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## Leaving No Stones Unturned: The Evolving Role of Refugee Legal Framework in Protection of Victims of Trafficking

• Yugichha Sangroula<sup>1</sup>

*The proliferation of transnational crimes has made protection of victims of trafficking all the more imperative. However, as the general definition of a victim is hazed by surfacing mixed migratory patterns, legal frameworks on their protection have become unaccommodating to some victims. The role of refugee legal framework in such circumstances for added and/or supplementary protection of such victims is very consequential and the nexus between these areas is not uncanny. Whether be it the vulnerability of refugees to be trafficked or the legitimate claim of victims of trafficking on voluntary repatriation or non-refoulement that gives rise to asylum claim, adducing refugee legal framework has become essential. There needs to be burden-sharing arrangements among the countries of origin, transit and destination and concerned agencies such as UNHCR and IOM to provide utmost legal assistance to the victims of trafficking. The obligation to protect demands states to refrain from treating the victims of trafficking as illegal immigrants and any denial of protection should be reasonably justified, including the right to asylum on well-founded grounds of persecution. States are also obligated to address the challenges persistent in the concerned area.*

### Introduction

The term ‘trafficking’ is not novel to anybody aware about the proliferating crime syndicates, especially transnational, looming large and threatening to rapture the very fabric of human society. Disturbingly, the perpetrators outpace the authorities by adapting to new methods and modes. What I am building on is that trafficking could most likely stay like an obstinate scar on the face for a while. Hence, prevention cannot and never has been only facet in combating trafficking.<sup>2</sup> The paper shall delve into one such consequential concept, that being

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<sup>2</sup> Multisectoral action is needed to fight human trafficking. Areas of action are often presented under the ‘3P’ approach, i.e. prevention, protection and prosecution. United Nations Global Initiative to Fight Human Trafficking, *Human Trafficking, An Overview* (New York: UNODC 2008), 40.

protection of the victims trafficked across international borders<sup>3</sup> in the line of particular challenges they face.

Due to its clandestine nature, it is extremely difficult to assess the worldwide scale of human trafficking, although UNODC estimates that there are, at a minimum, approximately 2.5 million victims of human trafficking at any given time.<sup>4</sup> ILO further estimates that 98 per cent of the people trafficked are women and girls<sup>5</sup> largely for sexual exploitation.<sup>6</sup> Trafficked children become victims of prostitution, pedophilia, pornography in which their fragile bodies are torture, thus constituting a major group at risk.<sup>7</sup> Also, the victims in general are compelled to endure one or more forms of harms<sup>8</sup>. These facts exclaim that the victims face a heightened risk of stigmatization.<sup>9</sup>

The protection needs of such victims have culminated into human rights frameworks, a noteworthy instrument being the *Trafficking Protocol* which recognizes victims of trafficking as a specific group, calling for specific actions.<sup>10</sup> The protocol is a leading reference in this area, however, there is a growing realization that it is inadequate in victims protection mechanism, compounded by a number of factors such as its narrow definitions of ‘trafficking’ and ‘smuggling’<sup>11</sup>, remaining tacit on possibility of these concepts

<sup>3</sup> During the course of research, it was realized that although the all the victims face similar threat to security and personhood, the legal framework and institutional response mechanisms available to victims internally displaced are different from those transported across the national frontier, which could call for a distinct treatment. See Anne P. Wilson, *Trafficking Risks for Refugees*, available at <http://digitalcommons.unl.edu/humtraffconf3/4/> (accessed on 8 September 2012), 3.

<sup>4</sup> UNDOC, *Human Trafficking FAQs*, available at <http://www.unodc.org/unodc/en/human-trafficking/faqs.html> (accessed on 8 September 2012), para 4.

<sup>5</sup> International Programme for Elimination of Child Labour, *Give Girls a Chance, Tackling Child Labour, a Key to the Future* (Geneva: ILO 2009), 39.

<sup>6</sup> *Ibid.*

<sup>7</sup> UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response* (Geneva: UNHCR 2003), 84.

<sup>8</sup> Common forms of harm involved in trafficking and forced marriage include rape and other sexual abuse, deprivation of liberty, physical violence, psychological violence, forced labor (within or outside of the home), severe economic deprivation, deprivation of education, honor killings, female genital mutilation (FGM), other severe human rights violations. See generally Amnesty International, *Trafficking of Women and Girls*, available at <http://www.amnesty.org/en/campaigns/stop-violence-against-women/issues/implementation-existing-laws/trafficking> (accessed on 8 September 2012); Radhika Cooramaswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UN Doc E/CN.4/2000/68 (2004).

<sup>9</sup> See UNHCR, *Summary of UNHCR's Executive Committee Conclusion on Children at Risk No. 107 LVIII 2007*, available at <http://www.unhcr.org/refworld/docid/496630b72.html> (accessed on 8 September 2012).

