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# LEGAL NOTE:

INTERNATIONAL LAW PROTECTIONS  
FOR REFUGEE WOMEN  
IN RELATION TO TRAFFICKING

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ACCOUNTABILITY  
UNIT



# LEGAL NOTE:

## INTERNATIONAL LAW PROTECTIONS FOR REFUGEE WOMEN IN RELATION TO TRAFFICKING

### EXECUTIVE SUMMARY

- International law prohibits the trafficking of persons and provides special protection to refugees, whilst recognising the unique experience of women.
- Women are at higher risk of becoming victims of trafficking. Sexual exploitation, which disproportionately affects women, is the most commonly identified form of exploitation.
- Attempts by States to adopt restrictive interpretations of the definitions of 'refugee' and 'trafficking' need to be challenged as contrary to established legal principles.
- Despite widespread ratification of key legal instruments, ratification is neither comprehensive nor are there effective mechanisms at the international level for monitoring and enforcing implementation.

### BACKGROUND

*How are refugees defined under international law and what specific issues do refugee women face in relation to trafficking?*

1. Under international law a "refugee" is someone who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable, or owing to such fear, unwilling to return.<sup>1</sup> However, the Refugee Convention (defined below) provides for a small number of exceptions to refugee status (the "Exceptions"),<sup>2</sup> the most relevant of which in this context is where a person has committed a serious non-political crime outside their country of refuge.
2. "Trafficking in persons" is the recruitment, transportation, harbouring or receipt of persons by threat or use of force or other forms of coercion, deception, abuse of power or giving or receiving of payments for the purpose of exploitation (sexual, labour, servitude or the removal of organs); consent of the person is irrelevant.<sup>3</sup>
3. It is widely reported and recognised that women are at higher risk of becoming victims of trafficking; in fact, nearly 80% of trafficking victims are women and girls.<sup>4</sup> While trafficking in persons involves many forms of exploitation, sexual exploitation which disproportionately affects women is the most commonly identified form representing 54% of all forms of trafficking in 2014.<sup>5</sup>

## INTERNATIONAL LAW

*Which are the key international law instruments that provide protections and rights to refugee women?*

4. This note provides a key snapshot of the principle international law instruments that may provide protection to trafficked refugee women in the destination country. This note does not address international humanitarian law protections for non-combatants in conflict zones or the international criminal law relevant to conflict – both are of lesser relevance from the perspective of providing immediate support to refugee women in a destination country outside the conflict zone.
5. This note also excludes from its scope regional instruments such as the European Convention on Human Rights, protections under EU law, or the domestic law of individual States.
6. Key international instruments are:
  - the 1951 UN Convention Relating to the Status of Refugees (the “Refugee Convention”),<sup>6</sup> supplemented by the 1967 Protocol Relating to the Status of Refugees (the “Refugee Protocol”).<sup>7</sup> This is the primary instrument protecting and conferring rights on refugees;
  - the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, (the “Palermo Protocol”),<sup>8</sup> which supplements the 2000 UN Convention against Transnational Organized Crime (the “Organised Crime Convention”)<sup>9</sup> and aims to prevent trafficking in persons, particularly of women

and children, and to protect and assist victims of trafficking with full respect to their human rights. It also seeks to promote cooperation between States in order to achieve those objectives; and

- the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”),<sup>10</sup> which aims to achieve State recognition of both *de jure* and *de facto* equality between men and women and categorises trafficking as a specific form of gender based violence.

### *Prohibitions protecting refugees and victims of trafficking*

7. The principle of *non-refoulement* constitutes the main protection for refugees under the Refugee Convention. This principle means that irrespective of whether a State is a signatory to the Refugee Convention, it may not expel refugees from their territory against their will or expel or return a refugee to a territory where their life or freedom would be in danger.<sup>11</sup> However, there are some exceptions to this, such as on the grounds of national security or public order.<sup>12</sup> However, to the extent that a refugee is facing torture or inhumane and degrading treatment upon return to his country, *refoulement* would in this instance be prohibited without exception.<sup>13</sup> The Refugee Convention also prohibits the imposition of penalties on refugees for illegal entry or stay in a particular country.<sup>14</sup>
8. The *non-refoulement* principle, however, affords protection only to refugees. As such, if a woman does not fall within the relevant definition of refugee (set out at paragraph 1, above), she will not have the benefit of

the principle of *non-refoulement* unless protection is available to an individual through another international or domestic legal instrument. Although being a female refugee increases the chances of someone becoming a victim of trafficking,<sup>15</sup> not all female victims of trafficking will be refugees. However, for the purposes of the Refugee Convention definition of a refugee, trafficking itself may amount to “persecution”, and so, a trafficked woman may fall within the definition, particularly if she fears re-trafficking or other serious harm in her country of origin, and would in that case receive the protection of the *non-refoulement* principle.<sup>16</sup>

