocumented minors is harsh: for example, one of the conditions is that the minor's parents' entry into Israel was legal.<sup>86</sup> This requirement is currently being challenged in court by a former trafficked child who has lived in Israel for years and is applying for a long term residence permit to replace her short term temporary residence and work permits.<sup>87</sup>

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<sup>85</sup> Section 377 A. (b) of the Israeli Prohibition of Trafficking in Persons Law, no. 5766, 2006 in Amended Penal Law, 5737 of 1977; Art. 388 (3) of Serbia's Criminal Code, no. 85/2005, 88/2005, 107/2005.

<sup>86</sup> See Hotline for Migrant Workers, *Annual Report 2006*, Tel Aviv, 16.

<sup>87</sup> At the time of the research, no decision had been made regarding the case; Phone interview with Government Respondents, November 2008.

## 4. Conclusion: Obstacles to Reliable Referral to the Asylum Procedure

### 4.1 Organizational Obstacles

#### 4.1.1 For All Trafficked Persons

72. **The absence of an effective legal framework:** As already discussed, the pre-requisites for implementing a systematic referral system include comprehensive domestic trafficking legislation, which promotes the identification and protection of trafficked persons, a working asylum system enshrined in a legal domestic framework, and a consistent and prompt referral system linking these two systems. The trafficking protection system needs to be established because, based on our research findings, trafficked persons are only properly identified if there is a national trafficking protection system, geared to the complexities of this task. Since trafficked persons rarely identify themselves, specialist expertise is required to ask the right questions and draw the right conclusions from the evidence available. Also, as pointed out earlier, the identification of a trafficked person often requires the assessment of something that might not have happened yet (e.g. exploitation). The asylum system is required so that trafficked persons can be referred to an existing, working system dealing with questions of international protection. All the countries investigated for this paper have established or will soon establish a legal framework for domestic trafficking protection. As far as international protection is concerned, several countries surveyed have not yet promulgated an asylum law, in some cases despite long standing ratification of the 1951 Refugee Convention.<sup>88</sup> Although all countries have established some form of asylum procedure and their willingness to work with UNHCR considerably enhances the protection of asylum seekers and refugees, international protection mechanisms that are not backed by proper legislations are flawed, not least by their limited capacity to process pending asylum claims.

73. **Competence of referral agency:** Despite the fact that all countries surveyed have established or are in the process of implementing a national trafficking protection system, **our overall finding is that referrals from this system to the asylum system are *ad hoc* at best.** Only in Norway is the option of applying for international protection routinely explained to trafficked persons as part of the free legal aid service provided for all identified trafficked persons. Ireland may soon adopt a similar approach, but this is still somewhat uncertain because the relevant international protection legislation is still under discussion (see the IRP bill described above). Only time will tell whether outstanding problems regarding consideration of the best interests of the child and the availability of free legal aid will be addressed. Clearly, the final decision made by a trafficked person about which system to rely on for protection depends heavily on the advice given in the early post identification stages. Yet, our finding is that **the lack of experience or adequate knowledge about the pros and cons of the different protection systems, on the part of legal advisers working within the national trafficking protection**

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<sup>88</sup> Israel ratified the 1951 Convention in 1954 respectively, whereas Thailand has not ratified it.

**system, has a seriously detrimental impact on the referral mechanism and therefore on the access to international protection for all trafficked persons.**

74. **Coordination:** Most national trafficking protection systems are supervised by a coordination office that connects all institutions and organizations involved in dealing with domestic trafficking. However, they are rarely connected with the asylum procedure. Moreover, refugee protection experts are not always included in the consultations of the trafficking coordination office, a measure that would significantly improve inter agency communication and trust. As a result, in most countries where both protection systems exist, **the trafficking protection and asylum systems remain completely separate**, ignoring the fact that trafficked persons may need the support of both systems in order to access consistent and long term protection.

