

Legal Remedies for the Right to Asylum for  
Qualifying Victims of Human Trafficking:  
A Comparative Analysis between United States,  
Mexico and the Dominican Republic

Ivanna Molina Peña

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The author remains responsible for the substantive content.

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**Legal Remedies for the Right to Asylum for Qualifying Victims of Human Trafficking: A Comparative Analysis between United States, Mexico and the Dominican Republic**

**Introduction**

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

Many victims of human trafficking are profiled and selected by their traffickers because of their nationality, race, religion, membership in a particular social group and sometimes their political opinion. Traffickers know that there are circumstances of exclusion or discrimination based on one or more of these grounds, that render persons vulnerable, sometimes leaving them without the protection of their states. Traffickers may capitalize on these circumstances and prey on their victims.<sup>2</sup>

When this is the case, and depending on the particular circumstances, the 1951

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<sup>1</sup> UN High Commissioner for Refugees (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*, 7 April 2006, HCR/GIP/06/07, par. 1. Available at: <http://www.refworld.org/docid/443679fa4.html>.

<sup>2</sup>*Id.*, par. 31

Convention Relating to the Status of Refugees (herein 1951 Convention) which guarantees that persons that are being persecuted by one or more of the five grounds established in the 1951 Convention,<sup>3</sup> comes into play, creating an intersection between asylum and human trafficking.

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. But it is very important that a very careful and individual analysis of each case is carried out by the competent Courts or institutions to be able to determine if the victim of trafficking qualifies or not as a refugee, and to guarantee that the legal remedies set forth by the States for the right to asylum, are effectively provided to the qualifying victims of trafficking.

The issue of human trafficking has been present around the world for a very long time. On November 2000, member States of the United Nations, convinced that the United Nations Convention against Transnational Organized Crime (herein Palermo Convention) would constitute an effective tool for international cooperation in combating criminal activities as money-laundering, corruption, among others, adopted the Convention, which came into force later in 2003.<sup>4</sup>

On the same date, States declared that in the absence of a universal instrument that addresses all aspects of trafficking in persons, persons who are vulnerable to trafficking wouldn't be sufficiently protected,<sup>5</sup> and adopted the Protocol to Prevent, Suppress and Punish

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<sup>3</sup> The five grounds are: religion, race, nationality, political opinion or membership of a particular social group. *Convention and Protocol Relating to the Status of Refugees*. Available at <http://www.unhcr.org/en-us/3b66c2aa10>

<sup>4</sup> *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, available at <https://www.unodc.org/unodc/treaties/CTOC/>

<sup>5</sup> UN General Assembly, *United Nations Convention against Transnational Organized Crime*, 15 November 2000, preamble. Available at <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

Trafficking in Persons Especially Women and Children (herein Palermo Protocol), supplementing the United Nations Convention against Transnational Organized Crime.<sup>6</sup>

Taking these basic concepts into consideration, this paper argues that victims of human trafficking that have been trafficked across international borders, have the right to apply for asylum. It further contends that their claim has to be carefully analyzed, taking into consideration whether any of the grounds established in the 1951 Convention were taken into account in the profiling and selection process by the traffickers, if the victim was persecuted or has a well-grounded fear of persecution for any of the mentioned grounds, and if the State of the country of origin or of habitual residence is unable or unwilling to protect the victim.

If these criteria are met, Courts or institutions in charge of reviewing asylum claims have to grant asylum to victims of human trafficking or otherwise the State would be violating the victim's rights and its international obligations on refugee and human rights law. Hence, the legal remedies provided by States for the right to asylum, for these specific type of victims, would be rendered void.

Throughout this paper it is assessed whether the legal remedies adopted in law and practice in the United States, Mexico and the Dominican Republic are guaranteeing that qualifying victims of human trafficking enjoy their right to asylum. This research focuses on these three particular countries as a way to analyze this issue in the region, taking into consideration that they have different contexts, problematics, institutional capacities, and legal

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<sup>6</sup> The purposes of the Palermo Protocol are (a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and (c) to promote cooperation among States Parties in order to meet those objectives. UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, art. 2. Available at: <http://www.refworld.org/docid/4720706c0.html>.

frameworks, which allows to understand the different ways in which legal remedies for the right to asylum of qualifying victims have been dealt with in the region.

For these purposes, the first section of this paper reviews the international framework on human trafficking to provide a better understanding of what constitutes human trafficking and what type of remedies have been agreed by the international community in the Palermo Protocol. The second section reviews the local legislation that has been adopted in the United States, Mexico and Dominican Republic in terms of human trafficking. The third section explores the international framework in asylum issues, carefully reviewing the United Nations High Commissioner for Refugees (herein UNHCR) position on international protection relating to the status of refugees to victims of trafficking and persons at risk of being trafficked, which serves as the basis supporting the thesis of this paper. Furthermore, section four explores the local legislation and case law that has been adopted by the mentioned countries in asylum issues, to demonstrate that in some cases those in charge of applying the 1951 Convention in the domestic jurisdiction are denying the right to asylum to victims of human trafficking because of an overly-narrow interpretation of the grounds set forth in the 1951 Convention, specially the ground of membership of a particular social group. Finally, section five provides some conclusions and recommendations for better ensuring that victims of human trafficking enjoy legal remedies in issues of asylum.

## I. International Framework on Human Trafficking

The Palermo Convention entered into force in September 29<sup>th</sup> 2000.<sup>7</sup> The United States of America ratified it on November 3<sup>rd</sup> 2005,<sup>8</sup> Mexico on March 4<sup>th</sup> 2003,<sup>9</sup> and the Dominican Republic ratified it on October 26<sup>th</sup> 2006.<sup>10</sup> On December 25<sup>th</sup> 2003 and less than 3 months after the Palermo Convention, the Palermo Protocol entered into force. In November 3<sup>rd</sup> 2005 it was ratified by the United States, on March 4<sup>th</sup> 2003 by Mexico, and on February 5<sup>th</sup> 2008 by the Dominican Republic.<sup>11</sup> Its content is crucial, given the fact that it establishes the legal remedies that should be available for victims of human trafficking.

First of all, the Protocol defines trafficking in persons as “*the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*”.<sup>12</sup>

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<sup>7</sup> This Convention was adopted to promote cooperation and to prevent and combat transnational organized crime more effectively (Art. 1). UN Treaty Collection, *United Nations Convention against Transnational Organized Crime, Status of Treaties*, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en).

<sup>8</sup> The United States ratified the treaty with some reservations that are not relevant for the present research. UN Treaty Collection, *United Nations Convention against Transnational Organized Crime, Status of Treaties*, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en).

<sup>9</sup> Id. Mexico ratified the treaty with some reservations that are not relevant for the present research.

<sup>10</sup> Id. No reservations were made.

<sup>11</sup> UN Treaty Collection, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Status of Treaties*, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en)

<sup>12</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, art. 3(a). Available at: <http://www.refworld.org/docid/4720706c0.html>.