9. Nevertheless, the possibility that trafficked women could, in theory, be repatriated remains. Generally speaking, the Palermo Protocol does not prohibit State parties from repatriating trafficked persons; it only requires State parties to “consider” (bearing in mind humanitarian and compassionate factors) adopting measures to grant victims of trafficking some form of temporary or permanent leave to remain in the country.<sup>17</sup> Repatriation of a victim of trafficking, however, must, at least, be carried out with due regard for the safety of the person concerned.<sup>18</sup> State parties to the Palermo Protocol must also adopt legislative measures making trafficking in persons a specific criminal offence.<sup>19</sup> The obligation prescribes that the full breadth of conduct covered by the Palermo Protocol should be criminalised, as should attempts to commit the offence, participating as an accomplice or organising or directing others to commit the offence. Further, the United Nations Office on Drugs

and Crime has issued a Model Law against Trafficking in Persons to assist States with their obligations to this effect.<sup>20</sup>

#### *Positive rights of refugees and victims of trafficking*

10. The circumstances that lead to an individual becoming a refugee often involve human rights abuses. Similarly the status of refugee usually leads to further violations of various human rights and/or a failure to address such violations.<sup>21</sup> The universally recognised human rights that are most notably at risk in these situations include the right to life, the prohibition of torture and ill-treatment, the right to a nationality, the right to freedom of movement, including the right to leave any country, including one's own, and to return to one's own country, and the right not to be forcibly returned.<sup>22</sup>
11. State parties to the Palermo Protocol are obliged to adopt legislative measures to offer information and assistance to trafficking victims. The requirement is extensive and includes providing appropriate housing, counselling, information regarding legal rights, medical, psychological and material assistance and employment, educational and training opportunities. Further, State parties, in making these provisions must take into account the special needs of victims as a result of their gender. This both shows a recognition that women are disproportionately affected by trafficking and obliges States to also be cognisant of the gendered nature of this issue, in order to provide effective support.<sup>23</sup>
12. Over the past decade, a general consensus has emerged in the international community that trafficking in and of

itself constitutes a serious human rights violation, as opposed to the breach of a series of rights occurring only by virtue of practices associated with trafficking (such as slavery, servitude, forced labour, sexual exploitation, servile forms of marriage etc.).<sup>24</sup> Further, the international community has accepted the unique vulnerability of women to become victims of trafficking, evinced through the declaration by the CEDAW Committee that trafficking amounts to a form of violence against women that must be eliminated.<sup>25</sup> The Committee has explicitly recognised the need to appreciate the intersection of the rights and vulnerabilities of women, stating that discrimination in one area can affect a woman to a greater degree than a man experiencing the same type of discrimination (and this expressly includes a woman's status as a refugee, asylum seeker or stateless woman).<sup>26</sup> The Committee also acknowledges, from a specifically gendered perspective, how the risk of trafficking can be exacerbated for women who become refugees as a result of conflict, and accordingly recommends that States respond with comprehensive and gender-sensitive anti-trafficking policies.<sup>27</sup>

13. International refugee law has acknowledged gender-related persecution since 1985, when the UN High Commissioner for Refugees ("UNHCR") acknowledged that "women asylum-seekers who faced harsh or inhuman treatment due to their having transgressed the social mores of the society in which they lived" might be considered a "particular social group" for the purposes of the definition of refugee in the Refugee Convention.<sup>28</sup>

Increasingly, the consideration and protection now offered to refugee women is far more encompassing; for example, the UN's Special Rapporteur on Violence Against Women has made clear that States are under a legal duty to guarantee that women in particular have access to legal remedies.<sup>29</sup>

