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TRAFFICKED WOMEN AS REFUGEES
Sexually exploited women as ‘members
of a particular social group’ under
International Refugee Law

Master thesis
20 credits (30 ECTS)

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Master's Programme in International Human Rights Law

Fall 2007

To my parents, Jenny and Humberto, for always believing in me and for instilling in me the values that make me want to fight for a better world.

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SUMMARY

This study aims to revise the possibility of interpreting the 1951 Refugee Convention to include female trafficked victims who might suffer from persecution if deported back to their home countries, in the definition of the Convention as members of a 'particular social group'.

Trafficking in women for the purpose of sexual exploitation is one of the most profitable 'markets' in the globalised world. The feminisation of poverty and migration, the globalisation of markets, economies and the internet, as well as social and cultural practices and values that view women as goods that can be sold and bought without any legal consequence contribute to the increase of this international crime.

Some women are lured with promises of a well-paid job abroad, a better life and/or more economic possibilities to partially solve some of their obligations, while others accept to work as prostitutes in another country. Most of them travel willingly because of the situation they face in their countries of origin. However, once they get to their destination country, they find out they were deceived and face a cruel and inhumane reality. These women are forced to work as prostitutes without any or hardly any payment at all. Most of them are deprived of their legal documents and are forced to serve up to 50 clients a day, besides being subjected to all sorts of human rights violations.

Regardless of this reality, female trafficking victims are basically unprotected both in International Law as well as in different national legislations. Once they manage to escape or are arrested by the police in their destination country, the majority of these women are deported back to their sending country, where they may be victims of gender persecution. This persecution can take various forms: they can be re-trafficked or suffer all sorts of retaliation measures from their traffickers, and/or they can also be ostracised, discriminated against and be subjected to gender violence due to their work as prostitutes and its conflict with the gender roles imposed to women of the society they belong to.

Western European countries are still the most attractive market for traffickers of women. Some of these countries have implemented measures of 'victim protection' that involve giving trafficking victims a temporary residence permit, if they agree to cooperate with the criminal proceedings against their traffickers. These measures have been criticised, since they only serve a purpose for the prosecution of the traffickers and do not really aim to protect and assist the victims of trafficking.

Scholars, United Nations bodies and various national courts have interpreted the fourth ground of the definition. An amalgamation of the main two interpretations given to this ground is contained in the United Nations High Commissioner for Refugees 'social group' guidelines. According to this definition, a social group is a group of persons who share a common characteristic and who are perceived as a group by society. The characteristic can be innate or unchangeable, or fundamental to the person's identity, conscience or exercise of the person's human rights.

This work analyses women as a particular social group in jurisprudence and doctrine and studies the cases in which female victims of trafficking for the purpose of sexual exploitation have been considered a particular social group. The attribution of refugee status to these women has either occurred because of them belonging to a certain society (namely an innate characteristic) or having worked in prostitution (constituting an unchangeable characteristic), which makes society perceive them as a distinct group.

ABBREVIATIONS AND ACRONYMS

1949 Convention	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
<i>Belém do Pará</i> Convention	Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women
Canadian Guidelines	Canadian Immigration and Refugee Board. <i>Women Refugee Claimants fearing Gender-related Persecution</i> , Guidelines issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, 1996
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COE Trafficking Convention	Council of Europe Convention on Action against Trafficking in Human Beings
CRC	Convention on the Rights of the Child
EXCOM	UNHCR Executive Committee
ICCPR	International Covenant on Civil and Political Rights.
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ Statute	Statute of the International Court of Justice
IGOs	International Organizations
IOM	International Organization for Migration
IOM Victim Assistance Handbook	The IOM Handbook on Direct Assistance for Victims of Trafficking
NGOs	Non-governmental Organizations
OAU Protocol on Women's Rights	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
Optional Protocol to the CRC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
Refugee Convention	Convention relating to the Status of Refugees
Rome Statute	Rome Statute of the International Criminal Court
UN	United Nations
UN Guidelines on Human Rights and Trafficking	UN 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 Trafficking Protocol	United Nations Protocol to Prevent, Suppress and Punish Trafficking in

	Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
UNHCR	United Nations High Commissioner for Refugees
UNHCR Gender Persecution Guidelines	UNHCR Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1a(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees
UNHCR Handbook	UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1992.
UNHCR Social Group Guidelines	UNHCR Guidelines on International Protection: “Membership of a particular social group”, within the Context of Article 1a(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees
UNHCR Trafficking Guidelines	UNHCR Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked

UNODC	United Nations Office on Drugs and Crime
UNODC Status of ratification	List of Countries who have ratified the <i>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime</i> .
VCLT	<i>Vienna Convention on the Law of Treaties</i> . (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

1. APPROACH AND CONCEPTUAL FRAMEWORK OF THE STUDY

1.1 Introduction: Aims and Issues to be Addressed

“Sex trafficking is more than an issue of crime or migration; it is an issue of human rights, a manifestation of persistent gender inequality and the subordinate status of women globally.”¹

Trafficking in women and girls² for sexual exploitation and the international sex industry has increased in the past several decades due to several factors such as the feminisation of poverty and migration; the globalization of markets, economies and the Internet; along with several gender discriminative cultural, religious or/and social practices.³ The prostitution industry, extremely interrelated to trafficking in women, is expanding in a world where many countries subscribe to the ideology of a free market economy, a market in which women become a highly sell-able item, to the extent that this industry has been classified as one of the fastest growing global enterprises, after drug and arms trafficking.⁴

Women are trafficked from developing countries into other developing countries, and more frequently to Western developed countries.⁵ Traffickers lure them with promises of a better life and the possibility of earning money to support their families back home. In some cases, traffickers lie about the work they will do, but even women who know they will work as prostitutes or in the ‘sex industry’ do not imagine the real situation they will face. Once they arrive to the destination country, they

¹ Pan-American Health Organization, *Trafficking for sexual exploitation: fact sheet*, 2001 (www.paho.org/English/AD/GE/trafficking.pdf) accessed 1 November 2007, p. 1.

² The phrase ‘trafficking in women’ will be used along the document as including women and girls.

³ See p. 26, fn. 56.

⁴ G. Ekberg ‘The Swedish Law That Prohibits the Purchase of Sexual Services: best practices for prevention of prostitution and trafficking in human beings’ In: *Violence against Women*, 10:10, 1187-1216, SAGE Publications, 2004. (www.action.web.ca/home/catw/attach/Ekberg.pdf) p. 1188.

⁵ United Nations Population Fund, *Trafficking in Human Misery* (www.unfpa.org/gender/violence1.htm) accessed 15 November 2007.

find themselves in an inescapable situation. Most of them are deprived of their legal documents and are usually subjected to debt bondage, living conditions that amount to slavery and do not have the possibility to leave or quit.⁶

Some women manage to escape, or the police arrest them either because they are practicing prostitution or because of their status of illegal migrants. They usually face one outcome: governments deport them back to their countries, treating them as criminals instead of protecting them for what they are: victims of the crime of human trafficking.⁷

Once they are back in their home countries, a considerable number of women face threats to their own life, safety and integrity, as well as that of their families. Their traffickers will persecute them for escaping and they will face great dangers, including the danger of being re trafficked. They may also be ostracised or have their rights violated by their own family and culture because of their involvement in prostitution.⁸ Not much has been done to provide victims with adequate protection. Some countries, particularly in Europe, grant temporary residence permit to victims who cooperate with criminal proceeding against their traffickers, the permit being conditional to this cooperation valid only the time that the proceedings last.⁹

This raises one question: whereas most victims of human rights violations are protected, and even entitled to compensation for what they have been through, why are victims of human trafficking and in particular trafficking for sexual exploitation the only victims who are required to give something to the State to ensure its protection?¹⁰

⁶ A. Brunovskis and G. Tyldum, *Crossing borders. An empirical study of transnational prostitution and trafficking in human beings*, 2004 (www.faf.no/pub/rapp/426/426.pdf) accessed 18 October 2007, p. 20.

⁷ O. Simic, 'Victims of trafficking for forced prostitution: Protection mechanisms and the right to remain in the destination countries' 2:28 *Global Migration Perspectives* (2004), p. 6.

⁸ J. Ward, 'Sex trafficking of women and girls' in IRIN/OCHA, *Broken Bodies, Broken Dreams: Violence against women exposed*. (2005), p. 91.

⁹ See section 3.2.

¹⁰ Human Rights Watch, *Commentary on the European Commission Proposal for a Council Directive "on the short-term residence permit issued to victims of action to facilitate illegal*

The present study aims to research the lack of protection provided by states to women trafficked for the purposes of sexual exploitation. The hypothesis of the investigation is that one of the solutions to the lack of victim protection mechanisms is the granting of refugee status to trafficked victims who might suffer from persecution, or be in danger of harm, if returned to their sending country. This is considered an issue of treaty interpretation, since several scholars as well as by the United Nations High Commissioner for Refugees¹¹ have stated that trafficked women can constitute a ‘particular social group’ under article 1A(2) of the Convention Relating to the Status of Refugees¹² of 1951.¹³ If this possible interpretation is confirmed, this work can be used as a tool for activists and human rights lawyers working with the topic of trafficking in women from various different disciplines.

The explanation of certain core concepts of the investigation, as well as the legal validity of certain legal documents that will be used throughout the study is important for a better understanding of it. The core concepts are the following:

- *Gender*: a social construction of power relations between women and men and the implications of these relations for women’s and men’s identity, status, roles, and responsibilities.¹⁴
- *Victim*: A person who is acted on and usually adversely affected by a force or agent; one that is injured, destroyed, or sacrificed under any of various conditions (accidents, crimes, etc.); one that is subjected to oppression, hardship, or mistreatment; one that is tricked or

immigration or trafficking in human beings who cooperate with the competent authorities (2002) (www.hrw.org/campaigns/migrants/docs/recidence-permit.pdf) accessed 4 January 2008. p. 1

¹¹ Hereinafter UNHCR.

