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The trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?

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Introduction

"The trafficking of persons, particularly women and children, for forced and exploitative labor, including sexual exploitation, is one of the most egregious violations of human rights which the United Nations now confronts." So stated the United Nations Secretary-General Kofi Annan[1] at a recent international conference on transnational crime. Experts disagree on the full scope of the problem, as figures are difficult to ascertain due to the illicit nature of the exploitation. However, trafficking in human beings is a rapidly expanding, and incredibly profitable, violation of human rights.

Human trafficking is the third most lucrative activity of organized crime groups worldwide, following the trafficking of arms and drugs.[2] Trafficking for the purposes of sexual exploitation is also the least punished of the three above mentioned forms of trafficking; when human traffickers are made to serve time, which is rare, their sentences have been much lighter than those served by drug and arms traffickers.[3]

Although human trafficking has been the focus of world attention since the first international counter-trafficking treaty was signed in 1904,[4] attention in the international arena has increased dramatically since the 1990s. Regardless of the international commitments to diminishing trafficking in humans, studies show that the phenomenon is increasing as the disparity between wealth and poverty grows between and within countries.[5]

As poverty disproportionately affects women and their children,[6] it is not surprising that, following trends in migration, women would be pushed to migrate in the hopes of acquiring economic security for themselves and their families. Although the push and pull factors of migration are similar for men and women, their migration experience can differ greatly. For millions of women this economic migration ends in sexual exploitation and debt bondage, with no international legal framework in place to address their protection needs.

Although the majority of trafficked women could be safely repatriated, a number of trafficking survivors suffer a well-founded fear of persecution at the hands of their traffickers upon return to their country of origin. Legislation to meet the protection needs of trafficked people is sparse and inconsistently implemented. The

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[1] From statement released December 12 2000, Palermo Italy. Deen, Talif (2000). *Trafficking in Human Beings Reprehensible, Says UN's Kofi Annan*. IPS.

[2] United Nations Children's Fund/United Nations Office of the High Commissioner for Human Rights/Organization for Security and Cooperation in Europe-Office for the Democratic Institutions and Human Rights (UNICEF/UNOHCHR/OSCE-ODIHR). (2002). *Trafficking in Human Beings in Southeastern Europe*.

[3] According to a UNHCR Working Paper (Morrison & Crosland, 2001), surveys show that in recent years, when convictions for human trafficking have occurred, the sentences have become more aligned with other forms of trafficking.

[4] 1904 International Agreement for the Suppression of White Slave Traffic, Amended by the 1949 Protocol. As per Refugee Reports (2000). '*Trafficking in Women and Children: a Contemporary Manifestation of Slavery'*. Volume 21, No 5.

[5] UNICEF/UNOHCHR/OSCE-ODIHR (2002). Op. cit.

[6] 70 per cent of the world's poor are women and their dependent children, according to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). Lantigua, J. (2000). '*Globally, Women's Condition not Sugar, Spice'*, Contra Costa Times, March 12.

international refugee regime now in place could serve as a back-up protection mechanism for this particular social group, but at present trafficked women are rarely recognized as refugees. At a time when international organizations are stressing the importance of addressing the protection and human rights needs of trafficked women, European governments are striving to harmonize their migration and asylum laws. It is presently an opportune period for the European Union to consider an interpretation of asylum laws that respects the protection and human rights needs of women trafficked into prostitution against their will, which could also work in the favor of European governments by decreasing organized crime activity within their borders.

Although research has taken place regarding the refugee-trafficking nexus, these studies have uniformly concentrated on the trafficking of women who have already been granted refugee status.[7] This paper strives to address this junction from another perspective: that of granting refugee status to trafficked women with a well-founded fear of persecution.

Root causes of migration

According to the International Organization for Migration, 2.5 percent of the world's population are international migrants.[8] Theories abound regarding why people migrate across national borders. These arguments run the gamut from maintaining that migration occurs in the interest of maximizing an individual migrant's earning potential; to reasoning that family members migrate in order to diversify risk for their family unit; to contending that people make their decisions to migrate based on political, social and economic forces that are out of their control.

The current approach toward economic development could have a destabilizing affect on populations. Annually, partially due to economic development policies supported by the current power of neo-liberal economists at the World Bank and the International Monetary Fund, 30 million people migrate from the countryside to cities in their own countries.[9] By 2025, 60 per cent of the world's population will be living in cities,[10] estimates the United Nations. As employment and infrastructure in the world's cities are unable to absorb this mass migration, most of these workers find jobs in the informal sector, resulting in a global figure of 900 million underemployed.[11]

Disappointment in the lack of opportunities in the city, as well as the uprooting effect of the original rural-urban migration acts to break the psychological security barrier to migration abroad. While potential migrants develop networks of family members or

[7] i.e. the trafficking of refugees directly out of refugee camps or urban refugee centers

[8] International Organization for Migration/United Nations (2000). *World Migration Report 2000*, p 18. This number rises to seven per cent if one includes estimates of undocumented migrants. Harris, Nigel (2002). *Thinking the Unthinkable*. IB Taurus. As per Baird, Vanessa (2002). *Fear eats the Soul.* New Internationalist, issue 350. October. p. 9.

[9] United Nations (1994). *World Urbanization Prospects: the 1994 Revision*, United Nations Population Division, New York.

[10] United Nations (1994). Op. cit.

[11] ILO (2000). *World Labour Report*. Geneva, Switzerland.

acquaintances from home areas who have successfully relocated abroad, the possibility of an international move becomes increasingly attractive and less risky.[12]

The United Nations Development Program's *Human Development Report* of 2000*,* while discussing the increasing gap between the poor global south and the rich global north, has argued that the mounting inequalities should be considered human rights violations.[13] As life expectancy is dropping in the global south and rising in the global north, and the wealth of the richest 200 people in the world is ten times that of the combined wealth of the 582,000,000 poorest,[14] a transfer of funds from the rich global north to the poor global south is desperately needed.

However, as documented in the HDR, there has been a massive shift away from a global-north to global-south allocation of development resources. While these global inequities exist, it is unlikely that we will see any great reduction of migration as citizens from less developed countries seek out economic opportunities.

Young women are subject to the same push-pull factors for migration as the rest of the population in poor countries. However, as will soon be argued, women can be particularly vulnerable while migrating. In some circumstances, this vulnerability can lead to trafficking for sexual exploitation.[15]

Forced migrants and voluntary migration

Migration is not always a fully voluntary phenomenon, as seen with refugees and internally displaced persons. IOM estimates that there are more people in need of humanitarian assistance and protection than a decade ago, although the actual numbers of persons granted refugee status has decreased from 17 million in 1990 to 14 million in 2000. However, internally displaced persons have increased, outnumbering refugees by more than two to one.[16] As the number of asylum seekers worldwide is multiplying, the number of people who are granted refugee status is falling.[17] Of those granted refugee status, seven out of ten are hosted by low-income countries.[18]

The decreasing number of recognized refugees in Europe is seen as a victory by some politicians, but in actuality seems to have led to more asylum seekers trying any means necessary, regular or irregular, to access European soil. The nationalities of those most often smuggled or trafficked into the European Union closely corresponds to the

[12] IOM/UN (2000). *World Migration Report*. Op. cit. p. 20. As we will see in the section on trafficking below, these same assistance networks are copied by traffickers in gaining the trust of women and their families for promised work abroad. In many cases, it is only upon arrival that women become aware of the deceit and their debt for having accepted such 'help'.
[13] Brittan, Victoria and Elliot, Larry. (2000). *Rich Live Longer, Poor Die Younger in a Divided World*. The Guardian, June 29.
[14] Brittan, Victoria and Elliot, Larry. (2000). Op. cit.
[15] Pearson, Elaine (2001). *Trafficking/Slavery*. New Internationalist. Issue 337, August 2001.
[16] Internally displaced persons often have similar conditions to refugees, but are not considered refugees as they have not crossed national borders.
[17] IOM/UN (2000). *World Migration Report*. Op. cit. p. 15.
[18] According to 2002 UNHCR Yearbook. One World South Asia (2002). *Richer Nations Urged to Do More to Help World's Refugees*. November 12.

nationalities most often given asylum worldwide,[19] with most asylum seekers either smuggled or trafficked into the European Union.[20]

The feminization of poverty and international migration

Worldwide, poverty is increasingly and disproportionately affecting women. Of the 1.3 billion absolute poor in the world today, 70 per cent are women and their minor dependents.[21] This poverty is due, in part, to women's lack of access to formal education and job opportunities in their countries of origin. Further, women fail to fully benefit from market 'reforms' due to their lack of economic power in their communities and families.[22] At the same time, women are the principal segment of the population affected by the massive cuts in social spending by governments following structural adjustment or similar reforms. Due to gender inequities and relative powerlessness, 'people who have little to lose may be willing to take great risks'.[23]

Women are also increasingly migrating to cities within their own countries. While this most often occurred in the past as women accompanied their partners, women are progressively migrating for economic reasons and finding that formal sector jobs are even more closed to them than to their male counterparts due to their lack of schooling or other discrimination. Therefore, patterns show that the informal sector is largely receiving female internal migrants, and women are taking jobs with a lack of job security or benefits.

