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## **Trafficking for sexual exploitation: victim protection in international and domestic asylum law**

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## Introduction

It is extremely difficult to assess the worldwide scale of human trafficking because of the clandestine nature of the crime. The UN Office of Drugs and Crime (UNODC) estimates that there are, at a minimum, approximately 2.5 million victims of human trafficking at any given time.<sup>1</sup> According to the UNODC, approximately 79 per cent of all human trafficking is for the purpose of sexual exploitation, while the ILO estimates that 98 per cent of the people trafficked for sexual exploitation are women and girls.<sup>2</sup>

Women fall victim to trafficking for many reasons. Primarily, they search out work in wealthier countries and are promised jobs as waitresses or nannies and are subsequently forced into sexually exploitative situations upon arrival in the country of destination.<sup>3</sup> It is unquestionable that inequality and economic disadvantage play a prominent role in rendering people vulnerable to trafficking.<sup>4</sup> An equally important contributing factor is the ability to draw vast profits from the exploitation of humans and the relatively low risk of being held accountable for these crimes.<sup>5</sup>

The ILO estimates that illicit profits from forced labour total almost \$32 billion a year, of which an estimated 67 per cent is derived from the sex industry.<sup>6</sup> The US State Department has gathered statistics on the total number of trafficking-related prosecutions and convictions around the globe. In 2008 there were 5,212 prosecutions and 3,427 convictions, relatively insignificant numbers.<sup>7</sup>

It is often asked why trafficking victims do not attempt to escape from the exploitative situations in which they find themselves. This is largely because traffickers use a variety of methods to manipulate and control their victims, including:<sup>8</sup>

- deception, including offers of employment abroad which result in forced prostitution, or statements indicating that the victim will be punished by national law enforcement or immigration authorities if they find out about her presence in the country;

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<sup>1</sup> UN Office on Drugs and Crimes, website, Human Trafficking FAQs, available at <http://www.unodc.org/unodc/en/human-trafficking/faqs.html>.

<sup>2</sup> International Labour Office, GIVE GIRLS A CHANCE: TACKLING CHILD LABOUR, A KEY TO THE FUTURE, 39 (2009).

<sup>3</sup> U.S. Dep't of State, TRAFFICKING IN PERSONS REPORT, 8 (June 2009) [*hereinafter* U.S. TIP Report], p. 8-9. In the trafficking context, the designation of origin, transit and/or destination country is used to explain the relationship between the victim and a specific country.

<sup>4</sup> See for example: Polaris Project, website, available at <http://www.polarisproject.org/content/view/26/47/>; UN Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective, Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Commission on Human Rights 56<sup>th</sup> Session, UN Doc. E/CN.4/2000/68, para. 54 (29 Feb 2000) [*hereinafter* Report of the Special Rapporteur on violence against women], para. 57; U.S. TIP Report, *supra* note 3, p. 36.

<sup>5</sup> Polaris Project, *supra* note 4.

<sup>6</sup> International Labour Office, *The Cost of Coercion: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (International Labour Conference, 98th Session 2009, Report I(B)), para. 145.

<sup>7</sup> U.S. TIP Report, *supra* note 3, p. 47.

<sup>8</sup> UN Office on Drugs and Crime, ANTI-HUMAN TRAFFICKING MANUAL FOR CRIMINAL JUSTICE PRACTITIONERS, Module 4 (2009) [*hereinafter* UNODC Manual].

- the use of violence or the threat of violence against the victim or the victim's family members, as well as imprisonment and/or isolation;
- the use of debt bondage; for example, charging the victim for transport, food and lodging costs, as well as charging exorbitant interest on money allegedly owed to traffickers; and
- the use of religious or cultural beliefs, including witchcraft and voodoo, to maintain control over the victim.

A recent case in Los Angeles involving the forced prostitution of young women and girls from Guatemala illustrates how traffickers combine such methods so as to ensure control of their victims:

Evidence showed that the defendants intimidated and controlled their victims by threatening to beat them and kill their loved ones in Guatemala if they tried to escape. Some defendants also used witchdoctors to threaten the girls that a curse would be placed on them and their families if they tried to escape. At least two of the defendants further restrained the victims by locking them in at night and blocking windows and doors. The defendants also used manipulation of debts, verbal abuse and psychological manipulation to reinforce their control over the victims. The scheme included strict controls over the victims' work schedules and ominous comments about consequences that befell the families of other victims who attempted to escape.<sup>9</sup>

### **Barriers to identification**

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime (UN TOC Convention) entered into force on 25 December 2005.<sup>10</sup> According to the Protocol:

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the

<sup>9</sup> U.S. Dep't of Justice, *Five Sentenced for Forcing Guatemalan Girls and Women to Work as Prostitutes in Los Angeles*, press release (18 August 2009), available at <http://www.justice.gov/opa/pr/2009/August/09-crt-812.html>.

<sup>10</sup> UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, UN GAOR 55<sup>th</sup> Sess., Annex II. UN Doc. A/RES/55/25 (2001) [*hereinafter* Trafficking Protocol]; UN Convention Against Transnational Organized Crime, UN GAOR, 55th Sess., Annex 1, Agenda Item 105, UN Doc. A/55/383, 2225 U.N.T.S. 275 (2000) [*hereinafter* UN TOC Convention]. There are currently 133 members to the Trafficking Protocol, see UN Treaty Collection, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en).

prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;<sup>11</sup>

A primary weakness of the Trafficking Protocol is that it does not provide sufficient victim protection mechanisms. This weakness is compounded by a number of other factors, including:

- the confusion that surrounds the respective definitions of trafficking and smuggling, as well as the overlap that exists between the two phenomena, especially when an individual begins as a willing migrant, seeking better opportunities in another country, but becomes a victim of trafficking during transit or upon arrival in the destination country;<sup>12</sup>
- the time and resource intensive nature of the investigation process required to determine whether a person has been trafficked, as well as the incentive for immigration officials to identify individuals as smuggled migrants rather than as trafficking victims, in view of the weaker responsibilities of states towards the former group;
- the mistaken assumption that trafficking victims may have consented to their exploitation, especially when they are engaged in sex work and other activities that meet with the general disapproval of society;
- the inadequate training provided to law enforcement and immigration officials with respect to the identification and protection of trafficking victims, coupled with the silence of the Trafficking Protocol in relation to the obligations of states in this area;
- a failure to understand that the defensive, uncommunicative and erratic behaviour of individuals may be as a result of the trauma that they have suffered or the fear of reprisals by those responsible for them being trafficked; and,
- the frequency with which a failure to accurately identify trafficking victims leads to immediate deportation or detention, sometimes without due process or legal assistance.

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<sup>11</sup> Trafficking Protocol, *supra* note 10, art. 3.

<sup>12</sup> International Organization for Migration, THE IOM HANDBOOK ON DIRECT ASSISTANCE FOR VICTIMS OF TRAFFICKING, 25 (2007) [*hereinafter* IOM Handbook], p. 22; Gallagher, Anne, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 Hum. Rts. Q. 975 (2001), p. 1001, *citing* Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Note by the United Nations High Commissioner for Human Rights, the United Nations Children's Fund, the United Nations High Commissioner for Refugees, and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons, UN Doc. A/AC.254/27, para. 2; Saito, Kaori, *International Protection for Trafficked Persons and Those Who Fear Being Trafficked*, United Nations Refugee Agency Policy Development and Evaluation Service, Research Paper No. 149 (2007), p. 5.

## Asylum as protection

Assuming an individual does not fall prey to the previously discussed barriers to identification and that she is properly identified as a victim of trafficking, it becomes necessary to examine her available options for protection. In many situations, the best option for victims of trafficking may be to return them, as quickly and safely as possible, to their country of origin or permanent residence.

The Trafficking Protocol provides that when returning a victim of trafficking to the state where the victim is a national or has a right of permanent residence, the sending state shall maintain “due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.”<sup>13</sup>

The UNODC Anti-Human Trafficking Manual for Criminal Justice Practitioners indicates that it is necessary for practitioners to conduct a risk assessment before repatriating victims of trafficking to ensure their safety.<sup>14</sup> Among the factors to consider are the types of support services and physical protection available to victims of trafficking, the presence of any social, cultural or religious factors that may make repatriation dangerous, and the risk of re-trafficking.<sup>15</sup> When return can not be accomplished safely, other options for protection must be considered.

A significant source of protection for victims of trafficking is the Convention and Protocol Relating to the Status of Refugees (1951 Convention). While not all victims of trafficking will qualify as refugees entitled to protection, it is important to consider the relationship between refugee status and human trafficking and the potential for protection that the refugee legal framework may offer to its victims.

The 1951 Convention requires that three conditions be met for an individual to be considered a refugee: (1) an individual is outside her country of nationality; (2) she has a well founded fear of persecution, for reasons of race, religion, nationality, membership of a particular social group or political opinion; and (3) she is unable or unwilling, because of such fear, to avail herself of the protection of that country. The following analysis asks whether and in what ways women who have been trafficked for the purpose of sexual exploitation may qualify for refugee status on the basis of these criteria.

The requirement that an individual be outside her country of nationality or habitual residence in order to gain refugee status is relatively straightforward. This evidently means that individuals who are trafficked within their country’s borders would not be eligible to apply for refugee status. Fear of persecution, it should be noted, need not be the initial factor in the victim’s departure from her country of origin; it is sufficient for the purposes of the 1951 Convention to demonstrate that the well-founded fear of persecution commenced after departure.

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<sup>13</sup> Trafficking Protocol, *supra* note 10, art. 8(2).

<sup>14</sup> UNODC Manual, *supra* note 8, Module 5, p. 11.

<sup>15</sup> *Id.*

To qualify for refugee status a trafficking victim must also meet the requirement of a “well-founded fear of persecution,” assessed in the light of both subjective and objective elements. US courts have determined that an applicant’s subjective fear becomes relevant only after the introduction of objective evidence “sufficient to suggest a risk of persecution.”<sup>16</sup> In addition, US courts have interpreted the objective component as requiring “a showing, by credible, direct, and specific evidence in the record, of facts that would support a *reasonable* fear that the petitioner faces persecution.”<sup>17</sup>

The production of documentary evidence may prove extremely difficult for trafficking victims. Whether a victim escapes from her traffickers or is discovered by law enforcement or immigration officials, she will seldom have valid identity documents in her possession, because the confiscation of such documents is a tool of control frequently used by traffickers.<sup>18</sup> Furthermore, a victim of trafficking for sexual exploitation will frequently feel embarrassed about her ordeal or suffer from the trauma of the sexual and/or physical violence to which she has been subjected.<sup>19</sup> The victim may also fear retaliation by traffickers, either against herself or against her family members.<sup>20</sup>

This makes it very difficult to obtain the necessary information to determine whether she has suffered persecution.<sup>21</sup> The United States Memorandum on Considerations for Asylum Officers Adjudicating Asylum Claims From Women (U.S. Gender Guidelines) alerts officers that the “[q]uestionable demeanor [of applicants] can be the product of trauma rather than a lack of credibility” and to take this into consideration when dealing with women victims of sexual violence to avoid inaccurate credibility determinations.<sup>22</sup>

It is interesting to note, as revealed by Stephen Knight’s analysis of 93 unpublished decisions by United States immigration judges and the Bureau of Immigration Appeals (BIA), the denial of asylum claims for refugee status based on abduction, rape and trafficking is frequently not due to the claimant’s lack of credibility.<sup>23</sup> It is unclear in those cases whether credibility would become an issue if the adjudicator were unable to deny the claim based on other factors.