#### *State obligations to cooperate*

14. As indicated above, State parties to the Palermo Protocol are required to tackle the issue of trafficking in persons from multiple angles. They must take or strengthen measures that firstly, "prevent and combat trafficking", but also which "alleviate factors that make persons, especially women and children, vulnerable to trafficking", and "discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking".<sup>30</sup> The legislation explicitly identifies poverty, underdevelopment and lack of equal opportunity as factors that contribute to the particular vulnerability of women in this area. There is no explanation of what constitutes or contributes to "the demand that fosters" exploitation, however, the suggested preventative measures are very broad, including "educational, social or cultural" and in relation to preventing and combating trafficking itself also includes research, information, mass media campaigns and social and economic initiatives. Some commentators have expanded on these factors, noting that lack of educational prospects, lack of adequate employment opportunities and disruption of traditional livelihoods contribute to the existence of trafficking and, in

particular, sexual exploitation is directly linked to women's disadvantaged social, economic and legal situation in many countries.<sup>31</sup> In addition, it is suggested that the demand for this form of exploitation is driven by its lucrative business model and global demand for women and children in the sex market.<sup>32</sup> As victims tend not to declare themselves to the authorities due to fear and/or shame,<sup>33</sup> and when enforcement occurs penalties have tended to be relatively lenient, trafficking constitutes a high profit, low risk enterprise.<sup>34</sup> Article 9 of the Palermo Protocol could, therefore, be interpreted as requiring reduction of demand by targeting the clientele of prostitution.<sup>35</sup>

15. State parties to the Palermo Protocol are also required to exchange information regarding methods used by organised criminal groups for trafficking, and provide law enforcement training,<sup>36</sup> taking into account gender-sensitive issues,<sup>37</sup> again demonstrating widespread recognition that this issue disproportionately affects women.

## IMPLEMENTATION

### *Implementation of the Refugee Convention*

16. To date 145 States have ratified the Refugee Convention and 146 States have ratified the Refugee Protocol.<sup>38</sup> However, the Refugee Convention is predominantly interpreted and applied by domestic decision makers and although disputes between State parties may be referred to the International Court of Justice,<sup>39</sup> there is no further supranational interstate supervisory

mechanism.<sup>40</sup> Additionally, there are States who have not yet ratified these instruments, which restricts certain refugees in enforcing their rights before domestic courts.<sup>41</sup>

17. The UNHCR has said that the Exceptions that apply to the definition of "refugee" must be interpreted restrictively.<sup>42</sup> This is particularly important for women, as States may refuse them their rights because of alleged complicity in criminal acts of prostitution.<sup>43</sup> As such, refugee status determination by States is an area that would benefit from further monitoring and advocacy, particularly from a gender-based perspective.<sup>44</sup>
18. A number of States made reservations when acceding to the Refugee Convention; the most criticised being by Turkey, which declared that it would apply the Refugee Convention only to persons who have become refugees as a result of events occurring in Europe.<sup>45</sup> However, the UNHCR considers that the principle of *non-refoulement* is a rule of customary international law binding on all States – including States that maintain the geographical limitation.<sup>46</sup> Such reservations may be permissible but undermine the humanitarian objectives of the Refugee Convention.<sup>47</sup>

### *Implementation of the Palermo Protocol*

19. The Palermo Protocol does not itself create any justiciable criminal offences and there is no mechanism under international law to hold State parties accountable for non-compliance.<sup>48</sup>
20. Many State parties adopted more limited definitions of trafficking than in the Palermo Protocol, including States



that report being in full compliance.<sup>49</sup> This destabilises efforts to create a coordinated response.<sup>50</sup> The issue of consent of the victim is also unbalanced: many State parties have not adopted the full language in their criminal laws, therefore, the courts could find that a woman is not a victim of sex trafficking if she has consented.<sup>51</sup>