<sup>10</sup> See *2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/55/383.

<sup>11</sup> Tyler Marie Christensen, ‘Trafficking for sexual exploitation, victim protection in international and domestic asylum law’ *UNHCR New Issues in Refugee Research*, available at [http://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_83.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_83.pdf) (accessed on 7 September 2012), 5.

overlapping.<sup>12</sup> This has opened the door for other legal frameworks to step in to ensure added and supplementary protection of the victims, one of them being the refugee legal framework which particularly has been extending its hands to the victims to leave no stones unturned in providing them access to protection, as the title suggests.

The paper shall focus on the legal protection of rights of victims of international trafficking by drawing reference to an evolving realization of its nexus with those established to protect rights of victims with refugee status, with special focus on the rights of victims of trafficking to be assisted in asylum and repatriation.

### **Revisiting the general definition of ‘Trafficking’**

The *Trafficking Protocol’s* definition on ‘trafficking’ revolves around a) its nature: recruitment, transportation, transfer, harboring or receipt of persons, b) the possible means: 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 and c) the purpose of the above being exploitation, such as sexual exploitation, including prostitution, forced labor or services, slavery and servitude or similar practices or removal of organ.<sup>13</sup> The definition also projects the stages at which the crime occurs, i.e. acquisition, movement and exploitation.<sup>14</sup>

The definition is agreeable to a large extent but not sufficiently accommodate many factual discrepancies which trafficking, in reality, is prone to. It exposes a tendency to neglect the strong links between human trafficking and the complex dynamics of irregular migration.<sup>15</sup> For instance, illegal immigrations aware about the stringent immigration policy have been

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<sup>12</sup> The statement holds good in case of an individual who begins as a willing migrant seeking better opportunities in another country, but becomes a victim of trafficking during transit or upon arrival in the destination country. IOM, *Handbook on Direct Assistance for Victims of Trafficking* (Geneva: IOM 2007), 25.

<sup>13</sup> *Trafficking Protocol* (n 10), article 3(a).

<sup>14</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (New York: Columbia University Press 2009), 5.

<sup>15</sup> Frank Laczko and Elzbieta Gozdziaik (ed), *Data and Research on Human Trafficking, A Global Survey* (Geneva: IOM 2005), 287.

transported to UK with consent, only to be deceptively abandoned by the smuggler at a transit, while the latter absconds with the victim's money.<sup>16</sup>

These are the 'trafficking victims made in process', whose plights expose the thinning demarcation between 'smuggling' (of migrants) and 'trafficking'<sup>17</sup> which are otherwise generally given a distinct treatment. What does not necessarily start as a process of trafficking at inception, may rather turn from other forms of irregular migration into trafficking<sup>18</sup> if there is a subsequent exploitation, in which case the definition of 'victim' has been seen to preclude force, deception and coercion.<sup>19</sup> The Somali refugee problem in Nepal is a glaring illustration of this development, which shall be discussed later in the paper.

Amidst such obscurities, ascertaining who may constitute a victim of trafficking and what kinds of protections they deserve have become dependent on objective test. Evolving practices indicate that asylum seekers, irregular migrants, and regular migrants whose labor or human rights have been violated or abused at some stage, are readily called 'victims of trafficking'.<sup>20</sup> At this point, refugee laws, both customary and statutory, are incontrovertible references.

### **Adducing refugee legal framework for protection of victims of trafficking**

Although refugees and victim of trafficking are distinct groups, special circumstances may result in amalgamation. While refugees are identified by UNHCR as those having refugee status and receiving distinct protection such as placement in a community and access to special services<sup>21</sup>, the modes in which refugees, labor migrants and victims of trafficking

<sup>16</sup> See Margaret Melrose, 'Mercenary Territory, A UK Perspective on Human Trafficking' in Kimberly A. McCabe and Sabita Manian (ed), *Sex Trafficking, A Global Perspective* (Maryland: Lexington Books 2010) 59, 60.

<sup>17</sup> *Ibid*, 5.

<sup>18</sup> Building upon the distinction traceable in Trafficking Protocol and Protocol against the Smuggling of Migrants by Land, Sea and Air, an author opines that human trafficking is distinct from human smuggling. Smuggling differs from trafficking because it does not involve coercion, and instead can be a voluntary decision by individuals to pay the smuggler to help them gain illegal entry to another country. Meredith Flowe, 'The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply and Demand', (2010) 35 *North Carolina Journal of International Law & Commercial Regulation* 669, 2.

<sup>19</sup> UNHCR (n 8), 84.

<sup>20</sup> Laczko and Gozdzia (n 14), 5.

