



# UNHCR

United Nations High Commissioner for Refugees

Haut Commissariat des Nations Unies pour les réfugiés

**Submission by the Office of the United Nations High Commissioner for Refugees  
to the Department of Labour (Interagency Working Group on People Trafficking)  
on the Plan to Prevent People Trafficking**

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UNHCR welcomes the announcement by the Government of New Zealand to develop a cross-government strategy to deal with people trafficking, and the preparation of a discussion paper by the Interagency Working Group on People Trafficking on the proposed approach, development and implementation of a plan of action to prevent and combat people trafficking.

UNHCR's Submission is principally directed towards the application of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees ("1951 Convention") to victims of trafficking and persons at risk of being trafficked.

**SUMMARY OF RECOMMENDATIONS**

UNHCR recommends that:

1. any national response be developed within the context of regional cooperation, in particular through existing fora which can contribute to the prevention of people trafficking and protection of the victims of trafficking, including those who may be refugees; existing fora include the Bali Process, the Pacific Immigration Directors' Conference (PIDC) and the Intergovernmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migration (APC) (*UNHCR Submission: Section II, paras. 8-9*);
2. asylum claims lodged by victims of trafficking or potential victims of trafficking 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 any individual case so as to engage New Zealand's obligations under the 1951 Convention (*Section IV, paras. 15-16*);
3. mechanisms be put in place at the national level to provide for the physical, psychological and social recovery of victims of trafficking in a manner which takes into account the age, gender and special needs of victims of trafficking and ensures access to fair and efficient asylum procedures (*Section IV, para. 17*);
4. effective systems are in place to protect victims of trafficking who choose to provide evidence to help identify and prosecute traffickers; such cooperation may also give rise to a risk of harm from the traffickers on return, which could amount to persecution or other serious human rights violations (*Section IV, paras. 20-22*); and
5. particular attention be given to trafficked women and children who can be particularly susceptible to serious reprisals by traffickers after their escape and/or upon return (*Section IV, paras. 23-28*).

## I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to make a Submission to the Interagency Working Group on People Trafficking regarding the Plan to Prevent People Trafficking.
2. New Zealand is a Contracting Party to the *1951 Convention relating to the Status of Refugees* (acceded on 30 June 1960) and its *1967 Protocol* (acceded on 6 August 1973). Additionally, New Zealand is a Contracting Party to the *1961 Convention on the Reduction of Statelessness* (acceded 20 September 2006).
3. On 19 July 2002, New Zealand ratified the *2000 United Nations Convention against Transnational Organized Crime* (“Convention against Transnational Crime”),<sup>1</sup> the *2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (“Trafficking Protocol”),<sup>2</sup> and the *2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* (“Smuggling Protocol”).<sup>3</sup>
4. This Submission is confined to UNHCR’s involvement with the issue of trafficking. 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 are recognized as refugees and afforded the corresponding international protection.<sup>4</sup> UNHCR has developed guidelines in this regard which have been attached to this Submission.
5. UNHCR’s standing to comment is based on the *Statute of the Office of the United Nations High Commissioner for Refugees*,<sup>5</sup> and the 1951 Convention.<sup>6</sup> UNHCR has a statutory function of providing international protection to refugees outside their country of nationality or former habitual residence, and additionally has been given a specific and global mandate to contribute to the prevention and reduction of statelessness by the United Nations General Assembly in 1974 and 1976 as well as through subsequent resolutions.<sup>7</sup>

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<sup>1</sup> Entered into force: 29 September 2003.

<sup>2</sup> Entered into force: 25 December 2003.

<sup>3</sup> Entered into force: 28 January 2004.

<sup>4</sup> UNHCR, *Guidelines on International Protection No. 7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, (HCR/GIP/06/07) 7 April 2006, [5].

<sup>5</sup> UN General Assembly, Resolution 428(V) of 14 December 1950, para. 8(a) and the Preamble.

<sup>6</sup> *1951 Convention relating to the Status of Refugees*, 189 UNTS 150, (Geneva, 28 July 1951; entered into force: 22 April 1954), Article 35; *1967 Protocol relating to the Status of Refugees*, 606 UNTS 267, (New York, 31 January 1967; entered into force: 4 October 1967), Article II.

<sup>7</sup> UN General Assembly, Resolutions 3274 (XXIX) of 10 December 1974 and 31/36 of 30 November 1976.