Female-headed households are also on the increase in the majority world of developing countries, and these households tend to be poorer and support more dependents than male-headed households. This is resulting in what is being called the 'feminization of poverty'. The internal uprooting, lack of a support network, and increased financial responsibility adds to the vulnerability of women to be recruited by a trafficker, in the hopes of improving her family or personal economic situation.

The European Commission contends that contributing factors to international female migration include female-focused unemployment, extreme poverty, and the marginalization of women in source countries.[24] This is particularly true when analyzing countries in transition from a community-based to an individual-based economic system. Following the collapse of communism in the USSR, and in communist states supported by the USSR, economic controls were imposed that led to great unemployment, social and financial insecurity.

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[19] Morrison, John and Crosland, Beth (2001). *The Trafficking and Smuggling of Refugees: the end game in European asylum policy?* Commissioned by UNHCR. Pre-publication edition. p. 27.
[20] Refugee Reports (2000). Op. cit.
[21] European Women's Lobby (2001). *Migration, trafficking and social development, what is at stake for women.* Brussels, Belgium.
[22] UNIFEM (2002). *Gender and Macroeconomics.*
[23] Swedish Ministry for Foreign Affairs (2001). *Trafficking of Women and Children in Asia and Europe*. Stockholm. p. 8.
[24] Commission of the European Committees (1996). *'Communication from the Commission to the Council and the European Parliament: On Trafficking in Women for the Purpose of Sexual Exploitation'*. Brussels, Belgium.

Those to be most affected by this economic transition were women. According to the U.S. Agency for International Development, between 70 and 80 per cent of currently unemployed Russian workers are women.[25] Similarly, in Ukraine and other Eastern European countries, women make up 70 per cent of those involuntarily unemployed.[26]

This is equally true for Moldova, considered to be the main source of trafficked women for Western Europe, the Balkans and the Middle East. At a time when 25 per cent of the workforce has immigrated internationally, news reports contend that the poorest Moldovans are selling their own organs, and 80 per cent of households live below the poverty line.[27]

Not surprisingly, patterns have also emerged that as women are struggling with poverty and are internally displaced for economic reasons, international migration of women is also on the rise. Not only is there a feminization of poverty, but a feminization of migration, as well. Female patterns of migration contribute to the overall patterns outlined previously; women, too are affected by unemployment and poverty, and depend on migrant networks for information regarding how best to migrate to the global north.

When one adds into the equation the disproportionately higher levels of poverty among women worldwide, the family responsibility for both their children and elderly relatives,[28] the lack of formal job opportunities in countries of origin and the lower levels of education available to women, it is not surprising that migrant streams which have typically been male are gradually becoming filled by women.[29] In fact, over half of the world's migrants are women, and the numbers of unaccompanied women who migrate are on the increase.[30]

The majority of women who migrate internationally do not succumb to traffickers. Discrimination against women continues to affect these migrants during their time outside their country; female migrants generally work in less favorable conditions for less pay than their male counterparts. However, they are able to aid their families financially, and their standings within their own communities tend to increase upon return to their countries of origin.[31] Due to the relative success of female migrants, it is not surprising that other women would put themselves at risk for trafficking by attempting to follow a similar path. Further, due to the stigma attached to prostitution in most countries of origin, repatriated trafficked women discuss the exact nature of their experiences abroad with difficulty, so the risks are not fully understood by other women considering a similar relocation.

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[25] Refugee Reports (2000). Op. cit.
[26] Lebed, Mikhail Adamovic (1998). *A Few Observations about Trafficking in Women by a Criminologist.* La Strada, Ukrainian NGO.
[27] Baker, Peter (2002). *Moldovan sold kidney to buy dad's medicine*. Toronto Star Newspapers, Ltd. The Hamilton Spectator. November 9.
[28] Women's Commission (2001). *Evaluating the implementation of UNHCR's Guidelines on the Protection of Refugee Women.*
[29] Castles, S. and M. Miller (1998). *The Age of Migration: International Population Movements in the Modern World*, 2nd ed. Guildford Press, New York, NY.
[30] IOM/UN (2000). *World Migration Report*. Op. cit. p. 49.
[31] UNICEF/UNOHCHR/OSCE-ODIHR. Op. cit. p. 7.

Human trafficking

In the UN Convention against Transnational Organized Crime (the Palermo Convention), adopted by the UN General Assembly in 2000, trafficking in persons was defined as 'the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other means of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability… 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.' [32]

Although exact figures are impossible to acquire due to the illicit nature of trafficking, it is estimated that from 700,000 to four million people are trafficked across borders every year.[33] Approximately 120,000 women and children are trafficked into the European Union every year,[34] with half a million trafficked women currently residing in Western Europe.[35] Of these women, 75 per cent are under the age of 25, of whom a great number are teenagers.

Every country in the world is affected by trafficking, either as a country of destination, transit or origin, or in combination. With an ever widening gap between the rich and the poor both nationally and internationally, declining socioeconomic status of women in CEE/CIS countries of origin, increasing profits for traffickers, lack of government action and, in some cases, government complicity, the trafficking in women is on the increase.[36] According to a UNHCR study, the CEE/CIS area is particularly affected as it has become the fastest growing source region for trafficked people.[37] Established trafficking routes are constantly changing as flexible traffickers change tactics and entry points in order to continue their exploitation of millions of people. Identified trafficking and smuggling routes from the CEE/CIS region to the European Union include:[38]

- *Albania and 'the Balkan Route'*. Widely used by organized crime rings.
- *The 'Eastern Route'*. With transit in Moscow, Belarus and Poland. Mainly used by African and Asian migrants. Poland is a transit country.
- *The 'Southern Route'*. Used by Balkan residents and Romanians. Poland is a transit country.

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[32] United Nations (2000). General Assembly. Document A/55/383.

[33] U.S. Department of State (2002). *Victims of Trafficking and Violence Protection Act 2000, Trafficking in Persons Report*. June. p. 1.

[34] European Union Press Release (2002). *EU urges higher priority for fight against trafficking in women and children.* Brussels, Belgium. A tremendous amount of trafficking occurs within CEE and CIS countries, as well. In the Balkans, with the introduction of peacekeeping forces and international aid workers, countries that had never before been destination countries began to receive trafficked women from other, poorer countries in the area.

[35] Quoting IOM figures. United Nations Economic and Social Council (2000). *Integration of the Human Rights of Women and the Gender Perspective.* February. p. 24.

[36] Caldwell, Gillian; Galster, Steven; and Steinzor, Nadia (1997). *Crime & Servitude: An Expose of the Traffic in Women for Prostitution from the Newly Independent States.* Global Survival Network. Washington, D.C.

[37] Morrison, John and Crosland, Beth (2001). Op. cit. p. 8.

[38] It should be noted that the Balkan region is also a significant destination point for trafficked women. Further, the EU is a transit region for some routes where the United States serves as a destination country.

