

Aberystwyth University

Guidelines on International Protection No. 7

Piotrowicz, Ryszard

Publication date:
2006

Citation for published version (APA):

Piotrowicz, R. (2006). *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*. UNHCR. <https://www.unhcr.org/uk/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html>

General rights

Copyright and moral rights for the publications made accessible in the Aberystwyth Research Portal (the Institutional Repository) are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Aberystwyth Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Aberystwyth Research Portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

tel: +44 1970 62 2400
email: is@aber.ac.uk

GUIDELINES ON INTERNATIONAL PROTECTION:

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

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees* in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, re-edited, Geneva, January 1992). They should additionally be read in conjunction with UNHCR's Guidelines on International Protection on gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01) and on "membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02), both of 7 May 2002.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff carrying out refugee status determination in the field.

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

I. INTRODUCTION

1. Trafficking in persons, the primary objective of which is to gain profit through the exploitation of human beings, is prohibited by international law and criminalized in the national legislation of a growing number of States. Although the range of acts falling within the definition of trafficking varies among national jurisdictions, States have a responsibility to combat trafficking and to protect and assist victims of trafficking.

2. The issue of trafficking has attracted substantial attention in recent years, but it is not a modern phenomenon. Numerous legal instruments dating from the late nineteenth century onwards have sought to address various forms and manifestations of trafficking.¹ These instruments remain in force and are relevant to the contemporary understanding of trafficking and how best to combat it. The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the “Trafficking Protocol”)² supplementing the 2000 United Nations Convention against Transnational Organized Crime (hereinafter the “Convention against Transnational Crime”)³ provides an international definition of trafficking. This represents a crucial step forward in efforts to combat trafficking and ensure full respect for the rights of individuals affected by trafficking.

3. Trafficking in the context of the sex trade is well documented and primarily affects women and children who are forced into prostitution and other forms of sexual exploitation.⁴ Trafficking is not, however, limited to the sex trade or to women. It also includes, at a minimum, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁵ Depending on the circumstances, trafficking may constitute a crime against humanity and, in armed conflict, a war

¹ It has been estimated that between 1815 and 1957 some 300 international agreements were adopted to suppress slavery in its various forms, including for example the 1910 International Convention for the Suppression of the White Slave Traffic, the 1915 Declaration Relative to the Universal Abolition of the Slave Trade, the 1926 Slavery Convention, the 1949 Convention for the Suppression of the Traffick in Persons and of the Exploitation of the Prostitution of Others and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

² Entered into force on 25 December 2003.

³ Entered into force on 29 September 2003.

⁴ Bearing in mind the prevalence of women and girls amongst the victims of trafficking, gender is a relevant factor in evaluating their claims for refugee status. See further, UNHCR, “Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (hereinafter “UNHCR Guidelines on Gender-Related Persecution”), HCR/GIP/02/01, 7 May 2002, paragraph 2.

⁵ See Article 3(a) of the Trafficking Protocol cited in paragraph 8 below.

crime.⁶ A common characteristic of all forms of trafficking is that victims are treated as merchandise, “owned” by their traffickers, with scant regard for their human rights and dignity.

4. In some respects, trafficking in persons resembles the smuggling of migrants, which is the subject of another Protocol to the Convention against Transnational Crime.⁷ As with trafficking, the smuggling of migrants often takes place in dangerous and/or degrading conditions involving human rights abuses. It is nevertheless essentially a voluntary act entailing the payment of a fee to the smuggler to provide a specific service. The relationship between the migrant and the smuggler normally ends either with the arrival at the migrant’s destination or with the individual being abandoned en route. Victims of trafficking are distinguished from migrants who have been smuggled by the protracted nature of the exploitation they endure, which includes serious and ongoing abuses of their human rights at the hands of their traffickers. Smuggling rings and trafficking rings are nevertheless often closely related, with both preying on the vulnerabilities of people seeking international protection or access to labour markets abroad. Irregular migrants relying on the services of smugglers whom they have willingly contracted may also end up as victims of trafficking, if the services they originally sought metamorphose into abusive and exploitative trafficking scenarios.

5. UNHCR’s involvement with the issue of trafficking is essentially twofold. Firstly, the Office has a responsibility to ensure that refugees, asylum-seekers, internally displaced persons (IDPs), stateless persons and other persons of concern do not fall victim to trafficking. Secondly, the Office has a responsibility to ensure that individuals who have been trafficked and who fear being subjected to persecution upon a return to their country of origin, or individuals who fear being trafficked, whose claim to international protection falls within the refugee definition contained in the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (hereinafter “the 1951 Convention”) are recognized as refugees and afforded the corresponding international protection.

