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Victims of trafficking for forced prostitution: Protection mechanisms and the right to remain in the destination countries

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Global Commission on International Migration

In his report on the 'Strengthening of the United Nations: an agenda for further change', UN Secretary-General Kofi Annan identified migration as a priority issue for the international community.

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Abstract

This study aims to explore the right of trafficked victims of forced prostitution to remain in destination countries through the application of legal standards and victim protection mechanisms found at the national, regional and international level. The study also highlights the importance of State recognition that trafficked persons are victims of serious human rights abuses. Premised upon the principle that non-discrimination is a fundamental human right, this paper argues that States need to take steps to safeguard the legal rights and protective needs of trafficking victims regardless of their immigration status or willingness to cooperate with law enforcement officials.

The study further considers the feasibility of the position that trafficked persons should have the right to temporary residence and work permits, thereby serving the dual interests of both enabling trafficked persons to recover and rebuild their lives, and enabling the effective prosecution of traffickers by encouraging victims to report to the authorities and to act as witnesses. Also under examination is the thesis that trafficked persons should be given the opportunity to apply for permanent residence permit under national and international laws. According to this position, victims should be allowed to seek and receive asylum if their State of origin is unable or unwilling to offer protection, as provided by the 1951 Convention relating to the Status of Refugees. Finally, the paper aims to highlight the need to widely acknowledge (and not only in exceptional cases) that trafficking in women can be considered as gender-based persecution and that women victims of trafficking comprise a particular social group, one of the enumerated grounds of the 1951 Convention.

> We must work from the perspective of those who most need their human rights protected and promoted...By placing human rights at the centre of our analysis, we are forced to consider the needs of the trafficked person-and thereby to confront the poverty, inequality and discrimination which is at the root of the phenomenon..." [1]

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[1] Mary Robinson, United Nations High Commissioner for Human Rights, *Trafficking in People*, Fact Sheet. (London, Anti-Slavery International, 2001) p. 1.

Introduction

The present study aims to explore the right of trafficked victims of forced prostitution to remain in destination countries through the application of legal standards found in both European Union (hereinafter EU) law and general International Human Rights law. Currently, there are a wide range of victim protection mechanisms at the national, regional and international levels which may be utilized. It is of great importance to use those mechanisms properly and to seek ways for their improved implementation and future development. Although many current initiatives have not yet reached the status of *de jure* law (as many of these initiatives have not yet come into force), one needs to be aware of their existence in the EU and in the international arena.[2]

While persons are trafficked for different purposes[3] the main focus of this discussion will be to examine trafficking in women for sexual exploitation as one of the most severe yet least punished crimes.[4] Chapter 1 discusses the phenomenon of trafficking in humans with a specific emphasis on women who are forced into prostitution as a significant aspect of trafficking, which must be seen as part of a broader global problem.[5]

Trafficking is commonly considered to be an immigration issue, and trafficked victims are often blamed for their own situations. Since trafficked persons are denied some of the most basic human rights that are enumerated in the Universal Declaration of Human Rights[6] (hereinafter UDHR) and other International Human Rights instruments,[7] it is important to recognize that trafficking has other dimensions and

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[2] R. Piotrowicz, "Trafficking in Human Beings and Victim Protection and Assistance." Paper presented at seminar: Fight against Trafficking in Human Beings and Related Crimes in the European Union (Warsaw, November 2002) p. 2

[3] Trafficking for the purposes of: sex work, domestic labour, forced marriage, forced labour or for begging. See Knaus, Kartusch, Reiter, Combat of Trafficking in Women ,for the Purpose of Forced Prostitution, International Standards (Ludwig Boltzmann Institute of Human Rights, Vienna, May 2000) p. 8; Global Alliance Against Traffic in Women "Human Rights in Practice: A Guide to Assist Trafficked Women and Children" (Bangkok, GAATW, 1999) pp. 12-17.

[4] J. Shearer Demir, "The trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?" Working Paper No. 80, UNHCR, EPAU, New Issues in Refugee Research, http://www: unhcr.org, accessed 5 June 2003.

[5] Each year, one to two million women are trafficked around the world. According to non-governmental organization sources, between 200,000 and 500,000 women are illegally working in prostitution within the EU alone. See Knaus, Kartusch, Reiter, supra, n. 3, p.12

[6] Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. See particularly Art. 3, Art. 4, Art. 5, Art. 9, Art. 13, Art. 14, Art. 23 (1) (2) (3).

[7] International Covenant on Economic, Cultural and Social Rights (ICESCR) Art. 6, Art. 7, Art. 9, Art. 12; International Covenant on Civil and Political Rights (ICCPR) Art. 7, Art. 8 (1) (2), Art. 9, Art. 11, Art. 13; Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW) Art. 6, Art. 11, Art. 12; Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT) Art. 3; Slavery Convention (SC) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (SCAS); International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (ICPRMW) Art. 10, Art. 11, Art. 16 (1) (2);

should be characterized "as a human rights issue with immigration implications."[8] Since destination countries are reluctant to provide trafficked persons with residence permits, Chapter 2 examines possibilities for their obtaining residence status in those countries.

Despite differences in specific regions and countries, it would appear that the promotion of States' national interests take precedence over the protection and promotion of the human rights of victims.[9] Victim protection programs are generally created to support the interests of the prosecution, rather than the victims. For instance, State support for the victims of trafficking often depends on their "usefulness" to the prosecution and their cooperation with public authorities. Criteria for participation in victim protection programs require that the victim is both willing and able to testify and that their testimony is required by the prosecution.[10] Protection of their psychological and physical integrity and ensuring that victims receive adequate compensation is of secondary importance.

Yet, it should be acknowledged that with protection assured for all individuals, victims would be more likely to testify against their traffickers, which may have an impact on the future number of women who are trafficked into destination countries.[11] In light of the above, Chapter 3 of the paper will discuss victim protection schemes currently found in national legislation in the Netherlands, Belgium and Italy. These three countries serve as the best examples of victim protection schemes among EU Member States.

The discussion will also highlight the fact that due to the combined impact of substandard law enforcement and the limited political will of authorities in destination countries to prosecute traffickers for crimes committed by perpetrators, women are in grave danger of being repatriated to their countries of origin. Moreover, trafficking in humans continues to be viewed by the police and the judiciary as illegal migration for the purposes of prostitution, rather than as a flagrant violation of human rights.[12] Fear of deportation and retaliation against members of victim's families, as well as coercion and violence against the victims themselves often exacerbates their marginal and vulnerable situations. Therefore, a significant number of trafficked women suffer

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International Labour Organization Conventions No. 29 Concerning Forced Labour (ILO No. 29) and No.105 Concerning Abolition of Forced Labour (ILO No.105).

[8] B. Young, "Trafficking of humans across United States borders: How United States laws can be used to punish traffickers and protect victims", 13 Georgetown Immigration Law Journal 73 (1998) at 74-75; G. Caldwell et al., "Crime & servitude: An exposé of the traffic in women for prostitution from the Newly Independent States" (1997), text available at: www.globalsurvival.net/femaletrade/9711russia.html, accessed 19 June 2003.

[9] E. Niesner, C. Jones-Pauly, Trafficking in women in Europe: Prosecution and victim protection in a European context (Kleine Verlag, Bielefeld, 2001) p. 230.

[10] E. Pearson, Human traffic human rights: Redefining victim protection (London, Anti Slavery International, 2002) p. 238.

[11] Shearer Demir, supra, n. 4, at 21.

[12] 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 South-eastern Europe".

a well-founded fear of persecution at the hands of their traffickers upon return to their country of origin.[13]

Although the international refugee regime could serve as a protective mechanism for women victims of trafficking as members of a particular social group, at present, trafficked women are rarely recognized as refugees. Gender is not one of the enumerated five grounds found in the Convention Relating to the Status of Refugees (hereinafter the 1951 Convention), and therefore persecution particular to women is often overlooked.[14] Although gender discrimination is not specifically prohibited by the Convention, an argument can be made for its inclusion as a "particular social group".[15] Hence, Chapter 4 will explore the possibilities for the use of the 1951 Convention as a protective instrument for women asylum seekers in destination countries on the ground of gender based persecution, conditional on proof of a well-founded fear of harm as well as lack of State protection. Chapter 5 will provide an overview of regional and International Human Rights provisions which are frequently violated in cases of trafficking in human beings.

As previously mentioned, the paper will be limited to an examination of trafficking in women for the purpose of sexual exploitation as one of the fastest growing phenomena and most common purposes of trafficking. Thus, a consideration of other forms of trafficking is beyond the scope of this paper. In order to reflect the fact that men and boys are also trafficked, the term "trafficking in persons" should be understood to refer to both sexes. However, it should also be acknowledged that women and girls are disproportionately trafficked and targeted by traffickers and as a result, deserve special attention.[16] The present discussion will therefore have a gendered focus, as highlighted by use of the term "trafficking in women". In addition, children will not be specifically addressed in this instance as they have special legal rights and require different forms of domestic and international rights protection. Finally, the definition of trafficking provided in Article 3 of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (hereinafter the Trafficking Protocol) will be employed.[17]

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[13] In Southeastern Europe alone, 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 a lack of trust in local authorities to provide adequate protection. As cited in: Shearer Demir, supra, n. 4, p. 11

[14] Convention relating to the Status of Refugees, 189 UNTS 150, entered into force April 22, 1954. Article 1A(2) of the 1951 Convention enumerated them as: race, religion, nationality, membership of particular social group or political opinion.

[15] United Nations High Commissioner for Refugees: Refugee Women and International Protection, Ex.Com. Conclusion No. 39 para. (k).

[16] In a recent publication by Hopkins, R., Nijboer, J., "Trafficking in Women to the Netherlands, Belgium and Italy" (The Netherlands, Rode Draad, 2003) researchers found that with one exception, all of the victims of trafficking were female. For text, see <//http://www.rodedraad.nl.>, accessed 17 July 2003.

[17] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. resolution 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49. Not yet in force. Current signatories 117, States parties 31. It will enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification (see Article 17). For text, see <http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html>, accessed 3 September 2003.

