

PROTECTING TRAFFICKED PERSONS IN THE AMERICAS: A REFUGEE LAW PERSPECTIVE¹

1. The Office of the United Nations High Commissioner for Refugees (hereinafter “UNHCR” or “the Office”) values the efforts and shares the legitimate interest of States to combat trafficking in persons, a crime which entails serious violations of the human rights of its victims. UNHCR specifically draws attention to the humanitarian consequences of this crime and calls for a human rights based approach to human trafficking which goes beyond identifying and prosecuting the perpetrators and includes measures to address the protection needs of victims or individuals at risk of being trafficked.

I. UNHCR’S INTEREST IN HUMAN TRAFFICKING

2. UNHCR has been entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees.² UNHCR’s mandate *ratione personae* also includes asylum-seekers,³ returnees,⁴ stateless persons⁵ and, under specific circumstances, internally displaced persons.⁶

3. Neither the issue of human trafficking nor trafficked persons *per se* fall under UNHCR’s mandate or the scope of application of the 1951 Convention Relating to the

¹ This is a revised version of the following document: UN High Commissioner for Refugees, *Considerations on the Issue of Human Trafficking from the Perspective of International Refugee Law and UNHCR’s Mandate*, March 2009, available at: <http://www.unhcr.org/refworld/docid/49ca275d2.html>

² See Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, para. 1 (1950).

³ An asylum-seeker is an individual who is seeking international protection and whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.

⁴ A returnee is a refugee who has returned to his/her country of origin.

⁵ According to the 1954 Convention Relating to the Status of Stateless Persons, a stateless person is a person who is not considered as a national by any State under the operation of its law. UNHCR’s global statelessness mandate derives from United Nations General Assembly Resolution 50/152 and is further developed in Resolutions 61/137 and 63/148. In resolutions 3274 (XXIX) and 31/36, the United Nations General Assembly requested also UNHCR to undertake the functions foreseen under Article 11 of the 1961 Convention on the Reduction of Statelessness.

⁶ In conformity with the Guiding Principles on Internal Displacement (adopted by the former UN Human Rights Commission in 1998), internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border. In resolution 53/125, the United Nations General Assembly set forth the criteria for UNHCR’s role in providing humanitarian assistance and protection to internally displaced persons.

Status of Refugees and its 1967 Protocol (hereinafter “the 1951 Convention”). However, UNHCR as part of a broader international response to human trafficking gets involved where human trafficking impacts on persons of concern to the Office.⁷ UNHCR gets engaged for example as part of its regular protection functions:

- To prevent that refugees and other persons of concern (asylum-seekers, returnees, stateless and internally displaced persons) become victims of human trafficking, and to address the specific protection needs of persons of concern who have fallen victims thereof;
- To ensure that the international protection needs of trafficked persons (or individuals at risk of being trafficked) which arose as a result of their trafficking experience are recognized, and that those who meet the criteria established in Article 1 of the 1951 Convention are granted refugee status,⁸ or
- To assist States in ensuring that trafficked persons who are without identity documents are able to establish their identity and nationality to prevent them from being rendered stateless, and to protect stateless trafficked persons.⁹

II. UNHCR’S ACTIVITIES IN THE FIELD OF HUMAN TRAFFICKING IN THE AMERICAS

4. In accordance with its mandate, UNHCR undertakes a series of activities related to human trafficking in the Americas. Such activities are based on the fact that this specific crime entails abuses or serious threats to the human rights of the victims and that a protection response may be called for to ensure the well-being of the persons concerned. More importantly, UNHCR understands that general protection measures for trafficked persons are not sufficient for those victims who fear persecution or other serious human rights violations and cannot return home. They also need the specific protection provided for in the 1951 Convention, most notably protection against *refoulement* and asylum.

⁷ See in particular the following ExCom conclusions: No. 90 (LIV-2001); No. 96 (LIV-2003); No. 97 (LIV-2003); No. 105 (LIV-2006); No. 106 (LIV-2006), and No. 107 (LIV-2007).

