**Submission to the call for input by the Special Rapporteur on the human rights of migrants on the ‘Report on how to expand and diversify regularization mechanisms and programs to enhance the protection of the human rights of migrants’**

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**Introduction**

This submission proposes that (some) migrants in an irregular situation ought to be regularised as refugees. To do so, the submission explores a promising practice exercised in relation to one particular group of irregular migrants: the granting of refugee status to trafficked persons at risk of re-trafficking. The submission compares the experiences of trafficked persons with those of other migrants in an irregular situation and suggests that, based on similarities between both groups, the practice of granting refugee status ought to be extended to migrants in an irregular situation who can meet the 1951 Refugee Convention’s refugee definition in a manner similar to trafficked persons.[[1]](#footnote-1)

Throughout this submission, the term ‘migrants in an irregular situation’ is shortened to ‘irregular migrants’, while acknowledging that irregularity is not an inherent feature of these migrants, but is ‘a condition that is *produced* through various processes of (ir)regularization’.[[2]](#footnote-2) When speaking of irregular migrants, the submission is concerned specifically with people who undertake dangerous migratory journeys due to a lack of legal migration pathways, who are unable to obtain international protection based on harm feared in their country of origin, or another form of leave to remain, and who, if returned, may re-migrate irregularly. The submission explores the possibility of regularising the status of such individuals by drawing analogies between their experiences and the experiences of trafficked persons.

**Trafficked persons’ asylum claims and their implications for other irregular migrants**

Non-nationals trafficked to their country of destination can be thought of as irregular migrants, as they often enter irregularly, or become undocumented as part of their trafficking experience. Unlike many other irregular migrants, trafficked persons often successfully claim refugee status based on their trafficking experience and future fear related thereto, thus regularising their status as refugees.[[3]](#footnote-3)

This submission is based on in-depth research on trafficking-based asylum claims from the UK and Germany.[[4]](#footnote-4) This research has shown that successful trafficking-based asylum claims from both jurisdictions have a number of features in common: a) risk of re-trafficking is established based on the presence of certain vulnerabilities; b) these vulnerabilities cause trafficked persons to experience serious harm; c) state protection against re-trafficking is acknowledged to entail a socio-economic dimension, i.e. protection against poverty/destitution; d) for the purpose of establishing a nexus to Refugee Convention grounds, ‘trafficked persons’ are conceived of as a particular social group (PSG) based on their previous trafficking experience.

Significantly, irregular migrants’ experiences are often strikingly similar to those of trafficked persons, so that it can be argued that they can satisfy the elements of the Refugee Conventions refugee definition in a similar way to trafficked persons, as outlined below.

**Vulnerabilities as indicators for re-migration risks**

Both UK and German courts rely on ‘indicators of vulnerability’[[5]](#footnote-5) in order to establish a risk of re-trafficking. These indicators can be summed up as young age, poverty, lack of employment opportunities and experience, having little education, having no family or other support networks in the country of origin, including being unmarried, or experiencing pressure from the family to earn money, having mental health issues, experiencing stigmatisation, and having illegitimate children.[[6]](#footnote-6) Some of these vulnerabilities will exist before the initial trafficking experience takes place, while others, specifically, mental health issues, stigma and illegitimate children, are brought about by that experience. These vulnerabilities are seen to converge, making it very difficult for the trafficked person in question to make a livelihood, thus leading to poverty and destitution and ultimately to a risk of re-trafficking.

Significantly, these vulnerabilities are not unique to trafficked persons, but may be present for other irregular migrants as well. Just like a trafficking experience, an irregular migration experience also leads to additional vulnerabilities such as stigma and mental health issues.[[7]](#footnote-7) As such, irregular re-migration, like re-trafficking, can be conceived of as a risk.

**Harm experienced during irregular migration**

As the UK Upper Tribunal has clarified with regard to trafficked persons’ asylum claims, ‘[i]t is not the poverty, destitution or vulnerability itself which is the basis of the claim, but the harm that ensues from that namely the exploitation’.[[8]](#footnote-8) However, harm in the trafficking context is not limited to the types of ‘exploitation’ listed in the international law definition of trafficking.[[9]](#footnote-9) The case law shows that in addition to sexual exploitation,[[10]](#footnote-10) such harm also includes abduction, beatings and rape,[[11]](#footnote-11) deprivation of liberty,[[12]](#footnote-12) starvation and forced injection of drugs,[[13]](#footnote-13) deprivation of medical treatment,[[14]](#footnote-14) and forced labour or domestic servitude.[[15]](#footnote-15)