In examining whether an individual maintains a well-founded fear of persecution, it must be determined that the acts complained of achieve a level of seriousness so as to constitute persecution. It is relatively uncontested that threats to life and freedom, and potentially other

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<sup>16</sup> *Rodriguez-Rivera v. INS*, 848 F.2d 998 (1988), p. 1002.

<sup>17</sup> *Id.*

<sup>18</sup> IOM Handbook, *supra* note 12, p. 29.

<sup>19</sup> UN High Commissioner for Refugees, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07 (7 April 2006) [*hereinafter* UNHCR Trafficking Guidelines], para. 48.

<sup>20</sup> *Id.*

<sup>21</sup> UNHCR, *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*, HCR/GIP/02/01 (7 May 2002) [*hereinafter* UNHCR Gender Guidelines], para. 35.

<sup>22</sup> U.S. Bureau of Citizenship and Immigration Services, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, 26 May 1995, available at: <http://www.unhcr.org/refworld/docid/3ae6b31e7.html> [accessed 31 October 2009] [*hereinafter* U.S. Gender Guidelines], p. 7.

<sup>23</sup> Knight, Stephen, *Asylum From Trafficking: A Failure of Protection*, Immigration Briefings (July 2007), available at [http://cgrs.uchastings.edu/documents/cgrs/advisories/Knight\\_%20ImmigBriefings\\_Trafficking\\_Asylum.pdf](http://cgrs.uchastings.edu/documents/cgrs/advisories/Knight_%20ImmigBriefings_Trafficking_Asylum.pdf), p. 6.

serious violations of human rights rise to the level of persecution.<sup>24</sup> The United States BIA determined that “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom” will amount to persecution for the purposes of refugee status determinations.<sup>25</sup> Furthermore, the UNHCR Handbook provides that it may be necessary to examine the acts complained of in a cumulative manner to determine whether they reach the level of persecution, where each act alone would be insufficient for a finding of persecution.<sup>26</sup>

The UNHCR Trafficking Guidelines explain that there are several forms of exploitation that are endemic in the trafficking experience and constitute such serious violations of human rights as to rise to the level of persecution.<sup>27</sup> For example, “abduction, incarceration, rape, sexual enslavement, enforced prostitution ... physical beatings, starvation, [and] the deprivation of medical treatment”<sup>28</sup> are all forms of exploitation commonly seen in situations involving trafficking for sexual exploitation.

In addition, the Trafficking Guidelines explain that an isolated incident of trafficking may still result in persecution where the victim experiences “ongoing traumatic psychological effects which would render return to the country of origin intolerable.”<sup>29</sup> Victims of sexual exploitation are especially susceptible to “ostracism, discrimination or punishment by the family and/or the local community or, in some instances, by the authorities” upon return to their communities.<sup>30</sup> Other incidents that may result in a fear of future persecution may include the threat of possible re-trafficking or reprisals involving serious harm or violations of human rights from traffickers upon return to the victim’s country of origin.<sup>31</sup>

The United States position on the use of sexual violence as a tool for persecution raises some concern upon closer analysis. The U.S. Gender Guidelines state, “Severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution.”<sup>32</sup> However, the next sentence makes a thinly veiled presumption that sexual violence does differ from other forms of physical violence in the consideration of whether it amounts to persecution. The Guidelines caution, “The appearance of sexual violence in a claim should not lead adjudicators to *conclude automatically* that the claim is an instance of *purely personal harm*.”<sup>33</sup> This statement suggests that, while adjudicators may instinctively deem sexual violence a personal criminal matter, distinct from other forms physical violence, this may not always be the case.

Despite these somewhat contradictory directives, United States federal courts have recognized sexual violence as a form of persecution on occasion. For example, in a case involving the gang

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<sup>24</sup> UN High Commissioner for Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, UN Doc. HCR/IP/4/Eng/Rev.1 (2<sup>nd</sup> ed. 1992) [*hereinafter* UNHCR Handbook], para. 51.

<sup>25</sup> *Acosta*, 19 I&N Dec. 222 (BIA 1985), p. 222.

<sup>26</sup> UNHCR Handbook, *supra* note 24, para. 53.

<sup>27</sup> UNHCR Trafficking Guidelines, *supra* note 19, para. 15.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, para. 16.

<sup>30</sup> *Id.*, para. 18.

<sup>31</sup> *Id.*, para. 17.

<sup>32</sup> U.S. Gender Guidelines, *supra* note 22, p. 9.

<sup>33</sup> *Id.* [*italics added*].



rape of a Haitian woman in retaliation for her political activities, the rapes were deemed to be persecution within the meaning of the United States Refugee Act.<sup>34</sup> Conversely, in a case involving a 45-year-old Polish woman who was violently sexually assaulted, repeatedly harassed and threatened by the chief of the Polish secret police and repeatedly interrogated by the secret police, the Court concluded that “such harm or threats arising from a personal dispute of this nature, even one taking place with an individual in a high governmental position, is not a ground for asylum.”<sup>35</sup> The Court elaborated further that “harm or threats of harm based solely on sexual attraction do not constitute “persecution” under the [Refugee] Act.”<sup>36</sup>

The decisions of the United States BIA and immigration judges have been equally troubling. In a case involving a 15-year-old Albanian victim who had been raped, kidnapped and threatened with trafficking by a local trafficker, the judge concluded that the trafficker was merely a “spurned suitor” and that his actions toward the victim were merely personal criminal acts not rising to the level of persecution.<sup>37</sup> According to the judge, there was insufficient objective evidence that the trafficker was a criminal or had previously committed acts like the ones complained of in the case.<sup>38</sup>

In another case involving a Thai woman who had been forced into prostitution in the United States by threats of death and physical violence, the BIA determined that the victim’s fear was based on the outstanding debt she incurred from being smuggled into the United States and because of international criminal conduct not because she would face persecution if returned.<sup>39</sup> The BIA explained that the threats her family had received in Thailand were simply because her smugglers were seeking repayment of the victim’s debt, not because they wanted to find and harm the victim.<sup>40</sup>

These cases were decided based on a complex analysis of the interrelatedness of the elements included in the refugee definition; however, the decisions of courts and immigration tribunals, as well as the U.S. Gender Guidelines, suggest a hesitancy to recognize sexual violence as a very real tool of persecution in the trafficking context. This hesitancy is puzzling, considering the focus, both within the Trafficking Protocol and the U.S. Trafficking Victims Protection Act (TVPA), on trafficking of women and girls for the purposes of sexual exploitation.<sup>41</sup> The emphasis on trafficking for sexual exploitation within these documents and the recognition that it is an extremely abhorrent crime does not appear consistent with interpretations employed by adjudicators in the United States.

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<sup>34</sup> *In Re D-V*, 21 I. & N. Dec. 77 (BIA 1993), p. 79.

<sup>35</sup> *Klawitter v. INS*, 970 F.2d 149 (1992), p. 152.

<sup>36</sup> *Id.*

<sup>37</sup> Knight, *supra* note 23, p. 6, quoting *Matter of Anon.*, A# redacted, 119-120 (New York, NY, Immigration Court, Feb. 4, 2004).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, p. 7, quoting *Matter of P-H*, A# redacted, 13 (Houston, TX, Immigration Court, March 4, 2004).

<sup>40</sup> *Id.*, quoting *Matter of P-H*, p. 2.

<sup>41</sup> 22 U.S.C. § 7101(b).

## Membership in a particular social group

Assuming that the acts involved in the trafficking for sexual exploitation are determined to constitute persecution, it must be assessed whether the persecution or threat of persecution is on account of one of the five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion. While it is possible for female victims of trafficking to be targeted because of their race, religion, nationality or political opinion, as well as any combination of the above, membership in a particular social group will frequently provide the most promise for those women who cannot readily claim persecution on the basis of one of the other four grounds. It is also possible that one or more of the listed grounds may factor into the claim based on membership in a particular social group. The discussions surrounding membership in a particular social group, and, more specifically, gender based persecution are of primary relevance to women seeking asylum in association with trafficking for sexual exploitation.

The category of “membership in a particular social group” has been the source of a variety of interpretations by jurists and scholars around the world, resulting in the lack of a viable clear standard for use in refugee status determinations. There is no explanation of the term contained in the 1951 Convention and there is relatively no discussion contained in the *travaux préparatoires* regarding the reason for the adoption of this fifth category within the refugee definition.<sup>42</sup> The UNHCR Handbook does not provide a great deal more assistance to deciphering the parameters of this category; it states:

77. A “particular social group” normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

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<sup>42</sup> Goodwin-Gill, Guy S. & McAdam, Jane, *THE REFUGEE IN INTERNATIONAL LAW*, 201 (3<sup>rd</sup> Ed. 2007), p. 74, *citing* UN doc. A/CONF.2/SR.3, 19 Nov. 1951, para. 14: “The lack of substantive debate on the issue suggests that contemporary examples of such persecution may have been in the minds of the drafters, such as resulted from the ‘restructuring’ of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families.”; Aleinikoff, Alexander, *Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW*, Eds. Erika Feller, Volker Türk & Frances Nicholson, Cambridge University Press (2003), p. 266, *citing* UN doc. A/CONF.2/SR.3, 19 Nov. 1951, para. 14.

The guidance provided by the UNHCR Handbook leaves a wide scope for national adjudicators in the interpretation of refugee claims of persecution for reason of membership in a particular social group. It is argued that “a sensible interpretation of the term must be responsive to victims of persecution without so expanding the scope of the 1951 Convention as to impose upon States obligations to which they did not consent.”<sup>43</sup> The difficulty of achieving this balance is illustrated through national decisions interpreting the meaning of membership in a particular social group.

In the United States, the BIA decision in *Matter of Acosta* provided an influential interpretation of membership in a particular social group, which has been cited by jurists in a number of national jurisdictions.<sup>44</sup> The case involved the member of a taxi cooperative operating in San Salvador, El Salvador who became the target of threats and physical violence from anti-government guerrilla operations.<sup>45</sup> The BIA applied the principle of *ejusdem generis*, meaning “of the same kind,” to interpret membership in a particular social group in accordance with race, religion, nationality and political opinion.<sup>46</sup> In explaining the content inherent in each of the four categories, it stated, “Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>47</sup> The BIA went on to apply this interpretation to membership in a particular social group:

[W]e interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something 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 be required to be changed.<sup>48</sup>

Several jurisdictions have relied on the interpretation provided by the United States BIA in *Acosta*. For example, the Canadian Supreme Court attempted to strike the balance between ensuring the protection of human rights and respect for the principle of non-discrimination,<sup>49</sup> while limiting the State’s obligation to offer protection to individuals fleeing their countries of

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<sup>43</sup> Aleinikoff, *supra* note 42, p. 265.

<sup>44</sup> *Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

<sup>45</sup> *Id.*, p. 217.

<sup>46</sup> *Id.*, p. 233.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, pp. 233-34.