<sup>21</sup> Coordinated Community Response Council, *Human Trafficking and Refugees, Recognition, Response, and Treatment* (Training Program, 7 April 2009), available at [https://www.santafe-ccrc.org/training.php?training\\_id=66](https://www.santafe-ccrc.org/training.php?training_id=66) (accessed on 7 September 2012).

illegally make journey to their country of destination are similar these days,<sup>22</sup> which necessitates collaborative prevention mechanisms. More importantly, these groups often share similar trauma, from physical and sexual violence to torture.<sup>23</sup> Both groups require special understanding by law enforcement and providers to respond effectively.<sup>24</sup>

Refugee law gets attracted in such protection frameworks in three ways: a) Those who already have a refugee status are vulnerable groups and may be targeted by traffickers<sup>25</sup>; b) A refugee in order to avail the limited modes for flight from country of origin may unknowingly employ the services of a trafficker at the outset or transit<sup>26</sup>; c) The victims of trafficking can qualify for refugee status on the country of destination, mostly in cases concerning women trafficked into forced prostitution where persecution can be determined on the basis of their membership of a social group; They may desire to repatriate to the country of origin, in which case he/she would require special assistance.<sup>27</sup>

Our concern here is the third instance regarding assistance in repatriation with *the Refugee Convention (or 1951 Convention)*<sup>28</sup> and *its Protocol Relating to the Status of Refugees*<sup>29</sup> as significant sources. It is important to consider the relationship between refugee status and human trafficking and the potential for protection that the refugee legal framework may offer to its victims.<sup>30</sup>

Victims of trafficking will qualify for refugee status if they meet the ‘well-founded grounds’ set forth by the *1951 Convention*<sup>31</sup>. The nexus between victims of trafficking and the scope of persecution in terms of the Convention is a relatively new area.

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<sup>22</sup> Refugees now follow the same migratory routes as labor migrants, turn to the same international smuggling operations to secure transport and cross borders, face the same enforcement measures, and live mixed together in the same communities in their countries of destination. Wilson (n 2), 4.

<sup>23</sup> *Ibid*, 41.

<sup>24</sup> CCRC (n 20).

<sup>25</sup> IOM has reported that their staffs know of instances where young refugee women have been abducted from refugee camps in Albania by members of organized crime syndicates, with the objective of forcing them into prostitution in Italy and elsewhere in West Europe. Refugee children, particularly unaccompanied and separated children, are at risk of being forcibly or deceptively trafficked, often for commercial sexual exploitation. UNHCR (n 8), 84.

<sup>26</sup> John Morrison, *The trafficking and smuggling of refugees the end game in European asylum policy?* (Geneva: UNHCR 2000), 62.

<sup>27</sup> *Ibid*, 63.

<sup>28</sup> See generally, *Convention relating to the Status of Refugees* (28 July 1951), 189 UNTS 150.

<sup>29</sup> See generally, UN General Assembly, *Protocol Relating to the Status of Refugees* (31 January 1967) 606 UNTS 267.

<sup>30</sup> Christensen (n 10), 6.

<sup>31</sup> *1967 Refugee Protocol* (n 29), article 1.

It is a generally accepted assumption that traffickers do not target people completely at random<sup>32</sup>, they pick up the vulnerable ones. Scenarios in which trafficking can flourish 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.<sup>33</sup> For instance, the convention is largely applicable in the period of political breakdown or socioeconomic transitions. Many people in the process of fleeing their country could be trafficked and may have a valid claim of persecution.<sup>34</sup>

In its *Guidelines on International Protection on Trafficking* (hereinafter *Guidelines on Trafficking*), UNHCR urges the decision makers to raise awareness of the potential international protection needs of victims of trafficking and ensure that those falling within the refugee definition are accorded such protection and coordinate with UNHCR in granting complementary forms of protection where victims of trafficking are in need of such international protection.<sup>35</sup>

### **Determining which victims of trafficking qualify for the refugee status**

As mentioned earlier, not all victims of trafficking fall within the scope of the refugee definition. In its *Guidelines on Trafficking*, UNHCR has elaborated on the application of Article 1A(2) of the *1951 Convention* and on issues concerning the application of *Convention Relating to the Status of Stateless Persons* (or *1954 convention*)<sup>36</sup> and the *Convention on the Reduction of Statelessness* (*1961 Convention*)<sup>37</sup> in addition to and distinct from the protection contemplated by Part II of the *Trafficking Protocol*.<sup>38</sup>

The first criteria enumerated by the *Guidelines on Trafficking* on the to claim refugee status according to the article 1A(2) of *1951 Convention* is that there are several forms of

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<sup>32</sup> See generally, Immigration and Refugee Board of Canada, *Compendium of Decisions, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution* (November 13 1996) available at <http://www.unhcr.org/refworld/docid/4713831e2.html> (accessed 8 September 2012); World Organization for Human Rights USA, *Guide to Establishing the Asylum Eligibility of Victims of Human Trafficking and Forced Marriage* (Washington DC: World Organization for Human Rights USA 2011), 47.