6. 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. These Guidelines are intended to provide guidance on the application of Article 1A(2) of the 1951 Convention to victims or potential victims of trafficking. They 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. The protection of victims or potential victims of trafficking as set out in these Guidelines is additional to and distinct from the protection contemplated by Part II of the Trafficking Protocol.⁸

⁶ See, for instance, Articles 7(1)(c), 7(1)(g), 7(2)(c) and 8(2)(xxii) of the 1998 Statute of the International Criminal Court, A/CONF.183/9, which specifically refer to “enslavement”, “sexual slavery” and “enforced prostitution” as crimes against humanity and war crimes.

⁷ The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air (entered into force on 28 January 2004).

⁸ Part II of the Trafficking Protocol concerns the protection of victims of trafficking. It covers areas such as ensuring the protection of privacy and identity of the victims; providing victims with information on relevant court and administrative proceedings, as well as assistance to enable them to present their views and concerns at appropriate stages of criminal proceedings

II. SUBSTANTIVE ANALYSIS

a) Definitional issues

7. The primary function of the Convention against Transnational Crime and its supplementary Protocols against Trafficking and Smuggling is crime control. They seek to define criminal activities and guide States as to how best to combat them. In doing so, they nevertheless provide helpful guidance on some aspects of victim protection and therefore constitute a useful starting point for any analysis of international protection needs arising as a result of trafficking.

8. Article 3 of the Trafficking Protocol reads:

“For the purposes of this Protocol:

(a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a 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, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;

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

9. The Trafficking Protocol thus defines trafficking by three essential and interlinked sets of elements:

The act: recruitment, transportation, transfer, harbouring or receipt of persons;

The means: by threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, or of giving or receiving of payments or benefits to achieve the consent of a person having control over the victim;

The purpose: exploitation of the victim, including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁹

against offenders; providing victims with support for physical, psychological and social recovery; permitting victims to remain in the territory temporarily or permanently; repatriating victims with due regard for their safety; and other measures.

⁹ For the purposes of these Guidelines, the Trafficking Protocol definition is used as it represents the current international consensus on the meaning of trafficking. In order to understand the legal meaning of terms used within the Protocol definition fully, it is nevertheless necessary to refer further to other legal instruments, for example, a number of International Labour Organization Conventions, including the 1930 Convention No. 29 on

10. An important aspect of this definition is an understanding of trafficking as a process comprising a number of interrelated actions rather than a single act at a given point in time. Once initial control is secured, victims are generally moved to a place where there is a market for their services, often where they lack language skills and other basic knowledge that would enable them to seek help. While these actions can all take place within one country's borders,¹⁰ they can also take place across borders with the recruitment taking place in one country and the act of receiving the victim and the exploitation taking place in another. Whether or not an international border is crossed, the intention to exploit the individual concerned underpins the entire process.

11. Article 3 of the Trafficking Protocol states that where any of the means set forth in the definition are used, the consent of the victim to the intended exploitation is irrelevant.¹¹ Where the victim is a child,¹² the question of consent is all the more irrelevant as any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used.

12. Some victims or potential victims of trafficking may fall within the definition of a refugee contained in Article 1A(2) of the 1951 Convention and may therefore be entitled to international refugee protection. Such a possibility is not least implicit in the saving clause contained in Article 14 of the Trafficking Protocol, 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.”¹³

Forced or Compulsory Labour, the 1957 Convention No. 105 on the Abolition of Forced Labour, the 1975 Convention No. 143 on Migrant Workers (Supplementary Provisions) and the 1999 Convention No. 182 on the Worst Forms of Child Labour. These are referred to in the first report of the Special Rapporteur on trafficking in persons, especially women and children, Ms Sigma Huda, E/CN.4/2005/71, 22 December 2004, paragraph 22. Her second report entitled “Integration of the Human Rights of Women and a Gender Perspective”, E/CN.4/2006/62, 20 February 2006, goes into this issue in further detail in paragraphs 31–45. The Special Rapporteur was appointed in 2004 pursuant to a new mandate created by the 60th Session of the Commission on Human Rights (Resolution 2004/110).

¹⁰ The Council of Europe Convention on Action against Trafficking in Human Beings, opened for signature in May 2005, addresses the question of trafficking within national borders directly.

¹¹ Article 3(b) of the Trafficking Protocol. See also, the second report of the Special Rapporteur on trafficking in persons, cited above in footnote 9, paragraphs 37–43 on the “irrelevance of consent”.

¹² Article 3(c) of the Trafficking Protocol follows the 1989 Convention on the Rights of the Child in defining a child as “any person under eighteen years of age”.