75. **Training:** Within the trafficking protection system, regular trainings and workshops are organized to improve the identification of trafficked persons, to facilitate their access to shelter and services, and to raise the expertise of staff working with trafficked persons. But we encountered no cases of routine trainings specifically targeted at enhancing the awareness of agency staff, particularly those involved in the identification and the provision of legal aid, regarding the needs of some trafficked persons for referral to international protection. Moreover, the absence of coordination between the trafficking protection and asylum systems means that there are no joint trainings for staff working in the two systems, nor are there separate agency trainings about the options offered by the other agency. This may be a surprising claim given that several manuals issued by organizations include reference to trafficked persons' potential eligibility for international protection. For instance, IOM recently published a booklet for Caribbean states providing guidance to states on domestic trafficking legislation.<sup>89</sup> UNHCR has also repeatedly stressed the importance of trafficked persons' access to international protection, for example during a meeting of ministers and experts of the Economic Community of West African states (ECOWAS) in April 2009.<sup>90</sup>

76. **Data collection:** Systematic data on trafficking is notoriously elusive and scarce. Our finding is that in none of the countries under review was data on identified trafficked persons methodically collected and forwarded to a central data processing entity such as the national coordination office for trafficked persons. The problem is not merely one of coordination and collection; the raw data relating to each stage of the trafficked person's identification and protection process is rarely available.

#### 4.1.2 *Child Specific Problems*

77. **Legal framework:** The protection of children is anchored in various international instruments and domestic laws which apply to each country surveyed. On the one hand, the existence of these formal commitments clearly strengthens each state's obligation to act in the child's best interest. On the other hand, without effective integration, these multiple legal instruments do not add up to a comprehensive system of protection. In fact, the existence of

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<sup>89</sup> In particular, see Appendix B regarding VOT's access to IP; IOM, *Caribbean Counter-Trafficking Model Legislation and Explanatory Guidelines: A Booklet*, Geneva and Washington D.C., December 2008, 75-77.

<sup>90</sup> Email correspondence, UNHCR Nigeria, May 2009.



multiple instruments and agencies may reduce the responsibility assumed by any given institution, especially if it is assumed that others will take ultimate responsibility for children's cases. We also found that, even within the trafficking protection system, the lack of clear and detailed instructions left agency staff confused about their actual duties and the procedures they should follow. In some countries, such as Serbia and Israel, national legislation on trafficking only refers to children connected to prosecutions (as a reason for increasing criminal sanctions against traffickers), and leaves out any mention of the protection needs of trafficked children.

78. **Protracted procedures:** The fact that trafficked children are often exempt from deportation and eligible for education and, as unaccompanied minors also for benefits of national child welfare legislations is positive, and in accordance with international obligations to make the best interests of the child a primary consideration. But all too frequently these benefits leave trafficked children in a protracted legal limbo. **Without a secure and resolved legal status, trafficked children face deportation once they reach majority.** This is a serious defect in many of the states surveyed.

79. **Long term solutions:** Most trafficking protection systems are based on the assumption that return is the only long term solution and that other mechanisms for achieving long term protection are unavailable and undesirable. In this process, the child's opinion is rarely taken into account.<sup>91</sup> Instead, family unity and repatriation to family are deemed the natural solution. For instance, Nigeria has signed MOUs with neighboring countries such as Benin, undertaking to return children as soon as they are identified as trafficked persons. In practice, however, repatriation may not be the most appropriate solution for trafficked children. Available evidence suggests that simple "rescue and return" approaches to trafficked children frequently lead to re-trafficking, especially where the home environment generated the trafficking situation in the first place (this applies to adults too, but even more to children). Our South African informants, for example, reported that many Zimbabwean parents oppose the return of their children from South Africa, for fear that the extreme destitution in living conditions back home will lead to re-trafficking pressures.<sup>92</sup> Aside from protection measures granted by anti-trafficking mechanisms and asylum authorities, only Norway has instituted procedures to provide long term protection to children under the national child protection system. UNHCR, for instance notes the lack of access to national legal and institutional mechanisms as a serious risk factor for displaced children.<sup>93</sup>

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<sup>91</sup> Both General Comment no. 6 by the CRC Committee (§§ 37; 40) and the UNHCR Guidelines on Determining the Best Interests of the Child (pp. 59-63) highlight the importance of taking into account the child's views; see UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>; and UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>.