Furthermore, it establishes certain protections for victims of human trafficking, for example, to the extent possible under its domestic law, States shall protect the privacy and identity of the victims, including making the proceedings related to the specific case confidential.<sup>13</sup> States shall also guarantee that information on relevant court and administrative proceedings is provided to the victims,<sup>14</sup> and that they receive assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders.<sup>15</sup>

Furthermore, it establishes that States shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society,<sup>16</sup> and in particular, the provision of appropriate housing<sup>17</sup>, counseling and information in a language that the victim is able to understand,<sup>18</sup> medical, psychological and material assistance<sup>19</sup>, employment, educational and training opportunities.<sup>20</sup> Physical safety has to be provided for victims while they are within the country's territory<sup>21</sup> and each State party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation.<sup>22</sup>

The Protocol also establishes that States parties shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory,

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<sup>13</sup> Id, art. 6

<sup>14</sup> Id, art. 6(a)

<sup>15</sup> Id., art. 6 (b)

<sup>16</sup> Id., art. 6.3

<sup>17</sup> Id., art. 6.3 (a)

<sup>18</sup> Id., art. 6.3 (b)

<sup>19</sup> Id., art. 6.3 (c)

<sup>20</sup> Id., art. 6.3 (d)

<sup>21</sup> Id., art 6.5

<sup>22</sup> Id., art. 6.6

temporarily or permanently, in appropriate cases.<sup>23</sup>

On the other hand, when a State Party returns a victim of trafficking in persons, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.<sup>24</sup> This is an important provision that should ensure that States don't repatriate victims of human trafficking that, for example, have submitted an asylum claim before the competent authorities until the claim is resolved, and even after that, if the person didn't qualify as a refugee and the claim is rejected because the criteria was not met, States have to carefully consider if the victim's safety could be at risk in case of refoulment and, in such case, abstain from carrying out the repatriation.

All these remedies, should be available to victims of human trafficking seeking asylum during the length of the procedure and after the claim has been resolved, if applicable. The fact that victims put themselves in the position of asylum seekers, doesn't eliminate the exploitation that they have been through nor cancels their status as a victim of human trafficking, hence entitled to those provisions set forth in the Protocol.

As a result of these obligations contracted by the States, United States, Mexico and the Dominican Republic, through different legislations, have adopted the Protocol's provisions in their domestic laws.

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<sup>23</sup> Id., art. 7

<sup>24</sup> Id., art. 8.2

## II. Local legislation in issues of Human Trafficking

### United States

The United States is an important country of destination for trafficking of human beings. According to the United Nations Office on Drugs and Crime (herein UNODC) from 2013 to 2014, 2,975 international victims were identified as being trafficked from abroad and identified domestic victims amounted to 2,306.<sup>25</sup> The international victims came from different countries including Honduras, Guatemala, El Salvador, Mexico, Central America and the Caribbean, Philippines, Thailand, and others.<sup>26</sup>

In attention to the problem that trafficking in persons creates, most importantly for the victims, the Trafficking Victims Protection Act of 2000 (herein TVPA or Act) was enacted by the Congress of the United States in October 28<sup>th</sup> 2000.<sup>27</sup> The TVPA makes a distinction between different types of human trafficking. First it talks about “severe forms of trafficking” defining it as the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>28</sup> In this definition it also includes sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.<sup>29</sup>

On the other hand, it defines “sex trafficking” as the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,

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<sup>25</sup> UN Office for Drugs and Crime (UNODC), *Country Profiles 2017, North America*, available at [http://www.unodc.org/documents/data-and-analysis/glotip/Glotip16\\_Country\\_profile\\_North\\_America.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Glotip16_Country_profile_North_America.pdf)

<sup>26</sup> *Id.*

<sup>27</sup> This Act recognizes that traffickers primarily target women and girls, who are disproportionately affected by economic marginalization, the lack of access to education, chronic unemployment and discrimination in their countries of origin. *Trafficking Victims Protection Act of 2000*, Sec 102 (4), available at <https://www.state.gov/j/tip/laws/61124.htm>

<sup>28</sup> *Id.*, Sec 103 (8) B

<sup>29</sup> *Id.*, Sec 103 (8) A

without taking into consideration elements of coercion.<sup>30</sup> Unlike for victims of “severe forms of trafficking”, no assistance is provided for victims of “sex trafficking”.

The Act defines coercion as threats of serious harm to or physical restraint against any person, any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process.<sup>31</sup> In this definition there are certain aspects that are not included in relation with the definition established in the Palermo Protocol, for example, the Act doesn’t include removal of organs as exploitation.

The Act establishes that victims of severe forms of trafficking shall not be detained in facilities inappropriate for their status as victims,<sup>32</sup> should receive medical care,<sup>33</sup> and should be provided protection in case there are any concerns for the victim’s safety<sup>34</sup> and confidentiality of the information of the victim and her or his relatives. Furthermore, it provides that victims of severe forms of trafficking shall have access to information about their rights and translation services.<sup>35</sup>

In the TVPA, the provision of housing, employment, education nor training opportunities is specifically provided. Although the Palermo Protocol establishes that states shall consider implementing these remedies for the victims, meaning that is not mandatory, they are very important for the victim’s recovery and sense of safety during her or his stay in the United States. Moreover, the Trafficking Victims Protection Act provides victims of human

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<sup>30</sup> Id., Sec 103 (9)

<sup>31</sup> Id., Sec 103 (2)

<sup>32</sup>Id., Sec 107 (c)(1)(A)

<sup>33</sup> Id., Sec 107 (c)(1)(B)

<sup>34</sup> Id., Sec 107 (c)(1)(C)

<sup>35</sup> Id., Sec 107 (c)(2)

trafficking with a special type of visa: the “T” Visa Nonimmigrants.<sup>36</sup>

This visa is granted to victims of human trafficking that are in the US territory and willing to comply with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking, and that demonstrates that she or he would suffer extreme hardship involving unusual and severe harm if removed from the US.<sup>37</sup> Wendy Chapkis once stated that this provision was designed not so much to protect the victim but to assist prosecutors in closing down trafficking networks.<sup>38</sup> More recently, the TVPA was amended to include certain exceptions to the requirement of cooperating with authorities. It has been established that victims under the age of 18 at the time of the victimization, or unable to cooperate with a law enforcement request due to physical or psychological trauma, may qualify for the T nonimmigrant visa without having to assist in investigation or prosecution.<sup>39</sup>

It has to be recognized that it’s not mandatory for States to provide with residence permits to victims of human trafficking.<sup>40</sup> Notwithstanding, even though the T Visa requirement to cooperate with law enforcement can be waived in certain circumstances, it still puts the victim in a position where she or he has to provide evidence of the physical or psychological trauma to the authorities to be able to benefit from the waiver, since it might most likely entail re-victimization of the person.

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<sup>36</sup> *Victims of Human Trafficking: T Nonimmigrant Status*, available at <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>

<sup>37</sup> Id. This type of visa is valid for four years and a visa holder may be eligible to apply for permanent residence (Green Card) after three years in a T nonimmigrant status.

<sup>38</sup> Chapkis, W. (2003). *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*. *Gender and Society*, 17(6), page 932. Available at <http://www.jstor.org/stable/3594677>

<sup>39</sup> *Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status*, available at <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-human-trafficking-t-nonimmigrant-status-0>

<sup>40</sup> See article 7 Palermo Protocol, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>

## Mexico

According to the UNODC, from 2012 to August 2015 there have been 706 identified victims of human trafficking in Mexican territory.<sup>41</sup> Aware of this reality and its obligations under Palermo Convention and Protocol, in June 14<sup>th</sup> 2012, the Mexican Government approved the General Law on Human Trafficking (Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de Estos Delitos), which was reformed in March 19<sup>th</sup> 2014.<sup>42</sup> In article 10 it defines trafficking in persons as the conduct of one or many people to recruit, hook, transport, transfer, retain, give, receive or harbor one or many people for the purpose of exploitation.<sup>43</sup>

Exploitation of a person shall be understood as: slavery<sup>44</sup>, servitude<sup>45</sup>, prostitution of others or any other form of sexual exploitation<sup>46</sup>, labor exploitation<sup>47</sup>, forced labor<sup>48</sup>, forced begging<sup>49</sup>, the use of children to commit illicit activities<sup>50</sup>, illegal adoption<sup>51</sup>, forced marriage<sup>52</sup>, organ, tissue and cell trafficking<sup>53</sup>, and illicit biomedical experimentation on human beings.<sup>54</sup> What should be considered as exploitation goes farther in this Law that what is established in the Palermo Protocol by including forced begging, illegal adoption, used of children to commit

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<sup>41</sup>From this number, 352 are domestic victims, 69 from Honduras, El Salvador and Guatemala, and 285 remain unknown. UN Office for Drugs and Crime, *Country Reports 2017, North America*, available at [http://www.unodc.org/documents/data-and-analysis/glotip/Glotip16\\_Country\\_profile\\_North\\_America.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Glotip16_Country_profile_North_America.pdf).