¹³ The Agenda for Protection, A/AC.96/965/Add.1, 2002, Goal 2, Objective 2, calls upon States to ensure that their asylum systems are open to receiving claims from individual victims of trafficking. This interpretation of the Article 14 saving clause as imposing an obligation on 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. This states in relation to Article 40 of that Convention:

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”

13. A claim for international protection presented by a victim or potential victim of trafficking can arise in a number of distinct sets of circumstances. The victim may have been trafficked abroad, may have escaped her or his traffickers and may seek the protection of the State where she or he now is. The victim may have been trafficked within national territory, may have escaped from her or his traffickers and have fled abroad in search of international protection. 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.

b) Well-founded fear of persecution

14. What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case.¹⁴ Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings and psychological make-up of the asylum applicant.

15. In this regard, the evolution of international law in criminalizing trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking. Asylum claims lodged by victims of trafficking or potential victims of trafficking should thus be examined in detail to establish whether the harm feared as a result of the trafficking experience, or as a result of its anticipation, amounts to persecution in the individual case. 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.

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*.

Additionally, the 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, available at www.ohchr.org/english/about/publications/docs/trafficking.doc, address in Guideline 2.7 the importance of ensuring that procedures and processes are in place for the consideration of asylum claims from trafficked persons (as well as from smuggled asylum-seekers) and that the principle of *non-refoulement* is respected and upheld at all times.

¹⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, re-edited 1992, paragraph 51 (hereinafter the “UNHCR Handbook”).

16. In cases where the trafficking experience of the asylum applicant is determined to be a one-off past experience, which is not likely to be repeated, it may still be appropriate to recognize the individual concerned as a refugee if there are compelling reasons arising out of previous persecution, provided the other interrelated elements of the refugee definition are fulfilled. This would include situations where the persecution suffered during the trafficking experience, even if past, was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable. In other words, the impact on the individual of the previous persecution continues. The nature of the harm previously suffered will also impact on the opinions, feelings and psychological make-up of the asylum applicant and thus influence the assessment of whether any future harm or predicament feared would amount to persecution in the particular case.

17. Apart from the persecution experienced by individuals in the course of being trafficked, they may face reprisals and/or possible re-trafficking should they be returned to the territory from which they have fled or from which they have been trafficked.¹⁵ For example, the victim's cooperation with the authorities in the country of asylum or the country of origin in investigations may give rise to a risk of harm from the traffickers upon return, particularly if the trafficking has been perpetrated by international trafficking networks. Reprisals at the hands of traffickers could amount to persecution depending on whether the acts feared involve serious human rights violations or other serious harm or intolerable predicament and on an evaluation of their impact on the individual concerned. Reprisals by traffickers could also be inflicted on the victim's family members, which could render a fear of persecution on the part of the victim well-founded, even if she or he has not been subjected directly to such reprisals. In view of the serious human rights violations often involved, as described in paragraph 15 above, re-trafficking would usually amount to persecution.

18. In addition, the victim may also fear ostracism, discrimination or punishment by the family and/or the local community or, in some instances, by the authorities upon return. Such treatment is particularly relevant in the case of those trafficked into prostitution. In the individual case, severe ostracism, discrimination or punishment may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process. Where the individual fears such treatment, her or his fear of persecution is distinct from, but no less valid than, the fear of persecution resulting from the continued exposure to the violence involved in trafficking scenarios. Even if the ostracism from, or punishment by, family or community members does not rise to the level of persecution, such rejection by, and isolation from, social support networks may in fact heighten the risk of being re-trafficked or of being exposed to retaliation, which could then give rise to a well-founded fear of persecution.

¹⁵ See, "Report of the Working Group on Contemporary Forms of Slavery on its twenty-ninth session", E/CN.4/Sub.2/2004/36, 20 July 2004, Section VII Recommendations adopted at the twenty-ninth session, p. 16, paragraph 29. This "[c]alls upon all States to ensure that the protection and support of the victims are at the centre of any anti-trafficking policy, and specifically to ensure that: (a) No victim of trafficking is removed from the host country if there is a reasonable likelihood that she will be re-trafficked or subjected to other forms of serious harm, irrespective of whether she decides to cooperate in a prosecution".

c) Women and children victims of trafficking

19. The forcible or deceptive recruitment of women and children for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecution.¹⁶ Trafficked women and children can be particularly susceptible to serious reprisals by traffickers after their escape and/or upon return, as well as to a real possibility of being re-trafficked or of being subjected to severe family or community ostracism and/or severe discrimination.