Trafficking in persons as a human rights violation and its root causes

Each year, hundreds of thousands of people – the majority of whom are women and children from less developed countries – are deceived, forced and sold into situations of exploitation from which they often have no escape. Trafficking in persons as a form of contemporary slavery is one of the most severe violations of human rights and freedoms. Compounded by the instability of civil societies and the weakened rule of law, human trafficking has expanded dramatically in recent years and has become a lucrative business for traffickers.[18]

Although it is impossible to acquire exact figures of victims due to the illicit nature of trafficking, it is estimated that between 700,000 and four million people are trafficked into forced labour and forced prostitution each year.[19] As a growing phenomenon both nationally and internationally, trafficking constitutes an integral part of the process of international migration. Trafficking in persons is particularly prevalent in countries of origin undergoing political and economic transition or post conflict stress. However, trafficking also involves more economically developed countries that are countries of destination and transit.[20] Thus, nearly every country in the world is affected by trafficking, either as a country of destination, transit or origin or as a combination of the above.[21]

Human trafficking is the third most lucrative activity of organized crime groups worldwide and is often combined with other illegal activities such as arms and drugs trafficking.[22] However, it appears that trafficking in persons poses a minimal risk for traffickers while yielding the highest profit. Traffickers face little chance of prosecution, receive relatively low fines when prosecuted and reap a significant financial return for the women they traffic for sexual exploitation.[23]

As poverty disproportionately affects women and their children, women are more likely to be motivated to migrate in the hopes of improving their economic situation for both themselves and their families. Out of 1.3 billion absolute poor in the world today, 70 per cent is comprised of women and their minor dependents.[24] This poverty

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[18] UNICEF/UNOHCHR/OSCE-ODIHR, 2002, *supra,* n. 12.

[19] U.S. Department of State, Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report (2001). Text available at http://state.gov/g/inl/rls/tiprpt/2001/index.cfm?docid=392, accessed 19 July 2003.

[20] A. Kartusch, *Reference Guide for Anti-Trafficking Legislative Review with particular emphasis on South Eastern Europe* (Vienna, Ludwig Boltzman Institute of Human Rights, 2001), p. 9

[21] Shearer Demir, *supra,* n. 4, p. 6

[22] International Organization for Migration (IOM) "Applied Research and Data Collection on Trafficking in Women for Sexual Exploitation To, Through and From the Balkan Region. Country Report Italy" (Rome, IOM Report, 2001), p.7

[23] V. P. Luigi, "Judicial co-operation in the fight against organized crime, especially with respect to the trafficking persons." Report presented at the International Conference on Preventing and Combating Trafficking in Human Beings, 2002.

[24] European Women's Lobby, "Migration, trafficking and social development, what is at stake for women?" (Brussels, Belgium, 2001) Text available at http://www.womenlobby.org/document.asp, accessed 18 July 2003.

is due in part to women's lack of access to formal education and job opportunities in their home countries. However, for millions of women, this economic migration ends in sexual exploitation and debt bondage, with only limited success in utilizing available legal mechanisms to address their protection needs.[25]

However, it is not only the individual economic situation of victims but also discrimination against women in the labour market, growing unemployment and a lack of skills and training which contribute to their willingness to search for improved living conditions and career opportunities.[26] Trafficked women's advocates also attribute the success of traffickers to the widening gap between rich and poor countries, the extreme poverty of women, the enormous potential for profits in trafficking, and the failure of governments to protect the human rights of victims and punish the traffickers.[27]

Despite increased attention given to the issue of trafficking in the international political arena, there remains a multifaceted set of problems that must be solved. These complex root causes, the internal and cross-border nature of this crime, an insufficient degree of awareness of the problem, combined with a lack of legal harmonization between relevant criminal legislation renders this criminal activity extremely difficult to combat. In the light of the restricted approach taken by governments to effectively deal with organized crime and illegal migration, it is evident that prevention programmes and victim rights protection do not receive adequate attention, thus depriving trafficked persons of their basic human rights.

Moreover, trafficked persons are more likely to be treated as criminals rather than victims of a crime either because they may have entered the country illegally, have irregular employment status or because of their work in prostitution.[28] They rarely posses the proper documentation required for the legal right to remain in a destination country. As a consequence, trafficked persons are often under threat from traffickers as well as from national authorities, thereby exacerbating their vulnerability.[29] Hence, bearing in mind this vulnerable position, it is common for victims to distrust national authorities and to refuse to cooperate with investigations.

Residence status of trafficked persons

In the majority of cases, trafficked persons do not have legal residence status in destination countries either because they have arrived without a residence permit or because the permit has expired. Those persons who are not recognized by law enforcement officials as having been trafficked face immediate deportation or can be detained if they report their case to the police, or if they have been found by the police

[25] Shearer Demir, *supra,* n. 4, p. 1

[26] UNICEF/UNOHCHR/OSCE-ODIHR, 2002. *supra,* n. 12.

[27] G. Caldwell et al., *supra,* n. 8. See also Shearer Demir, *supra,* n. 4, at 4; Knaus, Kartusch, Reiter, *supra,* n. 3, p. 12

[28] A. Kartusch, *supra,* n. 21, p. 9; Piotrowicz, *supra,* n. 2, p. 2.

[29] Piotrowicz, *supra,* n. 2, p. 2.

during an investigation.[30] In practice, law enforcement officials do not generally recognize them as possible victims, but see them as undocumented migrants. In these circumstances, many trafficked persons remain uninformed about their rights and are often deported.[31]

Destination countries are usually unwilling to provide trafficked persons with legal residence status and as a consequence, victims of trafficking are prevented from having access to protection and assistance. It is for this reason that possession of regular residence status is a precondition to any effective victim protection strategy.[32] However, the granting of residence permits is often conditional on cooperation in criminal proceedings against traffickers rather than on serious harm they have suffered or may suffer upon return to their country of origin.[33]

Residence permits for trafficked persons are frequently referred to as "humanitarian residence permits" and tend to be offered on a temporary basis. In the majority of destination countries, residence permits have the dual objective of protecting the victim's human rights as well as encouraging the victim to testify in criminal proceedings against traffickers.[34] However, it would appear from current legal regulations that offering victim protection by encouraging individuals to testify in criminal proceedings has priority over protection of a victim's human rights.

Some governments have recognized the need to provide victims of trafficking with short-term residence status in recognition of the importance of recovery, to provide them with opportunities to learn about their rights and to decide whether or not they feel comfortable cooperating with law enforcement officials. Authorities need to understand that victims will not be willing to report the crime or to cooperate in investigations if they have been arrested or face the risk of immediate deportation from destination countries. Moreover, some governments are prepared to provide long term residence status to victims who are willing to cooperate with law enforcement authorities or where they are in danger due to threats of retaliation. If these threats are ongoing, it is considered appropriate to provide the victim with permanent residence status.[35] Still, the many benefits of residence status may only be available to victims who are willing to cooperate with law enforcement authorities and agree to press charges against traffickers.

Thus far, and among the three countries examined in this paper, residence permits that are granted upon completion of criminal proceedings are only available in Italy and Belgium regardless of whether or not they face a threat of persecution in their

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[30] E. Pearson, *supra,* n. 9, p. 40.

[31] *Ibid.*

[32] A Kartusch, *supra,* n. 20, p. 9.

[33] Anti-Slavery International, "Support, assistance and protection of victims of trafficking, particularly in host countries." Open letter to the UNCHR, June 2003. Text available at http://www.antislavery.org/archive/submission/submission2003-trafficking.htm, accessed 23 July 2003.

[34] E. Pearson, *supra,* n. 9, p 41.

[35] A. Jordan, "International Human Rights Group: Annotated Guide to the Complete United Nations Trafficking Protocol," p. 26. Text available at http://www.hrlawgroup.org/initiatives/trafficking_persons/default.asp, accessed 1 August 2003.

countries of origin. In these countries, victims are permitted to become gainfully employed or to participate in training courses after a relatively short period of time. While Belgium will grant a residence permit depending on the success of criminal proceedings and the victim's potential for integration into Belgian society, Italy exercises its discretion to grant permits based solely on the criterion of successful integration.[36]

Based on an analysis of recent case law, it would appear that the criterion of social integration has begun to have the same importance as real or potential threats to the lives of trafficked victims. In one instance, an appeal for refugee status was granted by a UK Tribunal to a woman who had been trafficked from Albania on the ground that she had established family life in the UK.[37]

Protection schemes for victims of trafficking: European Union (EU) standards-witness versus victim protection

> We must first treat them as human beings, and then we can get good witnesses through positive collaboration between the NGOs and the police.[38]

Although trafficking is a world-wide phenomenon, the boom of trafficking in women for forced prostitution in Europe may be traced to the collapse of the communist system in the former Soviet Bloc as well as throughout Eastern Europe. Due to changes in the economic and political climate, there has been a grave rise in unemployment and poverty as well as a significant weakening of the rule of law and of functioning judicial systems which have allowed black market economies and corruption to flourish.[39] Approximately 120,000 women and children are trafficked into the EU every year from the former Eastern Bloc countries, with half a million trafficked women currently residing in Western Europe.[40]

The main objective of the victim protection scheme is purported to be to secure justice by minimizing the risk of retribution to those willing to testify against a perpetrator by providing them with protection against that risk.[41] The essence of the protection scheme is that it offers a limited residence permit in return for evidence against traffickers in order to secure the cooperation of trafficked victims with law

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[36] E Niesner, C Jones-Pauly, supra, n. 9, p. 239.

[37] Women's Asylum News, "Trafficked Women granted refugee status as protection in Albania deemed insufficient", Women's Resource Project-Asylum Aid. Issue 34 (July 2003). Text available at http://www.asylumaid.org.uk , accessed 13 July 2003.

[38] Anonymous, FIF-Conference in Frankfurt, June 1999. See: Niesner E., Jones-Pauly C., supra, n. 9, p. 209.

[39] D. S. Tavcer, "From Poverty to the Trafficking of Women for Sexual Exploitation: A Study of Causal Factors of Trafficked Women from Moldova," Paper presented on Trafficking in Persons Conference, Nottingham, June 2003 p. 4

[40] *Ibid*; Shearer Demir, *supra,* n. 4, p. 6.