<sup>49</sup> *Canada (Attorney General) v. Ward*, 2 S.C.R. 689 (1993), para. 78.

origin.<sup>50</sup> In furtherance of these efforts, the Court agreed with the interpretation taken by the BIA in *Acosta* and also identified three possible categories falling within the boundaries of particular social group:

- (1) Groups defined by an innate or unchangeable characteristic;
- (2) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) Groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>51</sup>

The Court indicated that the first category includes individuals facing persecution based on their “gender, linguistic background and sexual orientation,” and that the second group may, for example, contain individuals persecuted for their role as human rights activists.<sup>52</sup>

The United Kingdom has taken a similar position in the *Islam and Ex Parte Shah* case where the House of Lords applied the reasoning by the BIA in *Acosta* in the application of the particular social group category.<sup>53</sup> The reasoning employed by the House of Lords to recognize women in Pakistan as a particular social group is discussed in more detail below.

The High Court of Australia has taken a slightly different approach. The Court outlined three principles that must be identified before an individual may be considered to be a member of a particular social group. First, the group must be “identifiable by a characteristic or attribute common to all members of the group,” next, “the characteristic or attribute ... cannot be the shared fear of persecution, and finally, “the possession of that characteristic or attribute must distinguish the group from society at large.”<sup>54</sup> The Court departed from the cases in the United States, Canada and the United Kingdom when it indicated that it is not necessary for a characteristic to be innate or immutable to define a group.<sup>55</sup>

The Australian Federal Magistrates Court took an extremely broad view of membership in a particular social group under the 1951 Convention. It explained that the category is “intended to apply whenever persecution is found directed at a group or section of society not necessarily persecuted for racial, religious, national or political reasons.”<sup>56</sup> This is the sort of ‘catch-all’ interpretation of particular social group rejected by the Canadian

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<sup>50</sup> *Id.*, para. 77.

<sup>51</sup> *Id.*, para. 78.

<sup>52</sup> *Id.*

<sup>53</sup> *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords, 25 March 1999, 2 AC 629, available at: <http://www.unhcr.org/refworld/docid/3dec8abe4.html>, pp. 6-7.

<sup>54</sup> *Applicant S v. Minister for Immigration and Ethnic Affairs*, [2004] HCA 25, Australia: High Court, 27 May 2004, available at: <http://www.unhcr.org/refworld/docid/4110e81d4.html>, para. 36.

<sup>55</sup> *Applicant A and Another v. Minister for Immigration and Ethnic Affairs*, 190 CLR 225 (1997), p. 307.

<sup>56</sup> *VXAJ v. Minister for Immigration and Another*, [2006] FMCA 234 (20 April 2006), para. 15.

Supreme Court in *Ward* because, according to the Court, it would render the enumeration of the five specific categories superfluous.<sup>57</sup>

In 2002, UNHCR issued guidelines on the application of membership in a particular social group under the 1951 Convention (UNHCR PSG Guidelines).<sup>58</sup> The guidelines acknowledge the interpretations taken in national jurisdictions, noting the existence of two specific approaches: the “protected characteristics” approach and the “social perception” approach.<sup>59</sup> Jurisdictions utilizing the protected characteristics approach examine “whether a group is united by an immutable characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.”<sup>60</sup> This somewhat more restrictive approach is seen in the decisions in Canada and the United States.

The Guidelines include the three categories outlined in the *Ward* decision above as a method for identifying groups within the protected characteristics approach.<sup>61</sup> In contrast, the social perception approach “examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.”<sup>62</sup> This approach may be more inclusive in practice because it has the possibility of including groups defined by characteristics that would not meet the requirements contained in the protected characteristics approach.<sup>63</sup> In a decision of the High Court of Australia, Justice McHugh provided a valuable example of the social perception approach, he writes:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.<sup>64</sup>

This example identifies a reoccurring problem found in refugee status decisions dealing with the category of particular social group. While it is true that a social group must not be defined solely by the persecution, or fear of persecution, suffered by its members,<sup>65</sup> it appears that adjudicators have a tendency to conflate the characteristics necessary to constitute a particular social group and the requirement for a well founded fear of persecution in denying recognition of particular social groups. As the Court makes clear above, while persecution may make a group visible as a

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<sup>57</sup> *Ward*, 2 S.C.R. 689 (1993), para. 68.

<sup>58</sup> UNHCR, *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*, HCR/GIP/02/02 (7 May 2002) [*hereinafter* UNHCR PSG Guidelines].

<sup>59</sup> *Id.*, para. 6.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*, para. 7.

<sup>63</sup> *Id.*, para. 9.

<sup>64</sup> *Applicant A and Another*, 190 CLR 225 (1997), p. 264; *See also* UNHCR PSG Guidelines, *supra* note 58, para. 14; *Islam and Shah*, [1999] 2 AC 629, p. 645.

<sup>65</sup> UNHCR PSG Guidelines, *supra* note 58, para. 14.

particular social group in society, it is the characteristic of being left-handed, not the acts of persecution that define the particular social group. Moreover, it is not necessary that all members of the group maintain a well founded fear of persecution;<sup>66</sup> it is sufficient that the characteristic that unites the group serves as a target for persecution.<sup>67</sup>

The UNHCR Guidelines attempt to provide a working definition of particular social group that unifies the “protected characteristics” and “social perception” approaches. The Guidelines state:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>68</sup>

It is further explained that sex is a characteristic falling within the ambit of particular social group and that women are a “clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.”<sup>69</sup> It is undeniable that women are targets of persecution in some countries because of the simple fact that they are women and UNHCR, as well as many national jurisdictions, has acknowledged this fact with respect to refugee status determinations under the 1951 Convention.

### **Gender as a particular social group**

UNHCR has recognized that sex qualifies as a defining characteristic of a particular social group, both in the PSG Guidelines discussed above, and in the Guidelines on Gender-Related Persecution in the context of the 1951 Convention (UNHCR Gender Guidelines).<sup>70</sup> The UNHCR Gender Guidelines express two preliminary points of relevance: first, the distinction between sex, a biological determination, and gender, a social or cultural construction of “identities, status, roles and responsibilities” determined by sex,<sup>71</sup> and second, the historical context within which the 1951 Convention was written and through which it has been interpreted which focuses on the “male experience,” leaving gender related claims largely in the shadows.<sup>72</sup> These points are relevant in challenging the preconceived ideas about who is a refugee and the nature of the refugee experience in order to recognize gender-related claims of persecution.

Despite the definite distinction between gender and sex, national jurisdictions most often use the terms ‘gender’ and ‘sex’ interchangeably, making it even more difficult to assess the definitional requirements of gender-related claims. With respect to the second issue, national jurisdictions

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<sup>66</sup> *Id.*, para. 17: “Certain members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.”

<sup>67</sup> See Aleinikoff, *supra* note 42, p. 289: [T]he definition of the class must describe a group that stands apart in society where the shared characteristic of the group reflects the *reason* for persecution. This is importantly different from saying that a defined class must only include persons likely to be persecuted.” See also UNHCR PSG Guidelines, *supra* note 58, para. 17.

<sup>68</sup> UNHCR PSG Guidelines, *supra* note 58, para. 11.

<sup>69</sup> *Id.*, para. 12.

<sup>70</sup> UNHCR Gender Guidelines, *supra* note 21.

<sup>71</sup> *Id.*, para. 3.

<sup>72</sup> *Id.*, para. 5.

have struggled with the formulation of standards applicable to gender-related claims in response to the relatively recent developments in international law, recognizing that women have unique and specific experiences and that the laws must reflect these distinctions. The UNHCR Gender Guidelines are explicit in the conclusion that gender-related claims are included within the definition of refugee contained in the 1951 Convention,<sup>73</sup> but the willingness of national jurisdictions to heed this suggestion remains uncertain.

It is promising that national jurisdictions have progressively determined that women face particular issues in the refugee context, visible through the enactment of gender guidelines applicable to the refugee determination process. The Immigration and Refugee Board of Canada issued updated guidelines on gender-related persecution in 1996. The guidelines provide that “[g]ender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition.”<sup>74</sup> It is furthermore possible to recognize more particularized sub-groups within this category which combine gender with other characteristics, for example, “age, race, marital status and economic status.”<sup>75</sup>

The guidelines issued by the Australian government are somewhat less definitive than the Canadian guidelines; however, they seek to recognize gender as a “significant factor” in identifying a particular social group. The guidelines acknowledge the findings of the Australian Refugee Review Tribunal that, despite the immensity of the category, “women nonetheless have both immutable characteristics and shared common social characteristics which may make them cognisable as a group and which may attract persecution.”<sup>76</sup>

The United Kingdom issued guidelines in 2000 which provide that certain characteristics, such as “gender, age, race, marital status, family and kinship ties, sexual orientation, economic status and tribal or clan affiliation,” may identify particular social groups where the characteristics are “innate or unchangeable ... or characteristics that a woman should not be expected to change.”<sup>77</sup> The cultural and social context, in addition to the perception of state officials and perpetrators of persecution, is relevant in the determination of whether these characteristics are innate or unchangeable.<sup>78</sup> Decided prior to the enactment of the guidelines, the *Islam and Shah* case recognized women in Pakistan as a particular social group, applying the reasoning of the United States BIA in *Acosta*, because women in Pakistan are “discriminated against and as a group they are unprotected by the state.”<sup>79</sup> The House of Lords cites the Australian High Court’s example of

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<sup>73</sup> *Id.*, para. 6.

<sup>74</sup> Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*, (13 November 1996), available at <http://www.irb-cisr.gc.ca/Eng/brdcom/references/pol/guidir/Pages/women.aspx>.

<sup>75</sup> *Id.*

<sup>76</sup> Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996), available at [http://cgrs.uchastings.edu/documents/legal/guidelines\\_aust.pdf](http://cgrs.uchastings.edu/documents/legal/guidelines_aust.pdf), p. 22.

<sup>77</sup> United Kingdom Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000), available at [http://cgrs.uchastings.edu/documents/legal/gender\\_guidelines/UK\\_guidelines.pdf](http://cgrs.uchastings.edu/documents/legal/gender_guidelines/UK_guidelines.pdf) [*hereinafter* U.K. Gender Guidelines], § 3.39.

<sup>78</sup> *Id.*

<sup>79</sup> *Islam and Shah*, [1999] 2 AC 629, p. 644.

left-handed men for support that this recognition does not violate the principle that the group in question must exist independently of persecution.<sup>80</sup>

Applying this theory to the present case, it could be argued that the discrimination against women in Pakistan and the lack of protection provided by the State, serves to make women recognizable as a particular social group by society, but it is the characteristic of being a woman that defines the group. It is further explained that the fact that some women in Pakistan may be able to avoid persecution and obtain protection from the State does not impact the determination that women in Pakistan are a particular social group; it simply means that those particular women would not maintain a well-founded fear of persecution necessary for a positive refugee status determination.<sup>81</sup>

In the *K and Fornah* case, the House of Lords examined the preamble to the 1951 Convention, concluding that the statement that “human beings should enjoy fundamental rights and freedoms without discrimination”<sup>82</sup> indicated the intention to recognize only “persecution which is based on discrimination.”<sup>83</sup> If discrimination is the unequal treatment of persons similarly situated, then it is clear that persons targeted for persecution in a particular society for one of the five enumerated reasons in the 1951 Convention are subject to discrimination. The *Fornah* case involved a girl from Sierra Leone who was fleeing forced female genital mutilation (FGM). While it was shown that there was evidence of generalized discrimination against women in Sierra Leone, it was also determined that it was only women who have not undergone FGM who were “disparaged” within tribes practicing FGM.<sup>84</sup> It was not explicitly stated that the general inferior position of women in Sierra Leone was a necessary factor in finding a gender-based particular social group.