<sup>33</sup> UNHCR, *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* (HCR/GIP/06/07) available at <http://www.unhcr.org/443b626b2.html> (accessed on 8 September 2012), 12.

<sup>34</sup> *Ibid.*

<sup>35</sup> UNHCR (n 32), 16.

<sup>36</sup> See generally *Convention Relating to the Status of Stateless Persons* (28 September 1954), 360 UNTS 117.

<sup>37</sup> See generally *Convention on the Reduction of Statelessness* (30 August 1961), 989 UNTS 175.

<sup>38</sup> UNHCR (n 32), 6.

exploitation that are endemic in the trafficking experience and constitute serious violations of human rights as to rise to the level of persecution.<sup>39</sup> As to what amounts to persecution in trafficking cases, there is not an exhaustive list nor is it traceable to a uniform legal source. Some of the established notions shall be discussed here.

- Forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labor, removal of organs, physical beatings, starvation, deprivation of medical treatment constitute serious violations of human rights and thus generally amount to persecution.<sup>40</sup>
- 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.<sup>41</sup>
- Recognized child-specific manifestations such as child trafficking and female genital are included in forms of persecution.<sup>42</sup>
- Psychological trauma may constitute persecution in aggregate with other harm.<sup>43</sup>
- The combination of all the harms suffered constitutes persecution and their cumulative effect be termed persecution.<sup>44</sup>
- If the victims faces reprisal and/or possible re-trafficking should they be returned to the territory from which they have fled or from which they have been trafficked, such can be a ground for persecution.<sup>45</sup>

In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act of trafficking.<sup>46</sup>

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 15.

<sup>41</sup> The Commission on Human Rights has also recognized that such violence may constitute persecution for the purposes of the refugee definition. The Commission on Human Rights recognizes that such violence may constitute persecution for the purposes of the refugee definition. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR 2011), 138.

<sup>42</sup> UNHCR (n 15), para g(viii).

<sup>43</sup> *Javhlan v. Holder*, 626 F 3d 1119, 1123 (9th Cir 2010).

<sup>44</sup> *Ngengwe v. Mukasey*, 543 F 3d 1029, 1037 (8th Cir 2008).

<sup>45</sup> 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. UN Sub-Commission on the Promotion and Protection of Human Rights through Rapporteur Paulo Sérgio Pinheiro, *Report of the Working Group on Contemporary Forms of Slavery on its twenty-ninth session Chairperson-Rapporteur*, UN Doc E/CN.4/Sub.2/2004/36 (2004), 16; In one case, the appellant claimed asylum on 15 July 2007. She claimed that if returned to Thailand she would be hunted down by M's gang. She believed that M had links with Thai immigration. Eg *AZ v. The Secretary of State for the Home Department* CG [2010] UKUT 118 (IAC).



The second criteria is more appropriately a tendency of states to confer the refugee status on the victims of trafficking belonging to certain social group, which requires the victim to demonstrate the fear of being persecuted for reasons of their membership of a particular social group.<sup>47</sup> 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.<sup>48</sup> In *AZ v. The Secretary of State*<sup>49</sup>, the court spoke that victims of trafficking of a specific country can constitute a social group, in this case being Thailand. Also, the practice of recognizing gender as a factor in creation of social group has been embraced, for instance, UNHRC's *Guidelines on the Protection of Refugee Women* mentions that women who are subject to abuse for 'transgressing social standards' may be eligible for asylum.<sup>50</sup> Religion-based claims have also been accepted to suffice the social group criteria. Such concerns have been regarded by UNHRC as both substantive and procedural.<sup>51</sup>

It becomes obvious that a victim of trafficking as an asylum seeker has to suffice the definition of a refugee to claim the refugee status, which does not mean the asylum-seeker receives the status and protections in all the scenarios.<sup>52</sup>

### **Standards of protection under the refugee legal framework**

Identification of the protector/s is the next tier in protection of victims of trafficking under the refugee legal framework. In relation to it, the Executive Committee of UNHCR has stressed the mandated role of UNHCR in the identification of refugees and other persons of concern to the Office in mixed migratory movements with a view to meeting their international protection needs<sup>53</sup> and the importance of enhanced cooperation among States, UNHCR, international agencies, including IOM and other relevant actors, to address the complex problems arising in the context of mixed migratory movements, specially trafficking in

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<sup>46</sup> See generally, UNHCR (n 40).