<sup>92</sup> Phone interview, UNHCR South Africa, November 2008.

<sup>93</sup> See § 8 (b) of the UN High Commissioner for Refugees, *Children at risk*, 22 February 2007, EC/58/SC/CRP.7, available at: <http://www.unhcr.org/refworld/docid/49997afa27.html>.

## 4.2 Conceptual Obstacles to Predictable Referral

80. **Distinguishing between protection and enforcement-oriented benefits:** Since most trafficking legislation links the prosecution of traffickers to the protection of trafficked persons, many benefits for the latter are tied to benefits for the state. Thus, grants of short term protection and residence are not so much considered trafficking protection measures as methods for keeping witnesses for criminal proceedings in the country. It follows, as in Norway, that this short term status is not renewable if the prosecutor decides that the presence of trafficked persons is no longer necessary. For the same reason, the trafficking protection system focuses on short term rather than long term solutions.

81. **Treating trafficked persons as illegal immigrants:** trafficking protection is hampered if the destination country considers all people who cross the border without authorization to be irregular migrants, irrespective of their circumstances. This problem arises in two circumstances. First, countries without domestic asylum legislation such as Thailand and Israel have flawed asylum procedures at best. They tend to treat those seeking asylum and trafficked persons like migrant workers because they do not verify potential international protection needs. Second, countries experiencing large mixed migrations such as Italy and South Africa may indeed provide refugee status or complementary protection to some categories of asylum seekers but may not recognize that trafficked persons can fall into that category. This becomes a particular problem when instead of recognizing trafficked persons' experiences of exploitation and coercion, destination countries treat these trafficked persons as irregular migrants (voluntary sex workers for example).

82. **It is difficult to build political consensus in favor of public spending on migrants in need of international protection, including trafficked persons.**

83. In some countries, the trafficking protection system is an alternative to the asylum system, rather than a complementary system. For example, in Israel, the trafficking protection system enjoys a lot of governmental support but the refugee system does not.

## 5. Recommendations

### 5.1 Legal Measures

**The link between human trafficking and international protection** obligations needs to be explicit in domestic legislation, procedural regulations or official guidelines. Special attention needs to be paid to instituting protections for trafficked children. These steps would facilitate the development of communication and collaboration between the two systems and thus their transparency and predictability.

**More specifically, the applicability of the refugee definition to the circumstances of trafficked persons**, including trafficked children, needs to be further explained. Again, regulations could develop this point. They would ensure that in countries which do have effective refugee determination systems, trafficked persons do not have difficulties establishing their eligibility for protection. The same is true regarding eligibility for complementary forms of protection. Training is essential for these changes to be effectively institutionalized, and should include judges, immigration and refugee officers, administrative and welfare staff. The significant gap between child protection experts and migration and trafficking experts needs to be specifically addressed.

### 5.2 Institutional Innovations

**Initial assessment and referral to competent agency:** Questions relating to identification of potential international protection needs should be included in the module or questionnaire used by all involved agencies dealing with identification of trafficked persons, including trafficked children, as is currently the case in Norway. This should apply to all sites where trafficked persons are identified, including at the border, in detention facilities, in workplaces/shelters, in children's homes, in police stations, on the street, and in the course of police raids. A comprehensive initial assessment also presupposes competence of the agency conducting the interviews and will facilitate trafficked persons' access to adequate protection agencies.

**High level interdepartmental integration:** There should be regular meetings with a rigorous training component, to establish trust and collegial links between the plethora of agencies involved in child welfare, national trafficking protection systems and international protection. There should be a common management board with interagency representation. If a split responsibility between the Justice and Interior Ministries is maintained, there needs to be high level coordination to facilitate reliable referrals between the two ministries.

**Case-by-case assessment of long term solutions:** To institutionalize effective long term protection for trafficked persons, the close tie between trafficked person and state prosecution interests must be loosened, and a more holistic approach to the human rights and protection needs of trafficked person adopted instead. In other words, the effective protection of trafficked persons beyond the immediate short term requires a system that meticulously assesses the appropriate

durable solution on a case-by-case basis considering repatriation, asylum as well as complimentary protection.