*Moldova*, a more recent case decided by the Asylum and Immigration Tribunal in the United Kingdom, expanded on the notion of discrimination espoused in the above cases with respect to gender-related claims of persecution.<sup>85</sup> The case involved the trafficking of a national of Moldova into the U.K. for the purpose of sexual exploitation.<sup>86</sup> The victim previously provided evidence that resulted in the prosecution and conviction of the individual responsible for her exploitation in the U.K.<sup>87</sup> In the present case, the victim was seeking asylum based on her fear that, if she were returned to Moldova, she would face persecution from the perpetrator, who had been released from prison, and/or his family and associates.<sup>88</sup> The Tribunal summarized the relevant authorities in the U.K. relating to membership in a particular social group and concluded that “where the particular social group being relied upon is the *broad* one of gender or where any

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<sup>80</sup> *Id.*, p. 645.

<sup>81</sup> *Id.*, p. 644.

<sup>82</sup> UN Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (28 July 1951) [*hereinafter* 1951 Convention].

<sup>83</sup> *K v Secretary of State for the Home Department; Fornah v Secretary of State for the Home Department*, [2007] 1 A.C. 412, p. 430.

<sup>84</sup> *Id.*, p. 455.

<sup>85</sup> *SB (Moldova) v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002 (26 November 2007).

<sup>86</sup> *Id.*, para. 2.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



features to narrow the group are gender-based, then discrimination against the gender (i.e. discrimination in the wider sense) must be shown to exist.”<sup>89</sup>

The Tribunal went on to explain that it is not necessary to show generalized discrimination in cases involving the recognition of the family as a particular social group because the family already exists in society as a particular social group, independent of the persecutory actions.<sup>90</sup> Furthermore, if a showing of discrimination is necessary in these cases, it may be established in connection with the feared future acts of persecution without resulting in a circulatory definition based solely on the feared persecution.<sup>91</sup> The Tribunal’s emphasis on a requirement for general discrimination in situations involving gender based persecution does not appear to be in line with the interpretations presented by UNHCR.

The UNHCR Handbook explains that acts of discrimination exist in many societies which do not attain the level necessary to constitute persecution.<sup>92</sup> Only in certain situations will discrimination amount to persecution; for example, where discriminatory measures result in “serious restrictions on [the] right to earn [a] livelihood, [the] right to practise ... religion, or access to normally available educational facilities.”<sup>93</sup> Discrimination may also amount to persecution where it results in an individual’s subjective feelings of “apprehension and insecurity” with respect to her continued existence or the cumulative effects of discrimination might be viewed as attaining a persecutory nature.<sup>94</sup> The UNHCR Gender Guidelines include the above analysis and also address discrimination in the form of a State’s failure to provide protection in certain circumstances, for example, in situations involving domestic violence or harms targeted at individuals because of his or her sexual orientation.<sup>95</sup> Discrimination is analyzed by UNHCR in the context of assessing the individual’s well-founded fear of persecution, specifically, determining whether acts of discrimination amount to persecution for purposes of refugee status determinations.

The repeated use of the term ‘broad’ to describe the category of gender indicates the United Kingdom Tribunal’s apparent concern with an over-inclusive interpretation of gender as a particular social group. In seeking to employ a narrower interpretation of this category, the Tribunal seems to confuse the requirements for a well-founded fear of persecution and membership in a particular social group in the interpretation of the refugee definition. Discrimination is a possible method of persecution according to UNHCR; it is not a characteristic that defines a particular social group. While discrimination may support an individual’s claim of persecution, there is no requirement for a showing of general patterns of discrimination with respect to the categories of race, religion, nationality or political opinion and thus, should not be required of individuals claiming membership in a particular social group.

Moreover, the Tribunal explains that the discrimination requirement only applies to *gender-based* social groups and not social groups defined by other characteristics. The U.K. cases

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<sup>89</sup> *Id.*, para. 53(b) [*italics added*].

<sup>90</sup> *Id.*, para. 53(a) & (c).

<sup>91</sup> *Id.*

<sup>92</sup> UNHCR Handbook, *supra* note 24, para. 54.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*, para. 55.

<sup>95</sup> UNHCR Gender Guidelines, *supra* note 21, paras. 14 & 15.

illustrate a progression with respect to discrimination and gender-defined particular social groups which is disconcerting. It evidences the establishment of an additional burden on victims of gender-related persecution seeking asylum in the U.K. which is not faced by victims claiming persecution on one of the additional protected grounds.

In 1995, the United States issued the Gender Guidelines discussed above. The Guidelines provide little assistance to asylum adjudicators in determining whether gender may appropriately define a particular social group, either alone or in connection with other characteristics. In this regard, the Guidelines highlight the differing interpretations among the federal courts in the United States,<sup>96</sup> drawing in particular on the decision of the BIA which considered that sex is a characteristic that may potentially define a particular social group,<sup>97</sup> as well as the limited pronouncement by the UNHCR Executive Committee that women may qualify as a particular social group where they have “transgressed the social mores of the society in which they live.”<sup>98</sup>

More recently, the BIA addressed the issue of gender related persecution in the case *In re Kasinga*, involving female genital mutilation (FGM).<sup>99</sup> The BIA determined that the particular social group of the applicant was “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>100</sup> It was necessary to apply the reasoning outlined by the BIA in *Acosta* to the characteristics represented in members of this group to validate the group within the refugee definition. In applying this reasoning, the Board explained that the characteristics of being a young woman, untouched by the practice of FGM and a member of the tribe in question were all unchangeable characteristics supporting recognition of the applicant’s membership in a particular social group.<sup>101</sup> This case was a crucial step in United States refugee law, explicitly recognizing gender as a defining characteristic of particular social groups.

Several States maintain reservations to the inclusion of gender as a ground for persecution under the 1951 Convention. The UNHCR Gender Guidelines have responded to those opponents that fear the inclusion of gender as a particular social group would result in a massive influx of refugee claims. The Guidelines explain that this interpretation of the 1951 Convention does not mean that all women will automatically be granted refugee status, but that they will be required to show that they maintain a well founded fear of persecution on one or more of the convention grounds.<sup>102</sup> Furthermore, size should never be a factor disallowing recognition of women as a particular social group where the other four categories are in no way constrained by the potential size of the group.<sup>103</sup>

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<sup>96</sup> For example, the Second Circuit Court in *Gomez* refused to recognize gender alone as characterizing membership of a particular social group, in contrast to the Third Circuit Court in *Fatin*, which recognized Iranian women as members of a particular social group. *Gomez v. INS*, 947 F.2d 660 (2<sup>nd</sup> Cir. 1991), para. 664; *Fatin v. INS*, 12 F.3d 1233 (3<sup>rd</sup> Cir. 1993), para. 1240.

<sup>97</sup> *Acosta*, 19 I. & N. Dec. 211 (BIA 1985), p. 233.

<sup>98</sup> U.S. Gender Guidelines, *supra* note 22, p. 14, quoting UNHCR Executive Committee Conclusion, No. 39(k) (36<sup>th</sup> Session 1985).

<sup>99</sup> *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

<sup>100</sup> *Id.*, p. 365.

<sup>101</sup> *Id.*, p. 366.

<sup>102</sup> UNCHR Gender Guidelines, *supra* note 21, para. 4.

<sup>103</sup> *Id.*, para. 31.

Both the guidelines of Canada and the United Kingdom address this particular point of concern relevant to the discussion of gender as a particular social group, illustrating the weakness in the argument of those opposing inclusion of gender based on excessive claims. Utilizing the same language the guidelines state, “The fact that the particular social group consists of large numbers of the female population in the country concerned is *irrelevant* -- race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.”

Despite the existence of guidelines which challenge the perceived threat of opening the floodgates to women claimants, this fear is pervasive in United States immigration decisions. For example, a federal appeals court verbalized this fear explicitly in a case involving a young Albanian woman claiming a fear of being kidnapped and forced into prostitution.<sup>104</sup> The applicant argued for the recognition of broader social group categories, inclusive of gender, citing support from another federal appeals court decision which recognized Somalian females as particular social group.<sup>105</sup> The Court responded to this argument, “We do not necessarily agree with the Ninth Circuit's determination that virtually all of the women in Somalia are entitled to asylum in the United States.”<sup>106</sup>

This statement illustrates the Court’s misunderstanding and misapplication of the requirements relating to refugee status. Each individual claiming refugee status must still show that she is persecuted for reason of her gender, in addition to any additional defining characteristics, and that the State is unable or unwilling to provide protection from that persecution.<sup>107</sup> The purpose of the 1951 Convention is the protection of individuals fleeing persecution. This purpose is undermined by superfluous arguments that recognizing gender as a characteristic targeted by agents of persecution will result in a flood of refugee claims from women. This is comparable to saying that race should not be an accepted grounds for persecution because all racial minorities would be entitled to refugee status. This argument fails to credit the additional hurdles an individual must overcome within the context of the 1951 Convention definition of refugee.

### **Particular social group and the trafficking context**

In the context of trafficking women for the purposes of sexual exploitation, the category of membership in a particular group is often the only option available for victims seeking protection from trafficking related persecution. As explained previously, there may be situations where one of the additional four categories factors into the analysis; however, it is likely that the sex of the victim will be a crucial characteristic targeted by agents of persecution in the commission of this crime.

The UNHCR Trafficking Guidelines address the application of membership in a particular social group to victims of trafficking. In addition to the analysis regarding the inclusion of gender as a particular social group discussed above, the Guidelines provide examples of sub-groups of women, for example, “single women, widows, divorced women, [and] illiterate women,” which

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<sup>104</sup> *Rreshpja v. Gonzales*, 420 F.3d 551 (6<sup>th</sup> Cir. 2005), para. 555.

<sup>105</sup> *Id.*, citing *Mohammed v. Gonzales*, 400 F.3d 785 (9<sup>th</sup> Cir. 2005), para. 797.

<sup>106</sup> *Rreshpja*, 420 F.3d 551, para. 555.

<sup>107</sup> 1951 Convention, *supra* note 82, art. 1(A)(2).

are relevant in the trafficking context.<sup>108</sup> It may also be possible to include women who have been trafficked for sexual exploitation on the basis of the “unchangeable, common and historic characteristic of having been trafficked.”<sup>109</sup> \

Further support for this supposition can be found in the UNHCR Guidelines on Particular Social Group and the decision of the Canadian Supreme Court in *Ward*, acknowledging that past experience may qualify as a characteristic of a particular social group where the characteristic is unalterable.<sup>110</sup> Victims may be perceived as a specific group by society based on the fact that they have been trafficked, identifying them as targets of persecution.<sup>111</sup>

As stated previously, it is not possible to define a social group solely based on the persecution feared or suffered by its members; however, the Trafficking Guidelines explain that the historical fact of trafficking serves as a defining characteristic of the social group, distinct from fear of persecution in the form of “ostracism, punishment, reprisals or re-trafficking.”<sup>112</sup> In light of the suggestions from UNHCR on the inclusion of victims of trafficking as members of a particular social group, an examination of national jurisdiction decisions on this issue provides valuable insight into the treatment of victims of trafficking in State practice.