<sup>47</sup> UNHCR, *Guidelines on International Protection, 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), available at [http://cgrs.uchastings.edu/law/unhcr\\_un.php](http://cgrs.uchastings.edu/law/unhcr_un.php) (accessed on 7 September 2012), para 15.

<sup>48</sup> *Ibid.*

<sup>49</sup> *AZ v. The Secretary of State for the Home Department* (n 44).

<sup>50</sup> UNHCR, *Guidelines for the Protection of Refugee Women* (July 1991), available at <http://www.unhcr.org/refworld/docid/3ae6b3310.html> (accessed 8 September 2012).

<sup>51</sup> UNHCR (n 46), para 24-30. .

<sup>52</sup> Further see the "Challenges and Recommendations".

<sup>53</sup> UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 6<sup>th</sup> edition (Geneva: UNHCR 2011), 498.

persons.<sup>54</sup> Such coordination has been termed as ‘burden-sharing arrangements’<sup>55</sup> in which the role of countries of origin, transit and destination and mandated agencies are the actors in specific victim assistance prescribed to formulate special programs and policies as a part and parcels of the protection framework.<sup>56</sup> The states in particular are obligated to make the rights of the victims unconditional, confidential and undertake their activities in ways that do not lead to social stigmatization and discrimination, or put the victim at risk of retribution from traffickers.<sup>57</sup> The role of each actor depends on how a person examines his/her available options for protection upon identification as a victim of trafficking.<sup>58</sup>

### A. Assisting in repatriation

In many situations, the best option for the victim may be (and he/she may choose) to return, in which case the role of country of destination and transit is return the victim, as quickly and safely as possible, to their country of origin or permanent residence.<sup>59</sup>

If a victim of trafficking would enjoy protection in the country of origin and return is the desired outcome<sup>60</sup>, the refugee legal framework, in the opinion of the Executive Committee of UNHCR, can be instrumental in promoting cooperation among the states to verify the victim’s identity and nationality status as a means to prevent de facto statelessness<sup>61</sup> when such circumstances are likely.<sup>62</sup>

It would be erroneous not to refer to the principles of ‘voluntary repatriation’ and ‘non-refoulement’<sup>63</sup> that international refugee standards have largely contributed to<sup>64</sup> that apply to

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<sup>54</sup> *Ibid.*

<sup>55</sup> UNHCR, *Annual Theme, International Solidarity and Burden- Sharing in all its Aspects, National, Regional and International Responsibilities for Refugees* (A/AC.96/904), available at <http://www.unhcr.org/refworld/docid/4a54bc2f0.html> (accessed on 7 September 2012).

<sup>56</sup> See United Nations Global Initiative to Fight Human Trafficking (n 1), 38.

<sup>57</sup> *Ibid.*

<sup>58</sup> Christensen (n 11), 6.

<sup>59</sup> *Ibid.*

<sup>60</sup> UNHCR (n 52), 497.

<sup>61</sup> *Ibid.*

<sup>62</sup> While 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. UNHCR (n 32), para 42.

<sup>63</sup> UNHCR (n 32), 397.

<sup>64</sup> See generally, UNHCR, *Handbook on Voluntary Repatriation* (Geneva: UNHCR 1996).

the victims of trafficking as well. UNODC has recommended that immigration services should support and make use of existing voluntary repatriation programs involving local organizations in countries of origin.<sup>65</sup> The *Trafficking Protocol* has iterated the same and calls the countries of destination to take due regard for the safety of the victim for the status of any legal proceedings related to the fact that the person is a victim of trafficking.<sup>66</sup> A conclusion by the executive committee of UNHCR has mandated it to facilitate such legal proceeding by a) seeking appropriate solutions for persons who have no genuine travel or other identity documents; b) facilitating relevant States to cooperate with each other in verifying the victim's nationality status; c) ensuring full respect to any right regarding victim's safe return.<sup>67</sup>

### **B. Assisting in asylum claim**

The refugee legal framework also provides protection to the trafficked persons who do not wish to return home and must seek protection in another country.<sup>68</sup> If the victim wishes to avail such right, the *Agenda for Protection*, adopted by the Executive Committee of UNHCR, calls upon States to ensure that their asylum systems are fair and efficient<sup>69</sup> as well as appropriately open to receiving claims from individual victims of trafficking.<sup>70</sup>

Many countries have amended their existing asylum legislation and procedures in recent years. Formal procedures have also been introduced in a number of States which have recently acceded to international refugee instruments but had not yet established individual asylum systems.<sup>71</sup> States provide various options in this regard, both temporary or permanent in nature.<sup>72</sup> One particular form of protection which has been employed by many states is the issuance of temporary visas.<sup>73</sup>

<sup>65</sup> UNODC, *Toolkit to Combat Trafficking in Person* (New York: UNODC 2006), recommendation 41.