**Context-oriented flexibility:** Countries in the process of implementing dual protection systems, such as Mexico and South Africa, should establish a referral system once the new trafficking protection procedures are fully operational. In the case of identified trafficked persons in South Africa, given the enormous backlog in processing asylum applications (currently exacerbated by the crisis in Zimbabwe), it might make more sense to facilitate referrals from the international protection system to the domestic trafficking protection system, rather than vice versa, provided this domestic system affords generous residence conditions. This procedure would expedite trafficked persons' access to a status which entitles them to socio-economic rights ranging from free education and basic health care to adequate housing and social welfare protection.<sup>94</sup> This system would also reduce the risk of trafficked persons being *refouled* and re-exposed to their traffickers.<sup>95</sup>

### 5.3 Administrative Changes

**Common training on the characteristics and needs of trafficked persons, including trafficked children, and on their legal entitlements:** These should be regularly provided, and attendance should be mandatory across departments for personnel dealing with the different aspects of identification and protection of trafficked persons. The trainings should include material covering the relationship between trafficking and asylum eligibility and (where appropriate) child protection.

**Data collection:** Every country should ensure comprehensive record keeping about the time and place of identification of the trafficked person, the shelter where the trafficked person is accommodated including the services provided, the referral agency dealing with the case, or the reasons for ultimately granting or denying refugee or a complementary form of protection.

**Assessment of long term solutions for trafficked children according to best interest of the child:** Instead of the current default assumption being that repatriation and family reunification is the first and best outcome for trafficked children, their best interest must guide the procedure to assess the most adequate durable solution.<sup>96</sup> Repatriation and family reunification may be in the child's best interest in many cases, especially when the asylum system is generally not child-friendly or deals with a large backlog of cases such as in South Africa. Yet, in others, international protection may guarantee the best long term protection. Furthermore, all available long term protection measures should be considered, including those granted by national protection systems as is the case in Norway. Besides enhancing the overall protection net of trafficked children, such an approach is required by the non-discrimination provision of the CRC (art. 2).

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<sup>94</sup> Consortium for Refugees and Migrants in South Africa, *Protecting Refugees, Asylum Seekers and Immigrants in South Africa*, Johannesburg, June 2008, 37.

<sup>95</sup> Human Rights Watch, *Neighbors in Need: Zimbabweans Seeking Refuge in South Africa*, 19 June 2008.

<sup>96</sup> See section 3 of the UNHCR Guidelines on Determining the Best Interests of the Child on procedures to assess the child's best interest.

**Resource allocation and political will:** To implement a systematic referral system, political will has to be generated to establish both systems, to create lines of communication and to allocate the necessary resources to an integrated protection system.

**Monitoring and evaluation:** All trafficking cases should be carefully and consistently documented, from the time of identification through the procedure to the final outcome, whether this is long term asylum or short term protection followed by repatriation, or deportation. Cases of trafficked children should be separately tagged or recorded.

## 6. Bibliography

*Note: All weblinks were accessed in September 2009, unless otherwise indicated.*

### 6.1 Legal Framework

#### 6.1.1 International and Regional Legal Instruments<sup>97</sup>

##### i) Human Trafficking

*Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, 30 April 1957, 266 U.N.T.S. 3; available at: <http://www2.ohchr.org/English/law/slavetrade.htm>

*Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317, available at: <http://www.unhcr.org/refworld/docid/3ae6b38e23.html>

*Worst Forms of Child Labour Convention* (No. 182), adopted June 17, 1999, 2133 U.N.T.S. 161, available at: <http://www.unhcr.org/refworld/docid/3ddb6e0c4.html>

*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/25 (2000), available at: <http://www.unhcr.org/refworld/docid/4720706c0.html>

*Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, available at: <http://www.unhcr.org/refworld/docid/43fded544.html>

##### ii) Refugee Protection

*Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>

*Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>

*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*

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<sup>97</sup> See for a more detailed compilation of legal instruments related to trafficking: UN High Commissioner for Refugees, *Refugee Protection and Human Trafficking. Selected Legal Reference Materials*, December 2008, available at: <http://www.unhcr.org/refworld/docid/498705862.html>.