6. The term “refugee” in this Submission applies to all persons recognized by New Zealand under the 1951 Convention, and to asylum-seekers pending determination of their status, as recognition that refugee status does not make an individual a refugee but declares him or her to be one.<sup>8</sup> In this regard, this Submission applies equally to persons seeking international protection through the grant of refugee status, or some other form of complementary protection status. The term “stateless person” in this Submission applies to persons who are not considered a national by any State under the operation of its law.<sup>9</sup>
7. The term “internally displaced persons” (IDPs) in this Submission applies to all persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized State border.<sup>10</sup>

## **II. REGIONAL COOPERATION**

8. UNHCR considers any national Plan of Action to Prevent People Trafficking should be developed within the regional context, in particular linking with existing regional efforts to prevent trafficking and protect the victims of trafficking.
9. UNHCR welcomes the Government of New Zealand’s continued active contribution in the regional fora relating to the trafficking in persons and international refugee protection, including the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime and the Pacific Immigration Directors’ Conference (PIDC). UNHCR also considers the Intergovernmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migration (APC) to be a valuable forum in which to advance effective responses to people trafficking and the protection of the victims of trafficking.

## **III. TRAFFICKING IN PERSONS & INTERNATIONAL REFUGEE PROTECTION**

10. 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.<sup>11</sup>
11. 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

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<sup>8</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/Eng/Rev.2 (1 January 1992), [28].

<sup>9</sup> 1954 Convention relating to the Status of Stateless Persons, Article 1.

<sup>10</sup> UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, (E/CN.4/1998/53/Add.2) 11 February 1998.

<sup>11</sup> UNHCR, *Guidelines on International Protection No. 7*, above n 4, [7]-[13].

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,<sup>12</sup> 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.

12. 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.<sup>13</sup> Where the victim is a child,<sup>14</sup> 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.
13. 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. 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 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.<sup>15</sup>

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.”

14. 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.

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<sup>12</sup> 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.

<sup>13</sup> 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”.

<sup>14</sup> 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”.

<sup>15</sup> 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.

## IV. A PLAN OF ACTION & INTERNATIONAL REFUGEE PROTECTION

### A. Prevention & Protection

15. It is UNHCR's position that asylum claims lodged by victims of trafficking or potential victims of trafficking should 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 any individual case so as to engage New Zealand's obligations under the 1951 Convention.<sup>16</sup>
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. 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.<sup>17</sup>
17. 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. It is also necessary to ensure that victims of trafficking have access to fair and efficient asylum procedures as appropriate 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.<sup>18</sup>

### B. Prosecution

18. It is UNHCR's view that the evolution of international law in criminalizing trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking. 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 or breaches of other international human rights obligations.<sup>19</sup>

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<sup>16</sup> UNHCR, *Guidelines on International Protection No. 7*, above n 4, [15].

<sup>17</sup> *Ibid* [16].

<sup>18</sup> *Ibid* [45].

<sup>19</sup> *Ibid* [15].

19. 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.<sup>20</sup>
20. UNHCR notes that the victim's cooperation with the authorities in the country of asylum or the country of origin in investigations may also 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, re-trafficking would usually amount to persecution.<sup>21</sup>
21. 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. The fact that an individual has agreed to provide such evidence will 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.<sup>22</sup>
22. UNHCR reaffirms the need to maintain absolute confidentiality with respect to victims of trafficking with international protection needs during all stages of the investigation and criminal proceedings, in accordance with Article 6(1) of the Trafficking Protocol. UNHCR further encourages the Government of New Zealand to ensure that effective systems are in place to protect victims of trafficking who choose to provide evidence to help identify and prosecute traffickers.

### **C. Settlement**

23. Article 8 of the Trafficking Protocol 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.<sup>23</sup>

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<sup>20</sup> Ibid [17].

<sup>21</sup> Ibid.

<sup>22</sup> Ibid [50].

<sup>23</sup> 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

24. UNHCR notes that victims of trafficking 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.<sup>24</sup> Such issues would be relevant in the assessment of whether New Zealand's obligations under the 1951 Convention are engaged.
25. Consistent with Article 2(a) of the Trafficking Protocol, it is UNHCR's view that 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. 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.<sup>25</sup>
26. In certain settings, unaccompanied or separated children are especially vulnerable to trafficking. 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. 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.<sup>26</sup>
27. 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. Moreover, UNHCR notes that victims of trafficking may become effectively stateless should they be unable to receive assistance and documentation from their country of origin or former habitual residence to enable them to return.

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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.

<sup>24</sup> UNHCR, *Guidelines on International Protection No. 7*, above n 4, [18].

<sup>25</sup> Ibid [19].

<sup>26</sup> Ibid [20].

28. 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.

## **V. CONCLUSION**

29. UNHCR welcomes the broad consultation process that is taking place with key stakeholders and appreciates the opportunity to contribute to the development of New Zealand's plan of action to prevent and combat people trafficking.

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