



**Comments on the proposal for a
Directive of the European Parliament and of the Council
on preventing and combating trafficking in human beings, and protecting victims
(COM(2010)95, 29 March 2010)**

The European Commission presented its proposal for a Directive on preventing and combating trafficking in human beings and protecting victims on 29 March 2010. The proposal, if adopted, would repeal the Framework Decision on combating trafficking in human beings, in place since 2002, which provides for a European legal basis to prosecute the crime of human trafficking.¹ The proposed Directive aims among other things at achieving increased consistency among national rules on the fight against human trafficking and on victim protection.

The following comments of the Office of the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) are made in the context of UNHCR’s supervisory responsibility which is set out under its Statute, Article 35 of the 1951 Convention relating to the Status of Refugees (hereinafter “the 1951 Convention”), and Article II of its 1967 Protocol.² These comments are limited to those provisions of the proposal which relate to UNHCR’s mandate.

1. UNHCR’s interest regarding human trafficking

UNHCR becomes involved with the issue of human trafficking where human trafficking impacts on persons of its concern. In particular, UNHCR has a responsibility to work to ensure that refugees, asylum-seekers, internally displaced persons (IDPs) and stateless persons do not fall victim to human trafficking. UNHCR also works to ensure that individuals who have been trafficked or are at risk of being trafficked and who have a well-founded fear of persecution or are otherwise in need of international protection, are protected against *refoulement* and their claims to international protection are examined by the competent authorities.

In the context of its mandate to prevent statelessness and to come to the aid of stateless persons, UNHCR further assists States in ensuring that trafficking victims who are without identity documents are able to establish their identity and nationality status in order to prevent them from being rendered stateless, and to protect stateless victims of trafficking.

¹ Framework Decision 2002/629/JHA.

² 1951 Convention and 1967 Protocol Relating to the Status of Refugees, <http://www.unhcr.org/3b66c2aa10.html>.

While not all victims or potential victims of trafficking fall within the scope of the refugee definition, the Trafficking Protocol³ highlights this possibility in the saving clause contained in its Article 14, which states:

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

The obligation of European Union Member States to consider the international protection needs of victims of trafficking is strengthened by paragraph 377 of the Explanatory Report accompanying the Council of Europe Convention against Trafficking,⁴ to which all Member States are party. The paragraph states in relation to Article 40 of this Convention:

*“The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of non-refoulement”.*⁵

The Office of the UN High Commissioner for Human Rights (OHCHR) in its *Recommended Principles and Guidelines on Human Rights and Trafficking* also addresses the importance of ensuring that procedures and processes are in place for the consideration of asylum claims from trafficked persons, and that the principle of *non-refoulement* is respected and upheld at all times.⁶ Likewise, the *Agenda for Protection*, adopted by the Executive Committee of UNHCR in 2003, calls upon States to ensure that their asylum systems are open to receiving claims from individual victims of trafficking.⁷

Some victims or potential victims of trafficking may fall within the definition of a refugee contained in Article 1A(2) of the 1951 Convention or within the wider definition of persons

³ 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the “Trafficking Protocol”) supplementing the 2000 United Nations Convention against Transnational Organized Crime. The Trafficking Protocol has been signed by the European Community, and ratified by all but two EU Member States.

⁴ Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005 <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=1&CL=ENG>.

⁵ Council of Europe Convention on Action against Trafficking in Human Beings, Explanatory Report <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>.

⁶ Office of the High Commissioner for Human Rights (OHCHR) “*Recommended Principles and Guidelines on Human Rights and Human Trafficking*” presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights, E/2002/68/Add. 1, 20 May 2002, Guideline 2.7, www.ohchr.org/english/about/publications/docs/trafficking.doc.