⁸ The *Agenda for Protection*, adopted by the Executive Committee of the High Commissioner’s Program in 2003, encourages “States to ensure that their own asylum processes are open to receiving claims from individual trafficked persons, especially women and girls who can base their claim to asylum on grounds which are not manifestly unfounded”. Similarly, the *United Nations High Commissioner for Human Rights* has exhorted States to consider “[e]nsuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum-seekers and that the principle of non-refoulement is respected and upheld at all times”. *The Committee on the Elimination of Discrimination against Women* has called on States “to afford full protection under the 1951 Geneva Convention on Refugees, inter alia, to trafficked women who seek asylum on grounds of gender-based persecution in line with the latest developments in international refugee law and the practice of other States”.

⁹ See ExCom Conclusion No. 90 (LII), para (s), and Conclusion No. 106 (LVII), paras. (l) and (m).

5. The Office has been involved in **advocacy** efforts to promote an asylum-sensitive anti-trafficking legal framework at the national and regional levels. UNHCR advocates for the inclusion of specific provisions into that body of law to take into consideration the right of every person, including trafficked persons, to seek asylum from persecution. Similarly, the Office participates in National Coalitions or Working Groups on Trafficking to promote international protection under the 1951 Convention for eligible victims or individuals at risk of being trafficked. Another objective is to ensure that National Action Plans and Protocols on trafficking incorporate a focus on international refugee protection. At the regional level, UNHCR participates in various fora to advocate for the inclusion of international refugee law standards in their work on trafficking (e.g. the OAS Inter-American Program for the Promotion and Protection of Human Rights of Migrants, the OAS Meeting of National Authorities on Trafficking in Persons and the Regional Conference on Migration – RCM).

6. UNHCR is also involved in **awareness-raising** activities to disseminate information among the refugee population and other persons of concern to alert them on the different modalities of human trafficking and associated risks. Similarly, the UNHCR web site has a section on human trafficking which contains information on the Office's role in this field, as well as materials and guidelines on the refugee protection and human trafficking nexus¹⁰.

7. As to the **identification of risks for the population of concern**, UNHCR has incorporated human trafficking as a variable when undertaking risk assessments and monitoring the situation of refugees and other persons of concern. This measure will help identify special vulnerabilities of this population which could expose them to trafficking situations.

8. In the area of **identifying trafficked persons** or individuals at risk of being trafficked, the Office regularly undertakes training and border-monitoring missions to evaluate the arrival of refugees within mixed movements. Similarly, UNHCR visits holding and detention centers to identify refugees and other persons of concern.

9. The Office has also contributed in setting up informal referral mechanisms in collaboration with national authorities, national institutions for the promotion and protection of human rights, the International Organization for Migrations (IOM), and civil society organizations to ensure the **protection and assistance** of trafficked persons or individuals at risk of being trafficked of concern to UNHCR.

10. UNHCR is also actively involved in **training and capacity** building efforts. The Office carries out training activities on its protection mandate and the refugee protection and human trafficking nexus addressed to a variety of actors, including national authorities

¹⁰ See UNHCR and Human Trafficking at: <http://www.unhcr.org/pages/4a16aae76.html>

(migration officers, police, etc.), other international organizations and civil society organizations. Similarly, UNHCR participates in training activities on human trafficking jointly organized with other agencies such as UNODC, IOM and the Organization of American States (OAS) to ensure an International Refugee Law perspective on this issue.

11. UNHCR provides support to national asylum authorities on **refugee status determination**, including through training on the Guidelines on the “Application of Article 1A(2) of the 1951 Convention or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked”.¹¹ The Office has also submitted advisory opinions concerning individual cases on the interpretation of the refugee definition in cases of victims of trafficking in need of international protection.

12. As to **durable solutions**, resettlement has proved to be an effective tool for certain trafficked persons whose international protection needs have been recognized (i.e., once their refugee status has been formally determined) and who should be transferred to a third country to obtain effective protection. Refugee victims of trafficking could come under the scope of specific resettlement criteria, such as “legal and physical protection needs” and “women-at-risk”. For that reason, UNHCR uses resettlement as a tool for the protection of some refugee victims of trafficking.

III. DEVELOPMENTS IN THE FIELD OF HUMAN TRAFFICKING RELEVANT TO REFUGEE PROTECTION IN THE AMERICAS

13. During the past few years, most countries in the region have undertaken important efforts to strengthen their legal and institutional response to human trafficking. Some of the measures adopted by States contain important developments from the perspective of the international protection of refugees.

