

Trafficking in the Refugee Context
Presented by Emilie Wiinblad Mathez, Protection Officer, UNHCR Ireland
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Scope

The topic for this brief presentation is “International Protection for victims of Trafficking”. I will focus on the links between the 1951 Refugee Convention and trafficking issues, but also touch on the international and regional protection framework for victims of trafficking.

The first question I will seek to answer is “what is the internationally recognised definition of trafficking”? I will look in some more detail at the UN Protocol on Prevention, Suppression and Punishment of Trafficking in Persons, but also in the regional context the Council of Europe Convention on Action against Trafficking in Human Beings (2005).

The second question I will look at is “when it may be appropriate to consider refugee status in relation to a victim of trafficking”? and

The final question is whether UNHCR has any specific recommendations in relation to procedural issues of relevance for victims of trafficking in the asylum process?

Definition

On the question on the definition the relevant reference is the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) [*“Anti-Trafficking Protocol”*].

In way of brief background to the Convention against Transnational Organized Crime, the Convention was opened for signatures in 2000 together with its two protocols one sets out to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children and a second protocol against the Smuggling of Migrants by Land, Sea and Air.

It is in the first protocol we find the ***internationally recognized definition of trafficking***. The Convention and its protocols have been negotiated between states within the framework of the United Nations Office on Drugs and Crimes and first and foremost aims at creating an international framework for dealing with transnational organized crime, including trafficking.

Ireland has signed but not ratified the Convention and both Protocols.

The ***basic purpose*** of the Protocol is to prevent and combat trafficking, to protect and assist victims and to promote international cooperation. The protection of, and assistance to, victims is specified as a core purpose of the Protocol.

Article 3 of this *Protocol* provides an internationally-recognized definition of human trafficking. Although this definition does not require cross-border activities, Article 4 limits the application of the *Protocol* to instances where human trafficking is transnational in nature and involves organized crime. The *Protocol* requires states to establish criminal liability for human trafficking and to adopt preventative and cooperative measures to deter it. It also requires State Parties to provide a robust regime of health and social services to victims, including the possibility of remaining temporarily or permanently in

the receiving country. Article 14 of the *Protocol* precludes any effect of the *Protocol* on international humanitarian and human rights law obligations, and specifically mentions the 1951 *Convention* and 1967 *Protocol Relating to the Status of Refugees*.

The definition as set out in the protocol reads as follows. “For the purposes of this Protocol:

- (a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking 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, harboring 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.”

As can be seen, ***the definition has three distinct elements***, which must be fulfilled for a situation to be one of trafficking. There must be *an act* such as transport or recruitment. The act must be done *by means of* for example fraud, deception, abuse of power or outright physical force and finally, it must be *for the purpose of exploitation*.

Trafficking in human beings can take many forms and cover a range of diverse situations. It is worth noting that there is ***no requirement that a person must have crossed a border***. There is also no requirement for the trafficker to be unknown to the victim and the trafficker ***can therefore be a family member or a friend***, as long as the three elements of; act, means and for the purpose of exploitation are fulfilled. For children the definition is broader and only holds two elements; there must be “an act” for the purpose of exploitation.

It must also be noted that ***consent in the act of trafficking is irrelevant if the means used include those listed in the definition*** such as the use of threat, the 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. Therefore, a situation which may have started as one of consent to be taken legally or illegally to another country may therefore end up being a situation of trafficking.

In the ***regional context, the CoE also adopted a Convention*** on Action against Trafficking in Human Beings (2005). This Convention on Action against Trafficking in Human Beings entered into force 1st February 2008. The convention covers the issues of prevention, prosecution and protection. It has adopted the same definition of trafficking as was agreed upon in the UN 2000 Convention and outlined above. Ireland has signed but not yet ratified this convention.

Trafficking and refugee status

From the issue of the definition I would like to turn to the second topic of this presentation, which is the link to the 1951 Refugee Convention. Clearly ***not all victims of trafficking are refugees***; however trafficking can form the basis for a refugee claim.

UNHCR has published guidelines on international protection and the application of the refugee definition to victims of trafficking and persons at risk of being trafficked¹ (hereinafter UNHCR's trafficking guidelines). The guidelines provide for a comprehensive analysis of the trafficking definition and its different elements. They also give clear examples of how the harm related to trafficking can give a well founded fear of persecution and show how this may be linked to one or more of the Convention grounds of nationality, race, religion or membership of a particular social group or political opinion.