¹² *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. Hereinafter 1951 Refugee Convention.

¹³ United Nations High Commissioner for Refugees, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* (2006) HCR/GIP/06/07, p. 4. Hereinafter UNHCR Trafficking Guidelines.

¹⁴ *Summary Conclusions: gender-related persecution*, Expert roundtable organized by UNHCR and the International Institute of Humanitarian Law, San Remo, Italy, 6-8 September 2001. In: E. Feller et. Al. (ed.), *Refugee Protection In International Law: UNHCR's Global Consultations on International Protection* (UNHCR, Geneva, 2003) p. 351.

duped.¹⁵ As a terminology clarification it is important to mention that the word ‘victim’ will be used throughout this study to refer to persons, specifically women and girls, who have been trafficked. This does not intend to stigmatize or imply powerlessness, but to evidence that they have experienced injustice for which the perpetrator is responsible. As it is appropriate in the area of human rights protection, the use of the word victim indicates that this person has a right to protection, assistance and reparation.¹⁶ The use of the term ‘sex worker’ that some NGOs and countries have undertaken, tends to dignify the sex industry, laying a groundwork for recognizing buyers of commercial sex as legitimate customers and pimps as third party business agents or brokers, which is not the position supported by this thesis.¹⁷

- *Country of origin or source country*: a country that a migrant is coming from; a country that is a source of migratory flows (legal or illegal).¹⁸
- *Country of destination or receiving country*: A country that a migrant is travelling to; a country that is a destination for migratory flows (legal or illegal).¹⁹
- *Sexual exploitation*: in the context of trafficking, sexual exploitation includes prostitution, pornography, exotic dancing, sex tourism, or forced marriage.²⁰
- *Feminisation of poverty*: it often reflects three common traits, namely that women represent a disproportionate percentage of the world’s poor; that this trend is deepening throughout time; and that

¹⁵ International Organization for Migration, *The IOM Handbook on Direct Assistance for Victims of Trafficking*, 2007, (www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/CT%20handbook.pdf) p. 338. Hereinafter IOM Victim Assistance Handbook.

¹⁶ *Ibid*, p. xi.

¹⁷ J Raymond, *Guide to the New UN Trafficking Protocol* (Coalition Against Trafficking in Women, North Amherst MA, 2001) p. 6.

¹⁸ IOM Victim Assistance Handbook, *supra* note 16, p. 333.

¹⁹ *Ibid*, p. 333.

²⁰ *Ibid*, p. 336.

women's increasing share of poverty is linked with a rising incidence of female household headship.²¹

- *Feminisation of migration*: tendency at a global level regarding the increase of the share of women in migrant flows. Women today make up nearly half of all international migrants. Reasons can be that family and refugee migration, in which women usually outnumber men, have grown in importance *vis-à-vis* labour migration and that today more women migrate independently for work purposes.²²

The most important legal document regarding trafficking in human beings that will be used in the investigation is:

- *United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplemental to the UN Convention against Transnational Organized Crime*.²³ The Protocol, which entered into force in December 2003, is the most recent and effective treaty dealing with human trafficking. It provides a good definition of the crime and its disposition regarding victim protection will be analysed in Chapter Two.

Statements regarding concepts, facts and interpretative theory are based on guidelines, opinions, studies and publications by UN bodies such as UNHCR, International Organization for Migration²⁴, and the United Nations Office on Drugs and Crime²⁵ will be used throughout the

²¹ S. Chant, 'Re-visiting the 'feminisation of poverty' and UNDP gender Indices: what case for a gendered poverty index?' (Gender Institute, London School of Economics, United Kingdom) Issue 18, March 2006. (www.lse.ac.uk/collections/genderinstitute/fempov.pdf) accessed 1 January 2008. p. 3

²² J. Carling, 'Gender dimensions of international migration', *Global Migration Perspectives*, No. 35, Geneva, Switzerland, May 2005. (<http://gender.gcim.org/attachements/Carling%20Gender%20dimensions%20of%20international%20migration.pdf>) accessed January 3rd, 2008.

²³ *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, (adopted 8 January 2001, entered into force 25 December 2003) 52 UNTS 25. Hereinafter UN Trafficking Protocol.

²⁴ Hereinafter IOM.

²⁵ Hereinafter UNODC.

investigation. Furthermore, case law of various national courts will be consulted. The legal validity of these documents derives from the fact that they are considered valid sources of international law, according to article 38(1) of the International Court of Justice Statute.²⁶ Some of the most used documents are:

- The UNHCR *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees of victims of trafficking and persons at risk of being trafficked*.²⁷
- The UNHCR *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees*.²⁸
- The UNHCR *Guidelines on International Protection: “Membership of a particular social group”, within the Context of Article 1A(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees*.²⁹

1.2 Scope and Subject Matter of the Enquiry

The subject matter and main objective of this research is to study the phenomenon of trafficking in women for the purpose of sexual exploitation and demonstrate the possibility of protecting these victims by interpreting the definition of a refugee enshrined in the 1951 Refugee Convention to include these women as members of a particular social group. This will

²⁶ *Statute of the International Court of Justice*, (adopted 26 June 1945, entered into force 24 October 1945) 33 U.N.T.S. 933. Hereinafter ICJ Statute.

²⁷ UNHCR Trafficking Guidelines, *supra* note 13.

²⁸ United Nations High Commissioner for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1a(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/GIP/02/01 (2002). Hereinafter UNHCR Gender Persecution Guidelines

²⁹ Office of United Nations High Commissioner for Refugees, *Guidelines on International Protection: “Membership of a particular social group”, within the Context of Article 1a(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees*, UN Doc. HRC/GIP/02/02 (2002). Hereinafter UNHCR Social Group Guidelines.

make well-substantiated individual cases eligible for the right to seek asylum under this Convention.

This study focuses on particular perspectives, which define and limit the scope of the study and its results:

- The interpretation of ‘membership of a particular social group’ has been applied to several individuals in different circumstances. Chapter Three will study the definition and elements of ‘particular social group’ under the 1951 Refugee Convention. However, this study is limited to the application of this legal interpretation to trafficked women for the purposes of sexual exploitation.
- A gender perspective will be used in the investigation. This is intended to demonstrate that cultural views and gender relations affect the reality of trafficked women. It is impossible to study sex trafficking touching upon the related phenomenon of prostitution and the associated controversies. For this reason, Chapter Two includes an analysis of two models of prostitution (the restrictive and the permissive model) and the effects that these have on trafficking in women for sexual exploitation.
- The gender perspective previously mentioned will be applied to the case of trafficked women and women as a particular social group. Even if other populations (such as sexual minorities) could also be benefited from the analysis made herein, these groups fall out of the scope of this study.
- To study the practices of different countries regarding victim protection in trafficking, a limited number of countries were selected. These countries are destination countries and they were chosen based on a study by UNODC that declared them highly involved in human trafficking.³⁰ Most of them have developed different alternatives regarding victim protection, such as temporary

³⁰ United Nations Office on Drugs and Crime. *Trafficking in Persons: Global Patterns*, 2006 (www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf) accessed 5 November 2007.

residence if the victim is willing to contribute to the criminal proceeding.

- The original intention of the study was to include data regarding victim protection and assistance in both sending and destination countries. However, information regarding the reality that women must face once deported back to their countries of origin and how these countries assist returnees is not widely available. For this reason, and the fact that it is destination countries that are responsible for applying the legal interpretation of women as a particular social group suggested in this thesis, the study limits the investigation to certain destination countries.
- When mentioning the 1951 Refugee Convention definition, the term ‘ground of the definition’ will be used frequently. This is regarding the five grounds on which an asylum claim can be based, namely when a person has a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political grounds.³¹

1.3 Methodology

Using a scientific approach, the research was conducted by proposing a problem and suggesting a probable hypothesis to solve this problem. Therefore the subject matter and specific objectives of the study are intended to study the viability of the hypothesis.

The problem or question of the study is the following:

- Can trafficked women for the purpose of sexual exploitation be considered members of a particular social group under International Refugee Law?

The hypothesis suggested in the study is:

- When interpreting the 1951 Refugee Convention with a gender perspective, women that have been trafficked for the purpose of

³¹ Refugee Convention, *supra* note 12, article 1 (A.2).

sexual exploitation and who may suffer from persecution in their country of origin are entitled to asylum in the destination country since they are members of a particular social group, which is one of the four grounds of the 1951 Refugee Convention.

The specific objectives of the study were:

- To research trafficking in persons and study and understand the peculiarities of trafficking in women for the purpose of sexual exploitation through a gender perspective.
- To study the legal dispositions regarding trafficking in women for sexual exploitation.
- To study International Law regarding victim protection in trafficking in persons and, on the same topic, to study national legislation of selected, high transit receiving and sending countries.
- To study Refugee Law regarding the ground of membership of a social group in general and specifically, and include women who have been subjected to gender persecution as members of a particular social group.

1.4 Sources

The sources incorporated are the general international legal law sources according to article 38(1) of the International Court of Justice Statute³².

These are:

- International Law treaties.
- International Law doctrine written by experts.
- International legal documents emanated from UN working bodies.
- Case law, both by international tribunals and national courts.

³² ICJ Statute, *supra* note 26.

1.5 Disposition

Chapter One of this thesis gives information on the scope, limitations, aims and conceptual highlights of the investigation, giving the reader a framework of information that will make the reading of it a more informed and an easy process.