21. One commentator suggests that one reason for such restrictions could be the economic crisis and age of austerity, as it requires greater resources to assist victims or prosecute defendants under the formal and broader definition.<sup>52</sup> This is supported to some extent by comments by a former UN Special Rapporteur on Trafficking in Persons. She observed that prostitution as it is practiced globally usually amounts to trafficking and therefore, States, in particular those with legalised prostitution, have a heavy responsibility to ensure that they are not perpetuating widespread, systematic trafficking.<sup>53</sup> Another, more worryingly, cited reason is the continued disagreement regarding the nature of sex trafficking. Inconsistent definitions of trafficking may be the result of the fact that the views of many domestic political actors simply do not align with the supposed international consensus on trafficking as a multi-faceted widespread phenomenon that manifests in many forms. For example, the beliefs that trafficking has not taken place where there is consent to the exploitation, or that there must be threats of physical violence, or border-crossing in order to constitute trafficking still persist even

amongst those seeking to combat trafficking in persons.<sup>54</sup>

22. While the Palermo Protocol sets out a broad agenda for States in combating trafficking in persons, and prescribes a wide range of measures that should be taken, from educational to economic policies, this does not ensure that such steps are taken and implemented consistently in practice. Regarding the requirement to provide law enforcement training, 6 out of 17 State parties reported on had either: not defined the roles or responsibilities of the agencies created by the relevant legislation; not implemented any training that was legislated for; relied solely on training provided by the EU; only legislated for optional training; or been criticised that its programs are insufficient.<sup>55</sup>
23. While conviction levels remain very low, there is evidence that the longer countries have had comprehensive legislation in place, the more convictions are recorded; most national legislation has only been introduced in the last eight to ten years.<sup>56</sup> One commentator notes, however, that the successful implementation of the Palermo Protocol will always require a careful balance between the human rights and law enforcement approaches to trafficking in persons.<sup>57</sup>

#### *Implementation of international human rights law*

24. A total of 189 of 193 UN member States have ratified CEDAW to date.<sup>58</sup> However, State parties who have indicated a commitment to ending sexual violence against women can still restrict individual complaint

mechanisms by putting reservations on international human rights law treaties.<sup>59</sup>

25. The human rights angle of trafficking has been emphasised by the UN High Commissioner for Human Rights. The Office of the High Commissioner for Human Rights has issued a whole set of recommended principles and guidelines on human rights and human trafficking, and has commented that both the General Assembly and the Human Rights Council, along with many other treaty bodies, have advocated a rights-based approach to trafficking.<sup>60</sup> This should be recognised as being of great precedential value within international jurisprudence.<sup>61</sup> However, there is certainly more progress that needs to be made in this area.<sup>62</sup>

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7. Protocol Relating to the Status of Refugees, 1967, 606 UNTS 267, (entered into force 31 October 1967).
8. *Supra* note 3.
9. United Nations Convention against Transnational Organized Crime, 2000, A/RES/55/25, (entered into force 29 September 2003).
10. Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13 (entered into force 3 September 1981).
11. *Supra* note 1, art. 33.1; while this principle was first proscribed by the Refugee Convention it has acquired the status of customary international law, meaning that it is binding on all States, irrespective of whether or not they are signatories to the Refugee Convention.
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  17. *Supra* note 3, art. 7.
  18. *Ibid.*, art. 8.
  19. *Ibid.*, art. 5.
  20. UN Office on Drugs and Crime, Model Law against Trafficking in Persons, V. 09-81990 (E), 2009.
  21. UN Office of the High Commissioner for Human Rights, OHCHR Fact Sheet No. 20, Human Rights and Refugees, 1993, p. 2.
  22. "These rights are affirmed, among other civil, political, economic, social and cultural rights, for all persons, citizens and non-citizens alike, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights which together make up the International Bill of Human Rights: (a) "No one shall be subject to arbitrary arrest, detention or exile" (Universal Declaration of Human Rights, article 9); (b) "Everyone has the right to seek and to enjoy in other countries asylum from persecution" (Universal Declaration of Human Rights, article 14); (c) "Everyone has the right to a nationality" (Universal Declaration of Human Rights, article 15); (d) "Everyone has the right to freedom of movement and residence within the borders of each State" (Universal Declaration of Human rights, article 13; International Covenant on Civil and Political Rights, article 12)": *Ibid.*, p. 7.
  23. *Supra* note 3, art. 6.
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  31. N. Ollus, The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel, UN Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders Resource Material Series, 62, 2004, 16-30, pp. 16-17.
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  33. M. Korzinski, Identifying and Responding to Trauma in Victims of Trafficking and Exploitation, in P. Chandran (ed.), Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK, LexisNexis Butterworths, 2011, pp. 63-84.
  34. *Supra* note 31, pp. 26-27.
  35. *Ibid.*
  36. For example, the new EUROJUST unit, which is composed of national prosecutors, magistrates and police officers from the EU, aims at facilitating co-operation in order to support criminal investigations in organised crime cases, *ibid.*, p. 29; U.S. Law Library of Congress, Training Related to Combating Human Trafficking in Selected Countries, February 2016.
  37. *Supra* note 3, art. 10.
  38. UN High Commissioner for Refugees, State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, available at: <http://www.unhcr.org/uk/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> (updated as of 17 April 2015 and last accessed 19 December 2016).
  39. *Supra* note 1, art. 38. One commentator notes that there is a clear vacuum of adjudicatory authority in the human rights system, which the ICJ could and should fill. However, the ICJ is not using its influence to enforce international human rights standards as well as it could. The example used to demonstrate the weaknesses of the ICJ is the human rights abuses in Myanmar, which include breaches of the principle of non-refoulement of refugees by Bangladesh and Thailand: L. J. F. Deppermann, Increasing the ICJ's Influence as a Court of Human Rights: The Muslim Rohingya as a Case Study, Chicago