⁷ UNHCR *Agenda for Protection*, October 2003, A/AC.96/965/Add.1, 2002, Goal 2, Objective 2, <http://www.unhcr.org/refworld/docid/4714a1bf2.html>.

eligible for subsidiary protection as per Article 15 of the EU Qualification Directive,⁸ and may therefore be entitled to international protection. In their flight, refugees often have to rely on smugglers, who are often closely related to traffickers, with both preying on the vulnerabilities of people seeking international protection. They are thus affected by criminal activity. In addition to refugees, other victims of trafficking may be unable to return to their countries of origin for fear of further human rights violations. They may fear re-victimization at the hands of traffickers, risk being re-trafficked, or being stigmatized for their participation in sex work, albeit involuntary, which may amount to persecution. The non-state actors involved in trafficking may act as agents of persecution.

UNHCR's *Guidelines on victims of trafficking and persons at risk of being trafficked*⁹ provide guidance on the adjudication of asylum applications presented by victims or potential victims of trafficking. The Guidelines also cover issues concerning victims of trafficking arising in the context of the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. UNHCR's *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*¹⁰ further clarifies that, in the absence of effective State protection, victims of gang violence – which can include victims of trafficking, may qualify for international protection.

2. Respect for fundamental rights and principle of *non-refoulement*

UNHCR values the efforts and shares the legitimate interest of States in combating trafficking in persons, a crime which entails serious violations of the human rights of its victims. In this context, UNHCR welcomes the proposal for a Directive on preventing and combating trafficking, and in particular the objective of protecting, assisting and supporting victims. This Directive would represent an important development which would help to ensure that the rights of victims of trafficking are effectively addressed in binding European Union rules.

As such, UNHCR welcomes the various references made in the proposal to the Charter of Fundamental Rights of the European Union (hereinafter the "EU Charter"), in particular Article 5 (3) on trafficking, and Article 24 on Rights of the Child, and the mention of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The European Commission's Experts Group on Trafficking in its 2004 report stated that "*the integration of a human rights perspective is fundamental for the analysis of trafficking in human beings and the development of an effective response to it.*"¹¹ In the words of the Group, "a human rights perspective should be part and parcel of any policy".¹² UNHCR specifically calls for a human rights-based approach to human trafficking which goes beyond prosecuting the

⁸ 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 need international protection and the content of the protection granted (hereinafter the "EU Qualification Directive").

⁹ UNHCR *Guidelines on International Protection No.7: "The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked"*, 7 April 2006. <http://www.unhcr.org/443b626b2.html>.

¹⁰ UNHCR *Guidance on Refugee Claims Relating to Victims of Organized Gangs*, March 2010, <http://www.unhcr.org/refworld/docid/4bb21fa02.html>.

¹¹ European Commission, Directorate-General Justice, Freedom and Security, *Report of the Experts Group on Trafficking in Human Beings*, Brussels, 22 December 2004, p.60.

¹² *Ibid.*

perpetrators, and includes measures to identify (potential) victims of trafficking and address their protection needs beyond criminal investigation and proceedings.

UNHCR therefore considers it essential to reiterate in the proposed Directive the fundamental principle of *non-refoulement*, which binds the European Union and all Member States under the terms not only of the 1951 Convention, but also the EU Charter and other relevant treaties. UNHCR specifically draws attention to Article 19 of the EU Charter on protection in the event of removal, expulsion or extradition, which re-affirms the principle of *non-refoulement* i.e. ensuring that no-one is sent back to persecution. Measures will be needed to ensure its respect in law and in practice.

UNHCR calls for the introduction of a saving clause along the lines of Article 14 of the Trafficking Protocol. An alternative would be an explicit reference in the Preamble of the Directive to the fundamental principle of *non-refoulement*, and the fact that this Directive should apply without prejudice to the 1951 Convention.

3. Legal basis

The legal basis for the proposed Directive as named in the proposal is derived from Articles 82(2) and 83(1) of the Treaty on Functioning of the European Union (TFEU), in Chapter 4, on Judicial Cooperation in Criminal Matters. However, in UNHCR's view, a reference should also be made to Article 79(2)(d) TFEU (Chapter 2, Policies on Border Checks, Asylum and Immigration). Article 29(2)(d) requires the adoption of measures *inter alia* in the area of 'combating trafficking in persons, in particular women and children'. Given that the explanatory memorandum of this Directive proposal refers specifically to protective measures, including for women and children, it may be helpful to cite this in the proposal, in connection with the legal basis or within the Preamble, in order to emphasize the importance of the protection element. This would also reflect the fact that combating trafficking entails not only criminal law measures, but also protection for victims and safeguards to ensure their access, among other things, to processes for seeking asylum where needed.