Chapter Two studies the phenomenon of human trafficking generally, facts and international law relating to the phenomenon, and continues to focus on trafficking in women for sexual exploitation while attempting to cover the political, economic and social factors that characterize this crime.

Chapter Three focuses on victim protection measures available to these women, both in International Law and in some selected countries.

Chapter Four will study the interpretation of the 1951 Refugee Convention definition to include trafficked women who might suffer persecution in their home country, as members of a social group, and are therefore entitled to asylum. In order to do this, the chapter examines the fourth ground of the 1951 Refugee Convention, membership in a particular social group, as well as the phenomenon of gender persecution and its relationship to the interpretation.

Finally, Chapter Five provides a conclusion of the studied matter, attempting to confirm the validity of the hypothesis made in the first chapter or, if it cannot be confirmed, make the correct proposal.

2. HUMAN TRAFFICKING AND TRAFFICKING IN WOMEN: LAW AND REALITY

2.1 Human Trafficking

“Human trafficking, particularly trafficking in women and children for forced and exploitative labour, including sexual exploitation, is one of the most egregious violations of human rights today”.³³

This chapter presents data on human trafficking and trafficking in women for the purpose of sexual exploitation. It starts with a definition of human trafficking and the distinction between trafficking and human smuggling, with which it is often confused and sometimes even both presented in one same case. Common numbers and trends of the crime will be studied.

When studying who can be a victim of trafficking, women that travel freely to work in the sex trade will have special mention. This is the case of women who agree to work as prostitutes or in related activities, but find themselves later in a exploitative situation. It will be demonstrated that the willingness of travelling or the previous consent to work in this industry does not mean that these women cannot be considered victims of trafficking.

The second part of the chapter addresses trafficking in women for sexual exploitation. It intends to explain the causes and common factors underlying it and the cultural, political and economic reality behind it. Finally, the chapter studies the International Human Rights Law that protects the people who have been victims of this transnational crime.

2.1.1 Definition and related Figures

This section analyses the most recent and official definition trafficking in human beings. The figure is frequently confused with human smuggling and

³³ Kofi Annan, United Nations Secretary General, 2000.

in some cases both figures can be presented together, so the difference between the two will be discussed.

2.1.1.1 Human Trafficking Definition

The UN Trafficking Protocol defines trafficking in human beings as:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other means of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.³⁴

The UNHCR has interpreted the definition given in the UN Trafficking Protocol, stating that this crime has three essential and interlinked sets of elements:

- the act (the recruitment, transportation, transfer, harbouring or receipt of persons),
- the means (by means of the threat or use of force or other means of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over the victim) and,
- the purpose (exploitation including at least the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).³⁵

The definition is clear, however it is fairly new and each case can present different criminal figures. Human trafficking, human smuggling and migration can overlap, making it difficult to distinguish between one

³⁴ UN Trafficking Protocol, *supra* note 23, article 3.

³⁵ *Convention on the Rights of the Child* (adopted 10 November 1989, entered into force 2 September 1990) 1577 UNTS 3, article 4. Hereinafter CRC.

another. This is because the movement element of transnational trafficking in human beings has particularly influenced the perception of human trafficking as a migration issue, often being confused with the smuggling of migrants.³⁶

2.1.1.2 Human Trafficking and Human Smuggling: Differences and Overlapping Situations

In order to clearly understand how to discern between smuggling and trafficking, it is important to remember that smuggling is the “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.³⁷ Trafficking, on the contrary, by definition denotes that people are forced, tricked or threatened into situations in which they are exploited either sexually, financially or through forced labour.³⁸

The crime of trafficking is committed when at least one of the elements of the crime (criminal acts, the means used to commit those acts and the goal of the acts) is present.³⁹

Victims of trafficking are also distinguished from migrants who have been smuggled by the prolonged nature of the exploitation they endure. This exploitation includes serious and ongoing abuses of their human rights at the hands of their traffickers.⁴⁰

The overlapping between trafficking and smuggling can be especially frequent when it comes to women trafficking. A large number of women living in deplorable circumstances and with massive family obligations are exposed to traffickers in developing countries. They have a certain

³⁶ UNHCR Trafficking Guidelines, *supra* note 13, *para.* 4.

³⁷ *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, (entered into force 28 January 2004) 55 UNTS 65, article 3.

³⁸ J Carling, *Migration, Human Smuggling and Trafficking from Nigeria to Europe*, IOM, 2004

(www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/serial_publications/mrs23.pdf) accessed 10 October 2007, p. 7.

³⁹ United Nations Office on Drugs and Crime, *supra* note 30, p. 7.

⁴⁰ UNHCR Trafficking Guidelines, *supra* note 13, p. 4.

knowledge that they will work in the sex industry and therefore, some of them pay for traffickers to transport them into a country (which is a clear indication of human smuggling). Once they arrive in the destination country, they are deceived and exploited in several ways, and this is when the trafficking issue comes in.⁴¹

Some women are abducted and sold, some are deceived into consenting with the promise of a better life or a better job, and some feel that entrusting themselves to traffickers is the only economically viable option, even if they know what they are getting into.⁴²

The vast majority of women who are trafficked travel willingly, most of them realizing too late that the conditions under which they are going to live are not as they had been promised. This way, traffickers take advantage of the fact that hundreds of women need or wish to travel abroad to get a job, get married or start a new life. They cannot do this by themselves due to, among other things, the lack of financial means, language abilities and education.⁴³ On their arrival, they therefore depend on their recruiter, who often exploits this vulnerability.⁴⁴

Most women who have knowledge of the nature of the activity they will be involved with, later admit that they never knew the conditions were going to be so violent and humiliating,⁴⁵ indicating deceit, exploitation and the fact that once in the receiving country, they endure several violations of their human rights and dignity.

However this is not something that should impair a woman from classifying as a trafficking victim. The UN Trafficking Protocol has established that the consent of the victim of trafficking is irrelevant⁴⁶ and that all the victims of trafficking must receive protection, not only those

⁴¹ L Agustín, 'The Conundrum of Women's Agency: Migrations and the Sex Industry' in M O'Neill and R Campbell (eds.), *Sex work now* (Cullompton: William Publishing, 2006) p. 7

⁴² Pan-American Health Organization, *supra* note 1, p. 1.

⁴³ A Brunovskis and G Tyldum, *supra* note 6, p. 19.

⁴⁴ A Brunovskis and G Tyldum, *supra* note 6, p. 20.

⁴⁵ L Agustín, *supra* note 41, p. 7.

⁴⁶ UN Trafficking Protocol, *supra* note 23, article 3(b).

who can prove force.⁴⁷ The new definition helps to ensure that victims of trafficking will not bear the burden of proof that they were trafficked, which is also an improvement.⁴⁸

Moreover, UNHCR and other experts have reiterated that the consent of the victim in travelling, or her knowledge of the fact that she was going to work in the sex industry, does not make her lose the trafficking victim status. Instead, “[t]he consent of a victim of trafficking in persons to the intended exploitation is irrelevant where any of the means detailed in the definition have been used”.⁴⁹

2.1.2 Numbers and Common Trends

Due to its clandestine nature, accurate statistics on the magnitude of the human trafficking problem at any level are elusive and unreliable.⁵⁰ There are numerous estimations done by different United Nations agencies and other international organizations.

The unreliability of the existing data can be attributed to a number of reasons. First, some countries lack legislation concerning trafficking in human beings and various existing legislation only include certain types of trafficking. In addition, men are excluded from most anti-trafficking legislation, and existing laws are rarely enforced, leaving victims to be treated as illegal migrants. Finally, victims do not want to cooperate with authorities fearing retaliation and persecution against themselves and their families by either the traffickers or legal authorities.⁵¹

Furthermore, many countries lack a centralized agency that collects trafficking data and most studies by International⁵² and Non-Governmental Organizations⁵³ are based on assisted, repatriated and reintegrated victims, who are only a small number of the human trafficking victims worldwide.

⁴⁷ *Ibid*, article 3(a)(b).

⁴⁸ J Raymond, *supra* note 17, p. 4. UN Trafficking Protocol, *supra* note 22, article 3(b).

⁴⁹ United Nations Office on Drugs and Crime, *supra* note 30, p. 51.

⁵⁰ *Ibid*, p. 43.

⁵¹ *Ibid*, p. 44.

⁵² Hereinafter IGOs.

⁵³ Hereinafter NGOs.

Some statistics also mix data related to human trafficking, migrant smuggling and irregular migration. Additionally, most data include only victims of trans-border human trafficking, and do not incorporate internal human trafficking.⁵⁴

While trafficking in human beings is mainly a human rights related phenomenon, it is also a socio-political and economic matter, and cannot be separated from social constructions such as nationality, ethnic origin, gender and class inequalities.⁵⁵ Trafficking in persons is done mostly for labour and sexual exploitation. It affects men, women and children, but trafficking in women for sexual exploitation is the most common population in the market and needs special attention.⁵⁶

The phenomenon of trafficking in human beings is caused by several factors. Some of these causes are: poverty and economics (in the case of women trafficking, the feminisation of poverty); migration and feminisation of migration; gender-based discrimination and discriminatory social, cultural and religious practices. Globalisation and the internet has driven the growth of the sex industry internationally by making the movements of people, capital and business faster and easier, and this has influenced the trafficking market. Laws and policies on migration, armed conflicts and migratory consequences, corruption of authorities, and the increased involvement and growth of organised crime are some other roots of trafficking in persons.⁵⁷

It is important to understand that globalisation powers the growth and weight of this crime in an extreme way. Trafficking is one of the dark sides of globalisation, where the opening up of borders and markets has led to an

⁵⁴ United Nations Office on Drugs and Crime, *supra* note 30, p. 44.