<sup>66</sup> *Trafficking Protocol* (n 10), article 8(2).

<sup>67</sup> UNHCR (n 52), 495.

<sup>68</sup> World Organization for Human Rights USA (n 32), 5.

<sup>69</sup> Council of Europe Convention on Action against Trafficking in Human Beings, *Explanatory Report* (CETS No. 197), available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> (accessed on 9 September 2012), para 377.

<sup>70</sup> UNHCR, *Agenda for Protection* (A/AC.96/965/Add.1), available at <http://www.unhcr.org/refworld/docid/4714a1bf2.html>. (accessed on 9 September 2012), objective 2.

<sup>71</sup> The Trafficking Protocol states that each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. *Trafficking Protocol* (n 10), article 7.

<sup>72</sup> Christensen (n 11), 25.

<sup>73</sup> For example, the Australian model provides for a forty-five day rehabilitation and reflection period to suspected victims of trafficking, regardless of their ability or willingness to participate in investigation and

Certain vulnerable asylum-seekers require particular attention, understanding and sensitivity, including torture victims, victims of sexual violence, women under certain circumstances, children particularly unaccompanied or separated children, the elderly, psychologically disturbed persons, and stateless persons.<sup>74</sup> Specific procedures and guidelines must be developed for these groups.<sup>75</sup>

While female asylum-seekers may require gender-sensitive accommodation arrangements and counseling due to their irrefutable vulnerability<sup>76</sup>, the children asylum-seekers require arrangements in their 'best interest', such as a guardian to facilitate the procedure of asylum, especially in the case of a girl child.<sup>77</sup>

The states should also acknowledge that while victims may seek asylum based on humanitarian and compassionate considerations, this does not constitute an encouragement for them to testify against traffickers which means the right to protection should not be used as a barter for cooperation in prosecution.<sup>78</sup> On the other hand, if the victim of trafficking who legally qualifies to receive such status is denied of the same<sup>79</sup>, state bear the onus to explain why the right of asylum, a fundamental human right widely condoned by the United Nations was denied.<sup>80</sup>

### C. Expressed mandates of UNHCR

According to its *Guidelines on Trafficking*<sup>81</sup>, the mandates of UNHCR in providing protection to the victims of trafficking under the refugee legal framework are:

- to advocate with asylum decision-making authorities to ensure that victims of trafficking or individuals who have a well-founded fear of persecution of fear of re-

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prosecution of their traffickers. Australian Government, *Australian Government Anti-People Trafficking Strategy*, available at <http://www.facs.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx> (accessed on 9 September 2012).

<sup>74</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (EC/GC/01/12), available at <http://www.unhcr.org/refworld/docid/3b36f2fca.html> (accessed on 9 September 2012), 44.

<sup>75</sup> *Ibid.*

<sup>76</sup> Trafficked women and girls may be unaware of their rights, may lack access to information and advice, and may face obstacles to gaining access to mechanisms that protect those rights. UNHCR, *Handbook for the Protection of Women and Girls* (Geneva: UNHCR 2008), 231.

<sup>77</sup> UNHCR (n 33), para 45-50.

<sup>78</sup> Laczko and Gozdzik (n 14), 106.

<sup>79</sup> Morrison (n 25), 6.

<sup>80</sup> *Ibid.*

<sup>81</sup> UNHCR (n 32), para 45-50.

trafficked within the meaning of the Convention if returned to their country of origin are recognized as refugees and afforded international protection

- to undertake refugee status determination and be aware and take account of the above issue;
- to coordinate with government partners and other agencies, including UNICEF and the IOM to raise awareness of the potential international protection needs of women and girls who have been trafficked to another country;
- to provide legal assistance to victims of trafficking and to establish victim-support and witness-protection schemes so that perpetrators can be brought to justice.

## Reflecting on some practices on application of the framework

### A. United States of America

The United States has developed some specific remedies for trafficked persons who wish to remain in the country primarily through the T visa.<sup>82</sup> The eligibility threshold is quite high since it favors only victims of ‘severe forms of trafficking’ who would have to prove ‘extreme hardship involving unusual and severe harm’ if removed from the States.<sup>83</sup> A broader form of protection has been called for to adequately protect the many trafficked persons who do not qualify for this form of relief.<sup>84</sup>

In the States, the ground for acquiring asylum is based on set standards, in which the burden of proof lies on the asylum-seeker to prove the standards have been met. For example, recently in *Chicago Immigration Court v. M*, the court gave a ruling in favor a young Congolese woman trafficked for prostitution, stating that “[the respondent] satisfied her burden of proof to show that she was persecuted in the past on account of the protected grounds, thus creating a presumption of future persecution on the same grounds. The Court further finds that the presumption has not been rebutted and that the respondent would be eligible for asylum even if it had been.”<sup>85</sup>

<sup>82</sup> World Organization for Human Rights USA (n 1), 5.