[41] R. Piotrowicz, "European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers", 14 *IJRL* 2/3 (2002), p. 267.

enforcement authorities.[42] However, the human rights of the trafficked person should be protected first and foremost because s/he is a victim of a serious crime and, secondly, because it renders investigation and prosecution more effective. Therefore, the trafficked person should be protected and assisted as a victim as well as a witness.[43]

Within the EU context, the Proposal for a Council Directive (hereinafter the Proposal) on the short-term residence permit issued to victims of illegal immigration or trafficking in human beings who cooperate with the competent authorities has resulted from a series of initiatives undertaken by Member States in their efforts to combat trafficking.[44] Although the Proposal establishes that "it is not concerned with protection of either witnesses or victims", it does contain measures which are related to victim protection and support.[45]

According to the Proposal, victims of trafficking must be "informed of the provisions…i.e. the possibility of benefiting from its residence regime in exchange for cooperation," and must be granted a reflection period of 30 days to decide whether or not they wish to cooperate with authorities. During this time, the victim must not be expelled and shall have access to housing, medical and psychological care and to free legal and language assistance.[46]

However, the short term residence permit will only be issued if certain conditions are met by victims. Responsible authorities would assess whether the presence of the victim is essential to criminal proceedings, if they have severed all links with their traffickers and if they are prepared to cooperate.[47] Only after these requirements have been met and it has been determined that the victim is not a threat to public order or national security[48] will they be granted a short term residence permit. The permit will be issued for six months with a possibility for renewal if the necessary conditions continue to be fulfilled.[49] Holders of such permits will have access to vocational training, education and the labour market.[50] Once the residence permit expires or if it

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[42] *Ibid.* p. 268.

[43] Giammarinaro, M. G., Expert Group Meeting on Trafficking in Women and Girls "Trafficking in Women and Girls" (USA, November 2002) EGM/TRAF/2002/EP.6, pp. 3-4

[44] COM (2002) 71, Final. The Proposal deals with both trafficking and smuggling in persons. However, trafficking differs greatly from smuggling as smugglers facilitate illegal entry into a country for a fee, that the person has agreed to pay, and also that upon arrival in a destination country, the relation between the smuggler and the smuggled person is terminated. Trafficking always involves coercion or deception and it is involuntary. The victim is held in debt bondage and forced to work in order to pay off its debt. Therefore, the main aim of smuggling is entry into the destination country, while the focus of trafficking is the exploitation of the migrant upon arrival; Shearer Demir, *supra,* n. 4, at 7; Piotrowicz, *supra,* n. 41, p.266.

[45] *Ibid.* See: Explanatory Memorandum of the Proposal under section 2.3. "Not a victim protection or witness protection measure".

[46] *Ibid.* Articles 7-9.

[47] *Ibid.* Article 10(1). How these conditions will be assessed and on which criteria it is not defined in the text of the Proposal.

[48] *Ibid.* Article 10(2).

[49] *Ibid.* Article 10(3).

[50] *Ibid.* Article 12.

has not been renewed, ordinary immigration law will apply.[51] However, the Proposal stresses that authorities must take the victim's cooperation into account when they consider any future applications for residence permits.[52]

Implementation of standards in practice: the Netherlands, Belgium and Italy

Recognizing the importance of the symbiotic link between encouraging victims to testify through the provision of benefits, some States have adopted measures to aid those victims who are willing to cooperate with investigations. The Netherlands and Belgium were among the first countries to introduce a temporary residence permit for victims of trafficking.[53] The Netherlands was the first State to adopt a specific policy regarding temporary residency rights to persons trafficked into the sex industry.[54] However, the adopted measures are restricted to those victims who assist in the investigation and prosecution of traffickers. Italy is the only exception since protection is granted regardless of a victim's decision to act as a witness.

In Belgium under the1994 Circular, as in the Netherlands, known or suspected victims of trafficking may remain in a destination country under certain conditions.[55] The Circular provides for a reflection period and delays expulsion from a country for 45 days on the condition that victims have severed all connections with the environment into which they were trafficked and are being supported by one of the specialized centers for victim support.[56] However, the Netherlands offers more time to victims to consider whether or not they will press charges. Under the B9 Regulation[57] victims are offered three months during which they may make their decision.[58]

The aim of this consideration period is to provide victims with the time to recover, receive support from a social center and the time to make a decision of whether or not to file a complaint against her/his traffickers. During this period, the person is to be provided with housing, legal counselling and medical assistance. In both countries, work permits are not granted during the reflection period.[59]

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[51] *Ibid.* Article 16(2).

[52] *Ibid.*

[53] K. Katsui, **"**Human rights of trafficked people in Asia-Pacific: Do states comply with international obligations to protect the victims rights?" Essex LL.M. 2001, p. 27.

[54] E. Pearson, *supra,* n. 9, p. 66.

[55] Circular regarding the issuance of residence documents and work permits to migrant victims of trafficking in human beings (7 July 1994).

[56] E. Pearson, *supra,* n. 9, p. 89

[57] Anti-Slavery International non-official English translation "Victims and eye witness declarants of trafficking in persons" (2000), referred to as B9 Regulation. As cited in E. Pearson, *supra,* n. 9, p. 85. Currently, the Netherlands is a country with the longest reflection period and serves as an example which is used to lobby for prolonging this period in other countries.

[58] Section (3) of B9 Regulation.

[59] E. Pearson, *supra,* n. 9, p. 89

In Belgium, if the victim decides to cooperate and press charges against traffickers, s/he will be issued a three month residence permit called a "declaration of arrival."[60] One month before the expiry of a three month permit, the Immigration Office is obliged to ask the public prosecutor for more information on the complaint. If the public prosecutor replies that trafficking is involved and the case remains unresolved, the Immigration Office may approve a second temporary permit of stay (hereinafter referred to as a BIVR) which is valid for six months.[61] A BIVR can be renewed every six months until criminal proceedings against the trafficker have been concluded. With a "declaration of arrival" and a BIVR, a victim may be employed if an employer has obtained proper authorization of employment from the regional authorities.[62]

In the Netherlands, the procedure for obtaining a temporary residence permit appears to be less complex. Once a victim has filed a complaint against a trafficker, s/he is allowed to remain in the country and is entitled to a temporary residence permit until the end of the criminal trial. At the same time, if a victim decides not to cooperate, then s/he is requested to leave unless they have applied for permanent residency. If the request is ignored and a trafficked person is found in the Netherlands after the permit expires, s/he is deported as an undocumented migrant. Furthermore, the reflection period only covers those who have been trafficked into prostitution in the Netherlands, and not those who have may have been trafficked into another country and have fled to the Netherlands.[63] Considering the fact that trafficked women are moved frequently between different EU States, it seems that this provision unnecessarily limits the B9 Regulation.[64] Finally, those who have not actually been forced into prostitution, but are in the process of recruitment, can report their traffickers and obtain a temporary residence permit. However, they are not entitled to a reflection period under the B9 Regulation.[65]

In both countries, when criminal proceedings against a trafficker have been concluded, victims may request a permanent residence permit on humanitarian grounds. In the Netherlands, this depends on the risk of prosecution, the risk of retaliation and the lack of possibility of reintegration in the country of origin. On the other hand, Belgium is one of the countries which offer the best possibility of permanent residence. In determining this request, the Immigration Office takes into consideration the significance of the information provided for the criminal proceedings against a trafficker but also the degree to which a trafficked person has adapted to society if the victim has been in Belgium for more than two years.[66]

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[60] *Ibid.*

[61] Bewijs van Inschrijving in het Vreemdelingenregister (BIVR) (Certificate of Registration in the Immigration Register).

[62] E. Pearson, *supra,* n. 9, p. 89-90; E. Niesner, C Jones-Pauly, *supra,* n. 9 pp. 56-57

[63] *Ibid.* p. 68.

[64] Statement given by Transnational AIDS/STD Prevention among Migrant Prostitutes in Europe Project (TAMPEP). As cited in: E Pearson, *supra,* n. 9, p. 85.

[65] *Ibid.* p. 65.

[66] *Ibid.* p. 46; E. Niesner, C. Jones-Pauly, *supra,* n. 9, pp. 52-53.

As the only exception, Article 18 of the Italian Immigration Law[67] provides residence permits in situations where the safety of a severely exploited victim is endangered as a result of trying to escape or as a consequence of filing a complaint against her/his traffickers. This is currently the only country where victims of trafficking can obtain a residence permit for humanitarian reasons regardless of whether they agree to assist in investigations against traffickers.

According to the national legislation of Italy, there are two ways of obtaining a residence permit. The first method is through a judicial procedure ("judicial path") in which the Public Prosecutor has a main role. The second method is a social procedure ("social path") with local authorities, NGOs and associations as main reference points. Both paths lead to residence permits for work or education, allowing a foreigner to stay in Italy in conformity with immigration laws regarding the presence of non-European Community citizens.[68] Furthermore, individuals granted the Article 18 permit are obliged to take part in a social assistance and reintegration programme offered by local non-governmental organizations and community projects in Italy.[69]

The special right of residence for humanitarian reasons is granted provided that specific conditions are met; namely if:

- during the course of a police investigation a victim avails himself or herself of state-run social services;
- a victim will provide witness testimony in preliminary investigations or during the trial;
- a victim is attempting to break free of the criminal association with their trafficker; and
- information is provided that leads to the conclusion that the respective foreigner was subject to conditions of severe exploitation or exposed to danger to his/her well being or life.[70]

As in Belgium and the Netherlands, Italy will issue a right of abode for 6 months which includes access to social services, education, unemployment lists and qualification for full time employment. If the right of residence expires and a person has found temporary employment or is participating in a regular training course, the right of abode can be prolonged for the duration of the working relationship, or even for an unlimited period of time. This law was further revised so that those who denounce traffickers will be given protection comparable to that given to witnesses who testify against organized criminal networks. Thus, trafficked persons are more

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[67] Article 18 of the legislative decree no. 286/1998. (25 July 1998, Italy).

[68] Associazione On the Road, "Article 18: Protection of Victims of Trafficking and fight against crime (Italy and the European scenarios)", Research Report (Italy, Associazione On the Road, 2002) pp. 38

[69] E. Pearson, *supra,* n. 9, p. 140.