Similarly, other irregular migrants may experience harms very similar to those experienced by trafficked persons, such as ‘physical violence [and] rape’,[[16]](#footnote-16) ‘abuse and violence by smugglers’, as well as kidnapping, ‘sexual violence and torture’ and forced labour.[[17]](#footnote-17)

**The socio-economic dimension of risk and effective state protection**

Although it is not the poverty or destitution itself which forms the basis of trafficking-based asylum claims, in the context of state protection, the socio-economic dimension of the risk of re-trafficking plays a major role. The state of origin’s ability (and willingness) to provide reception and reintegration measures for trafficked persons which may counter their vulnerabilities is an important part of the enquiry into effective state protection.[[18]](#footnote-18) Where such measures are not available, a failure of state protection is established.

Importantly, the case law shows that effective reception and reintegration measures are often not available for trafficked persons. As such, such measures are even less likely to be available to other irregular migrants.

**The Refugee Convention nexus**

In the case law analysed, the nexus element of the Refugee Convention itself is barely discussed, yet, trafficked persons are seen to be able to establish nexus, often by reference to membership of the particular social group ‘trafficked persons’.[[19]](#footnote-19) The case law sees the status of trafficked person as an innate characteristic, while struggling with the question whether this status also leads to differential social perception. Nevertheless, it appears that it is the experience of having been trafficked – and the vulnerabilities this entails – which is seen to connect to the fear of re-trafficking. As such, the PSG ‘persons in vulnerable situations’ may be the more appropriate nexus ground, which would also apply to other irregular migrants.[[20]](#footnote-20)

**Conclusion**

Acknowledging that re-trafficking risks are based in vulnerabilities and granting trafficked person at risk of re-trafficking refugee protection is a promising practice of regularisation of irregular migrants. Yet, other irregular migrants besides trafficked persons may be able to meet the 1951 Refugee Convention’s refugee definition in a manner similar to trafficked persons. They may have a well-founded fear of irregular re-migration, based on vulnerabilities which converge to leave them no other choice but to re-migrate. Their states of origin may be unable to protect against this risk where they are unable to effectively address irregular migrants’ vulnerabilities and their effects. Irregular migrants are likely to be at disproportionate risk of irregular re-migration based on previous irregular migration experiences which have added to their vulnerabilities. As such, they may be able to satisfy the Refugee Convention’s nexus requirement as members of the PSG ‘persons in vulnerable situations’. This possibility should be considered in efforts to regularise and protect migrants in an irregular situation.

1. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2). [↑](#footnote-ref-1)
2. Vicki Squire, ‘The Contested Politics of Mobility: Politicising Mobility, Mobilising Politics’ in Vicki Squire (ed) *The Contested Politics of Mobility: Borderzones and Irregularity* (Routledge 2011) 5; emphasis in original. [↑](#footnote-ref-2)
3. See e.g. Kaori Saito, ‘International Protection for Trafficked Persons and Those who Fear Being Trafficked’ (2007) UNHCR Research Paper No 149 <www.unhcr.org/research/working/476652742/international-protection-trafficked-persons-fear-trafficked-kaori-saito.html> accessed 9 February 2023; Anna Dorevitch and Michelle Foster, ‘Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law’ (2008) 9 Melbourne Journal of International Law 1; Udara Jayasinghe and Sasha Baglay, ‘Protecting Victims of Human Trafficking within a Non-Refoulement Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?’ (2011) 23(3) International Journal of Refugee Law 489. [↑](#footnote-ref-3)
4. Maja Grundler, ‘Protection for Irregularised Migrants? – Trafficking, Smuggling and Asylum’ (PhD thesis, unpublished) Queen Mary, University of London, 2022. [↑](#footnote-ref-4)
5. *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC) [169]. [↑](#footnote-ref-5)
6. See e.g. *HD* ibid; *AZ (Trafficked women)* *Thailand CG* [2010] UKUT 118 (IAC); *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC); *TD and AD (trafficked women) CG* [2016] UKUT 92; *TDL v SSHD* [2021] UKUT (IAC) PA/00358/2020; *HC v SSHD* [2021] UKUT (IAC) PA/05060/2019; *SSHD v LVC* [2021] UKUT (IAC) PA/06804/2019; VG Würzburg, W 8 K 04.30919, 19.09.2005; VG Stuttgart, A 7 K 1405/12, 16.05.2014; VG Madgeburg, 6 A 40/19, 28.01.2020; VG Stuttgart, A 1 K 8819/18, 5770443, 16.11.2020. [↑](#footnote-ref-6)
7. Liza Schuster and Nassim Majidi, ‘Deportation Stigma and Re-migration’ (2015) 41(4) Journal of Ethnic and Migration Studies 635; Sine Plambech, ‘Back From “The Other Side”: The Post-Deportee Life of Nigerian Migrant Sex Workers’ in Shahram Khosravi (ed) *After Deportation: Ethnographic Perspectives* (Palgrave Macmillan 2018); Sarah Ringold, ‘Refugee Mental Health’ (2005) 294(5) The Journal of the American Medical Association 646; Jovana Arsenijević et al, ‘“I Feel Like I am Less Than Other People”: Health-related Vulnerabilities of Male Migrants Travelling Alone on Their Journey to Europe’ (2018) 209 Social Science & Medicine 86. [↑](#footnote-ref-7)
8. *HD* (n 4) [171]. [↑](#footnote-ref-8)
9. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking Protocol) Art 3(a): ‘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’. [↑](#footnote-ref-9)
10. This applies to women as well as men. For example, in *FK v SSHD* [2015] UKUT (IAC) AA/08453/2014, a male minor was trafficked for sexual exploitation. [↑](#footnote-ref-10)
11. See, eg, *AM and BM* (n 5) [7] and [22]; *AZ* (n 5) [5]; *ES (s82 NIA 2002, Negative NRM*) [2018] UKUT 335 (IAC)[3]; *MP (Trafficking – Sufficiency of Protection) Romania* [2005] UKIAT 00086 [6]; VG Aachen, 2 K 2224/15.A, 28.12.2017 [9]; VG Augsburg, Au 7 K 17.30060, 13.12.2017 [18]; VG München, M 23 K 11.30389, 30.09.2013 [2]. [↑](#footnote-ref-11)
12. See, eg, *AM and BM* (n 5) [7] and [22]; *AZ* (n 5) [5]; *ES* (n 10) [3]; *MP* (n 10) [6]. [↑](#footnote-ref-12)
13. See, eg, *AZ* (n 5) [5]. [↑](#footnote-ref-13)
14. See, eg, *EK (Article 4 ECHR- Anti-Trafficking Convention) Tanzania v SSHD* [2013] UKUT 00313 (IAC) [27]; VG Augsburg, Au 7 K 12.30184, 18.09.2012, p. 3. [↑](#footnote-ref-14)
15. See, eg, *EK* ibid [59]; *HD* (n 4) [206]; *TT (Vietnam)* [2019] EWCA Civ 248, [2019] 2 WLUK 401 [6]; VG München, M 10 K 16.30286, 17.11.2016 [7]; M 23 K 11.30389 (n 10) [2]. [↑](#footnote-ref-15)
16. Vladislava Stoyanova, ‘Victims of Human Trafficking: A Legal Analysis of the Guarantees for “Vulnerable Persons” under the Second Phase of the EU Asylum Legislation’ in Céline Bauloz et al (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill Nijhoff 2015) 77. [↑](#footnote-ref-16)
17. UNHCR, ‘Desperate Journeys: Refugees and Migrants Entering and Crossing Europe via the Mediterranean and Western Balkans Routes’ (February 2017). [↑](#footnote-ref-17)
18. *AM and BM* (n 5) [180]; *PO (Trafficked Women) Nigeria CG* [2009] UKAIT 00046 [201]; VG München, M 11 K 06.51323, 11.09.2007 [35]; VG Düsseldorf, 27 K 2264/18.A, 15.12.2020; VG Cottbus, 9 K 1516/18.A, 11.01.2021; *LTD v SSHD* [2015] UKUT (IAC) AA/13630/2011; *TSN v SSHD* [2019] UKUT (IAC) PA/07665/2017. [↑](#footnote-ref-18)
19. *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 [56]; *HD* (n 4) [9]; *ES* (n 10) [60]; *TD and AD* (n 5) [119]. [↑](#footnote-ref-19)
20. Vulnerabilities can be conceived of as innate at the time of refugee status determination and ‘vulnerable’ persons may be perceived as being different from surrounding society, the stigma experienced by trafficked persons and other irregular migrants serving as an example for this. [↑](#footnote-ref-20)