<sup>83</sup> As set out in 8 U.S.C. § 1101(a)(15)(T). *Ibid*.

<sup>84</sup> The definitions in the Trafficking Victims Protection Reauthorization Act (TVPRA) also present problems for some trafficked persons. To qualify as a trafficking victim under the TVPRA, a person must be in the United States on account of trafficking. This typically precludes people who were trafficked elsewhere and then escaped to the United States. *Ibid*, 9.

<sup>85</sup> Fact of the case: The respondent claims that she has been a victim of past persecution and has a well-founded fear of future persecution in the Democratic Republic of the Congo on account of her membership in a

## B. European Union (EU)

The EU Accession States (Poland, Czech Republic and Hungary) are all now major destinations in their own right for asylum seekers from many parts of the world.<sup>86</sup> As of yet, there is no such thing as a ‘refugee visa’ to gain entry into the EU explicitly for the purpose of claiming asylum. If any applicant suspected of being a potential asylum-seeker has been almost always be declined any type of entry clearance.<sup>87</sup> The *Europol*<sup>88</sup> has largely been criticized by the European Parliament for dealing with some genuine victims of trafficking, including refugees, as illegal migrants.

However, consensus has developed within the EU that a ‘comprehensive approach’ to migration is required. For the first time the High Level Working Group on Asylum and Migration has brought together second and third pillar perspectives on migration, i.e. foreign policy and justice and home affairs.<sup>89</sup> The *Council of Europe Convention on Action against Trafficking in Human Beings* calls for rights-based approach on anti-trafficking.<sup>90</sup> It also imposes stronger obligations on State Parties to implement temporary measures on permission to remain for trafficking victims.<sup>91</sup> In 2010, European Commission proposal for the *Framework Decision* on directive on preventing and combating trafficking in human beings and protecting victims that aims among other things at achieving increased consistency among national rules on the fight against human trafficking and on victim protection.<sup>92</sup>

## C. Nepal

Nepal has a national framework for protection of victims of trafficking most particularly in the form of *Human Trafficking and Transportation Control Act*<sup>93</sup> and its

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particular social group: young Congolese women who have engaged in prostitution. *United States Department for Justice, Chicago Immigration Court v. M* (August 9, 2011).

<sup>86</sup> Morrison (n 25), 8.

<sup>87</sup> European Commission, *Communication from the Commission to the Council and the European Parliament* (com/93/684), available at [http://ec.europa.eu/europe2020/pdf/nd/eccomm2012\\_en.pdf](http://ec.europa.eu/europe2020/pdf/nd/eccomm2012_en.pdf) (accessed on 9 September 2012).

<sup>88</sup> See Tampere European Council, *Presidency Conclusions* (16 October 1999), available at [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm) (accessed on 9 September 2012), para 45.

<sup>89</sup> *Ibid*, para 11-12.

<sup>90</sup> See Council of Europe Convention on Action against Trafficking in Human Beings (n 69).

<sup>91</sup> *Ibid*.

<sup>92</sup> Council of European Union, *Framework Decision* (2002/629/JHA), available at <http://www.unhcr.org/refworld/docid/3ddcfb7b2.html> (accessed on 9 September 2012).

<sup>93</sup> *Human Trafficking and Transportation Control Act* 2064 (2007).

Regulation.<sup>94</sup> In case of those trafficked to India, which is quite commonplace, the victims of trafficking have been found repatriating under the coordination of police of respective countries.<sup>95</sup> However, according to *the United States Department of State Report on Trafficking in Persons*, the Government of Nepal does not have a formal system of proactively identifying victims of trafficking among high-risk persons with whom they come in contact.<sup>96</sup>

Nepal is not party to the *1951 Convention* and had no refugee legal framework of its own. It provides asylum on humanitarian grounds. The Supreme Court has recently ordered the government to formulate new legislation to ensure, in keeping with international laws, a refugee legal framework after a lawsuit was filed by a local NGO on behalf of a Pakistani urban refugee.<sup>97</sup>

Nepal has had a fair share of refugee problems including those from Bhutan and Tibet. Around 90 Somali refugees have been living in Nepal, however, the government does not recognize their refugee status.<sup>98</sup> Many of these refugees are the victims of trafficking in who yearned for prosperous life in European countries, however, were abandoned at Nepal.<sup>99</sup> UNHCR already registered them as refugees and provides financial assistance, including monthly allowance<sup>100</sup> however, their non-recognition by the government of Nepal means that they have no access to either of the options, repatriation, integration or resettlement.<sup>101</sup>

#### D. Activities of UNHCR

As such the organization is operative worldwide. Two of its practices have been discussed for illustration of its mandate. In Slovenia, it has developed *Project Against Trafficking and*

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<sup>94</sup> *Human Trafficking and Transportation Control Regulation* 2065 (2008).