[70] Article 18 para. 1, *supra,* n. 70.

likely to gain a permit if they denounce their traffickers. If they do so, they will receive a high standard of protection.[71]

The Italian model is not ideal, but certainly recognizes that the provisions of support and protection to victims should not be conditional on cooperation in criminal proceedings and prosecution.[72]

Overview of the EU proposals on the protection for victims of trafficking; subsidiary protection

Within the EU, the European Parliament has been the first body to call for concrete actions to combat trafficking in persons since the late 1980s.[73] Several resolutions have incorporated provisions related to the residence status of trafficked persons in countries of destination. In 1989, the European Parliament adopted a resolution on the exploitation of prostitution and trafficking in human beings, calling on Member States to ensure that victims could lodge a complaint against traffickers without fear of immediate deportation.[74] In 1993, the Resolution on Trade in Women[75] called for the granting of residence permits and pre- and post-trial protection of migrant women who acted as witnesses.[76]

In addition, the resolution requested permission for victims to remain in a Member State's territory, especially when repatriation potentially posed a threat to their personal safety or could expose them to renewed exploitation. This was followed by a 1996 Resolution which called on Member States to grant victims temporary residence permits for humanitarian reasons in cases where they had reported traffickers to the police. Furthermore, the resolution indicated that if repatriation could seriously endanger the lives of victims, Member States should allow victims to remain in their territory.[77] Finally, according to the 2000 Resolution, Member States should introduce temporary residence permits regardless of whether or not victims wish to testify.[78]

The EU Member States have also adopted measures to cover persons who are in need of international protection. All EU Member States have some form of subsidiary protection for those who do not qualify as refugees but cannot be returned to their

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[71] E. Pearson, "Preliminary Report: Whose interests served? A review of the obstacles to prosecution and measures to protect victims, especially those who act as witnesses, in the context of trafficking in persons" (Anti Slavery International, June 2001) p. 29.

[72] Anti-Slavery International, *supra,* n. 34.

[73] S. Scarpa, "Universalism and Regionalism: The synergy to fight against trafficking in human beings" at 10. Paper presented at Trafficking in Persons Conference, Nottingham, June 2003.

[74] Resolution A2-52/89, 14 April 1989, OJ C 120, 16 May 1989, p. 352 ff., point 8.2.

[75] Resolution B3-1264, 1283 and 1309/93, 16 September 1993, OJ C 268, 4 October 1993, p. 141 ff.

[76] See also "The Hague Ministerial Declaration on European guidelines for effective measures to prevent and combat trafficking in women for the purpose of sexual exploitation" (DCE/97-429), the Hague, April 1997. Chapter III.2.1. "Provide…a temporary residence status during criminal proceedings…to enable women to make a complaint…"

[77] Resolution A4-0326/95, 18 January 1996, OJ C 032, 5 February 1996, p. 88 ff. Art. 25 and 27.

[78] Resolution on the Communication from the Commission to the Council and the European Parliament "For further actions in the fight against trafficking in women" COM (1998) 726, 19 May 2000 Sec. 21.

countries of origin because of a serious threat to their safety. Subsidiary protection has been defined in the 2001 Proposal for a Council Directive regarding the status of refugees and persons who otherwise need international protection (hereinafter the Directive).[79]

The Directive defines "international protection" as refugee status and subsidiary protection status. Article 2(a) and Article 2(e) defines persons who are entitled to subsidiary protection as those who do not qualify as refugees "but otherwise satisf[y] the rules regarding international protection." Furthermore, Article 5(2) specifies that subsidiary protection will be granted to non-refugees and those who have applied for protection on grounds not enumerated in the 1951 Convention, who have been forced, owing to a well-founded fear of persecution, to remain outside of her/his country of origin and is unwilling to avail her/himself of the protection of that country.

In accordance with Article 5(2) of the Directive, Article 15 defines serious and unjustified harm as three types of harm: torture or inhuman or degrading treatment or punishment; the violation of human rights, sufficiently severe to engage the Member State's international obligations and a threat to life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalized violations of human rights. However, it is acknowledged that these "categories…of persons do not create…new classes but are believed to encompass the best ones."[80]

Trafficked persons are most likely to be covered by the first categorization in that they have been subjected to torture or inhuman degrading treatment or punishment. Hence, the real risk of such treatment in the future creates an obligation on States not to return a person to a territory where the risk exists. In order to benefit from subsidiary protection, a person who has been trafficked must show that s/he fears being subjected to torture or inhuman and degrading treatment at the hands of persons in her/his own country.[81]

In the current framework of the EU, the Directive's subsidiary protection regime provides the greatest hope for victims of trafficking who give evidence. It acknowledges that there are people who need international protection although they do not fit within the definition of a refugee found in the 1951 Convention.[82] The Directive does not require the additional conditions that must be fulfilled according to the 1951 Convention. Therefore, the Directive offers greater scope for protection than the 1951 Convention, as this document only requires the existence of a well-founded

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[79] Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 12 September 2001, COM (2001) 510 Final.

[80] *Ibid.* pp. 27-28.

[81] R. Piotrowicz, "Preempting the Protocol: Protecting the Victims and Punishing the Perpetrators of People Trafficking" p. 19 in Christine Kreuzer (ed), *Frauenhandel-Menschenhandel-Organisierte Kriminalitaet*-forthcoming.

[82] Piotrowicz, *supra,* n. 41, p. 275.

fear of being subjected to serious harm in the form of torture or inhuman and degrading treatment or punishment.[83]

The 1951 Convention: the right of a victim not to return

> Everyone has the right to seek and to enjoy in other countries asylum from persecution[84]

International refugee law was formulated to serve as a back-up for the protection owed a national by her/his state. It was meant to come into play in situations where that protection is unavailable, and only then, in certain situations.[85] In order to achieve official recognition as a refugee within the terms of the 1951 Convention, an individual must have crossed a national border and his fear of persecution must be well-founded. Furthermore, the persecution which a refugee fears must be based on one of the grounds enumerated by Article 1A(2) of the 1951 Convention, namely on the grounds of race, religion, nationality, membership of a particular social group and political opinion.

In order to establish a risk of persecution, one must demonstrate that they face a well-founded fear of "serious harm" and that such harm must be at the hands of the State or a force that the State cannot or will not control.[86] Apart from having a "well-founded fear of being persecuted" s/he must not be eligible to benefit from the protection of her/his country of origin or if that individual is unwilling to avail her/himself of the protection of that country.[87] Therefore, the proof of persecution is a crucial element in admission procedures and as a result, the burden of proof has grown more restrictive in recent years.[88]

According to the UNHCR Handbook,[89] fear of persecution contains a subjective element (feelings, state of mind of the asylum seeker who believes that in the event of expulsion s/he would face ill-treatment) and an objective element (factual situations, a real risk that in the event of expulsion, s/he would personally face ill-treatment). Both elements must be taken into consideration in order to assess the fear of each individual.[90] Applicants must show "good reasons" for their fear of persecution and that her/his fear is of "a reasonable degree."[91]

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[83] Piotrowicz, *supra,* n. 84, p. 19.

[84] Article 14, UDHR, *supra,* n. 6.

[85] *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689. p. 691.

[86] H. Crawley, *Refugees and Gender: Law and Process* (Bristol, Jordan Publishing Limited, 2001), p. 49.

[87] Article 1A(2), the 1951 Convention, *supra,* n. 14.

[88] Lambert, H., *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (The Netherlands, Martinus Nijhoff Publishers, 1995) p. 72.

[89] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* paras. 40 and 42.

[90] H. Lambert, *supra,* n. 91, p. 77.

[91] UNHCR, *Handbook* , *supra,* n. 92, paras. 41-45.

In Attorney General for *Canada v Ward*,[92] "[t]he test as to whether a State is unable to protect a national is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense."

In Rouzbeh Amjadishad[93] the Board held:

> Subjective fear is capable of objective assessment…a person claiming refugee status must establish consistently, plausibly and credibly that specific events or …persons intervened in his life so that there arose in him an almost irrepressible feeling of physical or psychological threat against him or against his fundamental rights as human rights.

However, contracting parties to the 1951 Convention are free to determine their own criteria in deciding who is a refugee, including the appropriate standard of proof.[94] Furthermore, a well-founded fear of persecution need not necessarily be based on an applicant's own personal experience. The experiences of friends or relatives and other members of the same racial or social group may show that his fear is well-founded and that he faces an imminent threat of becoming a victim of persecution.[95] The 1951 Convention allows national jurisdictions to adopt a liberal interpretation on this matter. While subordinating the recognition of refugee status to fears of being persecuted, it allows the applicant to take advantage of past or present persecutions as well as a fear of future persecutions.[96]

However, if an asylum seeker is forcibly repatriated to a country in which s/he has a well-founded fear of persecution or faces a risk of torture, then expulsion is contrary to international law.[97] According to Article 33 (1) of the 1951 Convention, no person should, or can, be forcibly repatriated to any country where s/he is likely to face persecution. Article 33 applies to refugees as well as to asylum seekers awaiting final determination of their status.[98] Therefore, the UNHCR has also recognized that the fundamental importance of the principle of non refoulement applies to those with a presumptive or prima facie claim to refugee status and are entitled to protection "irrespective of whether or not individuals have been formally recognized as refugees."[99] Hence, at the international level, there has been no distinction between entitlement to non refoulement and refugee status.[100]

The principle of non-refoulement is part of the right not to be returned that is recognized by international customary law. It should be noted that this principle is not

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[92] *Attorney General for Canada v Ward, supra,* n. 88.

[93] Immigration Appeal Board Decision M85-1935, May 13, 1987.

[94] H. Lambert, "Protection against refoulement from Europe: Human Rights Law comes to the rescue" 48 *ICLQ* (1999), p. 535.

[95] UNHCR, *Handbook* , *supra,* n. 92, para. 43.

[96] Lambert, H., *supra,* n. 91, p. 85.

[97] G Goodwin-Gill, *The Refugee in International Law* (New York, Oxford University Press, 1996) p. 137.

[98] *Ibid.*

[99] Executive Committee Conclusions No. 6 (1997) para. (c).