<sup>42</sup> This Law is of public order and applicable throughout all the Mexican territory. *General Law for Victims (Ley General de Víctimas)*, art. 1, available in Spanish at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGV>.

<sup>43</sup> Id., art. 10

<sup>44</sup> Id., art. 10.I

<sup>45</sup> Id., art. 10.I

<sup>46</sup> Id., art. 10.II

<sup>47</sup> Id., art. 10.IV

<sup>48</sup> Id., art. 10.V

<sup>49</sup> Id., art. 10.VI

<sup>50</sup> Id., art. 10.VII

<sup>51</sup> Id., art. 10.VIII

<sup>52</sup> Id., art. 10.IV

<sup>53</sup> Id., art. 10.X

<sup>54</sup> Id., art. 10.XI

illicit activities and forced marriage.

The before mentioned Law establishes that the responsible authorities have to provide assistance to the victims in migratory issues, regardless of their migratory status in the country.<sup>55</sup> It also establishes that repatriation will always be voluntary,<sup>56</sup> humanitarian visas will be provided to victims and their relatives while the criminal procedures are taking place.<sup>57</sup> Unfortunately, this seems to assume that the victims will always want to follow a criminal procedure.

Furthermore, it establishes the creation of a fund that will be the basis for, when the judge determines reparations, the victim can enjoy medical treatment, therapies and psychiatric treatment, transportation to the country of origin if the victim so decides, food, provisional housing and basic needs items if necessary, compensation for the lost salaries, among others.<sup>58</sup>

The Law provides a comprehensive approach for the protection and assistance to the victims of human trafficking, which is aligned with what is established in the Palermo Protocol. However, as Regina Castro Traulsen contends, Mexico's real challenge is enforcement, implementation and effectiveness of the legislation.<sup>59</sup>

It is important to notice that the Law doesn't establish any type of cooperation mechanism between the National Institute of Migration nor the Mexican Commission for the

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<sup>55</sup> Id., art 75

<sup>56</sup> Id., art. 76

<sup>57</sup> Id., art 78

<sup>58</sup> Id., art. 82

<sup>59</sup> Regina Castro Traulsen, *The Mexican Legal Remedies for Trafficking in Persons Victims and its compliance with International Standards*, page 28. Available at <http://humanrights.nd.edu/research/areas-of-research/human-trafficking/student-research-papers-legal-remedies-for-human-trafficking/>

Assistance of Refugees (herein COMAR for its acronym in Spanish) nor makes any relationship with victims of human trafficking and the possibility to apply and be granted asylum depending on the specific circumstances of each case.

### Dominican Republic

Trafficking in persons is a reality that also affects the Dominican Republic. According to UNODC, between 2012 and September 2015, 872 victims of trafficking in persons were identified.<sup>60</sup>

In 2003 the Dominican Government enacted Law 137-03 on Illicit Smuggling of Migrants and Human Trafficking (herein Law 137-03) which entered into force on August 7<sup>th</sup> 2003. The law defines trafficking in persons as “recruitment, transportation, transfer, harboring or receipt of persons, recurring to the use of threat, force, coercion, abduction, fraud, deception, abuse of power, situations of vulnerability or of giving or receiving payments or benefits to achieve the consent of person having control over other person, for the purposes of exploitation, for the exercise of any form of sexual exploitation, pornography, debt bondage, forced labor or services, marriage, irregular adoption, slavery or similar practices or the removal of organs.”<sup>61</sup> The definition fulfills all the elements established in the Palermo Protocol and in fact goes farther in the definition of the scope of exploitation by specifying marriage, irregular adoption, pornography and debt bondage.

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<sup>60</sup> About 210 victims were Dominican citizens domestically trafficked and 22 Dominicans repatriated from other countries. On the other hand, 61 of the identified victims were Haitians and five victims were trafficked from East Asia. Five hundred eighty-seven children and 285 adults; 309 for sexual exploitation, 258 for begging, 31 for forced labor, 42 for illegal adoption and for the rest, the form of exploitation was not reported. UN Office for Drugs and Crime, *Country Profiles 2017, Central America and the Caribbean*. Available at [https://www.unodc.org/documents/data-and-analysis/glotip/Glotip16\\_Country\\_profile\\_Central\\_AmericaCaribbean.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/Glotip16_Country_profile_Central_AmericaCaribbean.pdf)

<sup>61</sup> Id., art. 1(a)

A very interesting and ground-breaking feature of Law 137-03 is that it establishes that not only individuals can be held responsible for trafficking in persons but also companies can be held liable for the commission of the crimes with a variety of sanctions that can be imposed, including the dissolution of the company.<sup>62</sup> This is not established in any of the other two domestic legislations reviewed in the present research.

The law establishes that the privacy and identity of the victims shall be protected.<sup>63</sup> It also establishes that the victim shall receive legal assistance so her or his opinions or preoccupations are presented and examined during the criminal procedure against the criminals and/or traffickers.<sup>64</sup> Moreover, it states that victims will receive physical, psychological and social attention, in addition to counseling and information about their rights,<sup>65</sup> adequate housing, medical attention, access to education, capacitation and access to employment.<sup>66</sup>

The law does an important job capturing pillar remedies for victims of human trafficking, however certain observations should be made. The law takes an exclusively criminal procedure approach to the issue of human trafficking, not taking into consideration that there might be other pathways that the victims would want to pursue as they exercise their right to justice. Instead of providing information on relevant court and administrative proceedings in general, as the protocol does, the Law exclusively mentions criminal procedure.

Furthermore, it does not specifically provide the possibility for victims to obtain

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<sup>62</sup> Id., art. 4: “Legal persons are criminally responsible and can be condemned for smuggling of migrants and trafficking in persons committed by any of the management administrative, supervisory bodies or those that must respond socially, generally or collectively or representatives of the legal persons.”

<sup>63</sup> Id., art. 9

<sup>64</sup> Id.

<sup>65</sup> Id., art. 10

<sup>66</sup> Id. It doesn't specifically mention if these protections are temporary or provisional. It also establishes that victims of trafficking, especially women, children and adolescents, will be subject to psychological evaluations or other types of evaluations that are required for their protection, taking into consideration their age and gender.

compensation for the damages suffered, which falls short from what is established in the Palermo Protocol. Moreover, it doesn't provide any type of visa or residence for victims, unlike United States and Mexico, nor it mentions a specific prohibition of refoulment, which leaves victims in serious danger and legal uncertainty.<sup>67</sup>

Furthermore, Law 137-03 does not mention anything about the possibility for a victim of human trafficking to seek asylum, nor includes the National Commission for Refugees (herein CONARE for its Spanish acronym) as an actor that might have any involvement in the process.

As mentioned earlier, many victims of human trafficking that are trafficked to the United States, Mexico and the Dominican Republic are profiled and selected by their traffickers because of their nationality, race, religion, membership of a particular social group, and sometimes because of their political opinion. Traffickers know that there are circumstances of exclusion or discrimination based on one or more of these grounds that render persons vulnerable, leaving them without the protection of their States. For these purposes, analyzing the legal framework regarding asylum becomes of outmost importance.