*Moldova*, discussed above, deals squarely with the application of particular social group to victims of trafficking.<sup>113</sup> In reaching its determination of whether the victim in this specific case should be considered to meet the requirements of membership in a particular social group, the Tribunal avoids gender entirely. It determines that by defining the particular social group to include “former victims of trafficking” and “former victims of trafficking for sexual exploitation,” it is able to avoid the previously outlined requirement for proof of generalized discrimination against women.<sup>114</sup> The focus falls on the shared immutable characteristic of having been trafficked to satisfy the definitional requirements of membership in a particular social group.<sup>115</sup>

This is a very narrow option for female victims of trafficking for sexual exploitation. While it potentially includes those victims who have been trafficked in the past, it fails to provide protection for women and girls who have been threatened with trafficking or fear being trafficked but have not yet actually been subjected to trafficking. Presumably, those women would be required to provide evidence of broad-based gender discrimination in their country of origin before they would be considered to constitute a particular social group for purposes of refugee protection.

The Australian Federal Magistrates Court has also addressed the application of membership in a particular social group to victims of trafficking for sexual exploitation.<sup>116</sup> This case involved a woman national of Thailand who had been deceived into traveling to Australia to work in

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<sup>108</sup> UNHCR Trafficking Guidelines, *supra* note 19, para. 38.

<sup>109</sup> *Id.*, para. 39.

<sup>110</sup> UNHCR PSG Guidelines, *supra* note 58, para. 6; *Ward*, 2 S.C.R. 689, para. 78.

<sup>111</sup> UNHCR Trafficking Guidelines, *supra* note 19, para. 39.

<sup>112</sup> *Id.*

<sup>113</sup> *Moldova*, [2008] UKAIT 00002.

<sup>114</sup> *Id.*, paras. 54-55.

<sup>115</sup> *Id.*

<sup>116</sup> *VXAJ*, [2006] FMCA 234.

prostitution.<sup>117</sup> Upon arrival, the victim was locked in a small apartment with other women and forced to work in a brothel as a sex slave.<sup>118</sup> She was found through a raid of the brothel conducted by law enforcement and later assisted in the prosecution of her traffickers in Australia.<sup>119</sup>

The victim sought review of a decision denying her a protection visa and the Court addressed the issue of membership in a particular social group with respect to women victims of trafficking under the 1951 Convention.<sup>120</sup> The Court did not question the lower tribunal's decision that sex workers in Thailand constituted a particular social group, whereas being a sex worker is a characteristic that defines the group and distinguishes the group from the rest of society.<sup>121</sup> However, the analysis provided by the Court did not provide significant insight into how this category might be applicable in other jurisdictions.

Immigration judges in the United States have struggled with the interpretation of particular social group with respect to victims of trafficking. They have endeavoured to interpret this category in compliance with the standard outlined in *Acosta*, while at the same time delineating limits on United States obligations for protection. The following are examples of particular social groups both accepted and rejected by immigration tribunals in the United States<sup>122</sup> In one case, the judge accepted the group of "sex slaves from foreign countries who are brought to the U.S. under false pretences and forced at the threat of death and destruction to participate in sexual activities."<sup>123</sup> While this group is partially defined by the persecution feared, it is also defined by the immutable historical characteristic of having been trafficked for sexual exploitation. In a similar case, the immigration judge rejected the category of women from the victim's country of origin "forced into prostitution by the mafia who escape from sexual bondage."<sup>124</sup> This social group included three immutable characteristics: gender, nationality and the historical experience of being subjected to sexual exploitation.

Another United States immigration judge determined that a "woman who was opposed to prostitution, but was being forced to engage in it against her will" was the member of a particular social group.<sup>125</sup> Again, this group is partially defined by the persecution suffered but also by gender and by a characteristic that could be argued to be fundamental to her conscience and, therefore, she should not be required to change. In contrast, a judge rejected the group of "young

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<sup>117</sup> *Id.*, para. 4.

<sup>118</sup> *Id.*

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

<sup>120</sup> *Id.*, paras. 6 & 11.

<sup>121</sup> *Id.*, para. 25.

<sup>122</sup> Because of issues relating to victim confidentiality, it is difficult to obtain published immigration decisions. Most of the cases discussed in the following section are unpublished decisions and the analysis for the purposes of this paper is limited to the information provided by Stephen Knight in his article *Asylum from Trafficking: A failure of Protection*, *supra* note 23. The CGRS case numbers reference the internal coding system of the Center for Gender and Refugee Studies, online at <http://cgrs.uchastings.edu/law/>.

<sup>123</sup> Knight, *supra* note 23, p. 7, quoting Matter of P-H-, A # redacted, 13 (Houston, TX, Immigration Court, March 4, 2004) (CGRS Case # 3695).

<sup>124</sup> *Id.*, p. 9, quoting Matter of Anon., A# redacted, 5 (Seattle, WA, Immigration Court, Feb. 7, 2000) (CGRS Case # 275).

<sup>125</sup> *Id.*, p. 14, citing Matter of J-M-, A # redacted, 15 (San Pedro, CA, Immigration Court, December 3, 1996) (CGRS Case # 364).

Albanian women who will not voluntarily enter a life of prostitution.”<sup>126</sup> The judge stated that it was not a “cohesive, homogenous group to which the term ‘particular social group’ was intended to apply.”<sup>127</sup> Despite the fact that this group is defined more narrowly than the group accepted above, it was rejected on grounds of over-breadth.<sup>128</sup>

The requirement for cohesiveness or voluntary association has been explicitly rejected by UNHCR, as well as by some national jurisdictions.<sup>129</sup> The above cases reveal the inconsistencies in decisions regarding particular social group determinations in trafficking cases. The insufficiency of decisions at the appeals level, as well as the confusion of the definitional elements contained in the 1951 Convention which is apparent in existing decisions, has failed to provide immigration judges with sufficient guidance in determining the applicability of the category of particular social group to trafficking victims.

### **Nexus between persecution and protected grounds**

Assuming that the necessary element of persecution is established and the definitional requirements of membership in a particular social group are met, a victim must still show that the persecution feared is on account of the characteristics defining membership in a particular social group.<sup>130</sup> One of the principle problems for victims of trafficking seeking inclusion in the category of particular social group on the basis of gender-related persecution is establishing this nexus.<sup>131</sup> A pattern can be seen in United States immigration decisions of treating claims by women victims of trafficking as “personal, criminal problems.”<sup>132</sup> In the case discussed above involving the kidnapping, rape and threatened trafficking of a teenage Albanian girl, the immigration judge failed to find a connection between the protected grounds and the acts of persecution because they were simply personal, criminal acts directed at the victim.<sup>133</sup>

In response to another young Albanian woman’s claim of attempted kidnapping for sexual exploitation, the immigration judge acknowledged that the evidence showed that Albania had an

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<sup>126</sup> *Id.*, p. 10, quoting *Matter of H-H-*, A# redacted, 7 (Chicago IL, Immigration Court, May 29, 2003) (CGRS Case #2506).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> UNHCR Gender Guidelines, *supra* note 21, para. 31; See also *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9<sup>th</sup> Cir. 2000), para. 1093, modifying its previous holding in *Sanchez-Trujillo* to the extent that it required a voluntary association between members of a particular social group. The Court stated, “We thus hold that a ‘particular social group’ is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”; *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9<sup>th</sup> Cir. 1986), para. 1576: “Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.”

<sup>130</sup> 1951 Convention, *supra* note 82: Article 1(A)(2) provides that the individual maintains a well-founded fear of persecution “for reasons of” one of the five protected grounds.

<sup>131</sup> Knight, *supra* note 23, p. 6; Musalo, Karen, *Beyond Belonging: Challenging the Boundaries of Nationality: Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DePaul L. Rev. 777 (2003), p. 786.

<sup>132</sup> Knight, *supra* note 23, p. 6.

<sup>133</sup> *Id.*, citing *Matter of Anon.*, A # redacted, 19-20 (New York, NY, Immigration Court, Feb. 4, 2004) (CGRS Case # 1034).

“overwhelming problem with the trafficking of women” but that the requisite nexus was not established because it was likely that there were many people in the victims situation who were harassed in the same manner as the victim.<sup>134</sup> As Stephen Knight explains, the existence of a large scale criminal problem in trafficking cases should not affect the determination and furthermore, “[t]he requirement that ‘at least one central reason’ for the harm need be linked to one of the five grounds does not mean that the existence of other potential reasons – such as monetary gain – is a barrier to a grant of protection.”<sup>135</sup>

The United Kingdom Gender Guidelines address the issue of pervasive violence against women in determining whether harm qualifies within the analysis. The Guidelines caution that “[t]he fact that, within a particular country, violence and/or discrimination against women is endemic and/or socially/culturally accepted is *irrelevant* when determining whether gender-specific forms of harm amount to ‘serious harm’.”<sup>136</sup>

This principle applies also to the establishment of the nexus between persecution and a protected ground; for example, evidence of large-scale crimes against members of a certain religion does not diminish the fact that individuals of that religion are targeted because they possess a characteristic identifying them as members of that religion. The analysis should not be any different for victims of trafficking claiming persecution on gender-related grounds. The presence of wide-spread gender-related persecution, whether perpetrated by the State or private individuals, where State protection is deficient, is still persecution.

### **Unable or unwilling to utilize state protection**

The final requirement in the refugee status determination analysis is whether the individual is unable or unwilling, owing to a well-founded fear of persecution, to avail herself of the protection of her country of origin.<sup>137</sup> When assessing whether an individual maintains a well-founded fear of persecution in her country of origin, it is necessary to determine from whom she fears persecution. Persecution may be perpetrated by both State and non-State actors.<sup>138</sup>

The U.S. Gender Guidelines explain that an applicant claiming persecution or threats of persecution from non-State actors must show that the State is unable or unwilling to protect its citizens from these perpetrators.<sup>139</sup> Of relevance in assessing whether an individual has been subjected to persecution by non-State actors is whether or not the applicant sought protection from the State or evidence that doing so would be ineffective.<sup>140</sup> This issue of persecution perpetrated by non-State actors is particularly relevant in the trafficking context.

It is helpful to examine a sampling of State responses, or failure to respond, to incidents of trafficking to understand the significance of this issue in refugee status determinations involving

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<sup>134</sup> *Id.*, p. 8, quoting *Matter of A-L*, A # A76-868-511, 5 & 9 (Chicago, IL, Immigration Court, May 3, 2001) (CGRS Case #562).

<sup>135</sup> *Id.*, quoting the U.S. Immigration and Nationality Act Real ID Act of 2005, INA § 208(b)(1)(B)(i).

<sup>136</sup> U.K. Gender Guidelines, *supra* note 77, para. 2A.15.