20. In certain settings, unaccompanied or separated children,¹⁷ are especially vulnerable to trafficking.¹⁸ Such children may be trafficked for the purposes of irregular adoption. This can occur with or without the knowledge and assent of the child's parents. Traffickers may also choose to target orphans. In assessing the international protection needs of children who have been trafficked, it is essential that the best interest principle be scrupulously applied.¹⁹ All cases involving trafficked children require a careful examination of the possible involvement of family members or caregivers in the actions that set the trafficking in motion.

d) Agents of persecution

21. There is scope within the refugee definition to recognize both State and non-State agents of persecution. While persecution is often perpetrated by the authorities of a country, it can also be perpetrated by individuals if the persecutory acts are “knowingly tolerated by the authorities or if the authorities refuse, or prove unable to

¹⁶ See UNHCR Guidelines on Gender-Related Persecution, above footnote 4, paragraph 18. The Commission on Human Rights also recognized that such violence may constitute persecution for the purposes of the refugee definition, when it urged States “to mainstream a gender perspective into all policies and programmes, including national immigration and asylum policies, regulations and practices, as appropriate, in order to promote and protect the rights of all women and girls, including the consideration of steps to recognize gender-related persecution and violence when assessing grounds for granting refugee status and asylum”. See Resolution 2005/41, Elimination of violence against women, 57th meeting, 19 April 2005, operational paragraph 22.

¹⁷ As indicated in the *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, 2004, “separated children are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives”, while unaccompanied children are “children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so”.

¹⁸ There are a number of international instruments which offer specific guidance with respect to the needs and rights of children. These should be given due consideration in assessing the claims of child victims. See, for example, the 1989 Convention on the Rights of the Child, the 2000 Optional Protocol to that Convention, on the sale of children, child prostitution and child pornography, the 1980 Hague Convention No. 28 on the Civil Aspects of International Child Abduction, the 2000 Trafficking Protocol and the 1999 ILO Convention No. 182 on the Prohibition of the Worst Forms of Child Labour. See also, generally, Committee on the Rights of the Child, “General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin”, CRC/CG/2005/6, 1 Sept. 2005.

¹⁹ See, *UNHCR Guidelines on Formal Determination of the Best Interests of the Child*, provisional release April 2006; UN Children's Fund (UNICEF), “Guidelines for Protection of the Rights of Child Victims of Trafficking”, May 2003 and in the process of being updated.

offer effective protection”.²⁰ In most situations involving victims or potential victims of trafficking, the persecutory acts emanate from individuals, that is, traffickers or criminal enterprises or, in some situations, family or community members. Under these circumstances, it is also necessary to examine whether the authorities of the country of origin are able and willing to protect the victim or potential victim upon return.

22. Whether the authorities in the country of origin are able to protect victims or potential victims of trafficking will depend on whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking, as well as to protect and assist the victims and on whether these mechanisms are effectively implemented in practice.²¹ Part II of the Trafficking Protocol requires States to take certain steps with regard to the protection of victims of trafficking, which can be of guidance when assessing the adequacy of protection and assistance provided. Measures relate not only to protecting the privacy and identity of victims of trafficking, but also to their physical, psychological and social recovery.²² Article 8 of the Trafficking Protocol also requires State Parties, which are facilitating the return of their nationals or permanent residents who have been trafficked, to give due regard to the safety of the individuals concerned when accepting them back. The protection measures set out in Part II of the Trafficking Protocol are not exhaustive and should be read in light of other relevant binding and non-binding human rights instruments and guidelines.²³

23. Many States have not adopted or implemented sufficiently stringent measures to criminalize and prevent trafficking or to meet the needs of victims. 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. The mere existence of a law prohibiting trafficking in persons will not of itself be sufficient to exclude the possibility of persecution. If the law exists but is not effectively implemented, or if administrative mechanisms are in place to provide protection and assistance to victims, but the individual concerned is unable to gain access to such mechanisms, the State may be deemed unable to extend protection to the victim, or potential victim, of trafficking.

²⁰ See, UNHCR *Handbook*, above footnote 14, paragraph 65; UNHCR, “Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees” (hereinafter “Interpreting Article 1”), April 2001, paragraph 19; UNHCR Guidelines on Gender-related Persecution, above footnote 4, paragraph 19.

²¹ See Part II of the Trafficking Protocol outlined in footnote 8 above.

²² *Ibid.*

²³ See, United Nations High Commissioner for Human Rights, “Recommended Principles and Guidelines on Human Rights and Human Trafficking”, above footnote 13, which states in Principle No. 2: “States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons”. Numerous instruments of a binding and a non-binding nature highlight the obligation of States to uphold the human rights of victims of trafficking. See, for example, the Council of Europe Convention cited above at footnote 10, the 2002 South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the 2003 Organization for Security and Cooperation in Europe (OSCE) Action Plan to Combat Trafficking in Human Beings.