*Need International Protection and the Content of the Protection Granted*, 19 May 2004, 2004/83/EC, available at: <http://www.unhcr.org/refworld/docid/4157e75e4.html>

### iii) Human Rights

*Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, 19; available at: <http://www.unhcr.org/refworld/docid/3b00f2244.html>

*Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3; available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>

*Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25 May 2000, A/RES/54/263, available at: <http://www.unhcr.org/refworld/docid/3ae6b38bc.html>

#### 6.1.2 Domestic Legislations

*Act Concerning the Entry of Foreign Nationals into the Kingdom of Norway and Their Presence in the Realm (Immigration Act) (last amended 28 July 2002) (No. 64)* [Norway]. 24 June 1988, available at: <http://www.unhcr.org/refworld/docid/3ae6b4fd14.html>

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## 7. Appendices

### Appendix I: Questionnaire

#### QUESTIONNAIRE

#### The Identification and Referral of Trafficked Persons, in Particular Children, with International Protection (IP) Needs

*There are two important parallel systems of protection for trafficked person in many countries: a domestic system specifically geared to the needs of trafficked person, and a more generic system based on international law, geared to the needs of refugees and others in need of temporary or permanent subsidiary protection. The two systems deliver different types of protection. This research, commissioned by UNHCR, aims to discover whether people identified as trafficked persons (trafficked person) have their needs and entitlements to IP addressed.*

#### Respondent's Contact Information

Name of (Response)  
Respondent  
Organization/ (Response)  
Institution  
Country of (Response)  
Expertise

#### I. NATIONAL LEGAL FRAMEWORK

- a) **Is there a national definition for trafficked person? If yes, in which law?**  
(Response)
- b) **Has your country passed a law relative to the protection of trafficked person, especially child Trafficked person? Is the trafficked person protection restricted to witness protection or does it go beyond?**  
(Response)
- c) **Are there gender-specific provisions relative to trafficked person? For example, are male and female trafficked person eligible for different protections? Are there procedural differences in the handling of male/female trafficked person cases? If so, please specify.**  
(Response)
- d) **Has your country passed a Law on Refugees/Asylum? Are there any specific provisions in the law regarding the IP of trafficked person?**

(Response)

- e) **Is there a specific legal status accessible for trafficked person (e.g. temporary protection visa)? What are the criteria of eligibility? What, if any, are the legal differences in status and conditions for eligibility between children and adults?**

(Response)

## **II. OPERATIONALIZATION OF trafficked person PROTECTION**

### **2.1. *Identification of trafficked person:***

- a) **Is there a system in place to identify trafficked person on your country's territory?**

(Response)

- b) **If yes, which agency/body is in charge of identifying trafficked person? If there are several, is there a mechanism for co-ordination?**

(Response)

- c) **Under which circumstances are trafficked person identified? (Please specify occasion, e.g. border control, work place inspection, raids, community-based networks, shelters, others)**

(Response)

- d) **Is there a monitoring mechanism to supervise the trafficked person identification process?**

(Response)

### **2.2. *Trafficking Protection System Regarding Internationally Trafficked Person And Their Implications:***

- a) **What legal status is accessible for trafficked person within the protection system?**

(Response)

- b) **What does this system provide for (Shelter/accommodation, counseling, welfare/stipend, legal aid, employment/educational/ vocational training opportunities, family tracing, etc.)?**

(Response)

- c) **Which is the lead agency/body (governmental or non-governmental) in charge of trafficked person protection?**

(Response)