<sup>137</sup> 1951 Convention, *supra* note 82.

<sup>138</sup> UNHCR Handbook, *supra* note 24, para. 65; UNHCR Trafficking Guidelines, *supra* note 19, para. 21.

<sup>139</sup> U.S. Gender Guidelines, *supra* note 22, p. 17.

<sup>140</sup> *Id.*

victims of trafficking. The United States Attorney General indicates that in 2008, the majority of applications for trafficking protection visas in the United States came from trafficking victims from Mexico, the Philippines and South Korea.<sup>141</sup> A closer examination into the specific situations within these countries illustrates each State's ability and interest in protecting victims from persecution within the trafficking context.

In Mexico, despite the fact that twenty-two states within the federal system have enacted some type of anti-trafficking legislation, NGOs report that there is rampant corruption, especially within local law enforcement and immigration officials who act with impunity.<sup>142</sup> UNHCR explains that the mere presence of a law against trafficking is not alone sufficient to guarantee against persecution if it is not applied effectively in practice.<sup>143</sup> Reports also indicate that it is not unusual for Mexican officials to accept or require bribes or sexual services and to discourage trafficking victims from reporting crimes.<sup>144</sup>

The Mexican Government has conducted investigations into state officials' involvement in organized crime and corruption but many victims are still fearful of seeking legal recourse or assistance for fear of retaliation from traffickers involved in organized crime. This indicates that Mexican Government may be unable to protect victims of trafficking from persecution both from State and non-State officials.<sup>145</sup>

In the Philippines, law enforcement and immigration officials are often complicit or at least tolerant of trafficking activities.<sup>146</sup> There is widespread corruption, with claims of law enforcement officials requiring payment from brothels to ignore violations of the law.<sup>147</sup> Despite reports that immigration officials are actively involved in the trafficking of individuals abroad, there were no prosecutions or convictions of State officials for trafficking related crimes between April 2008 and March 2009.<sup>148</sup> Even though the Philippines enacted anti-trafficking legislation in 2003,<sup>149</sup> it appears that the Government is not only unable to protect trafficking victims, but complicit in trafficking related persecution.

The Republic of Korea, in contrast, is in compliance with the minimum standards to prevent trafficking, according to the United States Department of State, and has made strong efforts in the prosecution of sex trafficking offences and in the area of victim protection.<sup>150</sup> These factors make an argument of persecution based on the unwillingness or inability of the Republic of Korea to protect victims of trafficking unlikely.

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<sup>141</sup> U.S. Dep't of Justice, *Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons* (June 2009), available at <http://www.state.gov/g/tip/rls/reports/2009/125631.htm> [hereinafter U.S. Attorney General's Report on Trafficking], p. 33.

<sup>142</sup> U.S. TIP Report, *supra* note 3, p. 207.

<sup>143</sup> UNHCR Trafficking Guidelines, *supra* note 19, para. 23.

<sup>144</sup> U.S. TIP Report, *supra* note 3, p. 207.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*, p. 241.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*, p. 239.

<sup>150</sup> *Id.*, pp. 176-177.



The above information suggests that it may be possible for trafficking victims seeking trafficking visas in the United States from Mexico and the Philippines to make arguments for refugee status based on the inability or unwillingness of their governments to protect them from trafficking related acts of persecution, subject to the additional requisite elements of the refugee status determination.

### **Alternative legal frameworks**

There are various options with respect to the protection and recognition of rights of trafficking victims in addition to grants of asylum. A system of temporary or permanent protection is sometimes necessary for a victim who is at risk of re-trafficking or to protect her fundamental human rights when these rights can not be guaranteed through the return of the victim to her country of origin.<sup>151</sup> One particular form of protection which has been employed by many states is the issuance of temporary visas. Article 7 of the Trafficking Protocol states that each State Party “shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.”<sup>152</sup>

The weakness in this provision lies in the suggestive nature of protection in the form of permission to remain. It is entirely up to State Parties whether and, if so, how they will give effect to this aspect of protection. Additional weaknesses lie in the temporal limitations of these methods of protection. In contrast to refugee status, which is premised on providing protection to an individual so long as protection is necessary, several of the temporary visa frameworks maintain artificial temporal limitations. For example, the granting of a visa in connection with providing assistance to law enforcement in the investigation and prosecution of traffickers and the termination of the visa when the prosecution is complete or the victim’s assistance is no longer needed. In this situation, the protective framework does not emphasize according protection so long as protection is needed, but instead focuses primarily on achieving the victim’s continued presence to assist in the apprehension of traffickers.

The Council of Europe Convention on Action against Trafficking in Human Beings provides stronger obligations on State Parties to implement temporary measures on permission to remain for trafficking victims; however, only a little over half of all Member States of the Council of Europe, and no non-Member States, have ratified the Convention at present.<sup>153</sup> The Convention requires that each Member State shall provide for a “recovery and reflection period of at least thirty days, when there are reasonable grounds to believe that the person concerned is a victim.”<sup>154</sup> It is argued that the thirty day requirement is not sufficient to provide for the recovery

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<sup>151</sup> Gallagher, *supra* note 12, p. 992.

<sup>152</sup> Trafficking Protocol, *supra* note 10, art. 7.

<sup>153</sup> Council of Europe Convention on Action Against Trafficking in Human Beings, Council of Europe Treaty Series No. 197 (16 May 2005) [*hereinafter* Council of Europe Convention], Chart of signatures and ratifications, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>.

<sup>154</sup> *Id.*, art. 13.

of victims of trafficking and, furthermore, that the short timeframe lessens the likelihood of a victim's willingness and ability to cooperate in prosecutorial efforts by the State.<sup>155</sup>

In addition, the Convention requires that States provide a renewable residence permit where competent authorities determine it is necessary for personal needs of the victim or it is necessary to gain the assistance of the victim in the prosecution of the trafficker.<sup>156</sup> While this provision mentions the granting of permits for victims assisting in prosecutorial matters, it is important that it also requires permission to remain if the personal situation of the victim so requires, however vague this requirement might be. It is argued that there is too much flexibility in this provision, allowing States to undermine the protection of the permit in national legislation.<sup>157</sup>

Member States are also obliged to adopt measures addressing the physical, psychological and social recovery of victims and the Convention further provides that this assistance shall not be made conditional on a victim's willingness or ability to assist with the prosecution of traffickers.<sup>158</sup> This component is critical. Separating victim assistance and protection from State prosecutorial efforts ensures a stronger emphasis on victim protection than that contained in the Trafficking Protocol and in many national laws.

National efforts to provide protection to victims of trafficking vary in the content and scope of the temporary visa protection offered. For example, the Australian model provides for a forty-five day rehabilitation and reflection period to suspected victims of trafficking, regardless of their ability or willingness to participate in investigation and prosecution of their traffickers.<sup>159</sup> It is however unclear what types of assistance are available to victims during this period. The Australian system provides an additional forty-five day visa for individuals who are willing but unable to participate in the investigation and prosecution for medical reasons.<sup>160</sup> Victims of trafficking may also apply for a permanent Witness Protection visa if they have "contributed to, and cooperated closely with, a trafficking-related investigation or prosecution and would be in danger if they returned home."<sup>161</sup> This visa includes family members of the victim located both inside and outside Australia's borders.<sup>162</sup>

This requirement to contribute to investigation and prosecution is problematic. For example, in a situation involving a victim suffering from severe trauma, who is therefore unable to assist with the investigation and/or prosecution, is only entitled to a maximum ninety day visa and is excluded entirely from the permanent visa system.<sup>163</sup> Furthermore, the victim must obtain a

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<sup>155</sup> Raffaelli, Rosa, *The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive, and the Italian Experience*, 10 German Law Journal 205 (2009), pp. 210-211.

<sup>156</sup> Council of Europe Convention, *supra* note 153, art. 14.

<sup>157</sup> Raffaelli, *supra* note 155, p. 211.

<sup>158</sup> Council of Europe Convention, *supra* note 153, art. 12.

<sup>159</sup> Australian Government Anti-People Trafficking Strategy, website, available at <http://www.facs.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

“Witness Protection Certificate” from the Attorney General in order to apply for the visa, raising questions about the objectiveness of the procedures in place for granting this certificate.<sup>164</sup>

A positive aspect of the Australian visa scheme is the recognition that the family members of a victim must be considered for inclusion. Traffickers often use threats against a victim’s family in effort to control the victim<sup>165</sup> and if the victim is in fear for her family’s safety she is less likely to cooperate with authorities. However, if threats to family members are serious and imminent, this process of inclusion may be too cumbersome to alleviate a victim’s fears.

Italy provides another example of alternative domestic methods of protection for trafficking victims. The Italian model requires admittance to an assistance program before a residence permit may be obtained.<sup>166</sup> In order to be admitted to the assistance program an individual must be in a situation of violence or serious exploitation and the individual must be in danger as a result of attempts to escape or statements made to authorities in the context of a pre-trial investigation or during the context of a trial.<sup>167</sup>

Following admittance to the assistance program, there are two methods of obtaining a residence permit, which is valid for a renewable period of six months.<sup>168</sup> The first involves a situation where the victim is working with authorities and the permit is issued at the request of the prosecutor.<sup>169</sup> The second method is via the request of a social service organization caring for the victim through the assistance program and is independent of the prosecuting officials.<sup>170</sup>

By not conditioning the residence permit on a willingness to cooperate with authorities, it is suggested that victims exhibit a greater willingness to participate following an adequate period of rest and rehabilitation.<sup>171</sup> This method is also far more victim-centred than many national approaches which condition protection on a willingness or ability to assist with the prosecution of traffickers. However, there have been claims by NGOs that the Italian system sometimes results in a refusal of residence permits to individuals who refuse to cooperate with authorities,<sup>172</sup> leading to questions about adequate enforcement of the legal provisions that clearly reject this precondition. The Italian system also provides for an additional form of temporary protection from three to six months for victims of trafficking, including basic assistance in the form of food, housing and medical care.<sup>173</sup>

The United States enacted the Trafficking Victims Protection Act (TVPA) in 2000 to address the global issue of trafficking in persons.<sup>174</sup> The stated purpose of the TVPA is to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women

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<sup>164</sup> *Id.*

<sup>165</sup> UN Office on Drugs and Crime, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS, Ch. 1.3 (2008), Ch. 6.2.

<sup>166</sup> Raffaelli, *supra* note 155, p. 215.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*, p. 217; *see also* U.S. TIP Report, *supra* note 3, p. 168.

<sup>169</sup> Raffaelli, *supra* note 155, p. 216.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*, p. 217.

<sup>173</sup> *Id.*; *see also* U.S. TIP Report, *supra* note 3, 168.