[100] G. Goodwin-Gill, *supra,* n. 100, p. 138.

absolute. Article 33(2) states that the benefit of non-refoulement "may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of…serious crime constitutes a danger to the community of that country." Whether s/he represents a risk to national security appears to be left to the judgement of a particular State.[101] What seems reasonable is that the crime in question and the threat to a community must be extremely severe if endangerment to the life of the refugee were to be disregarded.[102]

However, even if a State is authorized to expel an alien under the 1951 Convention in order to protect the security of the country against a serious danger,[103] it is nevertheless required to respect its legal commitments under other treaties such as Article 3 of the European Convention on Human Rights (hereinafter the European Convention),[104] Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (hereinafter the Torture Convention)[105] and Article 7 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR).[106] The principle of non refoulement is covered by the above mentioned articles which prohibit torture, cruel, inhuman or degrading treatment or punishment. It extends to every individual who has a well-founded fear of persecution, or if there are substantial grounds for believing that s/he would be in danger of being tortured if returned to a particular country.[107] Therefore, if an individual is unwilling to return, State authorities must verify that no obstacles exist to prevent the return of an individual to her/his country of origin before they exercise their power to expel or depart.[108]

Accountability of the state: "Persecution = Serious Harm + the Failure of State Protection" [109]

As a result of restrictive interpretations of Article 1A(2) and 1C(1) of the 1951 Convention, it has been accepted that persecution which is not committed by public or official authorities of a country of origin will not qualify an individual for refugee status. However, States are currently willing to grant another kind of status or a

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[101] *Ibid.* p. 139.

[102] *Ibid.* p. 14.

[103] Article 33(2) of the 1951 Convention., *supra,* n. 14.

[104] European Convention on Human Rights entered into force on 4 November 1950.

[105] U.N. Doc. A/39/51 (1984)], *entered into force* 26 June 1987.

[106] U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

[107] G. Goodwin-Gill, *supra,* n. 100, p. 139.

[108] Lambert, *supra,* n. 97, p. 515.

[109] D. Ryken, J. Donald, "Developments in refugee law relating to the interpretation to the term "social group" with particular reference to gender-based persecution on the basis of sexual orientation-a New Zealand perspective," August 2001. Paper presented at the International Bar Association 2001 Conference at Cancun. para. 15.

temporary right to stay, or to interpret the terms of the 1951 Convention in a liberal manner so as to include other actors of persecution.[110]

Under International Human Rights law, all States have an obligation to recognize, protect, promote and ensure the realization of human rights in practice. In relation to trafficking, this means the prevention of violations through anti-trafficking laws, implementation and enforcement of existing human rights treaties, investigation of violations, punishment of perpetrators as well as protection and reparation for victims of trafficking regardless of their immigration status.[111]

Despite State commitments, once trafficked persons are released from slavery-like or forced labour conditions, they may be subjected to serious human rights violations at the hands of governments. They are more likely to be treated as criminals than victims without much consideration as to what the trafficked person has experienced.[112]

According to general principles of international law, State responsibility may arise directly from acts directly or indirectly committed by its government agents, or omissions where the domestic legal and administrative systems failed to enforce or guarantee the observance of international standards.[113] Although the 1951 Convention does not specify from where persecution must originate (whether from State or non-State actors) States have a responsibility to protect against human rights abuses committed by non-State actors.[114] In any case, the 1951 Convention requires that asylum seekers show that a State was unable or unwilling to prevent or protect her/him from the persecution.

As the aim of the 1951 Convention is to ensure that effective protection is available, rather than merely holding States responsible, it is important to stress the difference between an absence of State protection under international refugee law and upholding State responsibility in accordance with human rights law. Victims of trafficking must establish that there has been a failure of State protection although it is not necessary to show that the State is directly accountable for the harm feared or sustained.[115] This may include a failure to exercise due diligence or to take reasonable steps to prevent and respond to violence as well as to punish abuses taken by traffickers.

This standard of due diligence has been articulated by the Inter-American Court of Human Rights:

> An illegal act which violates human rights and which is initially not directly imputable to the State (for example, because it is an act of a private person…) can lead to international responsibility of the

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[110] Lambert, *supra,* n. 91, p. 74.

[111] D'Cunha, J., "Trafficking in persons: a gender and rights perspective," Expert Group Meeting on Trafficking in Women and Girls, November 2002, USA. EGM/TRAF/2002/EP.8. Text available at http://www.un.org/womenwatch/daw/egm/trafficking2002/documents.html, accessed 12 August 2003.

[112] Global Alliance Against Trafficking in Women (hereinafter GAATW), "Human Rights and Trafficking in Persons: A Handbook", (Bangkok, GAATW, 2001) p. 54.

[113] G. Goodwin-Gill, *supra,* n. 100, p. 141.

[114] Non-state actors are people and organizations acting from outside the states and its organs.

[115] H. Crawley, *supra,* n. 89, p. 48.

> State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[116]

In cases of trafficking, threats and acts tend to originate from non-State actors. More often than not, States are responsible for failing to enforce existing international and domestic standards for the protection of trafficked victims. Hence, there is a failure of protection where a government is unwilling to defend citizens against private harm but also where there has been an objective inability to provide adequate protection.[117] In addition, there is no meaningful protection if a government encourages, supports or condones privately inflicted violations of basic human rights.

Failure of State protection will exist if "serious harm" has been committed by others and if authorities are unwilling to give effective protection because they support or tolerate the actions of the private persons concerned or if they have other priorities. This means that even though a State may have prohibited a persecutory practice, it may continue to condone or tolerate that practice.[118]

Another case when the State fails to provide protection occurs when "serious harm" has been committed by others, and the authorities are unable to effectively prevent the persecutory practice. In any instance, it will be necessary for the applicant to prove that State protection was not available. However, even when State protection may appear to be available, efficacy of such protection may be questionable.

> In assessing…persecution it is important to research the…norms…to determine how they operate both through legislation and in terms of actual practice in order to determine the degree of protection available.[119]

The 1951 Convention does not differentiate between State and non-State agents of persecution.[120] What is relevant is the inability or unwillingness of the State to offer protection from persecution.[121] 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

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[116] Amnesty International, "The severity shows the hatred-Homophobic Violence in the Community", p. 40. Text at http://web.amnesty.org/ai.nsf/4e5be749f06b3e4880256af600687348/dc31f264b72fabf280256a48003c810c/$FILE/ch5.pdf, accessed 17 July 2003.

[117] J. C. Hathaway, *The law of refugee status* (Toronto, Butterworths, 1991) p. 127.

[118] 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" 14 *IJRL* 2/3 (2003) p. 461.

[119] ADIMA (1996) Refugee and Humanitarian Visa Applications: Guidelines on Gender Issues for Decision-Makers (Australian Department of Immigration and Multicultural Affairs) para. 4.11.

[120] UNHCR, *Handbook*, *supra,* n. 92. See para. 65 "Where...offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to provide effective protection."

[121] Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. para. 23.

of State protection.[122] Therefore, acts committed by non-State actors when combined with state inability to protect, may constitute "persecution."[123]

In *Canada (Attorney General) v. Ward*, the Board outlined its position regarding the link between persecution and protection:

> Fear of persecution and lack of protection are interrelated elements. Persecuted persons clearly do not enjoy the protection of their country of origin and evidence of the lack of protection may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear.[124]

Both the European Court of Human Rights and the Inter-American Court have recognized the accountability of States for failing to protect their own citizens or respecting their international obligations. In X and Y v Netherlands[125] and Valesquez Rodriguez v Honduras,[126] the Courts have found States responsible for an absence of adequate legal protection and failure to investigate abuses, compensate victims or punish perpetrators. Since States have an affirmative obligation to prevent, investigate, prosecute and punish the violations of human rights, the failure or refusal to act is considered to be equivalent to the commission of an act.[127]

In addition, discussions have also been held regarding the relevance of whether or not the failure of a State to act was deliberate. The EU has issued a joint position on the application of the refugee definition found in Article 1 of the 1951 Convention. In cases where an act is committed by non-State agents it held:

> Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status...in the light in particular of whether or not the failure to act was deliberate.[128]

Trafficking in women: gender based persecution and membership of a particular social group?

> Some trafficked women... may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women...for the purposes of forced prostitution… is a form of gender-related violence… that can even lead to death. It can be

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[122] Shearer Demir, *supra,* n. 4, p. 30.

[123] *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689. p. 714.

[124] *Ibid.* p. 702.

[125] *X and Y v. the Netherlands* (1986) 8 EHHR 235 85/4.

[126] *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[127] P. Goldberg, "US Law and Women Asylum Seekers: Where Are They and Where Are They Going?" 73 *Interpreter Releases* 26 (1996) p. 573.

[128] Council of the European Union Joint Position defined by the Council on the basis of Article K3 of the Treaty on European Union on the "Harmonised Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees" Sec.5.2.

> 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, women...may face serious repercussions after their escape and/or upon their 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.[129]

Being a victim of trafficking normally does not suffice for the establishment of a valid claim for refugee status. On the other hand, this does not entail that under particular circumstances, trafficked persons may be in need of international refugee protection, such as those cases where the acts inflicted by the perpetrators would amount to persecution for one of the reasons listed in the 1951 Convention.[130] UNHCR has encouraged governments to open their asylum processes to claims from individual trafficked persons.[131] It has also argued that victims of trafficking are entitled to refugee status if their country of origin is unwilling or unable to provide protection.[132] Trafficked persons should legally enjoy the protection afforded to other persecuted groups through existing refugee mechanisms.[133]

Defining "particular social group" in current jurisprudence

In the international arena, there is evidence of increased support for the application of the "particular social group" ground claimed by women who allege a fear of persecution solely by reason of their gender.[134] In addition, it has been agreed that crimes such as rape, domestic violence, trafficking and other forms of gender-related violence are acts which inflict severe pain and suffering (both mental and physical) and can be used as a form of persecution.[135] Although some women may constitute a "particular social group", in each case they will be required to establish that the fear

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[129] 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, at para. 18.

[130] Observations by the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees on the Proposal for an EU Council Framework Decision on Combating Trafficking in Human Beings. Sec (v), point 9. Text available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/HR.GVA.OHCHR.STM.CHR.01.04.En?Opendocument>, accessed 11 August 2003.

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

[132] Shearer Demir, *supra,* n. 4, at 18.