24. There may also be situations where trafficking activities are *de facto* tolerated or condoned by the authorities or even actively facilitated by corrupt State officials. In these circumstances, the agent of persecution may well be the State itself, which becomes responsible, whether directly or as a result of inaction, for a failure to protect those within its jurisdiction. Whether this is so will depend on the role played by the officials concerned and on whether they are acting in their personal capacity outside the framework of governmental authority or on the basis of the position of authority they occupy within governmental structures supporting or condoning trafficking. In the latter case, the persecutory acts may be deemed to emanate from the State itself.

e) Place of persecution

25. In order to come within the scope of Article 1A(2) of the 1951 Convention, the applicant must be outside her or his country of origin and, owing to a well-founded fear of persecution, be unable or unwilling to avail her- or himself of the protection of that country. The requirement of being outside one's country does not, however, mean that the individual must have left on account of a well-founded fear of persecution.²⁴ Where this fear arises after she or he has left the country of origin, she or he would be a refugee *sur place*, providing the other elements in the refugee definition were fulfilled. Thus, while victims of trafficking may not have left their country owing to a well-founded fear of persecution, such a fear may arise after leaving their country of origin. In such cases, it is on this basis that the claim to refugee status should be assessed.

26. Whether the fear of persecution arises before leaving the country of origin or after, the location where the persecution takes place is a crucial aspect in correctly assessing asylum claims made by individuals who have been trafficked. The 1951 Convention requires that the refugee demonstrate a well-founded fear of persecution with regard to her or his country of nationality or habitual residence. Where someone has been trafficked within her or his own country, or fears being trafficked, and escapes to another in search of international protection, the link between the fear of persecution, the motivation for flight and the unwillingness to return is evident and any international protection needs fall to be determined in terms of the threat posed to the individual should she or he be obliged to return to the country of nationality or habitual residence. If no such well-founded fear is established in relation to the country of origin, then it would be appropriate for the State from which asylum has been requested to reject the claim to refugee status.

27. The circumstances in the applicant's country of origin or habitual residence are the main point of reference against which to determine the existence of a well-founded fear of persecution. Nevertheless, even where the exploitation experienced by a victim of trafficking occurs mainly outside the country of origin, this does not preclude the existence of a well-founded fear of persecution in the individual's own country. The trafficking of 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 continuous and interconnected nature of the range of persecutory acts involved in the context of transnational trafficking should be given due consideration. Furthermore,

²⁴ See UNHCR *Handbook*, above footnote 14, paragraph 94.

trafficking involves a chain of actors, starting with those responsible for recruitment in the country of origin, through to those who organize and facilitate the transport, transfer and/or sale of victims, through to the final “purchaser”. Each of these actors has a vested interest in the trafficking enterprise and could pose a real threat to the victim. Depending on the sophistication of the trafficking rings involved, applicants may thus have experienced and continue to fear harm in a number of locations, including in countries through which they have transited, the State in which the asylum application is submitted and the country of origin. In such circumstances, the existence of a well-founded fear of persecution is to be evaluated in relation to the country of origin of the applicant.

28. A victim of trafficking who has been determined to be a refugee may additionally fear reprisals, punishment or re-trafficking in the country of asylum. If a refugee is at risk in her or his country of refuge or has particular needs, which cannot be met in the country of asylum, she or he may need to be considered for resettlement to a third country.²⁵

f) The causal link (“for reasons of”)

29. To qualify for refugee status, an individual’s well-founded fear of persecution must be related to one or more of the Convention grounds, that is, it must be “for reasons of” race, religion, nationality, membership of a particular social group or political opinion. It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause. In many jurisdictions, the causal link (“for reasons of”) must be explicitly established, while in other States, causation is not treated as a separate question for analysis but is subsumed within the holistic analysis of the refugee definition.²⁶ In relation to asylum claims involving trafficking, the difficult issue for a decision-maker is likely to be linking the well-founded fear of persecution to a Convention ground. Where the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.²⁷

30. In cases where there is a risk of being persecuted at the hands of a non-State actor for reasons related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention-related. Alternatively, where a risk of persecution at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.

31. Trafficking in persons is a commercial enterprise, the prime motivation of which is likely to be profit rather than persecution on a Convention ground. In other words, victims are likely to be targeted above all because of their perceived or potential commercial value to the traffickers. This overriding economic motive does not, however, exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking. Scenarios in which trafficking can flourish

²⁵ UNHCR, *Resettlement Handbook*, November 2004 edition, chapter 4.1.

²⁶ See UNHCR Guidelines on Gender-related Persecution, above footnote 4, paragraph 20.

²⁷ See UNHCR “Interpreting Article 1”, above footnote 20, paragraph 25.

frequently coincide with situations where potential victims may be vulnerable to trafficking precisely as a result of characteristics contained in the 1951 Convention refugee definition. For instance, States where there has been significant social upheaval and/or economic transition or which have been involved in armed conflict resulting in a breakdown in law and order are prone to increased poverty, deprivation and dislocation of the civilian population. Opportunities arise for organized crime to exploit the inability, or lack of will, of law enforcement agencies to maintain law and order, in particular the failure to ensure adequate security for specific or vulnerable groups.