UNHCR recommends insertion of a reference to Article 79(2)(d) TFEU in the Directive proposal.

4. Definitions – The concept of “particularly vulnerable persons”

UNHCR welcomes the comprehensive definition of trafficking¹³ (Article 2), in particular the explanation provided under Article 2 (2) regarding a “position of vulnerability”. Recital 6 defines the concept of “particularly vulnerable persons” which “*should include at least all children, and adults who were particularly vulnerable on grounds of pregnancy, health conditions or disability at the time when the crime was committed*”. This definition is incorporated into the body of the Directive at Article 4 (2) (b) on penalties.

The proposal acknowledges that social vulnerability is one of the principal root causes of trafficking in human beings and that social vulnerability derives from, *inter alia*, gender

¹³ The definition aligns with that of the Trafficking Protocol and the definition in the Council of Europe Convention on Action against Trafficking in Human Beings.

discrimination.¹⁴ Despite a reference to the Roadmap on Gender Equality,¹⁵ and the need for Member States to adopt a “gender perspective” (Recital 15), the proposal lacks a gender-sensitive approach. Women and girls indeed represent the overwhelming majority of exploited persons as a result of trafficking in human beings. Moreover, the gender of (potential) victims of trafficking constitutes an additional factor of vulnerability for these persons.

Inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution.

UNHCR encourages the Council and Parliamentary legislators to mainstream a gender approach in the Directive, in particular in the definition of “particularly vulnerable persons”, to include vulnerability on grounds of gender.

UNHCR also calls for this definition to be extended to persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

5. Protection of victims of trafficking – A human rights-based approach

UNHCR welcomes the expressed intention for this Directive to address victim protection as well as to fight trafficking. This represents a positive development over the 2002 Framework Decision on combating trafficking in human beings. A holistic approach to trafficking encompassing prevention, protection and prosecution is necessary to address the humanitarian consequences of the crime of trafficking. As such, UNHCR welcomes the provisions for protection of victims of trafficking in criminal investigation and proceedings under Article 11, but encourages Council and Parliament more fully to address protection considerations in the Directive.

5.1 Protection beyond criminal proceedings

The holistic course of action underpinned by the 3 “P”s (Prevention, Protection, Prosecution) also requires a human-rights based approach, which places “*the rights of victims at the centre and takes into account the additional challenges for specific groups, such as women and children*”, as advised by the Council of the European Union.¹⁶ Similarly, the Experts Group on Trafficking advised “*that in order to effectively address trafficking, a holistic and integrated approach is needed which builds on the respect and promotion of human rights as its fundament.*”¹⁷

Of note for this Directive is the fact that victim-centered approaches also support the measures to combat trafficking through the trust and confidence they foster. If protected and assisted, victims are less likely to abscond with the risk of being re-victimized and re-trafficked, and they are likely to be more open to participating voluntarily in criminal proceedings by giving evidence against traffickers, once trust has been built with support services and authorities. In the proposal, however, protection measures provided to victims of trafficking are restricted to

¹⁴ Explanatory Memorandum 1.2.

¹⁵ Explanatory Memorandum 1.4.

¹⁶ Council of European Union, 10th EU annual report on Human Rights, 14146/2/08 REV 2, 7 November 2008, at p. 73.

¹⁷ Experts Group on Trafficking in Human Beings, p.63.

short-term assistance and support offered within the criminal justice system to victims of crimes (Article 11).

The assessment of the protection needs of trafficked persons should determine the best solution 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 or subsidiary protection as per Article 15 of the EU Qualification Directive could be an important component of the protection response for certain trafficked persons.

Short-term assistance and support are not sufficient for trafficking victims who fear persecution or other serious human rights violations and cannot return home. Such persons need international protection as provided for in the 1951 Convention and the EU Qualification Directive, in international human rights law or subsidiary forms of protection under regional and national law. This entails most notably durable protection against *refoulement* and in many instances the granting of asylum, subsidiary protection or another protection status.