### **III. International Framework in Asylum issues**

When victims of human trafficking are profiled and selected by their traffickers, in their countries of origin, because of their nationality, race, religion, membership of a particular social group or political opinion, or the State of origin doesn't provide them with protection because

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<sup>67</sup> According to the Special Rapporteur on trafficking in persons, two visits have been requested in 2009 and 2013 to the government of the Dominican Republic and they have not been granted. This raises questions on the underlying motives for the rejection of the request and the effective implementation of this law. United Nations, Office of the High Commissioner for Human Rights, *Country Visits*, available at <http://www.ohchr.org/EN/Issues/Trafficking/Pages/visits.aspx>.

of any of these grounds, the 1951 Convention Relating to the Status of Refugees comes into play, guaranteeing the right to asylum for these victims.

The United States of America has not ratified the Convention, but did ratify the 1967 Protocol on November 1<sup>st</sup> 1968,<sup>68</sup> Mexico ratified both instruments on June 7<sup>th</sup> 2000<sup>69</sup> and the Dominican Republic ratified both the 1951 Convention and its 1967 Protocol on January 4<sup>th</sup> 1978.<sup>70</sup>

For the purposes of the present section, I will outline the most important considerations made by UNHCR<sup>71</sup> in terms of victims of human trafficking and membership of a particular social group, given that this is perhaps the most common characteristic under which victims of human trafficking are assessed at the moment of analyzing their asylum claims.

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

In these guidelines, UNHCR clearly recognizes that not all victims or potential victims of trafficking fall within the scope of the refugee definition. To be recognized as a refugee, all

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<sup>68</sup> It was ratified with some reservations that are not relevant for the present research. Convention Relating to the Status of Refugees, *Ratifications*, available at <http://www.unhcr.org/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html>.

<sup>69</sup> It was ratified with some declarations that are not relevant for the present research. Convention Relating to the Status of Refugees, *Ratifications*, available at <http://www.unhcr.org/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html>.

<sup>70</sup> It was ratified with no reservations. Convention Relating to the Status of Refugees, *Ratifications*, available at <http://www.unhcr.org/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html>

<sup>71</sup> UNHCR is the Agency of the UN with the mandate to protect asylum seekers, refugees, returnees, stateless persons and internally displaced persons in certain cases.

elements of the refugee definition have to be satisfied.<sup>72</sup> These elements are persecution or well-ground fear of persecution; this persecution or fear have to arise because of one or more of the grounds established in the 1951 Convention and that the country of origin or habitual residence is unable or unwilling to protect the victim. It further establishes that 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.<sup>73</sup>

Such a possibility is not least implicit in the saving clause contained in Article 14 of the Trafficking Protocol, which states: “1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.”<sup>74</sup>

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 in, or for example, 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.<sup>75</sup>

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<sup>72</sup> UN High Commissioner for Refugees (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*, 7 April 2006, HCR/GIP/06/07, page 3. Available at: <http://www.refworld.org/docid/443679fa4.html>

<sup>73</sup> Id., page 5

<sup>74</sup> Id., page 5

<sup>75</sup> Id., page 6. Similarly, 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.

## Persecution

What amounts to a well-founded fear of persecution, will depend on the particular circumstances of each individual case. Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings and psychological make-up of the asylum applicant.<sup>76</sup>

In this regard, the evolution of international law in criminalizing trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking. Asylum claims lodged by victims of trafficking or potential victims of trafficking should thus be examined in detail to establish whether the harm feared as a result of the trafficking experience, or as a result of its anticipation, amounts to persecution in the individual case. Inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labor, 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.<sup>77</sup> 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>78</sup>

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<sup>76</sup> Id., page 6

<sup>77</sup> Id.

<sup>78</sup> Id., page 7. For example, the victim may 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 victims of sexual trafficking. 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. Victims could also fear reprisal if they cooperate with the local authorities to dismantle the criminal networks or give information about the traffickers. Reprisals at the hands of traffickers could amount to persecution depending whether the acts feared involved serious human rights violations or other serious harm or intolerable predicament and on an evaluation of their impact in the individual concerned.

### Agents of persecution

There is scope within the refugee definition to recognize both State and non-State agents of persecution. While persecution is often perpetrated by the authorities of a country it can also be perpetrated by individuals if the persecutory acts are “knowingly tolerated by the authorities or if the authorities refuse or prove unable to offer effective protection”.<sup>79</sup>

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.<sup>80</sup>

### Protection of the country of origin

The authorities of the country of origin ability and willingness to protect the victim or potential victim of trafficking will depend on whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking, as well as to protect and assist the victims and if these mechanisms are effectively implemented in practice.<sup>81</sup> In other words, it is not enough to have the mechanisms in place, but they have to be effective in granting protection to the victim, otherwise they are rendered void.

Where a State fails to take such reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of

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<sup>79</sup> Id., page 8

<sup>80</sup> Id., page 9

<sup>81</sup> Id. Part II of the Protocol requires States to take certain steps with regard to the protection of victims of trafficking, which can be of guidance when assessing the adequacy of protection and assistance provided. Measures relate not only to protecting the privacy and identity of victims of trafficking, but also to their physical, psychological and social recovery.

the individual is likely to be well-founded.<sup>82</sup> In this sense, the Courts that are assessing the claim of the victim or attempted victim of trafficking, have to analyze what are the existing mechanisms in the country of origin or habitual residence of the victim, to what extent have they been effective, and also to understand if those mechanisms are effective enough to guarantee that if the person is returned to her or his country of origin, will enjoy the protection of the State and therefore there would be no grounds to consider the existence of a well-founded fear.<sup>83</sup>

The circumstances in the applicant's country of origin or habitual residence are the main point of reference against which to determine the existence of a well-founded fear of persecution. However, if the exploitation experienced by the victim happens outside the country of origin or habitual residence, this doesn't mean that the claim has to be automatically rejected. The fact that the trafficking happens across international borders, gives rise to a very complex situation that requires careful analysis that should take into consideration the various forms of harm that have occurred at different points along the trafficking route.<sup>84</sup> According to UNHCR, in such circumstances the existence of a well-founded fear of persecution is to be evaluated in relation to the country of origin of the asylum seeker.<sup>85</sup>

### Grounds of persecution

Trafficking in persons is a commercial enterprise, the prime motivation might more likely be profit rather than persecution on a Convention ground. In other words, victims are likely to be targeted above all because of their perceived or potential commercial value to the traffickers. This overriding economic motive does not exclude the possibility of Convention-

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<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id., page 10

<sup>85</sup> Id., page 11

related grounds in the targeting and selection of victims of trafficking. Scenarios in which trafficking can flourish.<sup>86</sup>

Members of a certain race or ethnic group in a given country may be especially vulnerable to trafficking and/or less effectively protected by the authorities of the country of origin. Victims may be targeted on the basis of their ethnicity, nationality, religious or political views in a context where individuals with specific profiles are already more vulnerable to exploitation and abuse of varying forms. Individuals may also be targeted by reason of their belonging to a particular social group.<sup>87</sup>

In this same line, there is not one and only approach on how a victim of human trafficking might or might not be considered to be member of a particular social group. This has to be addressed case by case taking into consideration all the circumstances that surround the person that is being trafficked. Some questions have to be posed when analyzing this particular issue: What were the circumstances that lead the traffickers to choose that particular victim? What vulnerabilities of the victim might have lead the traffickers to choose that particular person? What are the general conditions in the State that allow these situations to happen and for traffickers to easily identify victims? Even if a person is not trafficked exclusively for a Convention reason, the traffickers might have taken into consideration one or more grounds at the moment of selecting the particular victim.