32. Members of a certain race or ethnic group in a given country may be especially vulnerable to trafficking and/or less effectively protected by the authorities of the country of origin. Victims may be targeted on the basis of their ethnicity, nationality, religious or political views in a context where individuals with specific profiles are already more vulnerable to exploitation and abuse of varying forms. Individuals may also be targeted by reason of their belonging to a particular social group. As an example, among children or women generally in a particular society some subsets of children or women may be especially vulnerable to being trafficked and may constitute a social group within the terms of the refugee definition. Thus, even if an individual is not trafficked solely and exclusively for a Convention reason, one or more of these Convention grounds may have been relevant for the trafficker's selection of the particular victim.

g) Convention grounds

33. The causal link may be established to any one single Convention ground or to a combination of these grounds. Although a successful claim to refugee status only needs to establish a causal link to one ground, a full analysis of trafficking cases may frequently reveal a number of interlinked, cumulative grounds.

Race

34. For the purposes of the refugee definition, race has been defined as including "all kinds of ethnic groups that are referred to as 'races' in common usage".²⁸ In situations of armed conflict where there is a deliberate policy of exploitation or victimization of certain racial or ethnic groups, persecution may manifest itself by the trafficking of members of that group. This kind of targeting of victims may occur in conjunction with an economic motivation which above all seeks to obtain financial gain. In the absence of armed conflict, members of one racial group may still be particularly targeted for trafficking for varied ends, if the State is unable or unwilling to protect members of that group. Where trafficking serves the sex trade, women and girls may also be especially targeted as a result of market demands for a particular race (or nationality). As the Special Rapporteur on trafficking has noted, such demand "is often further grounded in social power disparities of race, nationality, caste and colour".²⁹

²⁸ UNHCR, *Handbook*, paragraph 68.

²⁹ See, Report of the Special Rapporteur, "Integration of the Human Rights of Women and a Gender Perspective", above footnote 9, paragraphs 48 and 66.

Religion

35. Individuals may similarly be targeted by traffickers because they belong to a particular religious community, that is, they may be targeted because their faith or belief identifies them as a member of a vulnerable group in the particular circumstances, if, for instance, the authorities are known not to provide adequate protection to certain religious groups. Again the profit motive may be an overriding factor, but this does not obviate the relevance of religion as a factor in the profiling and selection of victims. Alternatively, trafficking may be the method chosen to persecute members of a particular faith.³⁰

Nationality

36. Nationality has a wider meaning than citizenship. It can equally refer to membership of an ethnic or linguistic group and may overlap with the term “race”.³¹ Trafficking may be the method chosen to persecute members of a particular national group in a context where there is inter-ethnic conflict within a State and certain groups enjoy lesser guarantees of protection. Again, even where the primary motive of the trafficker is financial gain, someone’s nationality may result in them being more vulnerable to trafficking.

Membership of a particular social group³²

37. Victims and potential victims of trafficking may qualify as refugees where it can be demonstrated that they fear being persecuted for reasons of their membership of a particular social group. In establishing this ground it is not necessary that the members of a particular group know each other or associate with each other as a group.³³ It is, however, necessary that they either share a common characteristic other than their risk of being persecuted or are perceived as a group by society. The shared characteristic will often be one that is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one’s human rights.³⁴ Persecutory action against a group may be relevant in heightening the visibility of the group without being its defining characteristic.³⁵ As with the other Convention grounds, the size of the purported social group is not a relevant criterion in determining whether a social group exists within the meaning of Article 1A(2).³⁶ While a claimant must still demonstrate a well-founded fear of being persecuted based on her or his membership of the particular social group, she or he need not

³⁰ See generally, UNHCR, “Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees”, HCR/GIP/04/06, 28 April 2004.

³¹ UNHCR, *Handbook*, paragraph 74.

³² See generally, UNHCR, “Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1A(2) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees”, HCR/GIP/02/02, 7 May 2002.

³³ *Ibid.*, paragraph 15.

³⁴ *Ibid.*, paragraph 11.

³⁵ *Ibid.*, paragraph 14.

³⁶ *Ibid.*, paragraph 18.

demonstrate that all members of the group are at risk of persecution in order to establish the existence of the group.³⁷

38. Women are an example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men. As such, they may constitute a particular social group.³⁸ Factors which may distinguish women as targets for traffickers are generally connected to their vulnerability in certain social settings; therefore certain social subsets of women may also constitute particular social groups. Men or children or certain social subsets of these groups may also be considered as particular social groups. Examples of social subsets of women or children could, depending on the context, be single women, widows, divorced women, illiterate women, separated or unaccompanied children, orphans or street children. The fact of belonging to such a particular social group may be one of the factors contributing to an individual's fear of being subjected to persecution, for example, to sexual exploitation, as a result of being, or fearing being, trafficked.