A. Legal and Operational Framework

14. Twenty-eight countries in the Americas have ratified the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. By means of the saving clause contained in Article 14 of this Protocol, these countries recognize that all actions undertaken under this international instrument, including the determination that a person is a victim of trafficking, should not affect the application of the 1951 Convention and its 1967 Protocol, in particular the refugee definition and the principle of *non-refoulement*.

15. As to the national legal framework, the 2009 Act against Sexual Violence, Exploitation and Trafficking in Persons in **Guatemala** contains important provisions on the

¹¹ Document available at: <http://www.unhcr.org/publ/PUBL/443b626b2.pdf>

right to asylum. In particular, the Act stipulates that the repatriation process for trafficked persons should be undertaken “without prejudice to the right to asylum” (Articles 16 and 17). It also provides for the right of trafficked persons to have information on their rights and the services available to them, as well as on “the asylum procedure, the tracing of their families, and the situation in their country of origin” (Article 2(h)).¹²

16. In **Costa Rica**, relevant executive decrees set out the possibility for international organizations and NGOs to participate as observers at the technical instances of the National Coalition against the Smuggling of Migrants and Trafficking in Persons.¹³ Furthermore, a multi-disciplinary and inter-agency Immediate Response Team was established by the Costa Rican Government to address the needs of trafficked persons. The International Organization for Migrations (IOM), the International Labour Organization (ILO), and UNHCR were formally included in the team as technical advisers.¹⁴

17. In **Mexico**, the 2007 Act to Prevent and Punish Human Trafficking (Article 13(II)(b)) provides for training on refugee law as part of the professional training on human trafficking for civil servants (public security, administration of justice, and migration). In 2010, the National Institute for Migration issued an administrative instruction on the protection of unaccompanied migrant children. In the case of those children who are potential victims of trafficking, this instruction provides that, based on the child’s view and best interest, the immigration authority has to determine which is the most appropriate solution for the child: repatriation, filing an asylum claim or a claim for a complementary form of protection.¹⁵

18. At the operational level, the Protocol for the Repatriation of Children and Adolescents Victims of Trafficking in **Costa Rica** contains a reference to UNHCR’s Guidelines on the Application of the 1951 Convention to trafficked persons and individuals at risk of being trafficked. This Protocol recognizes that, under national and international law, refugee status may be an appropriate protection response for certain victims of trafficking. At the same time, this instrument sets forth a saving clause on the principle of *non-refoulement* and the applicability of the 1951 Convention to trafficking situations.

19. In **Ecuador**, the Ombudsman Office issued a thematic report on the situation of trafficking in persons in that country in March, 2010. The report acknowledged that some

¹² Law against Sexual Violence, Exploitation and Trafficking in Persons, Guatemala, March, 2009.

Available in Spanish at: <http://www.acnur.org/biblioteca/pdf/7047.pdf>

¹³ See Articles 2 and 3, respectively, of Executive Decrees No. 34.199-G-MSP-J-MEP-S-MTSS-RREE of 03 January 2008 and No. 32.824-G of 16 November 2005.

¹⁴ The Executive Decree creating the Immediate Response Team for Situations of Human Trafficking was signed by the President on 19 March 2009.

¹⁵ National Institute for Migration (Mexico), Administrative Instruction No. 001/2010 establishing the procedure for the assistance of unaccompanied migrant children, 12 February 2010. Available in Spanish at: <http://www.acnur.org/biblioteca/pdf/7700.pdf>

trafficked persons may come under the scope of the refugee definition and therefore, are in need of the protection afforded by the 1951 Convention and its 1967 Protocol. The Ombudsman recommended that the national refugee protection policy be guided by international standards and that refugee recognition be considered in cases where the lives of the trafficked person or his/her family are at risk in the country of origin.

20. The Regional Guidelines for Special Protection in the Repatriation of Child Victims of Trafficking in Persons, adopted within the framework of the **Regional Conference on Migration**, include the same saving clause of the Palermo Protocol on Human Trafficking. Moreover, these Guidelines dictate that “[i]n those cases where the State providing protection has reasonable grounds to conclude that the repatriation carries a serious risk for the victim or his or her family, the State may offer legal and/or temporary or permanent humanitarian alternatives to repatriation, including when applicable to ensure access to asylum procedures, consistent with the domestic legislation of each country.”