The causal link may be established to one single Convention ground or to a combination of these grounds. Although a successful claim to refugee status only needs to establish a causal

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<sup>86</sup> Id.

<sup>87</sup> Id., page 12. As an example, among children or women generally in a particular society some subsets of children or women may be especially vulnerable to being trafficked and may constitute a social group within the terms of the refugee definition.

link to one ground, a full analysis of trafficking cases may frequently reveal a number of cumulative grounds.<sup>88</sup>

- *Race*: Members of one racial group may be particularly targeted for trafficking for varied ends, if the State is unable or unwilling to protect members of that group. Where trafficking serves the sex trade, women and girls may also be especially targeted as a result of market demands for a particular race (or nationality).<sup>89</sup>
- *Religion*: Individuals may similarly be targeted by traffickers because they belong to a particular religious community, that is, they may be targeted because their faith or belief identifies them as a member of a vulnerable group in the particular circumstances, if, for instance, the authorities are known not to provide adequate protection to certain religious groups. Although profit may be an overriding factor, this does not obviate the relevance of religion, for example, as a factor in the profiling and selection process of the victims.<sup>90</sup>
- *Nationality*: Someone's nationality might render that person more vulnerable to trafficking depending on a lot of factors such as trafficker's knowledge of that State's lack of protection, demand on the human market, among others.<sup>91</sup>
- *Membership of a particular social group*: Women are an example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men. As such, they may constitute a particular social group. Factors which may distinguish women as targets for traffickers are generally connected to their vulnerability in certain social settings; therefore, certain social subsets of women may also constitute particular social groups. Men or children or certain social subsets

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<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id., page 13

<sup>91</sup> Id.

of these groups may also be considered as particular social groups. Examples of social subsets of women or children could, depending on the context, be single women, widows, divorced women, illiterate women, separated or unaccompanied children, orphans or street children. The fact of belonging to such a particular social group may be one of the factors contributing to an individual's fear of being subjected to persecution, for example, to sexual exploitation, as a result of being, or fearing being, trafficked.<sup>92</sup>

- *Political opinion:* As with the other grounds, the fact that a person holds a particular political opinion might render that person more vulnerable to trafficking since, for example, the traffickers might be aware of the fact that the individual won't receive protection of the State for the particular opinions she or he holds.<sup>93</sup>

The Institutions that are responsible for carrying out the refugee status determination and the Courts in charge of reviewing those decisions, have to make a careful analysis to determine whether one or more of the grounds set forth in the 1951 Convention, played an important role in the profiling and selection of the victim.

On the other hand, since "membership of a particular social group" has been explored in cases in the United States involving victims of human trafficking, it is important to understand what UNHCR has said about this particular issue since it has given some guidelines that can help States to conduct a better implementation of the 1951 Convention.

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<sup>92</sup> Id., page 14

<sup>93</sup> Id.

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

One of the five grounds enumerated in Article 1A (2) of the 1951 Convention to be granted asylum is “Membership of a particular social group”. This is the most contested ground and the one with least clarity. Courts around the world apply this ground in a different way and from a different approach.<sup>94</sup>

According to UNHCR, there is no “closed list” of what groups may constitute a “particular social group” within the meaning of Article 1A(2) of the 1951 Convention. While Convention doesn’t establish a list of social groups, the drafting history of the Convention doesn’t provide guidance to determine that there is a set of identified groups that might qualify under this ground,<sup>95</sup> neither United States, Mexico and the Dominican Republic, have defined what it means under their national law. UNHCR has established that the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.<sup>96</sup> This doesn’t mean that any person could fit into this category and therefore be granted asylum. For this reason, UNHCR has established that the particular social group cannot be defined only by the fact that is targeted for persecution.<sup>97</sup>

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<sup>94</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: “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*, 7 May 2002, HCR/GIP/02/02, page 1. Available at: <http://www.refworld.org/docid/3d36f23f4.html>

<sup>95</sup> Id., page 2

<sup>96</sup> Id.

<sup>97</sup> Id.

According to UNHCR, two approaches have dominated the decision-making of what constitutes “membership of a particular social group” in common law jurisdictions:

- The “protected characteristics” approach (sometimes referred to as an “immutability” approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.<sup>98</sup> A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.<sup>99</sup>
- The “social perception approach” examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.<sup>100</sup>

On the other hand, in civil law jurisdictions this ground is generally less well developed. Decision makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group. Analysis under the two approaches may frequently converge, but at times they may reach different results. Given the varying approaches, and the protection gaps which can result, UNHCR has proposed that the two approaches ought to be reconciled, for this purpose, it has proposed a definition for a particular social group, as follows:

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<sup>98</sup> Id.

<sup>99</sup> Id., page 3

<sup>100</sup> Id.

*“A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”*<sup>101</sup>

The following are some important aspects that UNHCR has established applicants should not be requested to prove, and that are important when reviewing cases of victims of human trafficking:

- An applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be “cohesive.”<sup>102</sup>
- An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group.<sup>103</sup>
- The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A (2).<sup>104</sup>
- There is no requirement for the persecutor be a State actor. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.<sup>105</sup>
- The fact that large numbers of people risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.<sup>106</sup>

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<sup>101</sup> Id.

<sup>102</sup> Id., par. 15

<sup>103</sup> Id., par. 17

<sup>104</sup> Id., par. 18

<sup>105</sup> Id., par. 20

<sup>106</sup> Id., par 18

The international framework of refugee law has been incorporated in the United States, Mexico and the Dominican Republic in different ways. It is important to understand how has the 1951 Convention been incorporated in these countries and how the legal remedies available for victims of human trafficking that also have claims under the 1951 Convention have been designed.

#### **IV. Local legislation and case law on Asylum**

##### United States

The 1951 Convention has been incorporated in the United States in different sections of the Immigration and Nationality Act (herein INA). According to INA section 101, a refugee is any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>107</sup>

An asylum-seeker who is not facing removal proceedings, applies for asylum *affirmatively* with the United States Citizenship and Immigration Services' asylum office (herein USCIS) regardless of whether she or he entered the United States with permission or remains in lawful status, within 1 year after the date of arrival to the United States.<sup>108</sup> If USCIS declines to approve the asylum application and the applicant is not in some form of lawful immigration status, the application is referred to the immigration court and removal proceedings

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<sup>107</sup> *Immigration and Nationality Act (INA)*, Section 101(a)(42)(A), available at <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101/0-0-0-195.html#0-0-0-961>

<sup>108</sup> *Id.*, Section 2018 (a) 1 (B)

commence. At this point, jurisdiction over the asylum application shifts to the immigration court.<sup>109</sup>

On the other hand, if an individual is arrested by the Department of Homeland Security (herein DHS) or otherwise placed in removal proceedings, she must apply for asylum *defensively* with the immigration court. There the asylum application serves as a defense against removal and the court has exclusive jurisdiction.<sup>110</sup>

Asylum seekers have to establish that they fit the definition of refugee and that one or more of the grounds of the convention was, or will be, at least one central reason for persecuting the applicant.<sup>111</sup> If their application is solved in their favor, refugees are granted refugee status under sec 209 on the INA. This status allows them to be in the U.S. indefinitely and authorizes them to adjust status after one year.<sup>112</sup>

A lot has been written by scholars and practitioners in the US about how complicated it is for an asylum seeker to actually be granted protection and the recognition of refugee status in the United States.<sup>113</sup> This can be evidenced by the fact that in 2016, the U.S. immigration court and asylum systems were backlogged with more than 620,000 pending removal and asylum cases, resulting in combined wait times of up to six years for asylum-seekers.<sup>114</sup>

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<sup>109</sup> National Immigrant Justice Center. *Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings*. (2017). Available at [http://immigrantjustice.org/sites/default/files/content-type/resource/documents/2017-01/NIJC%20Asylum%20Manual\\_01%202017\\_final.pdf](http://immigrantjustice.org/sites/default/files/content-type/resource/documents/2017-01/NIJC%20Asylum%20Manual_01%202017_final.pdf), page 10

<sup>110</sup> *Id.*

<sup>111</sup> *Immigration and Nationality Act (INA)*, Section 208 (b)(B)4(i), available at <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101/0-0-0-195.html#0-0-0-961>

<sup>112</sup> *Immigration and Nationality Act (INA)*, Section 209 (b)1/ 3/, available at <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-1825.html#0-0-0-2109>

<sup>113</sup> See, for example, Tjersland, C.; Rosales-Fike, S. (1991). Refugees and Asylum in the United States. *Howard Law Journal* 34(1), 48-50.