⁵⁵ Coalition to Abolish Slavery and Trafficking, *Trafficking of women* (Los Angeles, USA, 1999) p. 2.

⁵⁶ S Skrobanek, *The Traffic in Women: human realities of the international sex trade* (Foundation for Women, USA, 1997) p. 30.

⁵⁷ Global Alliance against Trafficking in Women, *Human Rights and Trafficking in Persons: a Handbook* (GAATW, 2001) and L. Kelly and L. Regan, *Stopping Trafficking: Exploring the extent of, and responses to, trafficking in women for sexual exploitation in the UK* (Home Office Department, Police Research Series, paper 125, 2000) p. 1

increase of international crime that take advantage of the improvement of information technologies and transportation.⁵⁸

⁵⁸ United Nations Population Fund, *State of World Population. Selling Hope and Stealing Dreams: Trafficking in Women and the Exploitation of Domestic Workers*, 2006 (www.unfpa.org/swp/2006/english/chapter_3/) accessed 20 November 2007.

2.2 Trafficking in Women for Sexual Exploitation

This subsection studies trafficking in women for sexual exploitation with a more specific approach than in the previous general one. The data, numbers and common trends that this section presents apply only to trafficking in women and focuses on sex trafficking.

2.2.1 Definition

IOM has unofficially defined trafficking in women and its particular issues as any illicit transporting of migrant women and/or trade in them for any personal or economic gain. This includes:

- facilitating the illegal transport of migrant women to other countries, with or without their consent or knowledge;
- misleading migrant women about the purpose of migration, legal or illegal;
- physically or sexually abusing migrant women for the purpose of trafficking; and,
- selling or trading women for the purpose of employment, marriage, prostitution or other forms of profit-making abuse.⁵⁹

2.2.2 Numbers and Common Trends

Statistics are unreliable for the same reasons explained before, but rough estimates suggest that between 700,000 and two million women are trafficked across international borders annually.⁶⁰ Adding domestic trafficking would bring the total much higher, to perhaps four million persons per year.⁶¹

⁵⁹ International Organization for Migration, *International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights* (IOM, Geneva, 1994).

⁶⁰ United Nations Population Fund, *supra* note 5.

⁶¹ *Ibid.*

It is estimated that the greatest volume of trafficking occurs in Asia, however, Africa and Latin America also present the crime. Recently, the European Commission raised concerns about a growing 'slave trade' in Eastern European women - some 500,000 may have been forced into the commercial sex trade.⁶²

The reality of these women is usually one of a sex slave, as the UNODC indicates; once enslaved, women are often beaten and raped before being traded from one master or brothel owner to the next, frequently working up to 18 hours a day. They find themselves in many cases illegally without a passport in a foreign country and are forced to repay the debt owed to the middleman, expenses for the journey and the sum that the brothel owner paid for them.⁶³

There are various causes behind women being deceived, kidnapped or choosing to migrate in order to work in the sex business. Amongst them are the increased feminization of poverty⁶⁴ and migration⁶⁵ that the world has seen in recent years, as well as gender discrimination both in their countries and in the countries of origin and destination. Furthermore, discrimination in education and employment, gender and sexuality concepts that diminish women in their home countries are also to be considered.⁶⁶ Factors such as globalisation policies, public corruption and lack of effective regulation towards the sex industry also influence this phenomenon.⁶⁷

The internal uprooting, the lack of a support network, and the increased financial responsibility that women have encountered since the feminization of poverty adds to the vulnerability of women to recruitment by a trafficker because women are given the hope of improving their family

⁶² *Ibid.*

⁶³ United Nations Office on Drugs and Crime, *Trafficking in Persons: the New Protocol* (www.unodc.org/unodc/en/trafficking_protocol_background.html) accessed 14 November 2007.

⁶⁴ O. Simic, *supra* note 7, p. 5.

⁶⁵ L. Agustín, *supra* note 41, p. 3.

⁶⁶ J. Carling, *supra* note 38, p. 18.

⁶⁷ D. Guinn and E. Steglich, *In Modern Bondage: Sex Trafficking in the Americas* (International and Comparative Criminal Law Series: Transnational Publishers, 2003) p. 31.

or personal economic situation.⁶⁸ Women throughout the world have the family responsibility for both their children and elderly relatives. This, added to the lack of formal job opportunities in countries of origin and the lower level of education available to women, is why it is not surprising that migrant streams, which have typically been male, are gradually becoming filled by women.⁶⁹ In fact, according to IOM over half of the world's migrants are women, and the number of unaccompanied women who migrate is on the increase.⁷⁰

Trafficking is a complex phenomenon that presents three sides that work together in making trafficking in women a flourishing illegal and inhumane business: the supply market, the demand sector and the authorities.⁷¹ The behaviour of authorities is characterised by insufficient or inadequate laws, poor law enforcement, ineffective penalties, corruption and complacency and, in general, an unawareness of the issue. The 'supply' market usually portrays women that live in a situation of poverty, discrimination and unemployment; most of them suffer from gender-based violence and see themselves encountered with necessity and dream of a better life. Restrictive migration policies and lack of information about migration risks make them vulnerable to traffickers. Finally, the 'demand' sector reveals a social construction of male sexuality and the belief that 'boys will be boys', which is accompanied by general objectification of women's bodies and a perception that prostitutes cannot say no.⁷²

Additionally, one must add the new liberalisation of the sex industry in some Western countries, which has legalized or regularized prostitution, such as the Netherlands and Germany. These countries see abuse or

⁶⁸ J. Shearer, *Trafficking of women for sexual exploitation: a gender-based well-founded fear? An examination of refugee status determination for trafficked prostituted women from CEE/CIS countries to Western Europe* (University of Pavia, Italy, 2003) p. 12.

⁶⁹ For more information on feminisation of poverty *see also*: (www.un.org/womenwatch/daw/followup/session/presskit/fs1.htm) accessed 5 November 2007.

⁷⁰ J. Shearer, *supra* note 68, p. 13 and International Organization for Migration, *World Migration Report*, (REF-1/IOM/WOR/2000) p. 49.

⁷¹ Pan-American Health Organization, *Trafficking of women and children for sexual exploitation in the Americas*, (www.paho.org/english/hdp/hdw/TraffickingPaper.pdf) accessed 1 November 2007, p. 3

⁷² *Ibid*, p. 2.

exploitation of women in the sex industry as “accidental, not integral, to the prostitution, as if the harm to women is random, incidental or the chance behaviour of a bad pimp or buyer”⁷³

Organized crime groups or individuals that are in the business recruit women. The Italian *Camorra*, the Chinese Triads, the Russian *Mafiya* and the Japanese *Yakusa* are some of the well-known trafficking bands. They work in several countries and have links with other minor crime bands.⁷⁴ However, not all recruiters belong to these groups. Research has proved that “husbands and boyfriends of women often recruit, traffic and pimp their female partners into prostitution. They may engage a small group of friend or others to assist in the crime”.⁷⁵

Trafficking for sexual exploitation appears to be the most profitable form of trafficking for the criminals involved, as well as the most physically and emotionally damaging for the victim because of the persistent physical, sexual and psychological abuse that accompanies it on a daily basis.⁷⁶

2.2.3 Legal Status of Trafficked Women and Fear of Persecution

When trafficked women get arrested or manage to escape and go to the authorities, they are more likely to be treated as criminals rather than victims of a crime. This depends on the legislation of each country, but it is usually either because they are irregular migrants with illegal employment statuses or because they work in prostitution. Just having contact with authorities puts them under the threat of traffickers, doubling their vulnerability and making them unlikely to cooperate with investigations and distrustful of national authorities.⁷⁷

The legal status of trafficking victims too often renders them even more vulnerable, which is why establishing legal protection for victims is of

⁷³ J. Raymond, *supra* note 17, p 5. For more information regarding prostitution laws, *see* Section 3.2.1.2.

⁷⁴ J. Raymond, *supra* note 17, p. 2

⁷⁵ *Ibid*, p. 3

⁷⁶ IOM Victim Assistance Handbook, *supra* note 16, p. 25.

⁷⁷ O. Simic, *supra* note 7, p. 6.

extreme importance. Countries that forbid the practice of prostitution can view and treat victims as criminals. Victims can find themselves in desperate need of medical care, counselling and sometimes drug treatment; however, their legal status can prevent them from accessing these services.⁷⁸ Instead, countries usually deport these women back to their sending country.⁷⁹ Some European countries often given a temporary residence permit conditional to their cooperation with the government authorities in criminal procedures against their traffickers, which elevates the risk of being persecuted by the perpetrators even higher.⁸⁰

The risks suffered by these women increase the moment they escape; the organized crime groups regularly threaten the lives of the women who are able to flee from sex work upon their return home, as well as that of their families. In South Eastern Europe, an estimated 70 per cent of trafficked women either cannot or do not intend to return home, due to a fear of persecution and the lack of trust in the local authorities to provide adequate protection.⁸¹

The capacity of traffickers to retaliate against victims who have managed to escape and/or have testified against them is well documented; hence, the risk posed to trafficking victims by their exploiters cannot be overstated.⁸² The fear of being persecuted seems very rational and well-founded when one analyses several factors such as the corruption of authorities, physical and other kinds of punishment when arriving to their home country, ostracism and lack of economic opportunities.⁸³ An IOM report on trafficked women returned to the Kyrgyz Republic accounted that 75 per cent of returned women reported extortion and exploitation by customs and law enforcement officers on their return.⁸⁴

⁷⁸ Pan-American Health Organization, *supra* note 71, p. 7.

⁷⁹ J. Ward, *supra* note 8, p. 92.

⁸⁰ United Nations Population Fund, *supra* note 58.

⁸¹ J. Shearer, *supra* note 68, p. 29.