<sup>95</sup> The process of repatriation in many cases seems to be short and abrupt. It is unclear whether the victims are offered the options of staying at the country of destination. See, *HMG v. Raju Tamang*, NKP 2046; *Lal Bahadur Tamang v. HMG*, NKP 2048.

<sup>96</sup> United States Department of State, *2011 Trafficking in Persons Report - Nepal*, available at <http://www.unhcr.org/refworld/docid/4e12ee5bc.html> (accessed on 9 September 2012).

<sup>97</sup> Deepak Adhikari, 'Somali Refugees in Nepal, Stuck in the Waiting Room', *TimeWorld*, 10 November 2009.

<sup>98</sup> *Ibid.*

<sup>99</sup> One 28-year-old Somali boarded a flight from Dubai to Kathmandu on May 23, 2007, he was hoping he would finally reach his dream destination: Sweden. He had, after all, shelled out \$4,000 to a human trafficker who promised to smuggle him to the Scandinavian country. Instead, when Hassan got off the plane, he found himself in the airport in Kathmandu, where a taxi took him and the trafficker, who was traveling with him, to a bustling tourist neighborhood in the Nepalese capital. *Ibid.*

<sup>100</sup> Adhikari (n 97).

<sup>101</sup> Claire Cozens, 'Nepal's accidental refugees trapped by fine levied for overstaying', *The Telegraph*, 30 December 2009.

*Sexual and gender-based violence* (PATS) in 2003, in cooperation with the national authorities. The primary objectives were to introduce formalized mechanisms to provide information to asylum-seekers most at risk of falling prey to human traffickers and assist and protect victims of human trafficking and sexual and gender-based violence identified within the asylum procedures in the Republic of Slovenia.<sup>102</sup> The program has also been extended to Bosnia and Herzegovina.<sup>103</sup> In Albania, the UNHCR Office has worked with relevant government authorities and organizations, including OSCE and IOM to establish the pre-screening system to identify at an early stage, irregular migrants who may be asylum-seekers, victims of trafficking or economic migrants, and channeled them into appropriate procedures.<sup>104</sup>

### Challenges and Recommendations

First, the law enforcement goals of prosecuting perpetrators and the humanitarian aims of victim protection have been seen to result in a tension between these two, especially when a victim of trafficking potentially qualifies for both refugee protection and some other form of temporary or permanent protection.<sup>105</sup> Such tension needs to be sorted through a comprehensive approach to migration, which the EU has already adopted.

Second, there is also a tension between victim protection and criminal prosecution of traffickers in which the protection of victims has been found to be conditional, that is, if the victim cooperate in investigation and prosecution<sup>106</sup> Such conditions are disconcerting and should be addressed by formulation of codes of conduct for the authorities who would get involved in one or more protection stages.

Third, though the asylum laws accommodate the victims of trafficking to a large extent, in peculiar situations, they have been denied. For example, in *The Queen on behalf of Y v. Secretary for the Home Department*<sup>107</sup> the court denied the appellant asylum on the ground that she had well recovered from the trauma of trafficking and would no longer be considered

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<sup>102</sup> UNHCR (n 76), 237.

<sup>103</sup> *Ibid.*

<sup>104</sup> UNHCR, *Briefing Note: Pre-Screening of Asylum Seekers and Migrants in Albania* (25 April 2006), available at <http://www.unhcr.org/4d52864b9.pdf> (accessed on 9 September 2012), annex 9.

<sup>105</sup> Christensen (n 10), 33.

<sup>106</sup> Christensen (n 10), 34.

<sup>107</sup> Facts of the case is that the victim did not apply for asylum earlier and she got married and had a baby after fleeing from the traffickers. *Y, R (on the application of) v Secretary of State for the Home Department* [2012] EWHC 1075.



a victim in proper sense to demand persecution. To avoid such exhaustion of protection, the victims desiring protections under asylum should be made aware about such rights and service of assistance in procedures should be provided, especially to women and children.

Fourth, nations continue to deem smuggling and trafficking as illegal migration problems despite statistics indicating refugee and asylum-seeker increased use of smugglers and traffickers and high refugee recognition rates for those smuggled and trafficked. While it is justified that the states adopt strict policies to control illegal migrations, it has become necessary for the states to differentiate victims from perpetrators. States are under the obligation to observe and promote human rights obligations they have undertaken being the part of universal mechanism of UN. The definitions provided for trafficking and smuggling in any legal instrument demand objective application.

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