<sup>114</sup> American Immigration Council, *Asylum in the United States*. (2016). Available at <https://www.americanimmigrationcouncil.org/research/asylum-united-states>

Furthermore, it can also be evidenced by the fact that according to the DHS, in 2015, only 17,878 asylum seekers were granted asylum affirmatively and 8,246 were granted asylum defensively. This amounts to a total of 26,124 persons being granted asylum in 2015.<sup>115</sup>

For qualifying victims of human trafficking in the US for the right to asylum, the access to an effective legal remedy that recognizes and enforces their right in light of the 1951 Convention, is of outmost importance given the serious danger that they could face if they are returned to their country of origin.

In terms of case law, the United States has addressed multiple cases of asylum seekers that have been victims, or attempted victims, of human trafficking. One of the most iconic cases in asylum issues in the United States is *Cece v Holder*. This case is important because it gives light to the ground of “membership of a particular social group” established in the 1951 Convention. This also happens to be the case of a victim of attempted trafficking, which denotes the real needs and fears of prosecution that victims of human trafficking or attempted trafficking might experience and why it is important for them to have access to legal remedies that guarantee their right to asylum.

In 2001, Johana Cece, a woman in her mid-twenties, fled her hometown of Korçë, in Albania. As a young woman living alone in Albania, Cece had been the victim of attempted sex trafficking by a local gang member who was notorious for kidnapping young Albanian women and forcing them into sexual trafficking.<sup>116</sup> Cece encountered this trafficker several times, but always managed to escape. Ultimately, she fraudulently obtained an Italian passport

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<sup>115</sup> US Department of Homeland Security, *Refugees and Asylees: 2015*. Available at [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asylees\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2015.pdf)

<sup>116</sup> *Cece v. Holder, Attorney General*, No. 11-1989, United States Court of Appeals for the Seventh Circuit, 31 May 2012, Section I, par. 2, available at: [http://www.refworld.org/cases,USA\\_CA\\_7,4ff5acb72.html](http://www.refworld.org/cases,USA_CA_7,4ff5acb72.html)

and sought refuge in the United States.<sup>117</sup> Her case was analyzed under the 1951 Convention's ground "membership of a particular social group". The immigration judge that reviewed Cece's claim found her testimony credible and her fear reasonable.<sup>118</sup> The Board of Immigration Appeals vacated the decision of the immigration judge, finding that Cece failed to establish past persecution and had successfully relocated within Albania.<sup>119</sup>

Cece filed two appeals, in the first one the Board established criteria of "social visibility" meaning that they have to be identified by society as a group. The judge also established that the group has to share narrowing characteristics other than the risk of being prosecuted. By the time of the second appeal, the Board appropriately abandoned its criticism that Cece had failed to demonstrate "social visibility." Between the time of the first and second Board appeals, the Court rejected a social visibility analysis and concluded that applicants need not show that they would be recognized as members of a social group to qualify for withholding.<sup>120</sup>

When reviewing the element of persecution, the Court argued that an applicant who successfully proves that was subject to past persecution, is presumed to have a well-founded fear of future persecution, in the case of Cece, she had previously escaped the attempted trafficking. According to the Court, the applicant has to prove that there is a nexus between the prosecution and one of the five protected grounds.<sup>121</sup> The Court established that in the case of Cece she feared persecution because she was a single woman in Albania who lived alone and

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<sup>117</sup> Emily Niklaus Davis, *Cece v. Holder: An Unprecedented Look at the Asylum Claim for Victims of Attempted Sex Trafficking*, available at <http://law.emory.edu/eilr/content/volume-29/issue-2/comments/cece-v-holder.html>

<sup>118</sup> *Cece v. Holder, Attorney General*, No. 11-1989, United States Court of Appeals for the Seventh Circuit, 31 May 2012, page 5, available at: [http://www.refworld.org/cases,USA\\_CA\\_7,4ff5acb72.html](http://www.refworld.org/cases,USA_CA_7,4ff5acb72.html)

<sup>119</sup> *Id.*, page 5

<sup>120</sup> *Id.*, page 5

<sup>121</sup> *Id.*, section II, page 6

although she could have married, this is the type of fundamental characteristic change, i.e., marital status, the Court cannot ask of asylum applicants.<sup>122</sup>

Furthermore, the Court argued that although it is true that where a proposed group is defined only by the characteristic that it is persecuted, it does not qualify as a social group, and that social group cannot be defined merely by the fact of persecution or solely by the shared characteristic of facing dangers in retaliation for actions they took against alleged persecutors, the shared trait does not disqualify an otherwise valid social group.<sup>123</sup>

Furthermore, the Court argued that although it is true that these women are linked by the persecution they suffer (being targeted for prostitution) they are also united by the common and immutable characteristic of being (1) young, (2) Albanian, (3) women, (4) living alone. Under the “mixed-motives doctrine”<sup>124</sup>, an applicant may qualify for asylum so long as the applicant demonstrates by either direct or circumstantial evidence that his persecutors were motivated, at least in part, by one of the enumerated grounds.<sup>125</sup>

The Court noted that Ms. Cece’s social group was not different from many other social groups that are based primarily on broad “immutable characteristics”<sup>126</sup>, but can be narrowed by other changeable, but “fundamental characteristics”<sup>127</sup>. “In other words the social group is

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<sup>122</sup> National Immigrant Justice Center, *Cece v Holder*, available at <https://immigrantjustice.org/litigation/blog/cece-v-holder-0#.WNqAEhiZMdU>

<sup>123</sup> *Cece v. Holder, Attorney General*, No. 11-1989, United States Court of Appeals for the Seventh Circuit, 31 May 2012, page 13, available at: [http://www.refworld.org/cases,USA\\_CA\\_7,4ff5acb72.html](http://www.refworld.org/cases,USA_CA_7,4ff5acb72.html)

<sup>124</sup> This doctrine holds that there can be more than one motivation for the persecution, as long as the harm was motivated in part by an actual or imputed ground as shown by direct or circumstantial evidence produced by the applicant. *Asylum Basics: Elements of Asylum Law*. Retrieved from <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-basics-elements-of-asylum-law/>

<sup>125</sup> *Cece v. Holder, Attorney General*, No. 11-1989, United States Court of Appeals for the Seventh Circuit, 31 May 2012, page 14, available at: [http://www.refworld.org/cases,USA\\_CA\\_7,4ff5acb72.html](http://www.refworld.org/cases,USA_CA_7,4ff5acb72.html)

<sup>126</sup> Examples: gender and nationality.

<sup>127</sup> Examples: living alone or not having been subjected to female genital mutilation

defined by gender plus one or more narrowing characteristics.”<sup>128</sup>.