⁸² IOM Victim Assistance Handbook, *supra* note 16, p. 3.

⁸³ J. Ward, *supra* note 8, p. 91.

⁸⁴ IOM, *Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe*, (IOM, Geneva, 2002) p. 38. The Kyrgyz Republic is better known as Kyrgyzstan.

Furthermore, there is little incentive for women who have been trafficked to cooperate with criminal investigations of their traffickers, as testifying often increases the risks of reprisal upon repatriation. This is because most countries offer little protection to trafficking survivors, and instead immediately arrange for their return to their countries of origin. Even in the case of an ongoing trial, the benefits of incriminating their exploiters are minimal for trafficked women.⁸⁵ The few countries that offer a temporary residence permit only offer it conditional upon the victims' support and lasting only the length of the trial.⁸⁶

The cases of reprisals are much more numerous and serious in countries of origin than countries of destination because there, even the basic protection mechanisms are often missing. In several cases, protection for trafficking survivors is weak and women are in danger because government officials are corrupt and trafficking survivors remain indebted to their traffickers or have testified against them, which makes them vulnerable to persecution. For these reasons, their fear of physical harm or further exploitation is palpable. In fact, in Eastern Europe, 30 – 50 per cent of trafficking survivors are eventually re-trafficked following repatriation.⁸⁷

⁸⁵ J. Shearer, *supra* note 68, p. 28.

⁸⁶ See section 3.2.

⁸⁷ J. Shearer, *supra* note 68, p. 29.

2.3 Regulations under International Human Rights Law regarding Trafficking

This section will cover the human rights violations that the crime of trafficking involves. It evidences the need of attention regarding this problem because this crime breaches several basic human rights and human dignity as a core concept generally. It analyses the International Law instruments that protect these rights and also those that address the crime specifically.

2.3.1 Human Rights Violations regarding Trafficked Victims and their Protection in International Law

Regardless of the route, country of origin of the victim, or whether she knew she was going to work in the sex industry, the majority of trafficked women suffer from extreme violence and violations of various human rights.

Victims of trafficking for sexual exploitation are forced to work in different activities. Most of them work primarily in prostitution; the practices in the destination countries determine the other activities they must endure.⁸⁸ Women subjected to sexual abuse endure acts including vaginal, anal and oral rape, gang rape, sex without lubricants, sex during menstruation, forced unprotected sex, sex accompanied by violent or degrading rituals and forced participation in or exposure to pornography. They might be raped by 20-50 clients a day and are subjected to extreme violence by their traffickers and clients.⁸⁹ Furthermore, most of them receive no payment at all or only receive a ridiculously small amount, are locked in a house or building, and do not benefit from basic services such as health and education.⁹⁰

⁸⁸ R Surtees, *Second Annual Report on Victims of Trafficking in South Eastern Europe*, 2005 (www.old.iom.int//DOCUMENTS/PUBLICATION/EN/Second_Annual_RCP_Report.pdf) p. 35.

⁸⁹ B. Collier, *Country of Origin Information and Women: Researching gender and persecution in the context of asylum and human rights claims* (Asylum Aid, London, UK, 2007) p. 31.

⁹⁰ *Ibid*, p. 31.

This constitutes a violation of several rights, such as; the right to liberty,⁹¹ the right to dignity and security of person,⁹² the right not to be held in slavery or involuntary servitude,⁹³ the right to be free from cruel and inhumane treatment,⁹⁴ the right to be free from violence,⁹⁵ the right to equality and non-discrimination,⁹⁶ the right to health,⁹⁷ the right to education,⁹⁸ the right to an adequate standard of living⁹⁹ and the rights to earn their living by work they have freely chosen, favourable conditions of work and right to social security¹⁰⁰.

When receiving States fail to protect their victims' human rights, there can be discrimination on the basis of gender, race, nationality and/or immigration status involved, amounting to a violation of the obligations of State Parties contained in article 2 of the ICCPR and, more specifically, the right to equality enshrined in article 26 of the same instrument.¹⁰¹

If the victim is a member of a minority, article 27 of the ICCPR regarding minority protection also gives her special protection. On the same line, if the victim is a child, she is entitled to the protection of every right previously mentioned in addition to the special protection provided to the by the Convention of the Rights of the Child,¹⁰² particularly the rights to be free of all forms of violence¹⁰³ and protection from sexual exploitation and

⁹¹ *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 12. Hereinafter ICCPR.

⁹² *Ibid*, article 9.

⁹³ *Ibid*, article 8

⁹⁴ *Ibid*, article 7.

⁹⁵ *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, articles 1 and 2, hereinafter CEDAW. *See also* Committee on the Elimination of all Forms of Discrimination against Women, *General Recommendation 19, Violence against women* (UN Doc. A/47/38 at 1, 1998).

⁹⁶ ICCPR, *supra* note 91, article 2 and CEDAW, *supra* note 95.

⁹⁷ *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, article 12. Hereinafter ICESCR. CEDAW *supra* note 95, article 12.

⁹⁸ ICESCR *supra* note 97, article 13.

⁹⁹ *Ibid*, article 11.

¹⁰⁰ *Ibid*, articles 6, 7 and 9.

¹⁰¹ Human Rights Watch, *Owed Justice: Thai Women Trafficked into Debt Bondage in Japan* (HRW, New York USA 2000) p. 47.

¹⁰² CRC, *supra* note 35, article 4.

¹⁰³ *Ibid*, article 19.

abuse.¹⁰⁴ Additionally, the CRC Optional Protocol on the Sale of Children, Prostitution and Pornography¹⁰⁵ protects children from trafficking.¹⁰⁶

“Depending on the circumstances, trafficking may constitute a crime against humanity and, in armed conflict, a war crime.”¹⁰⁷ It will be a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.¹⁰⁸ This includes “enslavement, sexual slavery and enforced prostitution as some of the acts that, if occurring in the situation explained, could constitute crimes against humanity”.¹⁰⁹ In this case, enslavement is defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.¹¹⁰ Under certain circumstances, trafficking can also constitute a war crime.¹¹¹

2.3.2 International Law on Human trafficking

Several treaties have tried to regulate the crime of trafficking since the early twentieth century, both in a specific manner or included in a more general treaty. However, these attempts have focused more on migration issues and the punishment of this international crime than on the human rights violations suffered by the victims and their protection under international human rights law. Annex One shows a non-exhaustive list of 35 instruments that cover this transnational crime since 1904, generally as well specifically.

The most important instruments and recommendations regarding trafficking in human beings, in both the universal system and regional systems of human rights protection, are analysed below.

¹⁰⁴ *Ibid.*, article 34.

¹⁰⁵ *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (adopted 15 May 2000, entered into force 18 January 2002) 49 UNTS 6. Hereinafter Optional Protocol to the CRC.

¹⁰⁶ *Ibid.*, articles 1-10.

¹⁰⁷ UNHCR Trafficking Guidelines, *supra* note 13, p. 3.

¹⁰⁸ *Rome Statute of the International Criminal Court*, (adopted 17 July 1998, entered into force July 1 2002) 2187 UNTS 90, article 7. Hereinafter Rome Statute.

¹⁰⁹ *Ibid.*, article 7(1)(c) and (g).

¹¹⁰ *Ibid.*, article 7(2)(c).

¹¹¹ *Ibid.*, article 8(2)(e)(vi).

The United Nations Organized Crime Convention and its two Protocols are considered the “first serious attempt by the international community to answer the global challenge of transnational organized crime with a global response in the form of international law”.¹¹²

The UN Trafficking Protocol constitutes the most applicable and efficient treaty regarding human trafficking; however previous instruments also have applicable dispositions and remain in force, being relevant to the contemporary understanding of trafficking and how best to combat it.¹¹³ This is the case of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others¹¹⁴ and CEDAW.

The 1949 Convention criminalizes sex trafficking and acts associated with prostitution, but it has not been effective due to its weak enforcement mechanisms and the fact that it was ratified by only 69 countries.¹¹⁵ Additionally, the older instruments like the respective Convention do not include modern forms of sex trafficking and sexual slavery like the mail-order bride industry and sex tourism.¹¹⁶ CEDAW on the other hand, treats trafficking in women in its article 6, which requires States Parties to take action to suppress “all forms of traffic in women and exploitation of prostitution of women,” but failed to provide a definition of trafficking in persons and focused mainly on the punishment of traffickers.¹¹⁷ However, CEDAW Committee’s General Recommendation Number 19 on violence against women specifically mentions newer forms of exploitation neglected in the 1949 Convention.¹¹⁸

¹¹² United Nations Office on Drugs and Crime, *supra* note 30, p. 49.

¹¹³ UNHCR Trafficking Guidelines, *supra* note 13, p. 2.

¹¹⁴ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (adopted 2 December 1949, entered into force 25 July 1951) 96 U.N.T.S. 271. Hereinafter 1949 Convention.

¹¹⁵ Pan-American Health Organization, *supra* note 71, p. 6.

¹¹⁶ R. Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women. Report of the Special Rapporteur on violence against women, its causes and consequences*. (UNHCHR, 2000, E/CN.4/2000/68).

¹¹⁷ United Nations Office on Drugs and Crime, *supra* note 30, p. 50.

¹¹⁸ Committee on the Elimination of all Forms of Discrimination against Women, *supra* note 95.