- *via Croatia and Slovenia.* With Hungary as the most significant transit country into Austria;
- *via the Czech and Slovak Republics:* With transit through the Ukraine. Used by migrants from the Middle East, Far East and the Soviet Union;
- *via Albania, Hungary or the Czech Republic:* With Turkey, Bulgaria and Romania as significant transit countries;
- *The Mediterranean 'Blue Route':* crosses the Mediterranean. Migrants from Africa and Asia. Transit through North Africa to Europe via Greece, Italy, Spain and more recently Portugal;
- *The 'Northern or Baltic' routes*: with transit through Moscow and the Baltic States into Scandinavia.[39]

Trafficking and smuggling

Trafficking differs greatly from smuggling, as international bodies and non-governmental organizations are taking pains to point out. Whereas migration through smuggling rings is primarily voluntary and initiated by the potential migrant, trafficking is generally involuntary in nature; victims of trafficking are coerced, sold or at the most rare and extreme, kidnapped into their work. Coercion can take place through deceit, sexual abuse, torture, starvation, imprisonment, and threats of violence against family members, among some tactics used by traffickers.[40] Although most of the women trafficked are aware that they will be migrating, they are deceived about the nature of the work they will be forced to perform, as well as their future working conditions.

An additional difference between smuggled and trafficked migrants lies in entry to the country of destination. Women who are trafficked to be prostituted enter the countries of transit and destination both through legal and illegal avenues. Through the issuance of tourist and student visas, as well as forged documents, many of the women who will later be exploited pass borders through regular means while accompanied by their exploiters. This differs greatly from the increasingly common picture of smuggling seen in Europe, with thousands of immigrants being smuggled past borders by boat or truck.

One of the most striking differences between smuggling and trafficking is that, in the vast majority of cases, smuggled adult migrants are male, while trafficked adult migrants are female. Further, the nature of the action is fundamentally different. Whereas smuggling is an action with the intention to assist in the border crossing (albeit in a sometimes oppressive or life-threatening way, for exorbitant fees) the intention of trafficking is oppression of the victim and the ensuing financial gain following migration. Therefore, the focus of smuggling is entry into the destination country, while the focus of trafficking is the exploitation of the migrant upon arrival.[41]

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[39] Secretariat of the Budapest Group (1999). *The Relationship between Organized Crime and Trafficking in Aliens*. ICMPD, Vienna.

[40] Raffonelli, Lisa (2002). Op. cit.

[41] Secretariat of the Budapest Group (1999). *The Relationship between organized crime and trafficking in aliens*. International Centre for Immigration Policy and Development (IMPD), Vienna. June. As per Morrison, John and Crosland, Beth (2001). Op. cit.; also UNICEF/UNOHCHR/OSCE-ODIHR. (2002). Op. cit. p. 3.

The root causes of migration are similar for both smuggled and trafficked migrants. When immigration is discouraged by governments through visa, financial or passport regulations, determined migrants can turn to illegal means, or are vulnerable to exploiters promising safe passage and opportunities abroad. For women wishing to better their economic situation, the push and pull factors of migration can lead them to accept the assistance of people who intend to exploit them.

There is a great deal of overlap in the distinction between smuggled migrants and trafficked migrants. In some cases, trafficked migrants may be smuggled into the country of destination. Additionally, smuggled migrants may be victims of abuse and exploitation similar to that which threatens trafficking victims. However, the general patterns that emerge suggest that different approaches are needed to tackle the problems facing smuggled migrants and trafficked migrants. As governments act to reinforce their commitments to impenetrable borders, policy is being developed to counteract illegal migration.

However, due to the exploitation and deceit involved in the presence of trafficking survivors, as well as the substantial difference in their security needs, it is essential that decision makers develop policy that also acknowledges the human rights responsibilities of the host state:

> Trafficking in human beings must not be seen primarily or exclusively from the perspective of national security; it must not be viewed merely from the point of view of national protective interests; it must not be seen only as a fight against organized crime and illegal migration. Human trafficking is first and foremost a violation of human rights.'[42]

Trafficking to Western Europe

There is an increasing presence of national and transnational organized crime groups in human trafficking. Human trafficking activities are often combined with other illegal activity, such as drug and arms trafficking,[43] and profits from trafficking are partly used to procure equipment, legally invested, or used to further the illegal activity through corruption.

Authorities have observed that organized crime groups have moved the focus of their activities from immovable goods such as real estate, to moveable goods such as drugs, arms, and human beings.[44] Of moveable goods, humans are the least risky; traffickers in humans face little chance of prosecution, relatively lower fines, and a high resale value of the women they traffic for sexual exploitation.[45]

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[42] UNICEF/UNOHCHR/OSCE-ODIHR. (2002). Op. cit. p. xiii.
[43] IOM report (2001). *Applied Research and Data Collection on Trafficking in Women for Sexual Exploitation To, Through and From the Balkan Region (A.R.T.B.). Country Report Italy*. Rome. p. 7.
[44] Vigna, Piero Luigi (2002). *Judicial co-operation in the fight against organised crime, especially with respect to the trafficking in persons.* Report presented at the International Conference on Preventing and Combating Trafficking in Human Beings.
[45] Vigna, Piero Luigi (2002). Op. cit.

Women have little decision making power or recourse in being sold to another crime ring; this method is often used to break any ties the woman has made in the area where she is working, to increase her debt burden, or to disorient her so that escape is difficult. Repeated trafficking across national borders is also useful from the criminals' point of view, because if the victims are less able to communicate through language, then they are less independent and less likely to incriminate traffickers.

Although recruiting practices differ greatly from one country to another, some common patterns emerge, particularly within the CEE/CIS region. This area is dominated by criminal networks that have taken trafficking out of the hands of individual exploiters for massive financial gain. These crime rings, while previously remaining deeply divided by ethnic origin (including, in part, Albanian, Italian, Turkish and Russian organized crime networks) are now collaborating 'transnationally' to maximize their profits.[46] Giusto Sciacchitano, the Italian Antimafia Deputy Prosecutor contends, 'this phenomenon somewhat represents the dark side of globalization: it is on the increase also due to the fragile economies of some countries, the huge profits gained by traffickers, the few risks and infrequent convictions upon them, and the social condition of women.'[47]

These organized crime groups function by first recruiting potential migrants in their own countries of origin. Trafficked women are often approached by members of their own communities, lured by deceitful promises of jobs in the service sector as waitresses, nannies, or caregivers for the elderly. Traffickers use the traditional form of migrant networks to recruit victims, by utilizing trustworthy members from the same or a similar community who have worked abroad to make first contact with women for the purposes of recruitment. Although most traffickers are male, a growing number are female,[48] and offer assurances of jobs in the global north, transportation and housing assistance, as well as financial help.

Following recruitment, the original group of traffickers often leave their victims with other crime groups with whom they have working agreements, who assume responsibility for the transfer of the victims across borders. Collaborators also include government officials and businesses that have been corrupted by profits offered by the crime networks. 'It is commonplace for government officials in some countries to accept bribes from traffickers, help provide false documentation, and patronize brothels linked to trafficking rings. In addition, local police often fear reprisals from criminal gangs.'[49]

Although generalization of conditions of trafficked women is necessary on some level in order to comprehend the situation as a whole, it is also important to note that the conditions of trafficked women differ significantly, with a great deal of grey area existing between the slave-like conditions of some forced prostitutes and the semi-voluntary sex work of others.[50]

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[46] Sciacchitano, Giusto (2002). Italian National Antimafia Deputy Prosecutor, address to the IOM International Conference on Prevention and Fight Against the Trafficking in Persons, Ashford, UK. 20-22 May 2002.
[47] Sciacchitano, Giusto (2002). Op. cit.
[48] UNICEF/UNOHCHR/OSCE-ODIHR. (2002). Op. cit. p. 9
[49] Raffonelli, Lisa. (2002). Op. cit.
[50] IOM Country Report Italy (2001). Op. cit. p.10.

Once forced into prostitution, women are prohibited from leaving by a variety of methods. Traffickers typically assist victims to transfer abroad by providing for the costs of transportation, passport and visa acquisition. By accepting this arrangement, trafficking victims find themselves in a situation of debt bondage, owing what can be tens of thousands of dollars,[51] once they arrive at the country of destination. Traffickers typically force their victims to work until the debt is paid off, taking a cut of their profits while the victim's debt regularly mounts to cover the cost of clothing, medical expenses, housing and food, and victims rarely manage to pay off their debt.[52]

Traffickers frequently use threats against family members in the country of origin, brutal beatings and sexual violence to control women who have been trafficked for prostitution. Additionally, traffickers employ deceit, isolation, blackmail and psychological pressure to control the women they have prostituted.[53] Although many trafficked women enter the country of destination legally, upon arrival their documents are taken by the trafficker for 'safekeeping'. Traffickers instill fear of the authorities on trafficked women due to their lack of working papers, further hindering contact with police. This is particularly effective in destination countries in Western and Eastern Europe where prostitution is illegal and women are afraid of exposure.

