

**CONSIDERATIONS ON THE ISSUE OF HUMAN TRAFFICKING FROM
THE PERSPECTIVE OF INTERNATIONAL REFUGEE LAW AND
UNHCR'S MANDATE**

*Second Meeting of National Authorities on Human Trafficking (OAS)
25-27 March, 2009, Buenos Aires, Argentina*

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.¹ UNHCR's mandate *ratione personae* also includes asylum-seekers,² returnees,³ stateless persons⁴ and, under specific circumstances, internally displaced persons.⁵

3. In general, neither the issue of human trafficking nor trafficking victims *per se* fall under UNHCR's mandate or the scope of application of the 1951 Convention Relating to the 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.⁶ 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 trafficking victims (or individuals at risk of being trafficked) which arose as a result of their trafficking experience are recognized,⁷ or
- To assist 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.⁸

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

4. UNHCR undertakes, in accordance with its mandate, a series of activities related to human trafficking in this region of the world. Such activities are based on the pretense 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's activities in this field are based on the understanding that general protection measures for victims of trafficking are not sufficient for trafficking victims who fear persecution or other serious human rights violations and cannot return home. They need the specific protection provided for in the 1951 Convention, most notably protection against *refoulement*.

5. The Office has been involved in **advocacy** efforts to promote an asylum-sensitive anti-trafficking legislation at the national level. UNHCR advocates for the inclusion of specific provisions into that body of law to ensure the exercise of everyone's right, including trafficking victims, to seek asylum from persecution. Similarly, the Office participates in National Coalitions or Working Groups on Trafficking to promote international protection for eligible victims or individuals at risk of being trafficked under the 1951 Convention. The objective is also to ensure that National Action Plan and Protocols on trafficking incorporate a focus on international protection. At the regional level, UNHCR participates in international fora to advocate for the inclusion of international refugee law standards, where appropriate, in their work on trafficking (e.g. the OAS Inter-American Program for the Promotion and Protection of Human Rights of Migrants and the Regional Conference on Migration).

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 the risks associated to them. Similarly, UNHCR Spanish web site features 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 nexus (www.acnur.org/trata).

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 trafficking victims** or individuals at risk of being trafficked, the Office regularly undertakes training and border-monitoring missions to evaluate the arrival of refugees within mixed migratory flows. 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, the International Organization for Migrations (IOM), and civil society organizations to ensure the **protection and assistance** of trafficking victims 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 (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 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”.⁹ The Office has also submitted advisory opinions concerning individual cases on the interpretation of the refugee definition in cases of victims of trafficking.

12. As to **durable solutions**, resettlement has proved to be an effective tool for certain trafficking victims 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” reasons and “women-at-risk”. For that reason, UNHCR uses resettlement as a tool for the protection of refugee victims of trafficking or other persons of concern at risk of being trafficked.

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

13. During the past few years, most countries in the region have undertaken important efforts to strengthen their 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. As to the national legal framework, the recently passed 2009 Act against Sexual Violence, Exploitation and Trafficking in Persons in **Guatemala** contains important provisions on the right to asylum. In particular, the Act stipulates that the repatriation process for trafficking victims should be undertaken “without prejudice to the right to asylum” (Articles 16 and 17). It also provides for the trafficking victims’ right 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)).

15. 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.¹⁰ Furthermore, a new multi-disciplinary and inter-agency Immediate Response Team was recently established by the Costa Rican Government to address the needs of trafficking victims. The International Organization for Migrations (IOM), the International Labour Organization (ILO), and UNHCR were formally included in the team as technical advisers.¹¹

16. 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).

17. 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 trafficking victims and individuals 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 savings clause on the principle of *non-refoulement* and the applicability of the 1951 Convention to trafficking situations.

18. 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 (RCM)**, also include the same savings clause of the Palermo Protocol on Human Trafficking. These Guidelines also 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”.

B. Protection and Assistance for Trafficking Victims

19. Recognition of refugee status could be an important component of the protection response for certain trafficking victims. 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 victim fears upon return repercussions by the perpetrators which would amount to persecution for one of the reasons contained in the 1951 Convention definition against which no effective national protection was available.

20. In the Americas, some countries such as **Canada, Costa Rica,** and the **United States of America** have had significant developments in the application of the refugee definition to trafficking victims. 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;¹²
- The understanding that, in certain circumstances, the risk of re-victimization faced by trafficking victims upon return to the country of origin constitutes in and of itself a persecutory act;¹³
- 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;¹⁴ and
- Human trafficking could be linked to the victim's political opinion¹⁵ or membership of a particular social group.¹⁶

21. On the other hand, it is worth noting that refugee protection should be considered separately from witness or victim protection under criminal law, as not all victims of trafficking will be selected by investigating and prosecuting authorities to act as witnesses in criminal proceedings, a fact that has no bearing in their protection needs. Furthermore, many witness and victim protection programs are temporary in nature. A positive example in this respect is **Canada**, where victims of trafficking are not required to testify against their trafficker to gain temporary or permanent resident status.

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

22. As part of the efforts to attain durable solutions for refugees, countries such as **Argentina** 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 TRAFFICKING VICTIMS

23. 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 trafficking victims, including through the adoption of differentiated measures for those victims whose international protection needs have been duly identified, in accordance with the 1951 Convention.

24. In line with its refugee protection mandate, UNHCR issues the following recommendations to strengthen the protection and assistance of trafficking victims in the region:

- To strengthen the **legal and institutional frameworks** for combating human trafficking and protect and assist victims of this crime.
- 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 trafficking victims (or individuals at risk of being trafficked).
- To adopt all necessary measures to ensure participation of governmental institutions, including national asylum authorities, international organizations and civil society organizations in the **general assessment of protection needs of trafficking victims** 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 trafficking victims 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
March, 2009

¹ 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) (hereinafter ‘Statute’).

² 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.

³ A returnee is a refugee who has returned to his/her country or community of origin.

⁴ 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 flows 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.

⁵ 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.

⁶ 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).

⁷ 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”. The Savings Clause of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (hereinafter “the Palermo Protocol on Trafficking”), implicitly recognized that a trafficking victim could be recognized as a refugee, provided his or her case falls under the scope of the 1951 Convention.

⁸ See ExCom Conclusion No. 90 (LII), para (s), and Conclusion No. 106 (LVII), paras. (l) and (m).

⁹ Document available at: <http://www.unhcr.org/publ/PUBL/443b626b2.pdf>

¹⁰ 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.

¹¹ The Executive Decree creating the Immediate Response Team for Situations of Human Trafficking was signed by the President on 19 March 2009. It will enter into force upon publication in the Official Gazette.

¹² 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); and Immigration Court (Anchorage, AK), *Matter of F-L-*, A# redacted, 24 July 1998 (United States of America).

¹³ Federal Court, *Bian v. Canada (Minister of Citizenship and Immigration)* (2000) IMM-1640-00, 1 December 2000 (Canada).

¹⁴ Convention Refugee Determination Division, V95-02904, 26 November 1997 (Canada), and Convention Refugee Determination Division, VA0-02635, 22 March 2001 (Canada).

¹⁵ Immigration Court (Oakdale, L.A.), *Matter of V-B-*, 20 December 2005 (United States of America).

¹⁶ 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).