The UN Trafficking Protocol presents a legal and conceptual framework for combating trafficking in persons by providing a working definition of trafficking in persons, requiring ratifying States to criminalize such practices, and addressing the issue of victims' rights through obliging ratifying States to provide assistance to, and protection for, victims of trafficking.¹¹⁹

Nevertheless, regarding the topic of investigation of this thesis, the UN Trafficking Protocol's language is very weak¹²⁰ and only contains one reference to the resident status of victims in destination countries. Accordingly, 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, giving appropriate consideration to humanitarian and compassionate factors.¹²¹

Regional instruments also address trafficking in persons, both in Europe as well as in the Americas and Africa. The Council of Europe has adopted a Convention on Action against Trafficking in Human Beings.¹²² This Convention uses the definition of the UN Trafficking Protocol and gives special mention and protection to trafficked children, but not women. It demands that every Party shall aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures;¹²³ however the Convention itself does no such thing, instead including women in the general group of trafficked people without giving special attention to the particular circumstances that they live, both in the country of origin and destination.

In the Inter-American System of Human Rights the only instrument that addresses this issue specifically is the Inter-American Convention on

¹¹⁹ United Nations Office on Drugs and Crime, *supra* note 30, p. 50.

¹²⁰ O. Simic, *supra* note 7, p. 28

¹²¹ UN Trafficking Protocol, *supra* note 23, article 7.

¹²² *Council of Europe Convention on Action against Trafficking in Human Beings*, (ETS No. 197, Warsaw, 16.V.2005). Hereinafter COE Trafficking Convention. On 24 October 2007, the Convention received the 10th ratification necessary for the treaty to enter into force. The Convention will enter into force on 1 February 2008. *See*

(http://www.coe.int/t/dg2/trafficking/campaign/Default_en.asp) accessed 15 October 2007

¹²³ COE Trafficking Convention, *supra* note 122, article 17.

the Prevention, Punishment, and Eradication of Violence Against Women.¹²⁴ It explicitly names trafficking in persons and forced prostitution as forms of violence against women in its article 2(b). As such, States Parties to the convention are called upon to condemn trafficking and pursue policies to prevent, punish and eradicate it.¹²⁵

Regarding the African Union, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹²⁶ protects the right to life, integrity and security of person and states that every woman is entitled to respect for her life and the integrity and security of her person.¹²⁷ It also forbids all forms of exploitation, cruel, inhuman or degrading punishment and treatment and requires State Parties to take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those the women most at risk.¹²⁸

Obviously, there is no lack of instruments regarding the subject of trafficking in human beings, but despite its overwhelming human rights dimensions human trafficking continues to be addressed as a 'law and order problem' and has been located primarily within the crime prevention framework. Authorities criminalize and prosecute victims as illegal aliens, undocumented workers or irregular migrants, rather than victims of a crime. Trafficked women for sexual exploitation are also criminalized on charges of prostitution instead of receiving assistance.¹²⁹ "Human rights are yet to become the centre piece of anti-trafficking initiatives."¹³⁰

¹²⁴ *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women*, (OAS; 33 I.L.M. 1534, 1994). Hereinafter *Belém do Pará* Convention.

¹²⁵ Pan-American Health Organization, *supra* note 71, p. 7.

¹²⁶ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, (OAU, CAB/LEG/66.6, 2000). Hereinafter OAU Protocol on Women's Rights.

¹²⁷ *Ibid*, article 1.

¹²⁸ *Ibid*, article 4(2)(g).

¹²⁹ J. Sanghera, 'Human Rights and Human Wrongs: The Case of Trafficking in Persons' in Peoples for Human Rights, *Human Trafficking and Racism* (IMADR, 2006) p. 146.

¹³⁰ *Ibid*, p. 146.

3. VICTIM PROTECTION AND RELATED LEGISLATION: INTERNATIONAL AND DOMESTIC LAWS OF SELECTED COUNTRIES

“Can people really buy and sell women and get away with it? Sometimes I sit here and ask myself if that really happened to me, if it can really happen at all”¹³¹

Having studied the general facts of human trafficking, and specifically trafficking in women and the International law that relates to this crime, this chapter focuses more on what pertains this study: victim protection.

As explained before, due to the relationship of trafficking to cross-border movement, laws and counter measures formulated by States approach the matter within the framework of migration, particularly with a view to security concerns in relation to irregular/illegal migration.¹³² For this reason, the inclusion of victim’s protection articles in international instruments or national legislation regarding trafficking in human beings is a recent development. This chapter attempts to give an overview to the current trends in victim protection regarding trafficking in women for sexual exploitation. It will study victim protection in International Law, as well as in selected destination countries of the trafficking industry.

The selected receiving countries are: the Netherlands, Italy, Belgium, Germany, the United States of America, Canada, Turkey and Japan. These were selected because they have high incidences of trafficking, as reported in 2006 by the United Nations.¹³³

¹³¹ “A Ukrainian woman who was trafficked, beaten, raped and used in the sex industry in Israel. After a police raid, she was put in prison, awaiting deportation” In: D. Hughes, ‘The “Natasha Trade”: The Transnational Shadow Market of Trafficking in Women’, 52:2 *Journal of International Affairs*, 2000

(www.prostitutionresearch.com/pdfs/natasha_trade.pdf) accessed 1 December 2007. p. 1.

¹³² J. Apap and F. Medved, *Protection Schemes for Victims of Trafficking in Selected EU Member Countries, Candidate and Third Countries*, IOM, 2003 (www.old.iom.int/documents/publication/en/protection_schemes.pdf) accessed 25 November 2007, p. 7.

¹³³ United Nations Office on Drugs and Crime, *supra* note 30, p. 20.

Within the study of the selected national legislation, provisions regarding prostitution in some countries will be studied with the objective of relating them to the trafficking phenomenon and how it influences the trafficking market.

3.1 Victim Protection under International Law

3.1.1 The UN Trafficking Protocol and Victim Protection at a Universal Level

The Trafficking Protocol establishes the protection and assistance of the victims of trafficking, with full respect for their human rights as one of the purposes of the Protocol.¹³⁴ Indeed, Section II of the Protocol is dedicated to victim protection.

The Protocol deals with general assistance and protection of the victims. It mandates State Parties to protect the privacy and identity of victims of trafficking in humans, for example by making legal proceedings confidential to the extent possible under domestic law.¹³⁵ It also requires States to provide trafficked victims with information on relevant court, and administrative proceedings and assistance to enable their views and concerns.¹³⁶

States must consider implementing measures to provide for: the physical, psychological and social recovery of victims of trafficking in persons, in particular the provision concerning appropriate housing; counselling and information, which contains information regarding legal rights (in a language that the victims of trafficking in persons can understand), medical, psychological and material assistance; and employment, education and training opportunities.¹³⁷ The Protocol also requires States to take into account the gender and age of the victims,¹³⁸ provide for their physical

¹³⁴ UN Trafficking Protocol, *supra* note 23, article 2(b).

¹³⁵ *Ibid.*, article 6(1).

¹³⁶ *Ibid.*, article 6.

¹³⁷ *Ibid.*, article 6.

¹³⁸ *Ibid.*, article 6(4).

safety while they are within their territories,¹³⁹ and ensure that their domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.¹⁴⁰

Regarding legal status of victims, the UN Trafficking Protocol also deals with the status of the victims and repatriation.¹⁴¹ It obliges State Parties to consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in their territories (temporarily or permanently) in appropriate cases, giving appropriate consideration to humanitarian and compassionate factors.¹⁴²

The Protocol also talks about the possibility of giving victims the right to remain in the territory based on ‘compassion’ in article 7(2). The usage of this word as the basis of the permit instead of a term subject to legal definition, such as ‘fear of persecution, torture or cruel and inhumane treatment’, seems regrettable. It then becomes a decision within the margin of appreciation of the State to grant a permit, and not a situation easy to fit in a previous legal definition.

The Protocol also deals with the repatriation of victims of trafficking in persons. It requires sending countries to facilitate and accept, with due regard for the safety of that person, his or her return without undue or unreasonable delay.¹⁴³ This return shall preferably be voluntary.¹⁴⁴

States Parties must cooperate with each other in providing the receiving State with information regarding the victim’s citizenship and whether or not the victim was legal in the country at the time of the commission of the crime.¹⁴⁵ Furthermore, they must assist the state of origin and in providing the victims, who are their nationals or had residency permit, with their documents if they do not have them.¹⁴⁶ These dispositions regarding repatriation must be applied without prejudice to any right of the victim in

¹³⁹ *Ibid*, article 6(5).

¹⁴⁰ *Ibid*, article 6(6).

¹⁴¹ *Ibid*, articles 7 and 8.

¹⁴² *Ibid*, article 7.

¹⁴³ *Ibid*, article 8.

¹⁴⁴ *Ibid*, article 8(2).

¹⁴⁵ *Ibid*, article 8(3).

¹⁴⁶ *Ibid*, article 8(4).

domestic law or any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.¹⁴⁷

The saving clause of article 14 of the Protocol is extremely important for the purposes of this investigation, stating that nothing in the Protocol shall affect the rights, obligations and responsibilities of States and individuals under International Law. These include international humanitarian law and international human rights law, in particular the Refugee Convention and the principle of *non-refoulement*,¹⁴⁸ and prohibits any discriminatory application of the Protocol.¹⁴⁹

Other International Law instruments contain victim protection clauses, not only primary source instruments such as treaties, but also comments of different UN bodies.

Regarding girls and, generally minors who have been trafficked, the Committee on the Rights of the Child has stated that if there is a reasonable risk that the return to the home country will result in the violation of fundamental human rights of the child, the return is then not an option, in particular if the principle of *non-refoulement* applies. Return to the country of origin shall only be arranged if such return is in the best interests of the child.¹⁵⁰

The IOM has done research and publications regarding victims' assistance which address aspects of security and personal safety, screening of victims of trafficking, referral and reintegration assistance, health and cooperation of law enforcement agencies.¹⁵¹

Additionally, IOM and UNHCR both assist countries in victim repatriations. It is important to note that this investigation does not generally object repatriation and acknowledges that when a victim wants to

¹⁴⁷ *Ibid*, article 8(5)(6).