[133] UNICEF/UNOHCHR/OSCE-ODIHR, 2002. *supra,* n. 11, p. 139.

[134] UNHCR, Refugee Women and International Protection. Conclusion No. 39.

[135] Guidelines on International Protection, *supra,* n. 131, para. 9.

of persecution is well-founded, that the nature of harm rises to the level of serious harm, and that there has been a failure of State protection.[136]

Though gender is not referenced in the refugee definition as one of the grounds for establishing Convention refugee status, it is widely accepted that it can influence the type of persecution or harm suffered. If properly interpreted, the definition of the 1951 Convention may cover gender-related claims by providing protection to women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of the enumerated grounds.[137]

Current scholarship has suggested that the category of particular social group has an element of open-endedness that may enable the protection of different classes susceptible to persecution.[138] Hence, it has the potential of incorporating violations that are not covered by the other categories and may permit the inclusion of "all the reasons for persecution an imaginative despot could conjure up."[139] In Attorney-General v. Ward,[140] the Board accepted that a particular social group could include persons who feared persecution because they were being discriminated against on the basis of gender.

In *re Acosta*[141] the Board observed that a social group for the purposes of the Convention was defined by:

> an immutable characteristic…a characteristic that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed.

The Board went on to state that probably

> more than any other area of the (Geneva) Convention, the phrase "membership of a particular social group" has to be left to evolve in line with society's understanding of groups within it…There is no reason, therefore, to assume that the phrase "particular social group" in the Refugee Convention is meant to be confined to narrowly defined, small groups of people…The members of the social group may not know each other, may not even consider themselves part of the social group and the only thing that

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[136] H. Crawley, *supra,* n. 89, p. 73.

[137] Guideline 4: Women refugee claimants fearing gender-related persecution: Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. See A.I.

[138] G. Goodwin-Gill, *supra,* n. 100, p. 48.

[139] A. C. Helton, "Persecution on Account of Membership in a Particular Social Group as a basis for Refugee Status, 15 *Colum Hum Rights Rev.* 39 (1983) p. 56.

[140] *Attorney-General v. Ward*, *supra,* n. 126.

[141] *In re Acosta* (1985) 19 I. & N. 211. See also *Islam v Secretary of State for the Home Department Appeal Tribunal and Another, Ex Parte Shah, R v.* [1999] UKHL 20; [1999] 2 AC 629; [1999] 2 All ER 545 (25 of March, 1999).

> nominally unites them is the characteristic which gives rise to the persecution.[142]

As a consequence of different interpretations of the phrase "membership of a particular social group",

> courts and jurists have taken widely differing views as to what constitutes "particular social group" for the purposes of the 1951 Convention. The phrase is ambiguous, indeterminate and lacks a detailed legislative history and debate.[143]

The UNHCR has defined a "particular social group as normally comprising persons of similar background, habits or social status"[144] "who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society."[145] Therefore, since "gender is an innate characteristic…women may form a particular social group within the Convention refugee definition."[146]

In Cen v. Canada,[147] a woman had been sexually assaulted, drugged, exploited and falsely accused, tried and sentenced by her government to 7 years imprisonment for prostitution. As a result of the sexual assault, she became pregnant and underwent an abortion. She was denied refugee status as the Convention Refugee Determination Division (hereinafter the CRDD) decided that there was no nexus between her fear of persecution and one of the Convention grounds. She lodged an application for judicial review of the CRDD decision. Counsel argued that the claimant was "a member of a particular social group because of her gender and, as a woman, she was harassed and…would not be facing prosecution through either the regular legal system or administrative detention, if she was not a woman."[148]

Also there was a suggestion that a "particular social group" might be defined as:

> women who have been subjected to exploitation resulting in the violation of their security of the person and who, in consequence of the exploitation have been tried, convicted and sentenced to imprisonment.[149]

Trafficked women, especially those who have been trafficked for sexual exploitation, are vulnerable to arrest, detention and sentencing as undocumented migrants who have entered or worked in destination countries illegally. They usually do not have a

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[142] European Council on Refugees and Exiles (ECRE) (September 2000). "Position on the interpretation of Article 1 of the Refugee Convention". Points 56-58. Text available at <http://www.ecre.org/positions/tp.shtlm>, accessed 23 August 2003.

[143] *A. v. Minister for Immigration and Ethnic Affairs* (1997) 142 A.L.R.

[144] UNHCR, *Handbook*, *supra,* n. 92, para. 77.

[145] Guidelines on International Protection, *supra,* n. 131, para. 29. and Guidelines on International Protection, *supra,* n. 123, para. 11.

[146] Guideline 4, *supra,* n. 139. See: A.III.

[147] *Cen v. Canada (Minister of Citizenship and Immigration)* IMM-1023-95.

[148] *Ibid.* See < http://reports.fja.gc.ca/fc/1996/pub/v1/1996fca0120.html>, accessed 11 August 2003.

[149] *Ibid.*

chance to lodge a complaint, seek damages and asses whether it is safe to return home.[150]

In A. *v Minister for Immigration*,[151] the Judge stated that "[t]he only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution…"

Recognition by courts of trafficked women as members of particular social group

It is possible that States will be obliged by refugee law to allow trafficked victims to remain in a destination country. In the majority of cases, it appears that women are trafficked because they are vulnerable women and not because of one of the grounds enumerated in the 1951 Convention. However, there is evidence of a willingness by some countries to recognize women victims of trafficking for forced prostitution as members of a particular social group.[152]

Some courts have used the method of gathering all possible characteristics together in order to create a social group. In *Litvinov v SCC*,[153] members of a particular social group are recognized as

> women recently arrived from elements of the former Soviet Union...who are lured into prostitution …threatened and exploited by individuals not connected to government, and who can demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection."[154]

In the United States, asylum was also granted to a Chinese woman who was forced into prostitution as she had established a well-founded fear of persecution. She was also unable to avail herself of the protection of authorities and as such belonged to "a particular social group of women in China who oppose coerced involvement in government sanctioned prostitution."[155] Thus, if a trafficked woman can prove a well-founded fear of persecution, and cannot avail herself of protection from her own government, than she can be considered as a member of a particular social group and meets one of the five grounds of the 1951 Convention.[156]

Canada is also one of the countries which has recognized trafficked women as members of a particular social group. For instance, Canada has granted refugee status to a Ukrainian woman trafficked into forced prostitution. The Refugee Division found that the claimant was a member of a particular social group as an "impoverished

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[150] GAATW, *supra,* n. 114, p. 54.

[151] *A. v. Minister for Immigration and Ethnic Affairs and Another* (1997) 142 A.L.R. 331.

[152] Piotrowicz, *supra,* n. 41, pp. 274-275.

[153] *Litvinov, Svetlana v. SCC FCTD.* No. IMM-7488-93.

[154] *Ibid.* See Interpretation of the Convention Refugee Definition in the Case Law (Legal Services Immigration and Refugee Board, 2002) Chapter IV: Grounds of Persecution.

[155] A. Kartusch, *supra,* n. 21, p. 67.

[156] Guidelines on International Protection, *supra,* n. 131, para. 20-21.

young women from the former Soviet Union recruited for exploitation in the international sex trade." In addition, the Division found that upon her return to Ukraine, there was "a reasonable possibility that she would be subjected to abuse amounting to persecution at the hands of organized criminals." It found it reasonable that she would not be willing to seek State protection "given the ineffectualness of Ukraine's attempts to combat organized crime, and the links between organized crime and the government."[157] Finally, the Refugee Board 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 claimant's position.[158]

Canada may be used as an example of a State that is carefully adhering to its own gender guidelines. The Canadian Immigration and Refugee Board granted asylum to a Thai sex trade worker in debt bondage based on her membership in a particular social group of women, specifically, a social group of former sex trade workers.[159] In this case, the Guidelines concerning Women Refugees Claimants Fearing Gender-Related Persecution were referenced.[160]

In the UK, the Immigration Appeal Tribunal found that a woman from Ukraine who was forced to work as a prostitute belonged to a particular social group that consisted of "women trafficked from the Ukraine to other countries for sexual exploitation and detained under threat of violence." Also, the Tribunal found that Ukrainian authorities "rarely prosecute men for engaging women in the explosively growing sector of sexually exploitative work" and therefore, they were unable to provide the appellant with sufficient protection. Since the authorities could not sufficiently protect the woman, the Tribunal accepted that she had a well-founded fear of persecution for a Convention reason.[161]

In determining whether a State is willing or able to provide protection to a woman fearing gender-related persecution, decision makers should consider the fact that the forms of evidence which the claimant might normally provide as "clear and convincing proof" of a State's inability to protect the victim will not always be either available or useful in cases of gender-related persecution. In cases such as trafficking for sexual exploitation, the woman may have difficulty in substantiating her claim so

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[157] *CRDD V95-02904 (November 26, 1997).*

[158] J. Morrison, B. Crosland, "The trafficking and smuggling of refugees: the end game in European asylum policy?" New Issues in Refugee Research, Working Paper No. 39 (April 2001) at 66. Text available at http://www.unhcr.org/cgibin/texis/vtx/home/+3wwBmeFjT89wwwwnwwwwwwwhFqo20I0E2gltFqoGn5nwGqrAFqo20I0E2glcFqiTdGGGo5dDawDmagGd5cwDmDzmxwwwwwww/opendoc.pdf, accessed 11 August 2003.

[159] *CRDD No. 298, No. T98-06186. (Mar. 15, 2000).*

[160] T. Hartsough, "Asylum for Trafficked Women: Escape Strategies Beyond the T Visa", 13 *Hastings Women's L.J.* 77 (Hastings College of the Law Hastings Women's Law Journal, 2002) p. 43.