The Seventh Circuit finally decided to grant the petition for review and remand to the agency for further proceedings consistent with this opinion.<sup>129</sup> According with the National Immigrant Justice Center, the Court’s decision in *Cece v. Holder* brings the definition of “particular social group” more in line with international refugee law and should have extremely positive implications for social group-based asylum cases, particularly those involving gender-based claims.<sup>130</sup> It undoubtedly also open the path for more qualifying victims of human trafficking to be granted asylum and founding asylum in the United States.

It is exemplified how before the Seventh Circuit decided to rehear the case, authorities such as the BIA, were not conducting a careful assessment of all the circumstances that surround victims of human trafficking and undertaking very narrow interpretations of the grounds set forth in the 1951 Convention, specifically “membership of a particular social group”. *Cece v Holder* brings to life and to the legal arena the pressing need for clear understanding of refugee law and its application in a way that fulfills its ultimate objective, which is to protect persons that have valid claims. This case also exemplifies the effective application of a legal remedy with regards to the right to asylum and its complex intersection with human trafficking.

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<sup>128</sup> National Immigrant Justice Center, *Cece v Holder*, available at <https://immigrantjustice.org/litigation/blog/cece-v-holder-0#.WNqAEhiZMdU>

<sup>129</sup> *Id.*, page 27

<sup>130</sup> National Immigrant Justice Center, *Cece v Holder*, available at <https://immigrantjustice.org/litigation/blog/cece-v-holder-0#.WNqAEhiZMdU>

## Mexico

The “Law on Refugees and Complementary Protection” was enacted on January 26<sup>th</sup> 2011 and on October 30<sup>th</sup> 2014 it was reformed to become “Law on Refugees, Complementary Protection and Political Asylum”.<sup>131</sup> It establishes certain criteria that have to be met throughout the implementation of its dispositions, such as non-refoulment, non-discrimination, superior interest of the child, family unity, confidentiality,<sup>132</sup> and non-sanction for irregular entry to the country for those recognized as refugees or awarded complementary protection.<sup>133</sup>

Article 13 of the law establishes that the refugee condition will be recognized to every foreigner that is in the Mexican territory because of a well-founded fear of being persecuted for her or his race, religion, nationality, gender, membership of a particular social group or political opinion, founds herself or himself outside of their country of nationality and can’t, or because of the “well-founded fear”<sup>134</sup> doesn’t want to be subject to the protection of such State; or who, not having a nationality and being outside the country of her or his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>135</sup>

As we can see, the Mexican legislation goes farther than just adapting the grounds established in the 1951 Convention by including gender and also, in its following article, it

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<sup>131</sup> This law is of public order and it has to be complied with throughout the whole Mexican territory. According to article 3, its main objective is to regulate the recognition of political asylum, of the refugee condition and the granting of complementary protection. In addition to this, it seeks to establish the basis for attention and assistance for asylum seekers and refugees that are in Mexican territory, with the purpose to guarantee respect for their human rights. *Law about Refugees, Complementary Protection and Political Asylum* (Ley sobre Refugiados, Protección Complementaria y Asilo Político), article 3. Available in Spanish at [http://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP\\_301014.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP_301014.pdf)

<sup>132</sup> Id., art. 5

<sup>133</sup> Id., art. 7

<sup>134</sup> The Law defines founded fear as the acts and facts that give or have given place to a persecution and that because of their nature, repeated character or because an accumulation of actions committed by a third party, put, or could put, at risk the life, liberty or security of a person. *Law about Refugees, Complementary Protection and Political Asylum* (Ley sobre Refugiados, Protección Complementaria y Asilo Político), article 2. Available in Spanish at [http://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP\\_301014.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP_301014.pdf)

<sup>135</sup> Id., art. 13.I

incorporates the Cartagena Declaration by establishing recognition as a refugee to those that have fled their country of origin because their life, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have seriously perturbed the public order.<sup>136</sup>

As we saw earlier, international victims of human trafficking that have been identified by the UNODC in Mexico, come from countries of the North triangle which are well-known by its generalized violence and causation of an important flux of both migrants and refugees to Mexico and the United States. It would be important to analyze if those considerations are being taken into account by CONARE and the tribunal in charge of reviewing the appeal.

The Mexican Commission for the Assistance of Refugees (herein COMAR for its acronym in Spanish) is in charge of determining the condition of refugee and to develop all the programs and policies to guarantee their enjoyment of human rights.<sup>137</sup> The Ministry is also in charge of providing complementary protection to those foreigners that, as mentioned before, were not recognized as refugees but that their lives would be in danger in case of refoulment to their countries of origin or residence.

The Law specifically establishes that refugees will have the right to receive support from public institutions, health services, education or the recognition of their studies, right to work, identity and travel documents, family reunification and migratory document as a permanent resident.<sup>138</sup> Those that are granted complementary protection are also given a permanent residence.<sup>139</sup> This provision is of great importance given the fact that it provides

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<sup>136</sup> Id., art. 13.II

<sup>137</sup> Id., art. 15

<sup>138</sup> Id., art. 44

<sup>139</sup> Id., art. 48

more legal certainty for refugees compared to the United States where the status they are granted is not equal to a permanent residence.

Foreigners have to apply for asylum in a written or oral form before the COMAR or the National Institute of Migration within 30 days starting from the next day to their entrance to Mexican territory.<sup>140</sup> The COMAR has 45 days from the submission of the application to solve the application in written form based on the law and the facts.<sup>141</sup> After the asylum seeker has received the decision of the COMAR, she or he has 15 days to appeal.

Article 20 establishes a very important provision, it specifically mentions that during the procedure, COMAR will take all necessary measures to guarantee institutional assistance to those applicants that require any special attention, such as pregnant women, children, elders, persons with disabilities, victims of torture or cruel or inhuman treatment, victims of sexual abuse or gender based violence, victims of human trafficking or any other person that can be in a situation of vulnerability. The COMAR has to conduct an assessment of the types of measures needed for the protection of the persons in a situation of vulnerability taking into consideration the specific circumstances in each case.<sup>142</sup> Unfortunately, a provision like this is not established in the legislation of the Dominican Republic nor the United States.

On the other hand, Mexico has a special figure for those foreigners that don't comply with the requirements set forth to be recognized as a refugee, but recognizes that persons, even

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<sup>140</sup> Id., art. 18

<sup>141</sup> Id., art. 24

<sup>142</sup> Id., art. 20. Even though the law doesn't clearly establish what type of institutional assistance the Ministry would provide nor makes any reference to any other law that could provide some guidance in this matter, it is an important step forward in recognizing that first, victims of human trafficking can be undertaking asylum claims and that second, during the asylum procedure, victims of human trafficking can have special needs that should be attended and that require assistance.

after having been rejected as refugees, might still need protection from the State and their life might be in danger or they could be subjected to torture, cruel or inhumane treatment, if they are returned to their country of origin or of habitual residence.<sup>143</sup> This figure is called complementary protection and prohibits refoulment for those persons that qualify. As mentioned earlier, under this protection, the recipient is entitled to permanent residence. This is very important since this provision would allow victims of human trafficking that are found to not qualify as refugees, to still be able to remain in the country if their life would be in danger upon return to their country of origin.

UNHCR and COMAR have close collaboration in Mexico and they have developed education campaigns explaining what is a refugee. They have also been proactive in stating the importance of the accessibility of the process to seek asylum for victims of human trafficking that enter the Mexican territory. This should be considered as a good practice that should be replicated throughout the world.<sup>144</sup>

In terms of case law, in Mexico the resolutions issued by COMAR and the Federal Tribunal of Administrative Justice (Tribunal Federal de Justicia Administrativa) are not available to the public. Therefore, it was not possible to review the case law of these institutions, to be able to understand how they are assessing claims of victims of human trafficking and implementing the relevant legislation on human trafficking and asylum. Research was also conducted in the database of the Mexican Supreme Court of Justice to understand if there was any jurisprudence or “tesis aislada” on asylum issues since 1917. No relevant results were found. Further research, ideally in situ, is required in this regard.