Not all victims or potential victims of trafficking fall within the scope of the refugee definition. To be recognized as a refugee all elements of the refugee definition have to be satisfied. UNHCR's trafficking guidelines give examples of ***three scenarios*** where a claim for international protection presented by a victim or potential victim of trafficking can arise.

1. The victim may have been trafficked abroad, may have escaped his or her traffickers and may seek the protection of the State where s/he now is.
2. The victim may have been trafficked within national territory, may have escaped from his or her traffickers and have fled abroad in search of international protection.
3. The individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection. In all these instances, the individual concerned must be found to have a "well-founded fear of persecution" linked to one or more of the Convention grounds in order to be recognized as a refugee.

When looking at whether a victim or potential victim of trafficking has a well founded fear of persecution a decision maker ***must establish what the applicant fears and the persecutory nature of the various acts associated with trafficking***. These often include severe exploitation, abduction, incarceration, rape, sexual enslavement, forced labor, removal of organs, physical beatings, and starvation. Such acts constitute serious violations of human rights, which will ***generally amount to persecution***. Where the applicant has escaped from traffickers the fear is often related to reprisals from the trafficker who may have significant financial interests in the person. Fear may also be related to the treatment from other groups in society, who may discriminate or ostracize the person known to have been trafficked and for instance forced into prostitution. It should be noted that forced prostitution or sexual exploitation is a form of ***gender-related violence***, which may constitute persecution.

Once it is established that the person has a well founded fear of persecution and where the persecuting agent is not related to the state, it is necessary to look at whether ***State protection is available***. In most trafficking cases the persecutory act emanates from

¹ Guidelines on international protection: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to Status of Refugees to victims of trafficking and persons at risk of being trafficked. 7 April 2006 HCR/GIP/06/07 UNHCR

individuals such as criminal gangs, friends or family of the victim. Whether the country of origin is able to protect the victims or potential victims depends on the legislative and administrative mechanisms in place to prevent and combat trafficking as well as on the protection and assistance available. Where a State fails to take such reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well-founded.

When assessing whether a victim or potential victim of trafficking is a refugee establishing the **place of persecution may be particularly relevant**. A refugee must be outside his or her country of origin or former habitual residence. It is not necessary that the person left because of a well founded fear of persecution as s/he can have become a refugee **sur place**. This means that the person fulfills the refugee definition after s/he left the country of origin or former habitual residence but can no longer return because of a well founded fear of persecution. While the acts of persecution in relation to trafficking may arise in the country of origin, while *en route* and in the country where the person is seeking asylum, the assessment in relation to a refugee claim **must be made vis a vis the country of origin or former habitual residence**. However trafficking in individuals across international borders gives rise to a complex situation which requires a broad analysis taking into account the various forms of harm that have occurred at different points along the trafficking route.

The well founded fear of persecution **must be linked to one of the 1951 Convention grounds**. If the persecution is carried out by either the State or a non-State actor for one of the five grounds this is sufficient to establish the causal link to the Convention. If on the other hand the persecution is carried out by a non-State actor and there is no link to a convention ground then the lack of State protection must be linked to a convention ground. While the prime motivation for trafficking is likely to be one of profit, this does not exclude the possibility of Convention related grounds **in the targeting and selection of victims of trafficking**. This may especially be the case where **one or more groups in society are particularly vulnerable or less effectively protected because of** their religion, ethnicity or otherwise. Where there is no link to one of the Convention grounds, but the person is at risk of serious harm, it may be relevant to consider granting a person subsidiary protection.

The Convention grounds are race, nationality, religion, membership of a particular social group or political opinion. A victim or potential victim of trafficking may be targeted because they belong to any of these groups or are perceived to belong to any of the groups. It is the membership of a particular social group which tends to be more difficult to define. **The members of the particular social group must share common characteristic other than their risk of being persecuted or they must be perceived as a group within society**. Women may form a social group, as may certain sub-sets of women within society. Depending on the circumstances this could include; single women, widows, divorced women or illiterate women. Likewise certain groups of children may be a particular social group, such as orphans, street children or separated or unaccompanied minors. **Former trafficked persons may form a particular social group**. The fact of belonging to such a particular social group may be one of the factors contributing to an individual's fear of persecution².

² For a full analysis of how to consider refugee applications in relation to trafficking I would like to refer to UNHCR's trafficking guidelines and UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992

Procedural issues for trafficking victims in the asylum process – UNHCR’s recommendations

In relation to the final question on ***procedural matters UNHCR included some points on this in its Guidelines on international protection***: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to Status of Refugees to victims of trafficking and persons at risk of being trafficked. 7 April 2006 HCR/GIP/06/07 UNHCR.