[161] *SSHD v. Dzhygun IAT [00/TH/00728]* 17 May 2000.

reference may need to be made to alternative forms of evidence. These may include the testimony of women in similar situations where there has been a failure of State protection, or the testimony of the claimant herself regarding past personal incidents where State protection has been insufficient.[162]

Although States have adopted varying stances on gender-based persecution, acceptance of gender-based claims is sporadic.[163] The problem for many female applicants will not lie in demonstrating that the abuse constitutes "serious harm", but rather that the State is implicated in, or has failed to protect them from that harm. Since States are presumed capable of protecting their citizens, it is necessary to determine whether the State is liable for failing to protect against the acts of private individuals which violate protected human rights.[164] If the State fails to protect those put at serious risk due to gender, whether or not the State authorities are directly responsible for the alleged harm, such acts can still be considered as gender-based persecution.[165]

Finally, there has been recent recognition of a "risk of being trafficked" as a ground for granting asylum. The Immigration Appeal Tribunal of the UK found that K belonged to the social group of "women from the North East of Albania." The Tribunal accepted that if the claimant did return to Albania, she could not go near her family (because it was her family that sold her in the first place). Thus, "it would be disproportionate to require the Appellant to leave the country and seek entry clearance from abroad." It also accepted the "argument…that the…objective material, of recent date, indicates that there would not be a sufficiency of protection for the Appellant in Albania" and "that while there may be some improvement, the government of Albania does not yet fully comply with the minimum standards for the elimination of trafficking."[166]

International and regional human rights mechanisms: relevant provisions for trafficking victims

Trafficked victims are entitled to full protection of their human rights regardless of their potential breaches of domestic legislation provisions in destination countries. As previously mentioned, victims generally posses neither legal residence status nor the required employment permits. However, International Human Rights law has an aim to secure the fundamental rights of all human beings regardless of their legal status or

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[162] Guideline 4, *supra,* n. 139. See: C.II.

[163] J. Kumin, "Gender: Persecution in the Spotlight" 2*UNHCR Refugees Magazine* 123. Geneva, Switzerland. pp. 12-13.

[164] Crawley, *supra,* n. 89, p. 52.

[165] Shearer Demir, *supra,* n. 4, at 15.

[166] Women's Asylum News, *supra,* n. 38.

nationality.[167] In order to be bound by specific obligations enshrined in International Human Rights treaties**,** States must have acceded to or ratified these documents or the binding obligations must be considered as a part of customary international law.

In the following section**,** the discussion will consider the particular human rights which may be violated in the context of trafficking for which States can be held accountable in cases where they have failed to protect the rights and needs of a trafficked victim and failed to punish traffickers.

Trafficked women may be subjected to a wide range of human rights abuses, namely the right to be free from cruel, inhuman and degrading treatment, the right not to be enslaved, the right to liberty and security of the person, the freedom of movement and a wide range of economic, social and cultural rights.

Prohibition of trafficking in persons

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others[168] (hereinafter the 1949 Convention) consolidated all previous instruments[169] regarding trafficking and exploitation of prostitution. Article 1 of the Convention obligates States to "punish" any person who "procures [or] entices...for prostitution, another person, even with the consent of that person."

However, this treaty has been identified as problematic and heavily criticized by human rights activists. As the 1949 Convention has focused on the elimination of prostitution instead of the protection of human rights of trafficked persons, it cannot be regarded as an effective human rights convention.[170] The 1949 Convention has not been widely ratified and has been criticized for the absence of a definition of trafficking, lack of enforcement mechanisms and for referring to trafficking as solely the cross-border movement of persons into prostitution.[171]

The groundbreaking Trafficking Protocol[172] not only redefined the international standard of trafficking in persons, but also established new standards with respect to protecting the rights of trafficked persons, especially those who act as witnesses.[173]

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[167] Katsui, supra, n. 55, p. 19.

[168] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271, entered into force 25 July 1951.

[169] Such as the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, and the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age. As cited in E. Pearson, supra, n. 9, p. 30.

[170] GAATW, supra, n. 115, p. 23.

[171] United Nations Economic and Social Council, Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on Violence Against Women, its cause and its consequences, Ms Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with the Commission on Human Rights Resolution 1997/44, E/CN.4/2000/68, February 2000.

[172] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *supra*, n. 17.

The Trafficking Protocol is the most comprehensive international instrument and the first UN instrument which focuses specifically on trafficking in human beings. Containing the first international definition of "trafficking in persons," the Protocol serves as a legal framework for the establishment of national standards for criminalization of the act of trafficking, determining the severity of punishment and addressing the human rights protection for victims of trafficking. The elements for the support, assistance and protection of trafficking victims are outlined in Articles 6 and 7 of the Protocol.

In appropriate cases and to the fullest extent possible under domestic legislation, each State Party shall protect and assist victims of trafficking.[174] Although the language itself is very weak ("appropriate cases") and appears to permit governments to provide assistance to some trafficked persons but not to others, the Protocol nevertheless requires governments to adopt such measures.[175]

In addition, it contains only one brief reference to the resident status of victims in destination countries. The Protocol continues that each State Party shall consider the adoption of legislative or other appropriate measures that would permit victims of trafficking to remain temporarily or permanently in its territory in appropriate cases.[176] The need for legal immigration status is recognized but there is no government obligation to take specific action. The duties of State parties are very limited and the language employed is non-obligatory, as they must only consider allowing victims to stay.[177] Governments need to understand that trafficked persons who face immediate deportation or arrest will not likely be willing to cooperate with law enforcement officials nor will they readily report the crime.[178]

Article 6 of the Convention on Elimination of all Forms of Discrimination against Women[179] (hereinafter CEDAW) specifically obliges State Parties to take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women. This obligation also requires States Parties to address the root causes of trafficking and the exploitation of prostitution in addition to punishment of trafficking in women.[180]

Non-refoulement, torture, cruel, inhuman and degrading treatment

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[173] E. Pearson, *supra,* n. 9, p. 16.

[174] Article 6(1), Trafficking Protocol, *supra,* n. 17.

[175] Jordan, *supra,* n. 36, p. 19.

[176] Article 7(1), Trafficking Protocol, *supra*, n. 17.

[177] Piotrowicz, *supra,* n. 2, p. 4.

[178] Jordan, *supra,* n. 36, at 26.

[179] Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* 3 September 1981.

[180] L. Chiang, "Trafficking in Women" 1 *Women and IHRL* (1999) p. 348.

In a joint report with the World Health Organization (WHO), UNHCR identified sexual violence as a form of torture,[181] and recently called for individual States to introduce gender and age-specific safeguards regarding female victims of torture and gender-based persecution.[182]

Everyone is guaranteed the right to be protected against torture, inhuman and degrading treatment under Article 3 of the European Convention,[183] Article 3 of the Torture Convention,[184] Article 7 of the ICCPR[185] and Article 10 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families[186] (hereinafter ICPRMW), irrespective of conduct, citizenship or nationality.[187] In contrast to Article 3 of the European Convention and Article 3 of the Torture Convention, Article 7 of the Political Convention and Article 10 of the ICPRMW each prohibit cruel treatment and punishment. Even in situations of war or public emergency threatening the life of the nation,[188] provisions on the prohibition of torture, inhuman and degrading treatment are non-derogable. Moreover, this obligation is valid regardless of "activities of the individual in question, however undesirable or dangerous are, they cannot be considered."[189]

Although Article 7 of the ICCPR does not provide a clear definition of torture and cruel treatment, the Human Rights Committee (hereinafter the HRC) states that States Parties should afford protection to everyone against acts prohibited by Article 7, regardless of whether those acts are inflicted "by people acting in their official capacity…or in a private capacity."[190] This is particularly significant as cases of trafficking are mainly committed by non-State actors and therefore the Torture Convention would not be applicable.

In this context, the protection afforded by previously mentioned conventions is wider than that provided by Article 33(1) of the 1951 Convention. Article 33(1) of the 1951 Convention provides for exceptions to the principle of non-refoulement if there are reasonable grounds to believe that an applicant represents a danger to the security of the country in which s/he seeking asylum.[191]

While the European Convention does not contain provisions on asylum or non-refoulement, the European Court of Human Rights has held that expulsion or

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[181] UNHCR/WHO, "Mental Health of Refugees" (Geneva, Switzerland, 1996). Text available at http://www.unhcr.org/cgi-bin/texis/vtx/home/+mwwBmer2uk_wwwwnwwwwwwwhFqhT0yfEtFqnp1xcAFqhT0yfEcFqSMnDBwcarnwcBradhaGnh1tnn5Dzmxwwwwwww1FqmRbZ/opendoc.pdf>, accessed 20 August 2003.

[182] Shearer Demir, *supra,* n. 4, p. 33.

[183] European Convention, *supra,* n. 107.

[184] Torture Convention, *supra,* n. 108.

[185] ICCPR, *supra,* n. 109.

[186] U.N. Doc. A/47/49 (1992). *entered into force* 1 July 2003.

[187] Lambert, *supra,* n. 97, p. 522.

[188] See Article 15(2) of the European Convention; Article 2(2) of the Torture Convention; Article 4(2) of the ICCPR.

[189] *Ahmed v Austria (1996) EHRR No. 25964/94* para 41.

[190] General Comment No. 20. Article 7, point. 2. Forty-fourth session (1992)

[191] Article 33(2), the 1951 Convention, *supra,* n. 14.

extradition of a person to a State where s/he is threatened with inhuman treatment may lead to violation of Article 3. In reality, the European Convention is the most liberal on the issue of particular treatment which must be prevented by application of the principle of non-refoulement.

In *Chahal Family v United Kingdom*[192] the European Court held that:

> whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3…if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion… In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the…1951 Convention.

In *Ahmed v Austria*[193] the European Court of Human Rights held that State Parties to the Convention are obliged not to expel an alien "where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country."

In *Soering v UK*, the Court concluded that "a person's deportation or extradition may give rise to an issue under Article 3 (art. 3) of the Convention where there are serious reasons to believe that the individual will be subjected, in the receiving State, to treatment contrary to that Article (art. 3)."[194]

Through wide interpretation of the words "inhuman and degrading treatment", the European Court of Human Rights as well as the HRC have recognized that anyone, including rejected asylum seekers, may seek protection against refoulement. On the other hand, the Torture Committee has restricted the interpretative scope of Article 3 of the Torture Convention. Therefore, non-refoulement is limited only to torture and does not extend to less serious ill-treatment.[195]

It is unlikely that protection under Article 3 of the Torture Convention will be sought for the protection of trafficked persons.[196] According to Article 1(1) of the Convention, an act constituting torture must be inflicted by "a public official or other person acting in official capacity." At least formally, traffickers are not working in an official capacity. However, where the traffickers have been working in collusion or

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[192] *Chahal Family v. United Kingdom (1996) EHRR No. 22414/93 para. 80.*

See also *Vilvarajah and Others v United Kingdom (1991) EHRR No. 13448/87 para. 103.*

[193] *Ahmed v Austria, supra,* n. 192, para. 39.