- d) **Who is responsible for coordinating trafficked person protection between the different agencies/bodies involved (if different from the lead agency)?**  
(Response)
- e) **How is the personnel trained? By whom?**  
(Response)
- f) **Is trafficked person protection subject to any agreements to participate in legal/criminal proceedings or are there other conditionalities (e.g. participation in counseling, living in a particular shelter, agreeing to a time frame for departure, withdrawal of asylum application)? Or is trafficked person protection accessible to all with no prior conditionalities?**  
(Response)
- g) **What are the consequences of a trafficked person NOT agreeing to conditionalities (e.g. appearing as a witness in legal/criminal proceedings)?**  
(Response)
- h) **Are there other possible means of protection? If yes, for how long?**  
(Response)
- i) **What kinds of solutions are accessible for trafficked person within the trafficking protection system (solely repatriation, long term residence, naturalization, resettlement)?**  
(Response)
- j) **Who, if anyone, monitors the implementation of the system?**  
(Response)
- k) **Are there any other relevant aspects regarding the trafficking protection system?**  
(Response)

### **III. IDENTIFICATION, REFERRAL AND ASSESSMENT OF INTERNATIONALLY TRAFFICKED PERSON TO IP**

#### **3.1. *IP Identification Mechanism:***

- a) **At which point are the IP needs of trafficked person identified?**  
(Response)
- b) **Which agency/institution is in charge of identifying the IP needs of trafficked person? Is it the same that is in charge of assessing non trafficked person asylum claims (i.e. the asylum system)? Or is it the same agency that is in charge of assessing non asylum related trafficked person claims (i.e. the trafficking system)?**

(Response)

- c) **How does the identification mechanism work?**

(Response)

- d) **What kind of training, if any, do those in charge of identifying IP needs of trafficked person receive?**

(Response)

- e) **What role, if any, does UNHCR have in the identification mechanism?**

(Response)

### 3.2 *IP Referral Mechanism:*

- a) **At which point are trafficked person referred to a IP mechanism?**

(Response)

- b) **Which agency/institution is in charge of referring trafficked person to the IP system?**

(Response)

- c) **How does the referral mechanism work?**

(Response)

- d) **What kind of training, if any, do those in charge of the referral system receive?**

(Response)

- e) **What role, if any, does UNHCR have in the referral mechanism?**

(Response)

### 3.3. *IP Needs Assessment:*

- a) **At which point are trafficked person's needs for IP assessed?**

(Response)

- b) **Which agency/institution is in charge of assessing the IP needs of trafficked person?**

(Response)

- c) **How does the IP assessment mechanism work?**

(Response)

- d) **What role, if any, does UNHCR have in the IP assessment mechanism?**

(Response)

- e) **How many times has trafficked person been assessed for their IP needs?**

(Response)

**3.4. *Implications of Identification, Referral and Needs Assessment:***

- a) **What services are made available to a referred trafficked person to have his/her IP needs assessed (e.g. legal representation, guardianship, interpreter, psychological assessment)? Are there specific services available to trafficked person beyond the services for all asylum seekers?**

(Response)

- b) **What immigration status does the trafficked person receive pending assessment of his/her IP needs?**

(Response)

- c) **What interagency networking, coordination or collaboration exists for referrals? Is it ad hoc or institutionalized?**

(Response)

- d) **Is there any monitoring mechanism supervising the identification, referral and needs assessment of IP?**

(Response)

- e) **If not all trafficked persons are assessed for both trafficked person protection and IP, what are the criteria for choosing one or the other?**

(Response)

- f) **Is there any conditionality attached to referral (e.g. obligation to testify vs. trafficker, obligation to be accommodated in shelter, obligation to give family details to enable tracing)?**

(Response)

- g) **What are the consequences if the trafficked person is unwilling to comply with the conditionality? Is trafficked person protection still available, is (voluntary/forced) repatriation the only option?**

(Response)

- h) **If IP and trafficked person protection are both accessible in the beginning, is trafficked person protection also accessible once IP is denied?**

(Response)

- i) **What kind of immigration status does a trafficked person receive upon being granted IP (e.g. refugee status, subsidiary protection, temporary protection)?**

(Response)

- j) **What are the consequences of being denied any kind of IP?**

(Response)