UNHCR regrets the limitations brought forward by this proposal on protection measures despite the announced objective to “*establish specific protective measures for any victim of trafficking in human beings*” (Recital 10). Protection should be commensurate with the victim’s needs and should not necessarily be made conditional upon collaboration in every case by the trafficked person. This is particularly important in the case of refugee protection, a regime governed by the 1951 Convention and its 1967 Protocol and reflected in the EU asylum *acquis* that should be considered separately from the protection accorded to witnesses of victims under criminal law.

In line with the preamble, UNHCR encourages the Council and Parliament to include in the Directive provisions for the protection of victims of trafficking in human beings regardless of their involvement in criminal proceedings.

5.2 Assistance and support

UNHCR very much welcomes the new provisions introduced by Article 10 of the proposal with regard to assistance and support for victims of trafficking in human beings. These provisions represent a step forward from the existing Framework Decision, in particular the assistance and support afforded to victims of trafficking “for an appropriate time after criminal proceedings” (Article 10 (1)). UNHCR strongly supports the proposal at Article 10 (3) to “*ensure that assistance and support for a victim are not made conditional on the victim’s willingness to act as a witness.*” UNHCR also welcomes the provision of assistance and support in a language victims can understand (Article 10 (5)). In the context of trafficking related procedures, where so much depends on the testimony of an individual, effective communication with the victim, in a language s/he understands, is essential.

Despite the definition of “particularly vulnerable persons”, the proposal does not include any provision for the specific protection, assistance or support of these persons with the exception of minors (Articles 12 to 14). In addition, in light of the need for a gender-sensitive approach to combating trafficking, and specific protection, assistance or support for women and girls, it is recommended to clarify that assistance and support should be provided in a gender-sensitive manner.

UNHCR also encourages Member States to provide for special assistance and support to address the specific needs of particularly vulnerable persons.

UNHCR encourages Member States to provide assistance and support in a manner which takes into account the age, gender and special needs of victims of trafficking.

5.3 Free legal counseling

In UNHCR's view, the right to legal assistance is an essential safeguard, especially in complex European asylum and migration procedures. Victims of trafficking are often unable to articulate cogently the elements relevant to their account without the assistance of a qualified legal counselor. Quality legal assistance is, moreover, in the interest of States, as it can help to ensure that international protection needs are identified early and accurately. In the case of criminal proceedings, it can ensure that victims have the legal advice required to safeguard their rights as necessary.

UNHCR calls upon the Council and Parliament to insert the provision of free legal counseling under Article 10 (5) of the Directive.

5.4 Referral to asylum systems

UNHCR notes with appreciation the *"measures to establish appropriate mechanisms aimed at early identification, assistance and support for victims, in cooperation with relevant support organizations"* (Article 10 (4)). The Experts Group on Trafficking had recommended the establishment of *"National Referral Mechanisms (NRMs) to ensure the proper identification and referral of trafficked persons, including trafficked children, and to ensure that they receive adequate assistance while protecting their human rights."*¹⁸ UNHCR strongly believes that underpinning protection is the ability of authorities to identify at the earliest stages persons who are victims of trafficking or potential victims of trafficking, and ensure that persons who give any indication that they could be at risk of persecution are identified and referred to the competent national asylum authorities.

The EU Hague Programme referred to a comprehensive approach involving all stages of migration, and the need *"to pursue coordinated, strong and effective working relations between those responsible for migration and asylum policies"*.¹⁹ In a study commissioned by UNHCR published in October 2009,²⁰ a number of gaps in State practice were highlighted in relation to ensuring complementarity between international protection systems and procedures for the protection of victims of trafficking. States should ensure that appropriate and effective referral mechanisms are in place between the authorities involved in anti-trafficking activities and those responsible for granting international protection. Such measures must ensure full compliance with the principle of *non-refoulement*.

¹⁸ Experts Group on Trafficking in Human Beings, p.72.

¹⁹ The Hague Programme: strengthening freedom, security and justice in the European Union, December 2004.