As governments develop tactics to identify and prosecute traffickers, recent studies have shown that traffickers operating in Europe are changing their recruiting tactics. Many women find it difficult to identify themselves as survivors of trafficking, as they have established romantic relationships, even resulting in marriage, with their traffickers. Women trafficked by their 'boyfriends' are more apt to blame themselves for bad decision-making rather than recognize their victimization by a trafficking ring.[54]

Little is known about the clients creating the demand for young and 'exotic' sex workers, as studies focus more on the foreign supply of prostitutes than on domestic demand. It has been observed, however, that a great number of trafficked women seek and receive aid through their clients to escape their traffickers[55]. Although many of the information campaigns and projects currently in place throughout Europe target female victims of trafficking, few European countries are targeting the users of sexual services. Sweden, however, is taking a stand much different from its fellow European countries, in suggesting that rather than only focus on limiting the supply of prostitutes, countries should also look at their own residents and focus campaigns on the clients[56]. By addressing issues such as the image of women in the media, male-female power and control, and the damage caused by clients' actions, States could act to minimize demand, as well. This could be particularly important for some

[51] Raffonelli, Lisa (2002). Op. cit.
[52] Refugee Reports (2000). Op. cit.
[53] Human Rights Watch, Women's Rights Division (2001). *Recommendation regarding the Proposal for a Council Framework Decision on Combating Trafficking in Human Beings.*
[54] Pearson, Elaine (2002). *Human Traffic Human Rights: Redefining victim protection*. Anti-Slavery International. London, UK.
[55] Markgjonaj, Emila (2002). Psychologist in Counter-Trafficking, IOM Rome. From interview on August 6.
[56] This position is also supported by the United Nations High Commissioner for Human Rights in a recent report to the UN Economic and Social Council. UNHCHR (2002). *Recommended Principles and Guidelines on Human Rights and Human Trafficking.* E/2002/68/Add.1. May 20.

destination countries such as Greece, where it is estimated that one third of sexually active males regularly purchase sexual services from prostitutes.[57]

Protection needs

A factor relevant to trafficking survivors is their need for safeguarding, as the organized crime groups increasingly in control of human trafficking regularly threaten the lives of the women who are able to flee from sex work upon their return home. Further, government and/or police collaboration with wealthy traffickers in CEE and CIS countries of origin and transit is widespread, and adds to the fear of repatriation. In a radio address in the late 1990s, Russian President Boris Yeltsin warned that the Russian judicial system is 'defenseless against the pressure of criminal structures', particularly as many of the Russian mafia members are former KGB agents with strong contacts within the government.[58] In Southeastern Europe, estimates are that 70 per cent of trafficked women either cannot or do not intend to return home, due to a fear of persecution and the lack of trust in the local authorities to provide adequate protection.[59]

Corruption of local authorities and border guards by the moneyed criminal rings has a tremendous impact on the protection of women being trafficked or repatriated following trafficking. Reports by trafficked women include accounts of authorities ignoring the exploitation, delivering repatriated trafficked women back to traffickers, utilizing the sexual services of the women involved and even participating in the trafficking itself.

Further, there has been some evidence of collusion by authorities in host governments, as with a Greek official in Moscow caught selling visas to traffickers.[60] The 2001 International Corruption Perceptions Index shows that most of the CEE or CIS countries of origin for trafficking victims included in the survey have a high level of official corruption, where corruption is defined as '…the misuse of entrusted power for private gain.'[61] This corruption leads to a genuine fear, for some trafficked women, regarding the ability or willingness of the State to provide for their protection upon repatriation.

According to a report co-sponsored by UNICEF, as governments often tie protection access to incrimination of traffickers and 'voluntary' repatriation, those who refuse to leave the host country or are fearful to turn in their traffickers are not identified as victims of trafficking by police. Without this identification, they are not referred to IOM or other organizations working to meet the needs of trafficked women.[62] This has resulted in numerous cases of trafficking survivors being labeled as illegal migrants and deported, only to be met at the border by their traffickers, and re-trafficked with additional debt burdens.[63]

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[57] Athens News Agency (2002). *'Seminar in Athens on human trafficking, sex trade'*. December 12.
[58] Caldwell, Galster and Steinzor (1997). Op. cit.
[59] UNICEF/UNOHCHR/OSCE-ODIHR (2002). Op. cit. p. 146.
[60] Caldwell, Galster and Steinzor (1997). Op. cit.
[61] Transparency International (2002). *Frequently asked questions about Corruption.* Berlin, Germany. April.
[62] UNICEF/UNOHCHR/OSCE-ODIHR (2002). Op. cit. p. 142.
[63] UNICEF/UNOHCHR/OSCE-ODIHR (2002). Op. cit. p. 142.

The grounds for survivor refusal of assisted return are numerous, but certainly include fear of personal persecution. These fears cannot be taken lightly. In Italy, a destination country where protection for trafficking survivors is a priority, 189 foreign sex workers were killed in 1999.[64] However, witness protection programs, when accessible by trafficked women, are often unsuitable for this group as they are based on an assumption that the survivor to be protected can assimilate into a new environment.[65]

There is little incentive for women who have been trafficked to cooperate with criminal investigations of their traffickers, as testifying often increases the risks of reprisal upon repatriation. As most countries offer little protection to trafficking survivors, and immediately arrange for their return to their countries of origin, even in the case of an ongoing trial, the benefits for trafficked women of incriminating their exploiters are minimal.

> As a counselor from a German group assisting victims of trafficking to testify in court explained: "Yes, they are afraid… They know that this network is still existing. They get this information from the pimp: 'Even if I am called by the police, for example, there is still my brother and he will find your family when you are returning to your home country, if you will accuse me.' And of course, the women know the pimp is from the neighboring street… they know that there is still the family network.."[66]

The cases of reprisals are much more numerous and serious in countries of origin than countries of destination, as even the basic protection mechanisms are often missing. In cases where the protection of trafficking survivors is weak, traffickers have corrupted officials, and trafficking survivors retain debts to their traffickers or have testified against them, their fear of physical harm or further exploitation is palpable. In fact, in Eastern Europe, 30 – 50 per cent of trafficking survivors are eventually re-trafficked following repatriation.[67]

Family members of trafficked women are also subject to reprisals in countries of origin. Children that trafficked women have been forced to leave behind with other family members are often the targets of organized crime rings seeking reprisals against women who have chosen to implicate them with authorities. 'The reprisals against family members in countries of origin generally consisted of intimidation by traffickers or alleged officials, threats, bribes, violence and damage to property. Local police seemed ill-equipped to deal with the protection issues involved, and corruption was a particular issue… The most effective way of protecting family members from reprisals was to relocate them either within their own country or in the country of destination.'[68]

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[64] *IOM Country Report Italy* (2001). Op. cit. p. 7.
[65] Pearson, Elaine (2002). Op. cit. p.48
[66] Caldwell, Galster and Steinzor (1997). Op. cit.
[67] UNICEF/UNOHCHR/OSCE-ODIHR (2002). Op. cit. p.144.
[68] Pearson, Elaine (2002). Op. cit. p.48

Strong calls are being heard throughout Europe and other receiving areas for official reform of protection strategies for this particular social group, and some States are heeding this call with stronger legislation to protect these survivors of human rights abuse. However, the implementation of such protection is discretionary, and largely depends on the government and officials in place at the time of first encounters with foreign sex workers, as trafficked women are rarely otherwise aware of the existing legal framework that could serve to aid them. IOM reported in 2000 that regardless of the legislation in place in Italy, in most cases the Italian police were continuing with immediate deportations of Albanian foreign sex workers.[69] The targeting, apprehension and deportation of hundreds of prostitutes from the Balkans continues today.[70]

Seeking solutions to trafficking

The international community is striving to address the issues of trafficking through legal instruments, including most recently the commitments at the UN Millennium Summit to Fight Transnational Crime, including Trafficking in Human Beings; the UN Convention against Transnational Organized Crime; and the optional UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women. However, governments are too often pursuing strategies that target the legal and immigration-based issues of trafficking, but not fulfilling the human rights protection responsibilities of host states.