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<sup>143</sup> Id., art. 28

<sup>144</sup> See Guía para la Protección de los Refugiados en México. Retrieved from [http://www.acnur.org/t3/uploads/tx\\_refugiadosamericas/Guia\\_para\\_la\\_proteccion\\_de\\_los\\_refugiados\\_en\\_Mexico.pdf](http://www.acnur.org/t3/uploads/tx_refugiadosamericas/Guia_para_la_proteccion_de_los_refugiados_en_Mexico.pdf)

### Dominican Republic

The National Commission for Refugees<sup>145</sup> (herein CONARE for its acronym in Spanish) was established in November 15<sup>th</sup> 1983. The CONARE is in charge of the implementation of the 1951 Convention on the Status of Refugees and its Protocol of 1967. Unfortunately, it has had very long periods in which it has not being operative. In 2010 with the return of the UNHCR to the Dominican Republic, it resumed its activities.

For the purposes of the Law, a refugee is a person that due to a founded fear of prosecution on the grounds of race, religion, nationality, political opinions or membership to a particular social group, it's out of its country of nationality and is not able or willing to receive the protection of such country; or a person that without a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>146</sup>

According to the before mentioned Law, every person that fits the previous definition and wishes to be recognized as a refugee, has to present its application to the authorities of the General Direction of Migration in the border, ports, airports or in Santo Domingo. If a foreigner

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<sup>145</sup> Article 2 of the implementing regulation of the CONARE establishes that it shall be integrated by representatives of Ministry of Foreign Affairs, Ministry of Labor, Legal Advisor for the Executive Power, Office of the General Prosecutor, General Migration Direction, National Department of Investigations and National Police. It has a Technical Sub-Commission which is integrated by the representatives of the Ministry of Foreign Affairs, General Direction of Migration and the National Department of Investigations. This Sub-Commission is the one that studies the applications for the refugee status determination.<sup>145</sup> The Commission has a National Office for Refugees (herein ONR for its acronym in Spanish) which is open to the public for the required purposes, which are not specified in the law. *Implementing Rules for the National Commission for Refugees* (Reglamento de la Comisión Nacional para los Refugiados), art. 2. Available in Spanish at <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2002/1299.pdf>

<sup>146</sup> Id., art. 6

enters the country in an irregular migratory status, it will have to present its application in no longer than 15 days.<sup>147</sup>

During the time that the asylum claim is being processed, the ONR, previous recommendation by the sub-commission, will ask the General Direction of Migration to issue a permit that allows the asylum seeker to stay in the country for 60 days, renewable. This, until the CONARE issues a resolution about the claim,<sup>148</sup> which has to be within 30 days. The resolution by the CONARE has to be notified to the asylum seeker and to UNHCR,<sup>149</sup> and both can appeal before the CONARE within 7 days.<sup>150</sup>

According to the Law, CONARE shall authorize the National Direction of Migration to issue refugees an identification card that states that they are refugees.<sup>151</sup> In addition to this, the State has to issue the travel document established in the 1951 Convention.<sup>152</sup> The Law mentions the ID card but it doesn't make specific mention of the migratory status. After a conversation with one Colombian refugee in the Dominican Republic, it was concluded that in practice, refugees are receiving a temporary resident permit that they have to renew every year.<sup>153</sup>

In terms of case law, in the Dominican Republic the resolutions issued by the CONARE, or by the High Administrative Court (Tribunal Superior Administrativo), are not available to the public, therefore it is not possible to understand how the CONARE and the Court are assessing

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<sup>147</sup> Id., art. 7

<sup>148</sup> Id., art. 9

<sup>149</sup> Id., art. 14

<sup>150</sup> Id., art. 15

<sup>151</sup> Id., art. 17. The ID card will be valid for one year and can be renewed in the General Direction of Migration, previous authorization by the CONARE (See art. 18)

<sup>152</sup> Id., art. 17

<sup>153</sup> Information retrieved after an interview with a Colombian refugee in the Dominican Republic whose name is kept confidential for safety purposes.

claims of victims of human trafficking and interpreting Laws 137-03 and the implementing regulations of the CONARE. Further research, ideally in situ, is required in this regard.

## **V. Conclusions and Recommendations**

Only when careful and detailed assessments of the complexities that surround human trafficking are carried out, is that victims of human trafficking find relief and recognition as refugees. The fact that membership of a particular social group is still a contested ground, that is being applied in various ways throughout the world and even within different Courts in one country, makes it harder for victims of human trafficking that are not persecuted by any of the other for grounds to have successful cases before the competent institutions or courts. Some recommendations to deal with these issues in a more appropriate manner are the following:

- Recognize in local asylum legislations that victims of human trafficking should be considered for granting asylum if they comply with all the requirements in the 1951 Convention.
- Deeper understanding of refugee law and the very intricate characteristics of human trafficking is needed. This, with the hope to move forward to asylum systems that make more obvious links between human trafficking and its possible intersection with asylum claims.
- Ensuring cooperation between relevant authorities, officials and nongovernmental organizations to facilitate the identification and provision of assistance to trafficked persons and their referral, if so agreed by the victim, to the authorities in charge of receiving and reviewing asylum claims. The organization and implementation of such

cooperation should be formalized in order to maximize its effectiveness.<sup>154</sup> For this cooperation to be more efficient, local laws and implementing regulations have to facilitate cooperation between the authorities in charge of persecuting traffickers and providing relief for victims of human trafficking and those authorities in charge of reviewing asylum claims and granting refugee status.

- Human trafficking and asylum issues should not be understood as completely different matters, but as issues that can intersect in very complex ways and for which specific provisions have to be set in place.
- The Dominican Republic should accept the request for visit of the Special Rapporteur for human trafficking and take advantage of the opportunity to enhance its implementation of Law 137-03 and the mechanisms it has set in place to comply with the Palermo Protocol.
- As established by UNHCR, training programs should be strengthened for national asylum authorities and organizations working with victims of trafficking, including in regard to interpreting the refugee definition in an age- and gender-sensitive manner, and the criteria that give rise to the recognition of refugee or other protection status to trafficking victims (or needs of individuals at risk of being trafficked). Indicators of international protection for victims of trafficking should also be included.<sup>155</sup>
- In the reception of applicants who claim to have been victims of trafficking, and in interviewing such individuals, it is of utmost importance that a supportive environment be provided so that they can be reassured of the confidentiality of their claim. Providing interviewers of the same sex as the applicant can be particularly important in this

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<sup>154</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1, Guideline 2.3. Available at: <http://www.refworld.org/docid/3f1fc60f4.html>

<sup>155</sup> UN High Commissioner for Refugees (UNHCR), *Human Trafficking and Refugee Protection: UNHCR's Perspective*, page 4. Available at <http://www.unhcr.org/protection/operations/4ae1a1099/human-trafficking-refugee-protection-unhcrs-perspective.html>.

respect. Interviewers should also take into consideration that victims who have escaped from their traffickers could be in fear of revealing the real extent of the persecution they have suffered. Some may be traumatized and in need of expert medical and/or psychosocial assistance, as well as expert counselling.<sup>156</sup>

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<sup>156</sup> UN High Commissioner for Refugees (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*, 7 April 2006, HCR/GIP/06/07, page 16. Available at: <http://www.refworld.org/docid/443679fa4.html>