21. Also in the context of the RCM, the governments of **Canada, Mexico** and the **United States of America**, jointly with UNHCR, organize every year a course on migration control and fraudulent documents. Among other objectives, the course aims at strengthening the national capacity of authorities in the region to identify possible cases of trafficking in persons as well as refugees and other persons with specific protection needs (i.e. unaccompanied children) present within mixed movements.

22. Inter-agency cooperation agreements aim to identify the specific needs of those people on the move and to enhance the State’s capacity to provide protection to the different groups. For example, UNHCR and IOM have set up referral mechanisms for victims of trafficking who might be in need of international protection as refugees in **Central America** and the **Caribbean**. They also include mechanisms for the referral of trafficked persons with international protection needs to national asylum systems.

B. Protection and Assistance for Trafficked persons

23. The assessment of the protection needs of trafficked persons will determine the protection response and the best solution available for each case. Depending on the case and the prevailing circumstances in the country of origin, voluntary repatriation could be one of the solutions, but should not be seen as the only one. Recognition of refugee status could be an important component of the protection response for certain trafficked persons.

24. While being a victim of human trafficking normally does not suffice to establish a valid claim for refugee status, this does not exclude that, under specific circumstances, trafficked persons may be in need of international refugee protection. This could be the case, for instance, if the trafficking person fears upon return repercussions by the perpetrators which would amount to persecution for one of the grounds contained in the

1951 Convention refugee definition against which no effective national protection is available. Countries such as **Argentina, Canada, Costa Rica, Ecuador, Mexico, Peru** and the **United States of America** have had significant developments in the application of the refugee definition to trafficked persons. Administrative or judicial decisions exist that recognize the following aspects:

- The persecutory character of human trafficking for the purpose of the recognition of refugee status;¹⁶
- The understanding that, in certain circumstances, the risk of re-victimization faced by trafficked persons upon return to the country of origin constitutes in and of itself a persecutory act;¹⁷
- The recognition that the non-state actors involved in trafficking situations (members of criminal organizations, relatives of the victim, etc.) can act as agents of persecution;¹⁸ and
- Human trafficking could be linked to the victim's political opinion¹⁹ or membership of a particular social group.²⁰

25. Bearing in mind the link between trafficking in persons and the international protection of refugees, the **OAS** General Assembly encouraged member states “to provide victims of trafficking in persons and others who cannot return to their countries of origin, in accordance with domestic legislation, some form of subsidiary protection, or international refugee protection for those who meet the requirements for refugee status under the United Nations Convention Relating to the Status of Refugees of 1951 and its Protocol of 1967”.²¹

¹⁶ Convention Refugee Determination Division, *V95-02904*, 26 November 1997 (Canada); Convention Refugee Determination Division, *VA0-02635*, 22 March 2001 (Canada); Ministry of Interior and Police, *Order No. 1571-2008 DGM*, 30 October 2008 (Costa Rica); Board of Immigration Appeals (San Pedro, California), *Matter of M-J-*, 30 March 2001 (United States of America); Immigration Court (Oakdale, L.A.), *Matter of Anon*, *A79-607-478*, 20 December 2005 (United States of America); Immigration Court (Chicago, IL), *Matter of S-*, *A# redacted*, 18 June 2001 (United States of America); Immigration Court (Anchorage, AK), *Matter of F-L-*, *A# redacted*, 24 July 1998 (United States of America), and Special Committee for Refugees, Order No. 519-2009-CEPR, 30 December 2009 (Peru).

¹⁷ Federal Court, *Bian v. Canada (Minister of Citizenship and Immigration)* (2000) IMM-1640-00, 1 December 2000 (Canada).

¹⁸ Convention Refugee Determination Division, *V95-02904*, 26 November 1997 (Canada), and Convention Refugee Determination Division, *VA0-02635*, 22 March 2001 (Canada).

¹⁹ Immigration Court (Oakdale, L.A.), *Matter of V-B-*, 20 December 2005 (United States of America).