- k) **What kind of solutions does the granting of IP lead to (e.g. infinite refugee status, repatriation, resettlement, residence and naturalization)?**  
(Response)
- l) **Are there specific guidelines on IP identification, referral and assessment for trafficked person?**  
(Response)
- m) **What is the recognition practice? How many trafficked person referred to IP does get granted IP?**  
(Response)
- n) **What are the benefits and shortcomings of choosing either trafficked person protection or IP?**  
(Response)

#### **IV. CHILD-SPECIFIC PROTECTION**

- 4.1. a) *Identification of Children for Trafficked Person Protection:*
- b) **Are there any child-specific procedures in place to identify minor trafficked person?**  
(Response)
- c) **If yes, which agency/body is in charge of identifying child trafficked person? Is it different from the one identifying other trafficked person and/or is there a special unit within the same agency? What is the role of UNHCR?**  
(Response)
- d) **Are there differences in the identification procedure if children are concerned? If yes, in which respect?**  
(Response)
- e) **Is there a monitoring mechanism to supervise child trafficked person identification?**  
(Response)
- f) **Are child-specific services offered to child trafficked person besides the ones accessible to all trafficked person?**  
(Response)
- g) **Is child trafficked person protection attached to any conditionality and if yes, which one?**  
(Response)
- h) **What legal status is accessible for child trafficked person within the**

**protection system? Is repatriation the only option (what if trafficked person is unwilling to return)? Are there other possibilities such as temporary protection status?**

(Response)

- i) What kind of durable solutions are accessible for child trafficked person within the trafficking protection system (solely repatriation, long term residence, naturalization, resettlement)?**

(Response)

#### **4.2. *Referral of internationally trafficked child to IP***

- j) Is IP (asylum, subsidiary protection or temporary protection) accessible to child trafficked person?**

(Response)

- k) Are child-specific IP needs assessed within the identification procedure? If not, at which point are those needs assessed?**

(Response)

- l) Which agency/institution is in charge of assessing IP needs relative to child trafficked person? Is it the same that is in charge of assessing other asylum claims? Or is it the same agency that is in charge of assessing trafficked person claims? What is the role of UNHCR?**

(Response)

- m) What kind of training (if any) is provided to the personnel assessing IP needs of trafficked person?**

(Response)

- n) Are the same or different child-specific procedures in place with regard to both the identification and referral of child trafficked person for IP?**

(Response)

- o) Is there any conditionality attached to the referral of child trafficked person? If yes, which one?**

(Response)

- p) What immigration status does the minor trafficked person receive pending assessment of his/her IP needs?**

(Response)

- q) What interagency networking, coordination or collaboration exists? Is it ad hoc or institutionalized?**

(Response)

**r) Is there any monitoring mechanism supervising the referral of child trafficked person to IP?**

(Response)

**s) Are there any other child-specific aspects of referring a trafficked person to IP?**

(Response)

**Do you have any suggestions how the existing trafficked person protection/identification/referral system could be improved?**

(Response)

**Date:** (DD/MM/YEAR)

*Thank you very much for your time and your valuable contribution to this project!*

## Appendix II: Responses and Telephone Interviews

		IOs	Government	Civil Society: NGOs and Independent Experts	Total
		Email/telephone	Email/telephone	Email/telephone	Email/telephone/total
Europe					
	Ireland	1/0	1/0	1/0	3/0/3
	Italy	0/1	-	1/0	1/1/2
	Norway	2/0	2/0	0/1	4/1/5
	Serbia	1 / 2	1/0	1/0	3/2/5
Middle East					
	Israel	0/1	0/1	0/1	0/3/3
Americas					
	Mexico	2/0	-	1/0	3/0/3
Africa					
	Nigeria	1/0	1/0	1/0	3/0/3
	South Africa	1/1	-	2/0	3/1/4
Asia					
	Kyrgyzstan	1/0	-	-	1/0/1
	Thailand	2/1	-	-	2/1/3
Total		11 / 6 = 17	Government: 5 / 1 = 6	Civil Society: 7 / 2 = 9	32
		<b>Email: 23</b>	<b>Telephone: 9</b>		<b>32</b>

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