¹⁴⁸ *Ibid*, article 14(1). For information on the principle of *non-refoulement* see section 4.3.

¹⁴⁹ *Ibid*, article 14(2).

¹⁵⁰ Committee on the Rights of the Child, *General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (UN Doc CRC/GC/2005/6, 2005).

¹⁵¹ IOM Victim Assistance Handbook, *supra* note 16, p. vi.

voluntarily return to her home country, repatriation is actually one of the most important steps in victim's assistance. However, not all victims want to return and some seek to stay in the receiving country, fearing persecution and mistreatment. It is because of this that one of the main principles that IOM applies in its victim assistance work is that services provided to trafficking survivors are subject to informed consent of the victim and, concerning support under the Assisted Voluntary Return programme, which will be provided to those victims who have freely chosen to return home.¹⁵²

The UNHCR's Recommended Principles and Guidelines on Human Rights and Trafficking in Persons also emphasizes victim protection. They clarify that assistance or protection of victims should not be conditional to the capacity or willingness of the victim to cooperate with the criminal procedure.¹⁵³ To the extent possible, the return of the victim to his or her home country should be voluntary.¹⁵⁴ The Guidelines also emphasize that trafficked persons should not be held in immigration detention centres, but should be assisted in shelters.¹⁵⁵ When voluntary return cannot take place, the option of residency in the country of destination or third-country resettlement should be considered, taking into account the prevention of reprisals or re-trafficking.¹⁵⁶

3.1.2 European Countries

Since the majority of the countries analysed in the next section are in Europe and it is also in this region that advancements have been made in victim protection, the instruments of the Council of Europe will be studied. Furthermore, no comparable legislation was found in other regions of the globe.

¹⁵² *Ibid.*, p. ix.

¹⁵³ United Nations. *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*, E/2002/68/Add.1, UN, New York, 2002 ([www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument)) para. 8. Hereinafter UN Guidelines on Human Rights and Trafficking.

¹⁵⁴ *Ibid.*, para. 11.

¹⁵⁵ *Ibid.*, p. 10.

¹⁵⁶ *Ibid.*, p. 11.

In 2002, the European Commission unveiled its Proposal for a Council Directive “on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities.”¹⁵⁷ This proposal creates incentives for victims of trafficking and smuggling, such as access to social and rehabilitative services culminating in the grant of a short-term residence permit, if the victim cooperates with law enforcement and immigration officials in investigations and prosecutions of the perpetrators.¹⁵⁸

Human rights activists and other experts criticise this proposal because it addresses the problem of human trafficking solely as an element of efforts to combat illegal immigration, with an emphasis on law enforcement measures. It does not recognise the need to ensure victim protection for all trafficking victims.¹⁵⁹ The initiative appears to help victims, but it only introduces the option of a residence permit and is not concerned with protection of either witnesses or victims that refuse to testify.¹⁶⁰

The European Parliament amended some provisions of the directive by recognizing, to a certain extent, the needs of trafficking victims, including their potential need for long-term protection; however, the prosecuting focus still remains.¹⁶¹

Furthermore, the already mentioned Council of Europe Trafficking Convention introduced a mandatory recovery and reflection period of a minimum of 30 days for undocumented survivors, allowing victims to escape the influence of trafficking and recuperate while they decide on a possible cooperation with the authorities.¹⁶² This measure also emphasizes

¹⁵⁷ European Council Directive, *On the Short-Term Permit Issued to Victims of Action to facilitate Illegal Immigration or Trafficking in Human Beings who co—operate with the Competent Authorities* (COM(2002) 71 Final) February 11, 2002.

¹⁵⁸ *Ibid.*

¹⁵⁹ Human Rights Watch, *supra* note 10, p.1 and R. Piotrowicz, ‘European initiatives in the protection of victims of trafficking who give evidence against their traffickers’, 14:2/3 *International Journal of Refugee Law* (2002).

¹⁶⁰ Human Rights Watch, *supra* note 10, p. 4.

¹⁶¹ *European Parliament legislative resolution on the proposal for a Council Directive on the residence permit issued to third-country nationals victims of trafficking in human beings or to third-country nationals who have been subjects of an actions to facilitate illegal immigration who co-operate with competent authorities*, P5_TA (2004)0135

¹⁶² United Nations Population Fund, *supra* note 58.

on criminal proceedings instead of victim protection, leaving the victim unprotected once the procedure is over.¹⁶³

¹⁶³ United Nations Population Fund, *supra* note 58.

3.2 Selected National Legislation

As explained before, the following countries were selected based on a study by UNODC that considered them to be amongst the countries most frequented by human traffickers.¹⁶⁴ Some of them have also developed different alternatives regarding victim protection or legislation regarding prostitution that directly affects the trafficking business. This section only covers legislation and policies regarding trafficking victims of the selected countries. Relevant case law will be analysed in Chapter Four.

3.2.1 Destination Countries

3.2.1.1. Related Legislation and Policies regarding Victim Protection

3.2.1.1.1 General Benefits and Protection for Victims

From the countries selected, most have ratified the UN Trafficking Protocol, with the exception of Japan, which signed it but has not ratified it yet.¹⁶⁵ Also, the majority have condemned trafficking by specifically addressing the crime in their legislation, either by modifying or adding articles in their current legislation, such as the Netherlands¹⁶⁶, Turkey¹⁶⁷ and Japan¹⁶⁸, or by enacting specific legislation against human trafficking, such as Belgium,¹⁶⁹ Sweden,¹⁷⁰ Italy,¹⁷¹ the USA¹⁷² and Canada.¹⁷³

¹⁶⁴ United Nations Office on Drugs and Crime, *supra* note 30.

¹⁶⁵ United Nations Office on Drugs and Crime, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html) accessed 30 November 2007. Hereinafter UNODC Status of Ratification.

¹⁶⁶ United States State Department. *U.S. State Department Trafficking in Persons Report*, June 2007 (www.gvnet.com/humantrafficking/Netherlands-2.htm) accessed 30 November 2007.

¹⁶⁷ United States State Department. *U.S. State Department Trafficking in Persons Report*, June 2007 (www.gvnet.com/humantrafficking/Turkey-2.htm) accessed 30 November 2007.

¹⁶⁸ United States State Department. *U.S. State Department Trafficking in Persons Report*, June 2007 (www.gvnet.com/humantrafficking/Japan-2.htm) accessed 30 November 2007.

¹⁶⁹ Belgium does this through its 2005 amendment to its 1995 Act Containing Measures to Repress Trafficking in Persons. In: United States State Department. *U.S. State Department Trafficking in Persons Report*, June 2007 (www.gvnet.com/humantrafficking/Belgium-2.htm) accessed 30 November 2007.

¹⁷⁰ Ministry of Industry, Employment and Communications, Sweden. *Prostitution and Trafficking in Human Beings, fact sheet*, April 2005.

In the majority of the countries studied, victims do not get arrested or charged for acts related to their status as victim. However, in some countries they can be, such as Italy.¹⁷⁴ Turkey has a long way to go in this sense; the government continues to process trafficking cases as voluntary prostitution and illegal migration and the victims are deported on a regular basis.¹⁷⁵

Regarding victim protection shelters and benefits, a number of destination countries, such as the Netherlands, subsidize shelters and NGO's through which civil society and the police provide care for victims.¹⁷⁶ Sweden, for example, has funded not only shelters within its territory but also in other foreign major destination and sending countries, such as Turkey and Ukraine.¹⁷⁷ Belgium sponsors shelters for juvenile victims that suffer a risk of harm from their traffickers.¹⁷⁸ Other countries go further in this field, like Italy, which finances NGO projects that provide legal services, health care, and counselling to female victims of trafficking and also provide literacy courses, vocational training and employment assistance.¹⁷⁹ Japan, on the other hand, has victims stay in domestic violence shelters, and offers in-house counselling only in the Japanese language without any special services to address the unique trauma of trafficking or taking into account the cultures of the victims.¹⁸⁰

3.2.1.1.2 Legal Status and Matters regarding Residency

Regarding the legal status of victims, some countries have issued temporary residence permits for victims who decide to prosecute their traffickers. Holland currently implements new regulations to facilitate legal permanent

(www.sweden.gov.se/content/1/c6/04/28/96/88110928.pdf) accessed 29 November 2007, p. 3.

¹⁷¹ United States State Department. *U.S. State Department Trafficking in Persons Report*, June 2007 (www.gvnet.com/humantrafficking/Italy-2.htm) accessed 30 November 2007.

¹⁷² United States State Department. *U.S. State Department Trafficking in Persons Report*, June 2007 (www.gvnet.com/humantrafficking/USA-2.htm) accessed 30 November 2007.

¹⁷³ United States State Department. *U.S. State Department Trafficking in Persons Report*, June 2007 (www.gvnet.com/humantrafficking/Canada-2.htm) accessed 30 November 2007.

¹⁷⁴ United States State Department, *supra* note 171.

¹⁷⁵ United States State Department, *supra* note 167.

¹⁷⁶ United States State Department, *supra* note 166.

¹⁷⁷ Ministry of Industry, Employment and Communications, Sweden, *supra* note 170, p. 3.

¹⁷⁸ United States State Department, *supra* note 169.

¹⁷⁹ United States State Department, *supra* note 171.