²⁰ Convention Refugee Determination Division, *V95-02904*, 26 November 1997 (Canada); Board of Immigration Appeals, *Matter of M-J-*, 30 March 2001 (United States of America); Immigration Court (Chicago, IL), *Matter of S-*, *A# redacted*, 18 June 2001 (United States of America); and Immigration Court (Anchorage, AK), *Matter of F-L-*, *A# redacted*, 24 July 1998 (United States of America).

²¹ OAS General Assembly, resolution AG/RES.2511 (XXXIX-O/09), *Protection of Asylum Seekers and Refugees in the Americas*, adopted at the fourth plenary session, held on June 4, 2009. Available at: <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaraciones.asp>

26. In general, protection measures should be commensurate to the victim’s needs and should not be conditioned to any form of collaboration by the trafficked person. This is particularly important in the case of refugee protection, a protection regime governed by the 1951 Convention and its 1967 Protocol that should be considered separately from the protection accorded to witness or victims under criminal law. A positive example in this respect is **Canada**, where victims of trafficking are not required to collaborate with authorities in the investigation and prosecution of human trafficking cases to gain temporary or permanent resident status. In the **United States of America**, while trafficked individuals in general must agree to assist federal authorities in the investigation and prosecution of human trafficking cases to obtain a “T” visa,²² there is an exception in the cases of children or individuals who are unable to cooperate with the authorities due to physical or psychological trauma.

C. Attaining Durable Solutions and the Use of Resettlement to Protect Refugee Victims of Trafficking

27. As part of the efforts to attain durable solutions for refugees, countries such as **Argentina** and **Canada** have used resettlement as a tool to protect refugee victims of human trafficking who have not found effective protection in the first country of asylum.

IV. RECOMMENDATIONS TO STRENGTHEN THE PROTECTION AND ASSISTANCE OF TRAFFICKED PERSONS IN THE AMERICAS

28. Recognizing the valuable initiatives on prevention and training developed by several institutions and organizations in the Americas, UNHCR reiterates the need to pay more attention to activities focused on the protection of trafficked persons, including through the adoption of differentiated measures for those victims whose international protection needs have been duly identified, in accordance with the 1951 Convention and its 1967 Protocol.

29. In line with its refugee protection mandate, UNHCR issues the following recommendations to strengthen the protection and assistance of trafficked persons in the region:

- To **raise awareness among the population**, including refugees and IDPs, on the risks of trafficking and the tactics used by traffickers to deceive potential victims in order to prevent individuals from becoming victim of this crime.

²² In the United States of America, domestic law provides for a special non-immigrant “T” visa for trafficked persons who are able to establish that they would suffer severe hardship involving unusual or severe harm if returned to their home countries.

- To strengthen the **legal and institutional frameworks** for combating human trafficking and protect and assist victims of this crime, and to enhance coordination and cross-referral mechanisms, where appropriate, with asylum systems. As a protection safeguard, it is recommended that national legislation to combat trafficking and to protect trafficked persons explicitly include a provision regarding the right to seek asylum and the respect of the principle of *non-refoulement*.
- To ensure that trafficked persons who meet the criteria established in Article 1 of the 1951 Convention are **granted refugee status** and not a lesser form of protection.
- To strengthen **training programs for national asylum authorities** (National Refugee Commissions, General Migration Directorates, etc.) on interpreting the refugee definition in an age- and gender-sensitive manner, and to clarify the criteria that give rise to the recognition of refugee status to some trafficked persons (or individuals at risk of being trafficked).
- To adopt all necessary measures to ensure participation of governmental institutions, including national asylum authorities, national institutions for the promotion and protection of human rights, international organizations and civil society organizations in the **general assessment of protection needs of trafficked persons** with a view to determine, from a technical and humanitarian perspective, which protection measure is most suitable for each individual case.
- To include a module on International Refugee Law in the **national professional training programs on human trafficking** for relevant national authorities (migration, police, prosecutors, judges, etc.) to ensure that protection measures for trafficked persons have a refugee protection approach, if the case so requires.
- Establish **specific safeguards for the protection of boys and girls victim of trafficking**, including: (a) a formal best interest determination; (b) the adoption of child-specific protection measures, such as the appointment of guardians; (c) the gathering of information on the role parents might have played in the trafficking situation of their children; (d) issues of tracing and family reunification, and (e) the observance of specific safeguards in cases of the repatriation of unaccompanied or separated children.

UNHCR
May, 2010