Europe has seen a rise in recent years of negative popular opinion regarding immigrants from non-EU member states. The reluctance toward receiving migrants and refugees occurs at a time when Europe is rapidly aging. The 'greying of Europe' could profoundly affect the European economy as a small working population struggles to meet the needs of a much larger retired population.[71]

Anti-foreign sentiment has grown in Europe since the attacks in the United States in September 2001, as governments in Europe have justified their anti-immigration and asylum measures with the renewed need to protect their States from terrorism. These measures have acutely affected the treatment of migrants and asylum seekers in Europe.[72]

It is not surprising, therefore, that a strong focus has been put on migrants entering by irregular means into the European Union. Tackling both smuggling and trafficking

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[69] IOM Rome (2000). *Measures to Prevent and Combat Trafficking in Women and Minors for Sexual Exploitation: Emergency Health and Information Campaign.* Final Report to the Italian Ministry of Foreign Affairs. Rome. p. 13.

[70] Associated Press World News (2002). *Mass Italian police operation snags hundreds of immigrant prostitutes.* Rome. August 15, 2002. Provided by the Protection Project 2002.

[71] 'The European Commission estimates that the EU working population will start to fall in the next 10 years and decline to 223 million people by 2025 from 225 million in 1995. During the same period, the number of over-65s will continue to rise to reach 22 per cent of the population by 2025 from 15 per cent in 1995. The problems of an aging population, with not enough workers to pay for retired people's pensions, have led many EU leaders to consider relaxing immigration rules.' Hargreaves, Deborah (2001). *Europe reinvented: common immigration policy – survey.* Financial Times. Brussels, Jan 26.

[72] Human Rights Watch (2002). *Refugees, Asylum Seekers, Migrants and Internally Displaced Persons: The Year in Profile.*

has been the focus of considerable interest on the part of the European Union in the last decade. This attention has been appreciated by advocates for the rights of trafficked women. However, many of the declarations, conventions, and treaties that have been reached since 1990 focus on the needs of the governments and their voters increasingly critical of immigration. While the need to fight the criminal rings is widely acknowledged, with strong legislation enacted in order to counter their migration activity, equally strong legislation is lacking regarding meeting the needs of those who have been victimized by these smugglers or traffickers.

In addition, for societal solutions to be durable, governments must also focus their attention on changing societal attitudes. 'Because addressing the gender inequities that contribute to GBV [Gender-based Violence] is fundamental to addressing the perpetuation of GBV, any programming requires a long-term commitment to awareness-raising and advocacy, as well as recognition that addressing GBV includes providing women and girls access to power. Inasmuch as GBV programming should be integrated across sectors, so should efforts at gender mainstreaming. However, it is more often the case that international institutions and organizations, even if they theoretically support women's empowerment as a goal of programming, do not challenge the structures that reinforce women's subordination.'[73]

The Refugee Convention

In 1951, responding to the massive human rights violations and displacement of millions of people in Europe, official representatives met in Geneva, Switzerland to draft the UN Convention relating to the Status of Refugees. This convention, along with the 1967 New York Protocol establishes the right to asylum due to a well-founded fear of persecution based on five grounds. The Refugee Convention states that it is not enough to prove a well-founded fear of persecution, but that persecution must be based on reasons of race, religion, nationality, political opinion or membership in a particular social group.

Central to the Refugee Convention is the principle of 'non-refoulement', prohibiting governments from forcibly returning refugees subject to torture or death upon repatriation.[74] The flexible Refugee Convention and 1967 Protocol, and the later 1969 OAU Convention and 1984 Cartagena Declaration, have been interpreted to safeguard those requiring international protection due to civil war, international war, conditions of generalized violence, or other serious strife, as humanitarian needs have changed.[75]

[73] Ward, Jeanne (2002). *If not now, then when? Addressing Gender-based Violence in refugee, internally displaced, and post-conflict settings.* Women's Commission for Refugee Women and Children.

[74] In 1977, the UNHCR extended the principle of non –refoulement to include those subject to persecution if returned to their country of origin, irrespective of whether they have been granted formal recognition as refugees.

[75] IOM/UN (2000). *World Migration Report*. Op. cit.

Gender-based persecution

The threshold of the five convention grounds has served as a filter to allow refugee determination proceedings to occur only in the cases of some people in need of international protection. People fleeing economic or environmental crises are generally excluded from the possibility of accessing the procedures leading to the granting of refugee status. Further, access to asylum has historically been guided by male protection needs.[76] The gender-partial basis for defining the five convention grounds has recently become the focus of much analysis both within agencies working directly with refugees, and within legal and academic circles.

To fully understand the concept of gender-based persecution, it is necessary to differentiate between the concepts of 'sex' and 'gender'. Whereas sex is defined on a biological level, gender is a cultural construction taking into account power relationships between men and women. Gender is further defined by how power affects the identity, status, roles and responsibilities of both men and women. The idea of gender is not shared between all people, but holds social meaning for individual cultures, and is adapted as the culture changes.[77]

It is equally important to analyze the concept of 'persecution'. According to UNHCR, it is not necessary to prove that the government is the perpetrator of acts against the asylum seeker, but rather to show the systematic failure of State protection.[78] Therefore, if the State fails to protect those put at serious risk due to gender, whether or not the State is the direct executor of harmful deeds, such acts can still be considered gender-based persecution.

Those advocating for the inclusion of gender-based persecution as an entry point for refugee determination proceedings argue that there are specific forms of persecution based on gender-related claims which are not presently covered by the Refugee Convention. These claims have included, but are not limited to, persecution due to homosexuality, female genital mutilation, domestic violence, systematic rape, sexual slavery, forced pregnancy, enforced sterilization and human trafficking for prostitution.

Focus upon the gaps in the refugee determination system, namely in the exclusion of gender-based persecution as a sixth ground for refugee recognition, is not entirely new. In 1984, a resolution was passed by the European Parliament asking States to allow women who violate religious or societal traditions access to refugee determination proceedings. According to the European Parliament, these women could be considered members of a particular social group, therefore allowing assessment of their need for international protection. This groundbreaking resolution was followed by UNHCR conclusions and consultations on persecution specific to women. In the early nineties, it became increasingly accepted that gender-related claims could fall under the 1951 Convention. Recently, the understanding of the severity of gender-based persecution was underlined by the 1998 adoption of a statute

[76] United Nations High Commissioner for Refugees (2002). *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2). of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. Document no. HCR/GIP/02/01. May 7.
[77] Crawley, Heaven (2000). *Refugees and Gender: Law and Process*. Forced Migration Review. Issue 9
[78] Crawley, Heaven (2000). Op. cit.

by the International Criminal Court to adjudicate gender-related persecution, and the 2001 convictions of Bosnian Serb officers for crimes against humanity due to their use of systematic rape as a form of torture. However, States have adopted varying stances on gender-based persecution, and acceptance of gender-based claims is sporadic.[79]

An ever-growing number of organizations are calling for general recognition of gender-based persecution as the basis for refugee claim. These advocates maintain that due to the fact that gender is not indicated as one of the five grounds laid out in the Refugee Convention, persecution particular to women is often overlooked. Therefore, they contend, women subject to gender-based persecution should be entitled to refugee status as members of a particular social group, if it is possible to prove a well-founded fear of harm and the lack of State protection.

Arguments against the notion of gender-based persecution

There is a considerable amount of resistance to the extension of refugee protection to survivors of gender-based persecution, as it is feared that granting asylum to those suffering severe forms of gender-based persecution would open the floodgates to a great number of women fleeing domestic violence, female genital mutilation, or other female centered violence that the State may consider a private domestic matter. However, gender-sensitive refugee determination would not automatically lead to a blanket acceptance of refugee status for all women suffering from systematic violence.