²⁰ UNHCR, *"The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs"*, Bhabha, J and Alfirev, C, October 2009
<http://www.unhcr.org/refworld/docid/4ad317bc2.html>.

UNHCR encourages the inclusion in the text of references to cooperation between enforcement authorities and asylum authorities, and referral mechanisms for persons in need of international protection.

6. Protection of child victims of trafficking

UNHCR very much welcomes the inclusion of provisions to address the specific needs of child victims of trafficking, through new and distinct provisions (Articles 12 to 14). Given that most children in trafficking situations have been separated from their family and community, the provision for the appointment of “a special representative for the child victim of trafficking in human beings” (Article 14 (1)) is a positive step. Clarifications are however needed regarding the role and qualifications of this “special representative”.

UNHCR strongly recommends, in line with recommendations of UNICEF and other organizations in the field of child protection, the appointment for each unaccompanied and separated child of a guardian with a clearly identified role and qualifications as well as a legal representative trained in dealing with children in trafficking situations.

UNHCR also urges the Council and Parliament to insert provisions for the early identification of child victims of trafficking who are also in need of international protection, to ensure that any children who give any indication that they could be at risk of persecution are identified and referred to the competent national asylum authorities.

7. Non-application of penalties to victims of trafficking

UNHCR welcomes the insertion of a non-penalization clause (Article 7), which represents an improvement over the existing Framework Decision, and highlights the importance of not prosecuting the victims of this crime who may have been forced involuntarily to act contrary to law.

UNHCR however regrets that the provision only refers to the “possibility of not prosecuting or imposing penalties”. The OHCHR *Principles and Guidelines on Human Rights and Human Trafficking* recommend that “*Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.*” UNHCR reiterates the importance of not penalizing persons in need of international protection on account of their illegal entry or stay in the European Union, as stipulated by the 1951 Convention.²¹

UNHCR encourages the Council and Parliament to provide for the mandatory non-prosecution of and non-application of penalties to victims for their involvement in criminal activities they have been compelled to commit.

UNHCR recommends the insertion of a non-detention clause for victims or potential victims of trafficking for reasons of their immigration status in the European Union.

²¹ 1951 Convention Relating to the Status of Refugees, Article 31 - Refugees unlawfully in the country of refuge.

8. Training

UNHCR welcomes the mention under Recital 15 of training needs for “*any officials likely to come into contact with victims or potential victims of trafficking in human beings [...] to identify and deal with such victims*”, and the promotion of “*regular training for officials likely to come into contact with victims and potential victims, including front-line police officers, border guards, labour inspectors, health care personnel and consular staff*” (Article 15 (3)). This new provision is a positive development, given the broad range of situations in which trafficking cases come to light and victims of trafficking can be identified.

In view of the complexities of asylum claims presented by victims or potential victims of trafficking, such claims require an examination by the competent national authorities through the established asylum procedures.

Training of officials who are likely to come into contact with victims or potential victims of trafficking should encompass the ability to identify among victims those persons who may be in need of international protection, in order to refer them to the asylum authorities.

9. Monitoring

UNHCR welcomes the proposal to establish National Rapporteurs or equivalent mechanisms (Article 16). These National Rapporteurs will have an important role in monitoring the implementation of this Directive by Member States, analyzing human trafficking trends at the national level, assessing progress on preventing and combating human trafficking as well as protecting victims of trafficking, and ensuring the collection of data on a harmonized basis.

UNHCR encourages the monitoring mechanisms to include the collection of data on human trafficking in a harmonized manner, as well as the assessment of protection and assistance mechanisms including the identification of victims or potential victims of trafficking, and the referral mechanisms to the national asylum authorities.

In addition to national monitoring and reporting mechanisms, UNHCR considers that the European Union would benefit from the appointment of an EU Anti-Trafficking Rapporteur, in order to support a coherent approach across Member States, allow for effective and visible action against human trafficking at EU level, and provide for a monitoring and reporting system to the EU institutions.

UNHCR encourages the inclusion in the Directive of a provision for the establishment of an EU Anti-Trafficking Rapporteur with clearly defined responsibilities.

UNHCR
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