- Journal of International Law, 14(1), 2013, pp. 290-316; Another commentator has suggested that the major limitation of the ICJ is that its budget only permits several prosecutions per year but the international community has not provided the ICJ with clearly defined goals and priorities in selecting which cases to hear: M. M. deGuzman, Choosing to Prosecute: Expressive Selection at the International Criminal Court, Michigan Journal of International Law, 33(2), 2012, pp. 265-320.
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  46. UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007; Human Rights Watch, Turkey: Human Rights and the European Union Accession Partnership, D1210, 1 September 2000, available at: [http://www.hrw.org/reports/2000/turkey2/Turk009-10.htm#P470\\_114616](http://www.hrw.org/reports/2000/turkey2/Turk009-10.htm#P470_114616) (last accessed 20 December 2016): "The Turkish Government should remove the geographical restriction on the application of the Refugee Convention, and should be reminded of its obligation to uphold the principle of *non-refoulement* regardless of the geographical restriction. It should also establish without delay an independent advisory committee, composed of independent experts and representatives of the UNHCR and relevant non-governmental organisations, in order [to] comprehensively to review refugee protection in Turkey and make recommendations on how the government could better discharge its international obligations toward refugees".
  47. S. K. N. Blay and B. M. Tsamenyi, Reservations and Declarations Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, International Journal of Refugee Law 2(4), OUP 1990, 527-561, p. 529; Further, given the then relatively small number of European refugees, Turkey's reservation was seen at the time as equivalent to not accepting any obligations under the Refugee Convention and has been effectively overridden by the EU-Turkey deal to take in large numbers of refugees during the refugee crisis of 2016. *Ibid.*, p. 539; The refugee crisis of 2016 resulted in Turkey having to accept large numbers of Syrians, Iraqis, Afghan and other refugees as well as having to facilitate the return of a large number of Turkish refugees who were turned away from Greece in return for Turkey being able to continue pursuing membership of the EU: Migrant Crisis: EU-Turkey deal comes into effect, available at: <http://www.bbc.co.uk/news/world-europe-35854413> (last accessed 10 February 2017); However it must be noted that these non-European refugees do not have permanent status, the geographical limitation remains in place and they are accepted only on the basis of "conditional refugee status, humanitarian residence permit, or temporary protection": Refugees & Asylum in Turkey, Refugee Solidarity Network, available at: <https://perma.cc/PL5L-FHCE> (last accessed 13 February 2017).
  48. *Ibid.*, p. 157; Note that the UNHCR considers that in certain circumstances and if on a large enough scale, trafficking could constitute a crime against humanity; or, in armed conflict, a war crime; see UNHCR, Guidelines on International Protection: the application of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked.
  49. M. Madden Dempsey et al, Defining Sex Trafficking in International and Domestic Law: Mind the Gaps, Emory International Law Review 26(1), 2012, 137-162, fn. 128; Note that Turkey is one of the countries that defines trafficking using the same terminology as the Palermo Protocol. As at 2012, Croatia, India, Luxembourg and Malta were among the State parties that had not yet amended their penal codes to comply with Article 5.
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## CONTACT INFORMATION

This briefing note is published to provide general information and not as legal advice. Please contact a member of the Accountability Unit Legal Team or Research Team if you would like to discuss the contents of this note.

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