<sup>174</sup> U.S. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as 22 U.S.C. §§7101-7110).

and children, to ensure just and effective punishment of traffickers and to protect their victims.”<sup>175</sup> The TVPA contains two forms of temporary protection for victims of severe forms of trafficking in persons. A victim may apply for a T visa or receive a grant of “continued presence” by the United States Attorney General and the Secretary of Homeland Security.<sup>176</sup> “Continued presence” is the most immediate form of protection a victim may receive and, while the speed of obtaining protection is critical, this is a temporary status with no option for achieving permanent protection.<sup>177</sup>

The TVPA accords benefits and services to victims of severe forms of trafficking in persons to the same extent as individuals accorded refugee status in the United States.<sup>178</sup> These benefits and services include employment assistance, limited health care assistance, language training and vocational training.<sup>179</sup> To qualify for benefits the individual must have been subjected to force, fraud or coercion for the purpose of performing a commercial sex act, subsection to involuntary servitude, peonage, debt bondage or slavery.<sup>180</sup> In addition, the individual must either not have attained the age of eighteen or have been certified by the Secretary of Health and Human Services, in consultation with the United States Attorney General and the Secretary of Homeland Security.<sup>181</sup>

The purpose of the certification is to show that the victim is willing to assist in the investigation and prosecution of trafficking in persons or is unable to assist because of a physical or psychological trauma, and that the victim has either applied for a T visa, and not been rejected, or has been granted “continued presence” by the United States Attorney General and the Secretary of Homeland Security.<sup>182</sup> The permission for continued presence is granted at the discretion of the Secretary upon application from a law enforcement official stating that an individual is a victim or potential witness.<sup>183</sup> A grant of continued presence is initially for a period of one year and may be extended as long as the presence of the victim is deemed necessary for the prosecution of traffickers.<sup>184</sup> In 2008 there were 239 requests for continued presence from federal law enforcement agencies of which 225 were granted.<sup>185</sup>

In order to qualify for a T visa, the following elements must be met: 1) the individual must be a victim of a “severe form of trafficking in persons” as defined in the TVPA,<sup>186</sup> 2) she or he must be physically present in United States territory, 3) the victim must have “complied with any reasonable request” for assistance in the investigation or prosecution of acts of trafficking, be

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<sup>175</sup> 22 U.S.C. § 7101(a).

<sup>176</sup> 22 U.S.C. § 7105(b)(1)(E)(i)(II).

<sup>177</sup> Seltzer, Suzanne, Stewart, Christina, Thukral, Juhu & Tomatore, Suzanne, IDENTIFICATION AND LEGAL ADVOCACY FOR TRAFFICKING VICTIMS (2<sup>nd</sup> ed., 2005), available at <http://www.urbanjustice.org/pdf/publications/IDLegalAdvocacy.pdf>, pp. A-3 & A-9.

<sup>178</sup> 22 U.S.C. § 7105(b)(1)(A).

<sup>179</sup> U.S. Department of Health and Human Services, Office of Health and Human Services Refugee Resettlement Program, website, available at <http://www.acf.hhs.gov/programs/orr/benefits/rss.htm>.

<sup>180</sup> 22 U.S.C. § 7102(8).

<sup>181</sup> 22 U.S.C. § 7105(b)(1)(C)(ii).

<sup>182</sup> 22 U.S.C. § 7105(b)(E)(i).

<sup>183</sup> 22 U.S.C. § 7105(c)(3)(A)(i).

<sup>184</sup> 22 U.S.C. § 7105(c)(3)(A)(ii).

<sup>185</sup> U.S. Attorney General’s Report on Trafficking, *supra* note 141, p. 33.

<sup>186</sup> 22 U.S.C. § 7102(8).

unable to comply due to physical or psychological trauma or be under the age of eighteen, and 4) “would suffer extreme hardship involving unusual and severe harm upon removal.”<sup>187</sup> A T visa applicant may also apply to include certain family members, including family members that the Secretary, in consultation with law enforcement officials, determines will face retaliation from traffickers due to the victim’s escape or cooperation with law enforcement.<sup>188</sup>

The T visa is valid for a period of not more than four years,<sup>189</sup> with the possibility of applying for permanent residence after three years.<sup>190</sup> There is a limit on the number of T visas that may be awarded per year in the amount of 5000;<sup>191</sup> however, the number of visas granted continually falls far short of this limit. In 2008, there were 394 T visa applications of which only 247 were granted.<sup>192</sup> While this is the highest number of visas awarded to date, this number seems extremely low in light of the United States Department of State’s estimation that between 14,500 and 17,500 individuals are trafficked into the United States every year.<sup>193</sup>

### Temporary protection

One of the primary issues posed by temporary visa schemes in affording protection to victims of trafficking is the obligation to cooperate with law enforcement. The Trafficking Protocol and the United States TVPA indicate that one of the primary purposes of the legal framework is to provide protection to victims of trafficking.<sup>194</sup> Regarding the suggestive nature of the provisions addressing victim protection contained in the Trafficking Protocol<sup>195</sup> and the connection between protection measures and the willingness to assist law enforcement outlined in the TVPA,<sup>196</sup> it appears that protection for victims is secondary to the prosecution of traffickers.<sup>197</sup> Many victims face a very real threat of reprisals from traffickers, both individually and against family members, making it difficult to assist law enforcement.<sup>198</sup> Moreover, having experienced the trauma of exploitation, victims may not be able to provide the necessary information to assist law enforcement efforts. While there are sometimes exceptions to the requirement for cooperation for

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<sup>187</sup> 8 U.S.C. § 1101(a)(15)(T)(i).

<sup>188</sup> 8 U.S.C. § 1101(a)(15)(T)(ii)(III).

<sup>189</sup> 8 U.S.C. § 1184(o)(7).

<sup>190</sup> 8 U.S.C. § 1255(l).

<sup>191</sup> 8 U.S.C. § 1184(o)(2).

<sup>192</sup> U.S. Attorney General’s Report on Trafficking, *supra* note 141, p. 35.

<sup>193</sup> Srikantiah, Jayashri, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U.L. Rev. 157 (2007), p. 178.

<sup>194</sup> 22 U.S.C. § 7101(a); Trafficking Protocol, *supra* note 10, art. 2(b).

<sup>195</sup> Trafficking Protocol, *supra* note 10, art. 6: (1) “In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons ... (3) Each State Party shall *consider implementing* measures to provide for the physical, psychological and social recovery of victims of trafficking ... (5) Each State Party shall *endeavor* to provide for the physical safety of victims of trafficking ...” [italics added].

<sup>196</sup> 8 U.S.C. § 1101(a)(15)(T)(i).

<sup>197</sup> Baker, Katrina Lynne, *Don’t Forget the Family: A Proposal for Expanding Immediate Protection to Families of Human Trafficking Survivors*, 30 Fordham Int’l L.J. 836 (2007), p. 858; Gallagher, *supra* note 12, p. 994.

<sup>198</sup> Gallagher, Anna Marie, *Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination*, 19 Geo. Immigr. L.J. 99 (2004), 121; Srikantiah, *supra* note 193, p. 181.

medical or psychological necessity, as seen in the both the Australian and United States systems, it may be difficult for a victim to obtain the necessary documentation for these exceptions.

Reducing fear of reprisals against family members is a very serious weakness in temporary protection systems, particularly in the context of requirements for cooperation with law enforcement. If a victim is in serious fear for the safety of her family, it will potentially affect her decision to assist in the investigation and prosecution of her traffickers.<sup>199</sup> Even in the United States and Australian systems, where victims are permitted to apply for protection for certain members of their families, the inability to accord protection in a timely and efficient manner may negate the effects of this option. For example, if an average visa application takes four to twelve months to process in the United States, imminent harms faced by family members will not be addressed by this system.<sup>200</sup>

The use of witness protection programs may alleviate several issues involved in threats against victims and their family members. The UN TOC Convention requires a Member State to “take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings ... and, as appropriate, for their relatives and other persons close to them.”<sup>201</sup> The measures considered within the Convention include measures to “ensure physical protection,” possibly including relocation, as well as methods of testifying that aid in protection of victims, for example through the use of video testimony.<sup>202</sup>

The UNODC provides guidance on good practices regarding the protection of witnesses.<sup>203</sup> First, it emphasises the importance of distinguishing between witness assistance and witness protection. Witness assistance is primarily focused on obtaining “efficient prosecution and avoid[ing] secondary victimization or revictimization of the witness,” while witness protection is focused on those situations where “the threat against the witness is so serious that protection and support cannot be ensured by other means.”<sup>204</sup> In situations involving prosecution of small-scale traffickers, where there is little perceived threat to the victim in testifying, it may be sufficient to provide the victim with psychological and practical assistance, police protection and/or testimonial protection surrounding the trial.<sup>205</sup> Increased measures may be necessary in certain situations where the perceived threat is greater, such as temporary relocation or increased police protection and other security measures.<sup>206</sup> Cases involving extensive criminal networks may require admission to a witness protection program and a change of identity and location for the victim and members of her family.

The UNODC indicates that this type of protection can result in extreme consequences for the victim and her family in the form of “severe restrictions in their fundamental personal freedoms and individual rights in terms of movement, communication and work.”<sup>207</sup> When international

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<sup>199</sup> Srikantiah, *supra* note 193, p. 181; Baker, *supra* note 197, p. 869.

<sup>200</sup> Baker, *supra* note 197, p. 862.

<sup>201</sup> UN TOC Convention, *supra* note 10, art. 25.

<sup>202</sup> *Id.*, art. 25(2)(a)-(b).

<sup>203</sup> UN Office on Drugs and Crime, GOOD PRACTICES FOR THE PROTECTION OF WITNESSES IN CRIMINAL PROCEEDINGS INVOLVING ORGANIZED CRIME (2008) [*hereinafter* UNODC Witness Protection Report].

<sup>204</sup> *Id.*, pp. 27-29.

<sup>205</sup> *Id.*, p. 27.

<sup>206</sup> *Id.*, pp. 29-30.

<sup>207</sup> *Id.*, p. 86.

relocation is necessary, because an individual cannot be relocated safely within the prosecuting country, she may face additional barriers with respect to language, society and culture.<sup>208</sup> While this may be the only option for adequate protection for some victims of trafficking and their family members, the severity of the restrictions associated with witness protection programs may result in the revictimization of an individual who has already been subject to grave violations of her human rights and dignity and should be considered carefully.

Another issue within the United States and Australian context, and jurisdictions which employ similar methods, is the discretionary nature of certifying that a victim is indeed a victim of trafficking who is entitled to assistance. Every official maintains their own idea of the characteristics of a trafficking victim and determinations may be made, based on those assumptions, while a victim is still suffering from the effects of their experience and may not be extremely coherent or able to express the full extent of their exploitation.<sup>209</sup>

Giving such a vast amount of discretion to law enforcement and immigration officials with respect to victim assistance undermines the system of protection. Furthermore, even in the Italian context, where temporary protection is not solely conditioned on willingness to assist law enforcement, there are arguments that victims are in fact sometimes refused protection if they do not prove cooperative with law enforcement.<sup>210</sup>

Finally, criminal convictions, for example, prostitution related offences may impact the victim's right to remain and also her ability to obtain permanent residence.<sup>211</sup> The UN High Commissioner for Human Rights has issued guidelines calling for the non-criminalization of victims of trafficking for offences committed as a direct result of being trafficked.<sup>212</sup> The United States the TVPA provides that "[V]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation."<sup>213</sup>

The TVPA suggests that a conviction for prostitution related offences as a result of being trafficked should not affect the immigration options of the victim; however, legal practitioners in the United States indicate that there is no guarantee that a conviction will not later result in a denial of permanent residence or even a refusal of permission to remain.<sup>214</sup> In New York, the state legislature has addressed this concern by approving a bill that will erase prostitution convictions resulting from trafficking for sexual exploitation.<sup>215</sup> This is an important

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<sup>208</sup> *Id.*

<sup>209</sup> Srikantiah, *supra* note 193, p. 180.