[194] *Soering v UK* (1989) EHRR No. 14038/88, para. 82.

[195] Lambert, *supra,* n. 96, p. 533.

[196] Katsui, *supra,* n. 56, p. 23.

any other form of cooperation with the authorities, including participation or the support of retribution measures by traffickers against repatriated victims, it would be possible to argue that there is State involvement in the infliction of torture.[197]

Therefore, the prohibition of torture gives rise to a negative obligation for States to refrain from expulsion or extradition when this would facilitate torture or inhuman treatment by a third State, which is not required to be a State Party to the Convention. If a State Party to the European Convention, the Political Covenant or the Torture Convention disregards this duty, it violates prohibition of torture which is also part of customary international law.[198]

Prohibition of slavery, forced or compulsory labour

Treaty law has treated issues of sex trafficking and forced prostitution distinctly from other forms of slavery and the slave trade and has addressed these two issues simultaneously since the 1950s. Since the 1960s, however, opinio juris and State practice, as manifested in the organs of the United Nations, have indicated that the term "slavery" as employed in customary law has evolved to encompass all forms of sex trafficking as a result of forced prostitution of aliens.[199]

Slavery as well as torture form an extreme expression of the power one human being over another and represents a direct attack on the essence of one's human dignity and personality.[200] The Slavery Convention defines slavery "as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[201] The Supplementary Convention to the Slavery Convention[202] calls for the elimination of slavery-like practices in which many trafficked persons find themselves. It obligates States Parties to take action toward:

> the abolition or abandonment…of a debt bondage…the status or condition arising from a pledge by debtor of his personal services…if the value of those services as reasonably assessed is not applied towards the liquidation of the debt[203]

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[197] Piotrowicz, *supra,* n. 41, p. 274.

[198] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (N.P. Engel, Kehl am Rhein, 1993) p. 137.

[199] Y. Rassam, "Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law" 39 *Va. J. Int'l L.* 303. Text available at http://web.lexis-nexis.com/professional/form?_index=pro_en.html&_lang=en&ut=3239806997>, accessed 1 September 2003.

[200] *Ibid.* p. 143.

[201] Article 1(1). Slavery Convention, 60 L.N.T.S. 253, *entered into force* 9 March 1927.

[202] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, *entered into force* 30 April 1957.

[203] *Ibid.* Article 1.

As recognized in the Kunarac case, indicia of slavery may include "sex; prostitution; and human trafficking" as well as "control of sexuality."[204]

The prohibition of slavery and servitude is also found in Article 8(1) and (2) of the ICCPR, Article 4 of the European Convention[205] and the UDHR[206] as well as Article 11 of the ICPRMW. In addition, two ILO Conventions[207] condemn slavery-like practices as well. They prohibit the use of forced or compulsory labour as "a service which is extracted from any person …and for which the said person has not offered herself voluntarily."[208]

The International Law Commission is of the view that prohibition of slavery can be deemed as *ius cogens* or at least constitutes a binding obligation on Member States of the UN.[209]

Right to liberty and security of persons: freedom of movement

Everyone has the right to liberty and security of person.[210] Victims of trafficking usually do not posses legal status in destination countries so they are often treated as criminals rather than victims who should enjoy full protection provided by International Human Rights law. Under such treatment, victims have often been detained or imprisoned for illegal entrance in a country. The authorities usually do not take account of the fact that these individuals have been trafficked and will therefore not posses valid documents.

There is a close relationship between liberty of persons, freedom of movement and the prohibition of arbitrary expulsion of aliens**.** Along with endangering an individual's liberty, trafficking usually incorporates serious restrictions on a woman's freedom of movement as a result of abduction or the confiscation of a passport or other identification papers. Generally, upon arrival in a destination country, a trafficked victim's papers have been taken away rendering her an illegal resident. In addition, she is usually held in a "private house" with restricted movements and isolated from the outside world.

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[204] *Prosecutor v Kunarac et. al.,* Judgement, IT-96-23-T & IT-96-23/1-T, 22 February 2001. paras. 542-543.

[205] No breach of Article 4 has yet been found.

[206] Although UDHR is not per se legally binding, some argue that it has acquired the status of international customary law. At the United Nations International Conference on Human Rights in Teheran the statement by representatives of 84 States adopted the Proclamation of Teheran which states that "the UDHR constitutes an obligation for the members of the international community." As cited in: O. Schachter, *International law in theory and practice* (Dordrecht, M. Nijhoff, 1991) p. 343.

[207] International Labour Organization Conventions No. 29 Concerning Forced Labour (ILO No. 29) and No.105 Concerning Abolition of Forced Labour (ILO No.105).

[208] Article 2 of ILO No. 29.

[209] O. Schachter, *supra,* n. 209, p. 343.

[210] Article 9 the ICCPR, Article 5 of the European Convention, Article 16 (1) of the ICPRMW and Article 3 of the UDHR.

Article 13 of the ICCPR reads, "[a]n alien...may be expelled…only in pursuance of a decision reached in accordance with law..." The right to move freely within the State territory[211] as well as the prohibition of arbitrary expulsion of aliens guaranteed by Article 13 are rights that are available only to persons who are lawfully within the territory of a State Party. Therefore, although they are entitled to enjoy these rights in the same capacity as nationals, in this case aliens are subjected to discrimination as States may deprive them of the protection of all rights by expelling them from their territory.[212]

The HRC held that this provision does not apply to illegal entrants unless the legality of his stay is in dispute.[213] Trafficked victims cannot be held responsible for their illegal entry since trafficking is conducted on a non-consensual basis by third parties.[214] Therefore, it can be argued that trafficking victims are entitled to remain in destination countries under Article 13 of the ICCPR.

Protection of economic, social and cultural rights

Lack of education, poverty and health inequalities involve the denial of basic social and economic rights for trafficked women. Articles 6, 7 and 9 of the International Covenant on Economic, Cultural and Social Rights[215] (hereinafter ICESCR) and Article 11 of CEDAW contain provisions relevant to women's livelihood such as the right to make their living by work they have freely chosen, the right to just and favorable conditions of work and the right to social security. Women forced into prostitution are denied the right to freely choose their work or their conditions. Their right to just and favorable conditions of work is also violated as they are forced to work without payment, in unsafe and unhealthy working conditions. Article 11 of the ICCPR recognizes the right of everyone to an adequate standard of living, including adequate food, clothing and housing. Victims of trafficking are deprived of this right as they usually live in poor conditions without the possibility of a decent standard of living.

The right to physical and mental health, enshrined in Article 12 of the ICESCR and Article 12 of CEDAW is violated as they are denied access to health services. Article 12 of CEDAW contains the right to health care and related services. Women trafficked for sexual exploitation are often sexually abused and raped in order to break down their emotional and mental defenses and to force them into sex work. They are often physically punished for refusing to have sex with customers or for trying to escape. They do not have a right to choose clients, conditions of selling their services or methods to prevent sexually transmitted diseases. Despite the high risk of HIV/AIDS, they are forced to have unprotected sexual contact and are punished if

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[211] Article 12. *supra*, n. 109.

[212] M. Nowak, *supra,* n. 201, p. 199.

[213] General Comment No. 15. "The position of aliens under the Covenant" point 9. Twenty-seventh session (1986).

[214] Katsui, *supra,* n. 56, p. 27.

[215] ICESCR, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976.

they refuse to do so. In addition, they are often forced to consume drugs and have illegal, high risk abortions.

Conclusion

It is imperative that States recognize that trafficked persons are victims of serious human rights abuses and should therefore take steps to protect their legal rights regardless of their immigration status. They should also protect trafficked persons from any harm and further victimization they may have experienced if they decide to testify against their traffickers in criminal proceedings. The needs of victims and recognition of their vulnerability should be at the core of any protection scheme.

Since the principle of non-discrimination is a fundamental human right, protection should be provided to all victims regardless of their willingness to cooperate with law enforcement officials. As has been discussed throughout this paper, the current approach of the majority of States is a willingness to guarantee protection only to those victims cooperating with law authorities. However, offering protection to victims should not be conditional upon giving evidence against those suspected of committing crimes of trafficking. The experience of the Dutch police force shows that intelligence gained from victims can be as valuable as their agreement to give evidence in criminal proceedings.[216]

Trafficked persons should have the right to seek temporary residence permits as well as a right to work. At minimum, temporary residence permits should be provided for the duration of and in the immediate aftermath of criminal proceedings. Ample consideration must be taken of the security and safety of victims to be repatriated such as the possibility of their being re-trafficked or the risk of retaliation. Providing victims with temporary residence permits during criminal proceedings provides victims with an opportunity to apply for permanent residence and removes their fear of immediate deportation. This serves the dual interests of enabling trafficked persons to recover and regain control over their lives and, secondly enabling the effective prosecution of traffickers by encouraging victims to report to authorities and to act as witnesses.[217]

The degree of social integration of victims in destination countries should also be taken into consideration. The repatriation of victims should be completely voluntarily. Repatriation should only be considered if a victim wishes to return if there is no risk of reprisal and if the destination State can ensure their safe return.

Finally, trafficked persons should have an opportunity to apply for permanent residence under national and international laws. Victims should be allowed to seek and receive asylum if their State of origin is unable or unwilling to provide protection. It should be widely accepted (and not only in exceptional cases) that trafficking in women is considered gender-based persecution and that women victims of trafficking

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[216] Stop the trafficking of women and children for sexual exploitation in London, "Silent Slavery: Conference Recommendations to the UK Government", City Hall, Queen's Walk, London, 20 June 2003.

[217] Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women, International Human Rights Law Group, "Human Rights Standards for the Treatment of Trafficked Persons" January 1999. p. 13 Text available at http://www.hrlawgroup.org/resources/content/IHRLGTraffickin_tsStandards.pdf, accessed on 1 September 2003.

comprise a particular social group as one of the enumerated grounds of the 1951 Convention.

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