The points raised concern both issues related to the asylum system and to the material and socio-psychological support provided. Some of the key points in relation to procedures are

- Access to the asylum procedure
- Access to legal counselling
- Normally requires examination on their merits in regular procedures.
- Interviewing in supportive environment – reassured about confidentiality, same sex interviewer and interpreter.
- May need expert counselling and psycho-social assistance.
- Due to often disproportionately affect on women and children, they can be considered victims of gender-related persecution.

Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, ***require a supportive environment*** where they can be reassured of the confidentiality of their claim. (See also Sexual Violence Against Refugees: Guidelines on Prevention and Response (UNHCR, Geneva, 1995) and Prevention and Response to Sexual and Gender-Based Violence in Refugee)

UNHCR has made some recommendations in relation to ***ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process***. They include:

- Women asylum-seekers should be ***interviewed separately***, without the presence of male family members.
- It is essential that women are given ***information about the status determination process, access to it, as well as legal advice***, in a manner and language that she understands.
- Claimants should be informed of the ***choice to have interviewers and interpreters of the same sex*** as themselves and they should be provided automatically for women claimants. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education.
- An ***open and reassuring environment*** is often crucial to establishing trust between the interviewer and the claimant.
- The ***interview room*** should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances.
- General good practice recommendations around interviewing form and style apply.
- The type and level of emotion displayed during the recounting of her experiences should not affect a woman’s credibility.
- For some cases, it may be appropriate to ***seek objective psychological or medical evidence***.

- It is unnecessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as, use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers, civilians) etc.) as well as the motivation of the perpetrator may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse.
- Mechanisms for **referral to psycho-social counseling** and other support services should be made available where necessary. Best practice recommends that trained psycho-social counselors be available to assist the claimant before and after the interview.

Of course one of the more practical issues that arise is when to treat a person as a victim of trafficking, when this exact fact may be the question of the procedure.

Article 10 of the CoE Convention deals specifically with identification of victims of trafficking. The “test” used is whether “the competent authorities have **reasonable grounds to believe**”. In the Irish context it is currently decided that it is the GNIB, which is the competent authority.

When it comes to **child victims** Article 10 (3) makes it clear that “When **the age of the victim is uncertain** and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.

The specific assistance to the child outline in article 10:

- (a) provide for representation of the child by a legal guardian, organization or authority which shall act in the best interests of that child;
- (b) take the necessary steps to establish his/her identity and nationality;
- (c) make every effort to locate his/her family when this is in the best interests of the child.

However this does not in itself answer the question on when a person should be treated as a victim of trafficking in the asylum process.

Some **countries have produced particular guidelines** on the matter

This Part has benefited from the valuable guidance provided by various States and other actors, including the following guidelines:

Considerations for Asylum Officers Adjudicating Asylum Claims from Women (Immigration and Naturalization Service, United States, 26 May 1995);

Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers (Department of Immigration and Humanitarian Affairs, Australia, July 1996);

Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update (Immigration and Refugee Board, Canada, 13 November 1996);

Definition in Guideline 8: Guideline on procedures with respect to vulnerable persons appearing before the IRB. Effective 15 December 2006

Position on Asylum Seeking and Refugee Women, (European Council on Refugees and Exiles, December 1997);

Gender Guidelines for the Determination of Asylum Claims in the UK (Refugee Women’s Legal Group, July 1998);

Gender Guidelines for Asylum Determination (National Consortium on Refugee Affairs, South Africa, 1999);

Asylum Gender Guidelines (Immigration Appellate Authority, United Kingdom, November 2000); and

Gender-Based Persecution: Guidelines for the investigation and evaluation of the needs of women for protection (Migration Board, Legal Practice Division, Sweden, 28 March 2001).

Some of the common aspects are similar to those mentioned in UNHCR's guidelines. These are linked to gender related persecution in general and do not deal with trafficking in particular. However, in relation to the issue of identification the recommendation is to have an **early as possible identification** of women with gender related persecution issues and to do so in a **collaborative way through different bodies**. The Canadian guidelines on vulnerability, which includes persons who have been victims of torture or gender related persecution, also makes it clear that treating a person as vulnerable does not mean that the "facts" claimed have been accepted, when in fact this is what is under consideration.

In UNHCR's view it is of significant importance that applicants in the asylum process are **given good quality legal advice as early as possible in the process** and that the legal adviser can flag particular vulnerable cases to the decision making body, so necessary special measures can be taken.

Thanks for your attention.