39. Former victims of trafficking may also be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked. A society may also, depending on the context, view persons who have been trafficked as a cognizable group within that society. Particular social groups can nevertheless not be defined exclusively by the persecution that members of the group suffer or by a common fear of persecution.³⁹ It should therefore be noted that it is the past trafficking experience that would constitute one of the elements defining the group in such cases, rather than the future persecution now feared in the form of ostracism, punishment, reprisals or re-trafficking. In such situations, the group would therefore not be defined solely by its fear of future persecution.

Political opinion

40. Individuals may be targeted for trafficking because they hold a certain political opinion or are perceived as doing so. Similar considerations apply for the other Convention grounds, that is, individuals may, depending on the circumstances, be targeted because of their actual or perceived political views which make them vulnerable and less likely to enjoy the effective protection of the State.

III. STATELESSNESS AND TRAFFICKING

41. The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness establish a legal framework setting out the rights of stateless persons, the obligations of States Parties to avoid actions that would result in statelessness and the steps to be taken to remedy situations of statelessness. The 1954 Convention applies to anyone who is “not considered as a national by any State under the operation of its law”,⁴⁰ that is, it applies for the benefit of those who are denied citizenship under the laws of any State. The 1961

³⁷ Ibid., paragraph 17.

³⁸ Ibid., paragraph 12. See also UNHCR Guidelines on Gender-related Persecution, above footnote 4, paragraph 30.

³⁹ See UNHCR Guidelines on Membership of a Particular Social Group, above footnote 32, paragraph 14.

⁴⁰ See Article 1(1) of the 1954 Convention.

Convention generally requires States to avoid actions that would result in statelessness and explicitly forbids the deprivation of nationality if this would result in statelessness.⁴¹ This constitutes a prohibition on actions that would cause statelessness, as well as an obligation to avoid situations where statelessness may arise by default or neglect. The only exception to this prohibition is when the nationality was acquired fraudulently.⁴²

42. When seeking to assess and address the situation of someone who has been trafficked, it is important to recognize potential implications as regards statelessness. The mere fact of being a victim of trafficking will not *per se* render someone stateless. Victims of trafficking continue to possess the citizenship they had when they fell under the control of their traffickers. If, however, these traffickers have confiscated their identity documents, as commonly happens as a way of establishing and exerting control over their victims, they may be unable to prove citizenship. This lack of documentation and temporary inability to establish identity is not necessarily unique to victims of trafficking. It should be, and in many cases is, easily overcome with the assistance of the authorities of the State of origin.⁴³

43. Everyone has the right to return to their own country.⁴⁴ States should extend diplomatic protection to their nationals abroad. This includes facilitating their re-entry into the country, including in the case of victims of trafficking who find themselves abroad. If, however, the State withholds such assistance and fails to supply documentation to enable the individual to return, one practical consequence may be to render the individual effectively stateless.⁴⁵ Even if the individuals were not previously considered stateless by their State of nationality, they may find themselves effectively treated as such if they attempt to avail themselves of that State's protection.⁴⁶ UNHCR's statelessness mandate may mean it needs to take action to assist individuals in such circumstances.⁴⁷

⁴¹ See Article 8(1) of the 1961 Convention.

⁴² In addition to the 1954 and 1961 Statelessness Conventions, other international or regional instruments set out similar principles. See, for instance, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1997 European Convention on Nationality, the 1969 American Convention on Human Rights and the 1990 African Charter on the Rights and Welfare of the Child.

⁴³ In such circumstances, it is necessary to respect principles of confidentiality. These require amongst other things that any contact with the country of origin should not indicate either that the individual concerned has applied for asylum or that she or he has been trafficked.

⁴⁴ 1948 Universal Declaration of Human Rights, Article 13(2). See also, Article 12(4) of the International Covenant on Civil and Political Rights, which reads: "No one shall be arbitrarily deprived of the right to enter his own country."

⁴⁵ See, Executive Committee Conclusion No. 90 (LII), 2001, paragraph (s), in which the Executive Committee of UNHCR expresses its concern that many victims of trafficking are rendered effectively stateless due to an inability to establish their identity and nationality status.

⁴⁶ This is so, despite relevant State obligations contained in the 1961 Convention on the Reduction of Statelessness, in addition to Article 8 of the Trafficking Protocol.

⁴⁷ When the 1961 Convention on the Reduction of Statelessness came into force, the UN General Assembly designated UNHCR as the UN body entrusted to act on behalf of stateless persons. Since 1975, General Assembly Resolutions have further detailed UNHCR's

44. There may also be situations where stateless individuals are trafficked out of their country of habitual residence. The lack of documentation coupled with lack of citizenship may render them unable to secure return to their country of habitual residence. While this alone does not make someone a refugee, the individual concerned may be eligible for refugee status where the refusal of the country of habitual residence to allow re-entry is related to a Convention ground and the inability to return to the country leads to serious harm or a serious violation, or violations, of human rights amounting to persecution.