<sup>210</sup> U.S. TIP Report, *supra* note 3, p. 217.

<sup>211</sup> Seltzer, Stewart, Thukral, & Tomatore, *supra* note 177, p. A-5.

<sup>212</sup> UN High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, UN ESCOR, Substantive session 2002, UN Doc. E/2002/68/Add.1 (2002) [*hereinafter* UNHCHR Trafficking Principles], Guideline 3.

<sup>213</sup> 22 U.S.C. § 7101(b)(19).

<sup>214</sup> Seltzer, Stewart, Thukral, & Tomatore, *supra* note 177, p. A-5.

<sup>215</sup> Sex Workers Project, *New York State Assembly Gives Trafficking Victims a Second Chance*, press release (16 June 2009), available at <http://www.sexworkersproject.org/downloads/2009/20090616-swp-vacating-convictions-release.pdf>.

development and hopefully other jurisdictions will heed the suggestions of UNHCHR and follow New York's lead.

## Reparation

Regardless of whether a victim seeks protection in the form of asylum, a temporary visa, or is repatriated, she should have access to methods of reparation for the harm she has suffered as a consequence of her trafficking. The right of an individual to a remedy for violations of international human rights law can be found in several international human rights instruments: the Universal Declaration of Human Rights, Article 8; the International Covenant on Civil and Political Rights, Article 2; the International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14. The UN General Assembly has defined victims of crime for the purpose of reparation as: “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”<sup>216</sup>

Victims of trafficking suffer grievous violations of their human rights and fundamental freedoms; thus, the UN TOC Convention calls on Member States to “provide access to compensation and restitution” for victims<sup>217</sup> and the Trafficking Protocol provides further that “[e]ach State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”<sup>218</sup> In order to provide victims sufficient access to remedies, the UN High Commissioner for Human Rights explains that several factors must be considered. For example, States must inform trafficking victims of their rights to remedies and provide them with legal and other necessary assistance to guide them in the process.<sup>219</sup>

Crucial components of ensuring access to remedies involve permitting a victim to remain in the country where the remedy is sought throughout the duration of any criminal, civil or administrative proceedings and providing for the victim's safety during these proceedings.<sup>220</sup> The ability of a victim of trafficking to obtain restitution, compensation or other forms of remedy for the violation of their rights is a vital component of protection. While it is of primary importance to protect a victim's physical safety, providing them with the means to begin to heal and recover from these grave violations must not be overlooked.

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<sup>216</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, 96<sup>th</sup> Plenary Meeting, UN Doc. A/RES/40/34 (1985), para. 1.

<sup>217</sup> UN TOC Convention, *supra* note 10, art. 25(2).

<sup>218</sup> Trafficking Protocol, *supra* note 10, art. 6(6).

<sup>219</sup> UNHCHR Trafficking Principles, *supra* note 212, Guideline 9(1)-(2).

<sup>220</sup> *Id.*, Guideline 9(3).



## Refugee status and other forms of protection

Problems may sometimes arise where a victim of trafficking potentially qualifies for both refugee protection and some other form of temporary or permanent protection, for example a trafficking visa. The tension between the law enforcement goals of prosecuting perpetrators and the humanitarian aims of victim protection may be most apparent where the victim first comes into contact with law enforcement via a trafficking investigation. Within the United States legal structure, law enforcement may want to delay the filing of the T visa application where essential information to the prosecution's case may be subpoenaed by defense counsel, compromising the case.<sup>221</sup> The victim may still receive a grant of continued presence from law enforcement, entitling her to social, health and employment benefits, but she may not be able to apply for subsidiary protection for family members at risk without filing a T visa application.<sup>222</sup>

There is also a risk that a victim might remain uninformed about her options to apply for both asylum and visa protections when she enters the system in relation to a criminal investigation. Furthermore, issues may arise with filing deadlines for the application for asylum. In the United States, there is a statutory exception to the one year filing deadline where the applicant has maintained "Temporary Protected Status" until a "reasonable period before the filing of the asylum application."<sup>223</sup> It is unclear under what circumstances this exception would apply. In addition, the applicant bears the burden of proving that the exception is reasonable under the circumstances.<sup>224</sup> This type of exception is valuable in ensuring that a victim is not denied necessary asylum protection due to her assistance in prosecutory matters but it may only be applicable in certain situations.

Presumably, the best decision for a victim is to apply for all available options for protection to increase her chances of receiving effective protection, although the possibility of multiple, simultaneous applications may vary by jurisdiction. There are benefits and detriments associated with both temporary visa protection and asylum protection. As indicated in the previous analysis, one of the major problems with visa protection is the temporary nature of the protection. While some temporary visa frameworks provide the option of applying for permanent residence status at a later point, the potential that a victim will receive time-limited protection must be considered. Refugee status, on the other hand, is focused on providing sustainable solutions to threats of persecution. This means that the protection will not cease unless the threat of persecution has ceased to exist.<sup>225</sup>

Obtaining refugee status may also mean that a victim is able to apply for permanent status sooner, meaning she can begin working to rebuild her life without fear of being forced to relocate. Under the United States asylum legal framework, an individual may qualify for permanent residence status after one year,<sup>226</sup> while under the T visa scheme, a victim is not

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<sup>221</sup> Seltzer, Stewart, Thukral, & Tomatore, *supra* note 177, A-5.

<sup>222</sup> *Id.*, pp. A-6 & A-7.

<sup>223</sup> 8 U.S.C. § 1208(a)(5)(iv).

<sup>224</sup> 8 U.S.C. § 1208(a)(5)

<sup>225</sup> The UNHCR Handbook provides that the cessation of refugee protection on account of change in circumstances in the country in which persecution was feared should be interpreted narrowly. UNHCR Handbook, *supra* note 24, paras. 112 & 116; *see also* 1951 Convention, *supra* note 82, Art. 1C(5)-(6).

<sup>226</sup> 8 U.S.C. 1159(b)(2).

entitled to apply for permanent status until three years following the grant of the visa, and only if the victim has complied with law enforcement requests for assistance, would “suffer extreme hardship” if removed from the United States or was under 18 years old at the time of victimization.<sup>227</sup> Finally, a grant of asylum protection is not dependant on a victim’s willingness to cooperate with law enforcement efforts, only on the need for protection.

However, the previous analysis illustrates the reluctance of States to recognize women victims of trafficking for sexual exploitation as a category within the definition of refugee. Therefore, the likelihood of obtaining asylum protection for these women is greatly diminished. The pros and cons of refugee protection and temporary visa structures indicate the necessity of making certain that victims of trafficking are adequately apprised of all available options to ensure appropriate respect for their rights.

## **Conclusion**

While it is difficult to provide a precise number of women trafficked for the purpose of sexual exploitation, there is no question that the estimates are extremely significant. In light of the large numbers of victims and the grave violations of fundamental human rights and freedoms associated with this crime, it is critical to ensure that both international and domestic legal frameworks provide sufficient protection measures to these individuals.

Existing methods of identifying victims of trafficking and referring them to protection procedures are severely deficient, both within international and domestic legal structures. The failure to provide training, guidelines and protocols for State officials most likely to come into contact with victims of trafficking renders legislation addressing victim protection ineffective. The most comprehensive law will serve little purpose if those responsible for enforcing it are insufficiently informed.

In the trafficking context, there is a tension between victim protection and criminal prosecution of traffickers. The requirement for victim participation in prosecutorial matters, found in many domestic temporary systems of protection, as a condition for the receipt of protection is problematic. The assistance of victims in obtaining the necessary evidence to convict traffickers is undoubtedly crucial; however, the conditional nature of the relationship between protection and the victim’s role in the investigation and prosecution of traffickers is disconcerting.

Placing greater emphasis on the needs of law enforcement in bringing traffickers to justice, over the needs of the victim, results in exacerbating the already extensive human rights violations suffered by victims of trafficking. Furthermore, the connection between the prosecution of traffickers and victim protection provisions can result in the cessation of victim protection before the need for protection has been eliminated.

Unlike most temporary trafficking visas, asylum law is premised solely on an individual’s need for protection. Under asylum law, once an individual is determined to be a refugee, the provision of protection will not end until it is no longer warranted by the circumstances. Protection

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<sup>227</sup> 8 U.S.C. § 1255(1)(1).

afforded to refugees is not conditioned on their ability or willingness to assist law enforcement efforts; however this does not mean that asylum protection will provide sufficient protection for women victims of trafficking.

Despite the fact the UNHCR has recognized sex as a defining characteristic of a particular social group within the 1951 Convention, in addition to the adoption of gender guidelines by several national jurisdictions, adjudicators continue to struggle against the idea that women may constitute a particular social group for the purpose of refugee status determinations. The argument that the inclusion of women within this category will somehow make refugee status applicable to all women is unfounded. This would be comparable to arguing that the inclusion of Catholics within the category of religion would result in the eligibility of all Catholics for refugee protection.

This argument fails to credit the additional elements an individual must overcome to qualify as a refugee, including the showing of a well-founded fear of persecution on account of one of the protected grounds and a failure of State protection. Furthermore, while some jurisdictions have recognized women victims of trafficking as refugees, many decisions fail to identify the requisite nexus between particular social group and persecution. This results from a combination of the unwillingness to recognize gender as grounds for persecution and misconceptions regarding acts constituting persecution.

Many adjudicators classify the persecution faced by women in the trafficking context as personal, criminal acts, not amounting to persecution for reason of protected characteristics. In this regard, it is troubling to see the creation of additional barriers to women claiming gender-related persecution not faced by individuals claiming persecution on other grounds; for example, the U.K.'s requirement for generalized discrimination in gender-related persecution cases. As long as women continue to be targeted by traffickers, forced or coerced into sexually exploitative situations and subjected to a failure of State protection, the international community must take responsibility for ensuring that the human rights of these women are protected.

It is also crucial to address the relationship between refugee protection and other forms of protection. The primary focus of State officials on the criminal prosecution of traffickers has the effect of funnelling victims into systems of temporary protection, providing little or no options of permanent protection. Furthermore, a victim may not be sufficiently informed about her ability to apply for asylum when her primary contact is with State officials in the criminal prosecution context. This may also result in a victim's failure to meet requisite filing deadlines for asylum protection. Providing victims with the information and the means to obtain appropriate protection is of vital importance in guaranteeing their ability to make informed decisions.

The above analysis illustrates that more comprehensive international and domestic legal frameworks are needed. Moreover, State officials must receive more extensive training with respect to the requirements for the identification and protection of victims of trafficking, specifically those officials most likely to obtain first contact with victims. States must also take a more active role in providing guidance to asylum adjudicators to ensure correct application of the 1951 Convention, taking note of the interpretative guidelines provided by UNHCR. This is crucial if the asylum framework is to uphold its position as a protector of those individuals suffering violations of their human rights in situations involving insufficient State protection. It

is true that the eradication of human trafficking is of primary importance, but so long as the crime exists, there will be victims, and the protection of those victims should be of paramount importance.

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