In fact, in 1999 only one in four asylum seekers were granted refugee status in the European Union[80]. The Refugee Status Appeals Authority of New Zealand has stated that, 'the refugee claimant must still establish that the fear of persecution is well-founded, that the nature of the harm anticipated rises to the level of serious harm, that there will be a failure of state protection and that the well-founded fear of being persecuted is for reasons of race, religion, nationality, membership of a particular social group or political opinion. The refugee status inquiry is always individual; it is always particularized.'[81]

Recent political opinion in destination countries has swayed away from the responsibility-sharing of hosting asylum seekers. Intergovernmental organizations, such as UNHCR and IOM, have therefore been put in the difficult position of balancing the needs of migrants and refugees against the xenophobic sentiment rising in the global north. The additional burden of granting asylum to potentially thousands of women fleeing gender-based persecution is indeed a daunting prospect, and it would be difficult to convince host governments of their human rights responsibilities for women who have been trafficked into their States, and even more so toward women who are victims of internal trafficking in third States. UNHCR, therefore, has made a number of public statements regarding repatriation for those not in need of

[79] Kumin, Judith (2001). *Gender: Persecution in the Spotlight*. UNHCR Refugees Magazine. Volume 2. No. 123. Geneva, Switzerland. p 12-13.
[80] Achiron, Marilyn (2001). *A Timeless Treaty under Attack*. UNHCR Refugees Magazine. Volume 2. No. 123. Geneva, Switzerland. p. 20.
[81] Haines, Rodger, QC., (2001). Op. cit. p.4.

international protection in order to safeguard the commitments by the States to protect those already recognized as refugees.

In doing so, UNHCR has singled out trafficked and smuggled migrants as among those who should be targeted for repatriation. '…UNHCR has had to contend with a rapidly changing and complex environment in which the – real or perceived – political, security, economic and social costs of hosting refugees have affected the willingness and capacity of States to receive refugees. …Problems of illegal migration, smuggling and trafficking of persons in some parts of the world, and the security dimensions of refugee problems in some other regions, have compounded the situation, leading increasingly to politicization of the institution of asylum, and in some states, to a tendency to criminalize refugees and asylum-seekers.'[82] It has further been argued that survivors of trafficking have needs different than those of refugees, including protection within the host country and legal redress of their traffickers, and, in some cases, resettlement in a safe, third country.

In addition to safety concerns trafficked women often suffer when returning to their countries of origin, they also have specific needs due to the nature of their oppression, including often severe physical and psychological trauma:

> Trafficking victims suffer from serious physical and emotional effects of their treatment, including both acute and long-term problems such as STDs including untreated syphilis, HIV+ and effects of forced and/or unsafe abortions, tuberculosis and other untreated diseases, injuries from assault, malnutrition and painful dental problems. Post traumatic stress disorder is common as are intense feelings including fear, guilt, anger, shame, betrayal, depression, disorientation and lack of trust in the ability to make judgments about others, including those offering assistance. An extensive network of service providers is required in order to meet the urgent medical and mental health needs of trafficking victims.[83]

Some experts claim that although protection should certainly be guaranteed to survivors of trafficking, protection and social assistance should take a different form than that currently secured by refugees. According to these counter-trafficking advocates, asylum for women fleeing gender-based persecution due to resistance to trafficking should be considered only as a last resort in States that have not developed their own comprehensive protection mechanisms for survivors of trafficking.[84]

Refugee determination proceedings for trafficking survivors

UNHCR has taken a cautious stand on the issue of granting asylum to survivors of trafficking in need of international protection, in short writings located in various

[82] United Nations General Assembly Executive Committee of the High Commissioner's Programme (UNHCR ExCom). (2000). *Note on International Protection*. Paragraph 3.
[83] McMahon, Kathryn (1999). *The Traffic in Women Revisited: Women Speak Out from WWII to the Present.*
[84] Albano, Teresa (2002). Interview. Project Manager for the Counter-Trafficking Unit, IOM Rome. September 13.

documents.[85] UNHCR has stated that providing safe houses in countries of origin for survivors of trafficking should be pursued as much as possible in the interest of maintaining the integrity of the national asylum system[86] producing an adequate substitute to the determination of refugee status.[87] Whereas the UN refugee agency has said as recently as 2001 that status as a victim of trafficking should not by itself allow or deny access to refugee status determination,[88] UNHCR has also encouraged governments to open their asylum processes to claims from individual trafficked persons.[89]

Whereas some of the statements issued by UNHCR have been guarded about the possibility of asylum, questioning its effect on the integrity of the international refugee regime, it has increasingly become supportive of the idea of case-by-case refugee determination proceedings for trafficking survivors. In Guidelines issued in spring 2002 on International Protection, UNHCR took up the question of refugee status for trafficking victims, arguing that survivors are entitled to refugee status if their country of origin is unable or unwilling to provide protection.

> Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.[90]

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[85] UNHCR has concentrated its efforts regarding the trafficking-asylum nexus on 1/ the trafficking of women who have already been given refugee status, i.e. trafficking activity taking place in refugee camps; and 2/ the smuggling or trafficking of asylum seekers as a method of accessing European soil. Little work has been produced by UNHCR regarding the possibility of asylum for victims of trafficking.

[86] UNHCR/IOM (2001). *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM.* Global Consultations on International Protection, 2nd Meeting. EC/GC/01/11. Paragraph 33.

[87] UNHCR/IOM (2001). Op. cit. Paragraph 31.

[88] UNHCR/IOM (2001). Op. cit. Paragraph 32.

[89] UNHCR ExCom (2002). *Agenda for Protection: Addendum*. A/AC.96/965/Add.1. June 26, 2002. p. 11, point 2.

[90] [emphasis added] United Nations High Commissioner for Refugees (2002). *Guidelines on International Protection: Gender-Related Persecution* Op. cit. Additionally, in a 2001 UNHCR Working Paper, authors Morrison and Crosland have called for a sharing of international case law on how the act of trafficking has given grounds for 1951 Convention status. Morrison, John and Crosland, Beth (2001). Op. cit. p. 99.

Some progress has been made in the establishment of international gender guidelines, in a departure from the political focus of persecution that has favored male refugees in the past.[91] In 1985, UNHCR and the Executive Committee of the High Commissioner's Programme issued a report which called upon the High Commissioner to:

> …support and promote efforts by States toward the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women… In accordance with the principle that women's rights are human rights, these guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution.[92]

Further, during the 1995 World Conference on Women in Beijing, China, official representatives drafted Strategic Objective E.5 in the Platform for Action. This item called for the recognition of women as refugees, if there is a well-founded fear of persecution due to sexual violence or other gender-related persecution.[93]

A number of State precedents exist that are steering the protection of trafficking survivors in the direction of refugee status. In 1996, a U.S. Immigration Judge in San Pedro, California granted asylum to a Chinese woman referred to as Ms. M. Having been internally trafficked in China with the collaboration of local police, Ms. M. managed to escape from the hair salon/brothel where she had been confined, and arranged to be smuggled into the United States. Upon her apprehension by U.S. border officials for illegal entry, she sought asylum due to gender-based persecution. Although the U.S. Immigration and Naturalization Service (INS) appealed the decision granting her refugee status on these grounds, the highest level Board of Immigration Appeals later upheld the verdict, granting Ms. M asylum in the United States.[94]

Although advocates hoped that this case would establish precedent for asylum of human trafficking survivors with a well-founded fear of persecution upon repatriation, a U.S. Immigration Judge in 2000 denied a similar case (Ms. O) instead conferring temporary relief under article 3 of the Convention against Torture. Although still protected by the U.S. government, Ms. O has no permanent status and her travel is restricted, therefore has received a more limited form of protection than would be the

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[91] Crawley, Heaven (2000). Op. cit.

[92] [emphasis added] UN doc A/AC.96/878, IIIa.1(o). and see generally UNHCR's Division of International Protection, '*Gender-Related Persecution: An analysis of Recent Trends'* (1997). IJRL Special Issue 79-80. See also the *Platform for Action* adopted at the Beijing Fourth World Conference on Women in September 1995, particularly paragraph 136 recognizing as refugees women who face persecution. As per Haines, Rodger, QC., (2001). *Gender Related Persecution,* New Zealand Refuge Status Appeals Authority. p.3.

[93] Fourth World Conference on Women (the Beijing Conference). (1995). Platform for Action: Strategic Objective E.5 (147(h).)

[94] United States Department of Justice, (1996). *In the Matter of J.M., Applicant in Exclusion Proceedings.* Executive Office for Immigration Review, Immigration Court San Pedro, California. December 3.

case if she had been granted asylum.[95] This case was appealed by Ms. O's lawyers, and INS withdrew its opposition to the appeal in November 2001.[96]

Although not uniformly enforced, the U.S. Immigration and Naturalization Service adopted Considerations for Asylum Officers Adjudicating Asylum Claims from Women ('Gender Guidelines') that direct INS officials to recognize that gender-specific forms of persecution can be the basis of asylum claims[97]. Additionally, the Gender Guidelines advise that if an asylum applicant can prove a well-founded fear of persecution, and the trafficking survivor cannot avail herself of protection from her own government, she can be considered a member of a particular social group and therefore meets one of the five grounds of the 1951 Geneva Convention.