IV. PROCEDURAL ISSUES

45. Given the broad range of situations in which trafficking cases come to light and victims of trafficking can be identified, it is important that mechanisms be put in place at the national level to provide for the physical, psychological and social recovery of victims of trafficking. This includes the provision of housing, legal counselling and information, medical, psychological and material assistance, as well as employment, educational and training opportunities in a manner which takes into account the age, gender and special needs of victims of trafficking.⁴⁸ It is also necessary to ensure that victims of trafficking have access to fair and efficient asylum procedures as appropriate⁴⁹ and to proper legal counselling, if they are to be able to lodge an asylum claim effectively. In view of the complexities of asylum claims presented by victims or potential victims of trafficking, such claims normally require an examination on their merits in regular procedures.

46. In the reception of applicants who claim to have been victims of trafficking, and in interviewing such individuals, it is of utmost importance that a supportive environment be provided so that they can be reassured of the confidentiality of their claim. Providing interviewers of the same sex as the applicant can be particularly important in this respect. Interviewers should also take into consideration that victims who have escaped from their traffickers could be in fear of revealing the real extent of the persecution they have suffered. Some may be traumatized and in need of expert medical and/or psycho-social assistance, as well as expert counselling.

47. Such assistance should be provided to victims in an age and gender sensitive manner. Many instances of trafficking, in particular trafficking for the purposes of exploitation of the prostitution of others or other forms of sexual exploitation, are likely to have a disproportionately severe effect on women and children. Such individuals may rightly be considered as victims of gender-related persecution. They will have been subjected in many, if not most, cases to severe breaches of their basic human rights, including inhuman or degrading treatment, and in some instances, torture.

responsibilities regarding the prevention of statelessness and the protection of stateless persons.

⁴⁸ See Article 6 in Part II of the Trafficking Protocol.

⁴⁹ See Agenda for Protection, Goal 2 Objective 2, and the OHCHR, “Recommended Principles and Guidelines on Human Rights and Human Trafficking”, above footnote 13, Guideline 2.7, and the Council of Europe Convention, Explanatory Report, paragraph 377.

48. Women, in particular, may feel ashamed of what has happened to them or may suffer from trauma caused by sexual abuse and violence, as well as by the circumstances surrounding their escape from their traffickers. In such situations, the fear of their traffickers will be very real. Additionally, they may fear rejection and/or reprisals by their family and/or community which should be taken into account when considering their claims. Against this background and in order to ensure that claims by female victims of trafficking are properly considered in the refugee status determination process, a number of measures should be borne in mind. These have been set out in Part III of UNHCR's Guidelines on International Protection on gender-related persecution and are equally applicable in the context of trafficking-related claims.⁵⁰

49. Children also require special attention in terms of their care, as well as of the assistance to be provided in the presentation of asylum claims. In this context, procedures for the rapid identification of child victims of trafficking need to be established, as do specialized programmes and policies to protect and support child victims, including through the appointment of a guardian, the provision of age-sensitive counselling and tracing efforts which bear in mind the need for confidentiality and a supportive environment. Additional information on the appropriate handling of claims by child victims of trafficking can be found in the UN Children Fund (UNICEF) "Guidelines for the Protection of the Rights of Child Victims of Trafficking",⁵¹ in the "Recommended Principles and Guidelines on Human Rights and Human Trafficking" of the Office of the High Commissioner for Human Rights⁵² and General Comment No. 6 of the of the Committee on the Rights of the Child.⁵³

50. An additional and specific consideration relates to the importance of avoiding any linkage, whether overt or implied, between the evaluation of the merits of a claim to asylum and the willingness of a victim to give evidence in legal proceedings against her or his traffickers. Providing evidence to help identify and prosecute traffickers can raise specific protection concerns that need to be addressed through specially designed witness protection programmes. The fact that an individual has agreed to provide such evidence will nevertheless not necessarily make her or him a refugee, unless the repercussions feared upon a return to the country of origin rise to the level of persecution and can be linked to one or more of the Convention grounds. Conversely, the fact that a victim of trafficking refuses to provide evidence should not lead to any adverse conclusion with respect to her or his asylum claim.

⁵⁰ See UNHCR Guidelines on Gender-related Persecution, above footnote 4. Complementary information can be found in World Health Organization, London School of Hygiene and Tropical Medicine and Daphne Programme of the European Commission, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women*, 2003, available at <http://www.who.int/gender/documents/en/final%20recommendations%2023%20oct.pdf>.

⁵¹ See above footnote 19.

⁵² See above footnote 13. Guideline 8 addresses special measures for the protection and support of child victims of trafficking.

⁵³ See above, footnote 18, especially paragraphs 64–78.