Canada has made legal judgments in favor of refugee status for survivors of trafficking, as well. In a recent case involving a Ukrainian survivor of trafficking, refugee status was granted on the basis of her membership in a particular social group. The board of the Canadian Convention Refugee Determination Division stated that, '…[the] recruitment and exploitation of young women for the international sex trade by force or threat of force is a fundamental and abhorrent violation of basic human rights. International refugee protection would be a hollow concept if it did not encompass protection of persons finding themselves in the claimants position.'[98]

Additionally, other States have begun to adopt provisions recognizing gender-based persecution in refugee determination, including Denmark, Germany, Ireland, Norway, Sweden, UK, and Australia. The gender guidelines and adopted legislation specifically address women who fall prey to systematic acts of violence.[99] Some States have indeed formally recognized non-state and gender specific persecution as grounds warranting international protection under the 1951 Refugee Convention, including most recently Germany, with legislation passed in 2002.[100]

At present, there is little incentive for governments in countries of origin to protect women from trafficking. As the women who are victimized by traffickers are often poor with little political power and low levels of education, they are frequently seen as more of a burden than a benefit to the national economy. In addition, as the traffickers are pulling in an astronomical profit, there is great opportunity for public officials to be bribed to turn a blind-eye to human trafficking.

The censure of the government of origin by conferral of refugee status on their citizens abroad, implying the incapability of a government to protect its own people, could work to increase local protection and counter corruption. In the end this could benefit European destination countries by stemming the tide of trafficking victims into Western Europe. As stated by the UNHCR Protection Department, '[The Refugee

[95] Amnesty International USA (2000). *NSA 6/00 Refugee Concern (Fear of Refoulement).*
[96] Center for Gender & Refugee Studies (2001). *The Case of Ms. O- Update*.
[97] U.S. Immigration and Naturalization Service (1995). *Considerations for Asylum Officers Adjudicating Asylum Claims from Women ('Gender Guidelines')*. May 29.
[98] [emphasis added] Neuenfeldt (1997). Canadian Convention Refugee Determination Division, V5-02904. November 26. As per Morrison, John and Crosland, Beth (2001). Op. cit. p. 66.
[99] Canadian Council for Refugees (2000). *Refugee Women Fleeing Gender-Based Persecution*.
[100] ECRE (2002). Op. cit.

Convention] is the best we have, at an international level, to temper the behavior of States.'[101]

In cases where the well-founded fear of persecution exists, trafficking survivors, as members of a particular social group, should legally be entitled to enjoy the protection afforded to other persecuted groups through existing refugee mechanisms.[102] In addition to putting pressure on countries of origin, if trafficking survivors are afforded the possibility of asylum in their host country the benefits may extend to national governments, as trafficking survivors will not be identified solely based upon their willingness to testify and return home. With protection in place, more survivors may be willing to testify against their traffickers, which would have a significant impact on the numbers of future women trafficked into the countries of destination, as well as attack the growing strength of organized crime rings. [103]

Protection alternatives to refugee status

As seen in the U.S. case of Ms. O, other options to the protection guaranteed to refugees may be applied in the case of trafficking survivors. The recently approved 'T' visa in the United States is one such precedent, giving proven survivors of trafficking a status similar, although not identical, to refugees. The T-visa guarantees 'victims of severe forms of trafficking' access to shelters, social assistance, medical care, compensation, residence, privacy and protection. However, this status is only granted to those who are willing to provide information on traffickers to police. Five thousand trafficking survivors may be granted T-status annually, and are entitled to many of the advantages of refugee status. Additionally, responsibility for T visa holders falls within the Office for Refugee Resettlement.[104]

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[101] Feller, Erika (2001). Director of the Department of International Protection of the UNHCR. As per Achiron, Marilyn (2001). Op. cit. p 6.

[102] A number of organizations support in some measure the access of international refugee mechanisms for victims of trafficking with a well-founded fear of persecution, although the topic remains controversial. See UNHCR (2002). *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2). of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. Document no. HCR/GIP/02/01. May 7. p.5; UNICEF/ UNOHCHR/OSCE-ODIHR (2002). *Trafficking in Human Beings in Southeastern Europe*. p. 139; UNHCHR (2002). *Recommended Principles and Guidelines on Human Rights and Human Trafficking*. E/2002/68/Add.1. 20 May. p.5.; Human Rights Watch, Women's Rights Division (2001). *Recommendation regarding the Proposal for a Council Framework Decision on Combating Trafficking in Human Beings*; Amnesty International USA (2000). *NSA 6/00 Refugee Concern (Fear of Refoulement). ;* UNHCR's Division of International Protection (1997). '*Gender-Related Persecution: An analysis of Recent Trends'* IJRL Special Issue 79-80; UNHCR ExComm(1996). *UN doc A/AC.96/878, IIIa.1(o)*; U.S. Immigration and Naturalization Service (1995). 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women ('Gender Guidelines')'. May 29.; Official representatives at the Beijing Fourth World Conference on Women (1995). *Platform for Action*. Paragraph 136. September.

[103] This has proven to be true in the case of the implementation of Article 18 of the Consolidation Act in Italy, which affords temporary protection to victims of trafficking regardless of whether they choose to testify against their trafficker. Gruppo Abele, (2001). *Annuario Sociale 2001*, Giangiacomo Feltrinelli Editore, Milan. p.726.

[104] Raffonelli, Lisa (2002). *INS Final Rule to Assist Victims of Trafficking.* International Institute of Rhode Island.

Italy has been in the forefront for enacting legislation to meet the needs of women who have been trafficked. Article 18 of the Alien Law[105] departs from legislation in most of the other EU Member States by extending protection to trafficking survivors regardless of their collaboration with state authorities. The protection provided as part of Article 18 is a six-month temporary 'social protection residence permit',[106] with the possibility of extension for up to eighteen months, as required.

The enactment of Article 18 is relatively new, and the number of women receiving this form of protection is quite low, perhaps due to a reluctance on the part of the Italian police of some municipalities.[107] A 2001 report by the Italian Ministry of the Interior has detailed the positive effect that these residence permits have had on the fight against organized crime, with a significant increase in the incrimination of traffickers.[108]

Following Italy's lead, Belgium, the Netherlands and Spain have adopted measures to provide temporary residence permits to trafficking survivors. However, they have taken the decision to limit these permits to those willing to incriminate their traffickers. If needed, the utilization of witness protection mechanisms, in place for domestic needs, may be considered for the protection of trafficked women in these States.

Throughout Europe, it is theoretically possible for trafficked women to qualify for residence permits on humanitarian grounds, but the implementation of residence permit distribution for survivors of trafficking is uneven and discretionary.[109] According to the European Commission, the minority of European States that currently hold legislation addressing protection for survivors of trafficking have policy which is vastly divergent.[110]

European harmonization of asylum laws

The Amsterdam treaty of the European Union came into force on the first of May, 1999. A key element of the Amsterdam treaty was European Union harmonization, including the harmonization of asylum law and policy. The European Union gave itself a deadline of 2004 to realize harmonization of asylum law, establishing common standards but not uniform procedures. Additionally, the Presidency Conclusions of the European Council in Tampere, Finland declared in 1999 that the EU must move past aiming toward the minimal standards of refugee protection and instead target a common asylum procedure and refugee status.[111]

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[105] Art. 18 del Testo unico sull'immigrazione n. 286/98. As per Gruppo Abele (2001). Op. cit. p. 726

[106] The full name of this residence permit is *Permesso di Soggiorno per Protezione Sociale*. Please note that while many of the laws regarding migration have changed in Italy as of July 11 2002, the social protection residence permit remains unaffected.

[107] Gruppo Abele (2001). Op. cit.

[108] Italian Ministry of the Interior (2001). *Rapporto sullo stato della sicurezza in Italia*. Rome, Italy.

[109] Commission of the European Communities (2002). *Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities*. Brussels, Belgium. Page 5.

[110] Commission of the European Communities (2002). Op. cit. p. 8.

[111] UNHCR ExCom (2000). Op. cit. Paragraph 42.

As Europe studies and debates the commitments they are prepared to make as a union toward the people of the world with a proven well-founded fear of persecution, the analysis of precedents and human rights responsibilities toward the ever-growing phenomenon of trafficked women might be a timely and vital exercise.

Although some States, such as Italy or the United States, have developed their own measures to protect trafficking survivors, UNHCR contends that individual State protection measures may be discretionary or unevenly implemented,[112] as seen in the recent deportations of foreign sex workers by the Berlusconi government in Italy, or the uneven immigration judgments in the United States concerning trafficked women.[113] Adherence to an international standard would increase the regularity of implementation, particularly with a common geographical approach to asylum issues.

Discussions in the European Union currently include proposals for short-term residence permits for survivors of trafficking. Studies show that States issuing temporary residence permits have a higher success rate of persecution of traffickers than States without such protective measures. This is particularly true if residence permits are not restricted to willingness to testify against traffickers.[114]

Also contributing to successful persecution is a three-month 'reflection period' currently in place in the Netherlands and Belgium. This reflection time allows trafficked women to decide whether or not to testify, as well as to determine if they are willing to repatriate. This period is important to allow trafficked women to fully understand the consequences of testifying against their traffickers, as well as to consider the possible consequences of repatriation, such as further trafficking, reprisals by traffickers, and stigmatization.[115] On a governmental level this waiting period is also important, as trafficked women can continue to be influenced by their traffickers immediately after apprehension.[116]

The European Union proposal would, similarly to the Italian Article 18, allow short-term residence for trafficking survivors. Different from the protection given under Article 18, however, the Commission for European Communities proposes that this protection be offered as a reward for cooperation with police authorities and incrimination of traffickers following a reflection period. The Commission itself admits that 'The prime objective of the proposed Directive is to tighten up measures against illegal immigration by introducing a short-term residence permit for victims… who cooperate with authorities.'[117]

By its own admission, the driving factor of proposed EU legislation regarding survivors of trafficking is protection of the integrity of its own borders, rather than its human rights responsibilities to women suffering 'the biggest violation of human

[112] UNHCR ExCom (2000). Op. cit. Paragraph 31.
[113] As of October 30, 2000, nine asylum appeals were filed on the behalf of prostituted women in the US, using arguments of 'gender-based persecution'. Five of the nine were denied. Musalo, Karen and Knight, Stephen M. (2000). *'Gender-Based Asylum: An Analysis of Recent Trends.'* Interpreter Releases. Vol.77, No. 42. October 30.
[114] As seen in Belgium, Italy, the Netherlands and the U.S. Pearson, Elaine (2002). Op. cit. p. 2.
[115] Pearson, Elaine (2002). Op. cit. p. 3 and 7.
[116] Pearson, Elaine (2002). Op. cit. p.43.
[117] Commission of the European Communities (2002). Op. cit. p. 8.

rights in the world'.[118] The Commissioner for Justice and Home Affairs for the European Commission, Antonio Vitorino, has himself called for further legislation targeting the human rights needs of trafficking survivors. '[This directive] is only one element of a comprehensive strategy which must strike a clear balance between the repressive aspect of fighting crime and respect for human rights and aid for victims.'[119]

Temporary protection for trafficking survivors with a well-founded fear of prosecution could be an inadequate form of protection, however. Besides the obvious reservations regarding providing protection solely to those willing to testify against their traffickers, the European Council on Refugees and Exiles has documented that people receiving temporary protection in Europe have experienced mental health problems due to the insecure nature of the protection.[120] Further, the lack of long-term status contributes to the social exclusion of those temporarily protected, particularly those suffering trauma from their experiences. Often temporary protection is not coupled with the right to family reunification, education, basic health care, national identification documents, and travel.

Finally, respecting the binding principle of 'non-refoulement', European governments should avoid involuntary return for the trafficking survivor with an ongoing well-founded fear of persecution, if the Refugee Convention is applicable in her case.[121] UNHCR states that temporary protection 'only complements and does not substitute for the wider protection measures, including refugee asylum, offered by the [Refugee] Convention.'[122]

European Union harmonization in 2004 would be an appropriate occasion to adopt guidelines recognizing gender-based persecution, specifically addressing the need to offer international protection to trafficked women with a well-founded fear of persecution. If the EU took the opportunity to follow precedents set both within and outside of the borders of its member states, and expanded its interpretation of grounds leading to refugee determination procedures, the benefits would be two-fold.

First, the European Union would be fulfilling its human rights responsibilities by extending protection to a growing vulnerable group. Second, it would be aiding in the struggle against organized crime and irregular entry into Europe by enabling victims to testify and seek justice against their exploiters without fear of retaliation. Further, conferring refugee status on victims of trafficking would put pressure on countries of origin to decrease corruption and prosecute organized criminals.

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[118] Arlacchi, Pino as per Refugee Reports (2000). '*Trafficking in Women and Children: a Contemporary Manifestation of Slavery'*. Op. cit.

[119] European Union Press Release (2002). *Combating illegal immigration and trafficking in human beings: Commission's proposal for a residence permit for victims who cooperate with the authorities reminds the Member States that the phenomenon cannot be tackled at national level alone.* Brussels, Belgium.

[120] European Council on Refugees and Exiles (ECRE) (1997). *Position on temporary protection in the context of the need for a supplementary refugee definition.* March.

[121] Apap, Joanna; Cullen, Peter; and Medved, Felcita (2002). *Counteracting Human Trafficking: Protecting the Victims of Trafficking*. Centre for European Policy Studies. p. 28.

[122] Refugees Magazine (2001). *Most frequently asked questions about the Refugee Convention.* United Nations High Commissioner for Refugees. Volume 2. Number 123. p. 7.

Conclusion

Protection of trafficked women is, at present, not a strong focus of destination governments who are concentrating their efforts on impenetrable borders. While authorities focus on economic interests and public order, the human rights of victims of trafficking tend to be a less pressing concern.

By focusing on diminishing the activities of human smugglers and traffickers challenging the authority and ability of the State to keep unwanted irregular foreign nationals outside their borders, governments are pursuing policies to assuage their national pride, rather than analyzing their responsibilities to protect the human rights of those who have been abused during power struggles between the State and the ethnic mafias controlling trafficking rings. However, as has been shown in countries implementing policy that strives to protect trafficking survivors, the success rate of apprehension of traffickers increases when States put an emphasis on protecting the human rights of trafficked women.[123]

The European Union has already taken a strong step toward safeguarding those in need of international protection by requiring that all States joining the European Union sign on to the 1951 Refugee Convention and 1967 Protocol.[124] The Convention, developed at a time of massive displacement due to ethnicity and political ideology, supports the modern idea that people with a well-founded fear of persecution should be able to seek safe haven.

As methods of oppression have changed to target victims based on gender, the application of the Convention should embrace massively targeted new groups, such as women with low socio-economic status being regularly sexually assaulted for others' financial gain. At the very least, governments should guarantee the human rights of trafficked women through the Refugee Convention while developing more adequate protection measures specifically suited for this particular social group.

In refugee-status determination proceedings, country experts would be necessary to determine survivors with legitimate claims to refugee status. A case-by-case determination for trafficked women seems to be needed, particularly in light of claims that traffickers have manipulated aid agencies into assisting who they believe to be trafficked women, only to discover that those assisted were working for the trafficker as recruiters. In light of traffickers offering freedom to prostituted women if they recruit young women from their own communities, the problem of deception will need to be addressed by country specialists currently working with refugee determination proceedings.[125]

This paper is not a call for asylum for all trafficked women, but instead a call for a common understanding that women trafficked for forced sexual services are victims of gender-based persecution. As survivors of trafficking, women and girls who have been prostituted by force form membership of a particular social group. With this classification, a trafficked woman should be entitled to entry into refugee-

[123] Pearson, Elaine (2002). Op. cit. p. 35.
[124] Morrison, John and Crosland, Beth (2001). Op. cit. p. 31.
[125] UNICEF. Op. cit. p. 147.

determination proceedings to assess whether, as an individual, she has a well-founded fear of persecution, and is in need of international protection.

Although being a survivor of trafficking does not guarantee blanket refugee status, victims should be afforded the possibility to be heard for refugee status determination, having passed the threshold on one of the five convention grounds. If trafficking survivors as members of a particular social group are afforded the possibility of asylum benefits may also extend to governments, as more survivors may be willing to testify against their traffickers and governments of origin may feel pressured to provide adequate protection of their citizens.