¹⁸⁰ United States State Department, *supra* note 168.

residence for these victims, who have a period of three months to decide on this.¹⁸¹ However, if the victim chooses not to assist with the prosecution, he or she will only be eligible for a residence permit if the State officials believe the victim will face hardship or retribution upon return to their country.¹⁸² The Netherlands is currently drafting a law to enable victims of trafficking to press charges anonymously. It would give victims the possibility to remain unidentified in the criminal proceeding. The police, the prosecutor and the court would be the only ones to know victim's personal details.¹⁸³

The Belgian Law also expanded protection for victims in 2006 by revising the 1980 Immigration Act, encouraging victims to participate in trafficking investigations and prosecutions by providing short-term residence status if they assist authorities, regardless of the outcome of the prosecution.¹⁸⁴ They may also obtain permanent residency after their traffickers are sentenced, otherwise the victim may have to return to their country of origin under certain limited circumstances, and only after rigorous review by immigration authorities.¹⁸⁵

The penal provisions in the Swedish Aliens Act, amended in 2001, make it possible to issue a temporary residence permit to the victims. It may be issued to a victim or witness in order to conclude a preliminary investigation or the main proceedings in a criminal case and can also be extended depending on the duration of the procedure, by application of the prosecutor.¹⁸⁶ However, if the victims decline to participate in investigations, they are subject to deportation.¹⁸⁷ During their stay in

¹⁸¹ United Nations Population Fund, *supra* note 58, fn. 44.

¹⁸² United States State Department, *supra* note 166.

¹⁸³ Anti-Slavery International, *Trafficked persons to be able to press charges anonymously in the Netherlands* (www.antislavery.org/homepage/traffic%20news/index.htm#6) accessed 25 November 2007.

¹⁸⁴ United States State Department, *supra* note 169.

¹⁸⁵ *Ibid.*

¹⁸⁶ Ministry of Industry, Employment and Communications, Sweden, *supra* note 170, p. 3

¹⁸⁷ United States State Department. *U.S. State Department Trafficking in Persons Report*, June 2007 (www.gvnet.com/humantrafficking/Sweden-2.htm) accessed 30 November 2007.

Sweden, the victims are entitled to health care and medical attention as well as social welfare.¹⁸⁸

Concerning immigration status, article 18 of the Italian Anti-Trafficking Law allows authorities to grant residence permits and provide protection and job training services to victims of all forms of trafficking. These permits are a way to encourage victims to assist in trafficking investigations or prosecutions, although the collaboration is not a requisite in order to get the permit.¹⁸⁹ Victims have a waiting period of six months of legal stay in Italy before they decide whether to cooperate in the legal proceedings or not.¹⁹⁰ Despite the government's efforts to identify and protect all victims of trafficking, some, such as Nigerian women in commercial sexual exploitation, are still deported without being identified as victims.¹⁹¹

The USA is amongst the countries with best victim protection regarding immigration status. The Trafficking Victim Protection Act established the 'T visa', which allows certified victims of trafficking to become temporary residents.¹⁹² It also recognizes that deporting victims to their country of origin is often not in their best interests and that they need the opportunity to rebuild their lives without facing the threat of deportation. After three years, a 'T visa' recipient can apply for permanent residence status. In certain situations, it enables victims of human trafficking to get 'T visas' for family members.¹⁹³ Furthermore, the law also makes victims of trafficking eligible for the Witness Protection Program.¹⁹⁴ Victims are also entitled to benefits such as food, health care and employment assistance. Finally, the Return, Reintegration, and Family Reunification Program for

¹⁸⁸ Ministry of Industry, Employment and Communications, Sweden, *supra* note 170, p. 3

¹⁸⁹ United States State Department, *supra* note 171.

¹⁹⁰ United Nations Population Fund, *supra* note 58, *fn.* 44.

¹⁹¹ United States State Department, *supra* note 171.

¹⁹² United States State Department for Health and Human Services, *The 2000 Trafficking Victims Protection Act Fact Sheet* (www.acf.hhs.gov/trafficking/about/TVPA_2000.html) accessed 1 December 2007).

¹⁹³ United States Department for Health and Human Services, *Victim Assistance Fact Sheet*. (www.acf.hhs.gov/trafficking/about/victim_assist.html) accessed 2 December 2007.

¹⁹⁴ United States State Department for Health and Human Services, *supra* note 192.

Victims of Trafficking, gives the victim a chance to return to their home country or reunify with her family in the USA.¹⁹⁵

Canada authorizes renewable temporary residence permits for foreign trafficking victims and guarantees access to essential and emergency medical care, dental care, and trauma counselling. The government encourages victims to assist in the investigation or prosecution of their traffickers, however they are not required to testify against their traffickers to maintain their temporary immigration status.¹⁹⁶ More important, Canada is one of the countries that have given refugee status to trafficking victims on the grounds of membership of a particular social group and gender persecution. This will be discussed in the section regarding case law.

In Turkey, foreign victims may apply for humanitarian visas and remain in the country for up to seven months. However, this appears to happen rarely, since no such visas were granted during the reporting period for 2007.¹⁹⁷ The government encourages victims to participate in trafficking investigations and prosecutions, although this participation is not systematically implemented.¹⁹⁸

Finally, in Japan victims are provided temporary residency and encouraged to assist in the investigation and prosecution of traffickers. Furthermore, the government funds IOM assisted repatriations. Nonetheless, victims are not offered longer-term legal alternatives to their removal to countries where they may face hardship or retribution. Some victims are still treated as violators of Japanese immigration or prostitution statutes and penalized instead of being protected as victims of human trafficking.¹⁹⁹

¹⁹⁵ U.S. State Department for Health and Human Services. *Sex Trafficking Fact Sheet*. In: http://www.acf.hhs.gov/trafficking/about/fact_sex.html

¹⁹⁶ United States State Department, *supra* note 173.

¹⁹⁷ Hereinafter US Trafficking Report.

¹⁹⁸ United States State Department, *supra* note 167.

¹⁹⁹ United States State Department, *supra* note 168.

3.2.1.2. Domestic Models regarding the Regulation of Prostitution and their relation to Trafficking in Women for Sexual Exploitation

This section intends to prove the direct influence that prostitution legislation has on trafficking in women for sexual exploitation.

Two different models are compared below: the first model is represented by the Netherlands, where prostitution has been legalized and regulated; the second mode represented by Sweden, where the purchase of sexual favours is illegal and criminalized. By comparing two different and totally opposite models, this investigation intends to prove the intrinsic relationship between prostitution and trafficking for sexual exploitation.

The Netherlands has legalized prostitution and removed laws against procurement or pimping. The supporters of this model insist that by legalizing and regulating prostitution, governments have more control over the industry and can also protect the women's rights. However, this reality has never been proven and therefore, the theory must be rigorously examined.²⁰⁰ On the contrary, countries that have legalized or regulated prostitution are those into which the highest numbers of foreign women are being trafficked. A report by the Budapest Group in the Netherlands found that 80 per cent of the women in the brothels are from foreign countries, most of them recruited abroad and trafficked into the country.²⁰¹

Legalization or regulation of prostitution does not address its primary consequence: the segregation of prostitutes as a legal class whose occupation is to provide sexual services to men, letting the male demand for commodification of women's bodies stand.²⁰² Other countries, such as Sweden, have manifested their opinion on legalization by saying that it will "inevitably normalize an extreme form of sexual discrimination and violence and strengthen male domination of all female human beings".²⁰³

²⁰⁰ J. Raymond, *supra* note 17, p. 8.

²⁰¹ *Ibid.*, p. 8.

²⁰² G. Ekberg, *supra* note 4, p. 1190.

²⁰³ G. Ekberg, *supra* note 4, p. 1190.

Sweden is a world example for combating prostitution and trafficking.²⁰⁴ It has provided a pioneer step by passing the Law that Prohibits the Purchase of Sexual Services.²⁰⁵ This law was made within a framework that combines policy with public education, awareness-raising campaigns, and victim support. The objective of this policy is that, by putting the buyers at risk of punishment, the number of men who buy prostituted persons decreases, and the local prostitution markets become less lucrative. Traffickers will then choose more profitable destinations.²⁰⁶ The law penalizes the purchase of any kind of sexual service in all sorts of places (street, brothels, massage parlours, escort services, etc.) with a fine or imprisonment for a maximum of six months.²⁰⁷

One crucial aspect of the law is that it does not criminalize the selling of sex because the law considers the prostitute “a weaker partner who is exploited by those who want only to satisfy their sexual drives”.²⁰⁸ Instead, the law gives these women and children (mostly girls) the right to assistance in order to escape prostitution.²⁰⁹

This law also has extraterritorial effects, meaning Swedish men (including soldiers) who buy sexual services in other countries where it might be legal, can be charged by the Swedish government.²¹⁰

The Swedish Prostitution Act has been reported by the National Rapporteur for Trafficking in Women to have a positive impact on the indexes of trafficking in women for sexual exploitation.²¹¹ This report estimates that between 400 and 600 women are trafficked into Sweden every year, mainly from the Eastern European countries, such as Estonia and Lithuania, as well as from Russia.

²⁰⁴ UNODC Status of Ratification, *supra* note 165.

²⁰⁵ G. Ekberg, *supra* note 4, p. 1199. The law came into force on January 1, 1187. Hereinafter Swedish Prostitution Law.

²⁰⁶ G. Ekberg, *supra* note 4, p. 1187.

²⁰⁷ *Ibid.*, p. 1192.

²⁰⁸ *Ibid.*, p. 1188.

²⁰⁹ *Ibid.*, p. 1196.

²¹⁰ *Ibid.*, p. 1189.

²¹¹ This is found in a report done by the National Rapporteur for Trafficking in Women at the National Criminal Investigation Department. G. Ekberg, *supra* note 4, p. 1199. See also: www.spiegel.de/international/europe/70,1518,516030,00.html

If one compares this number to neighbouring Scandinavian countries where the purchase of sexual services is not penalized, such as Finland, Denmark, and Norway, the difference is remarkable. In Denmark, 5,500 to 7,800 women are prostituted every year, and 50 per cent are victims of trafficking in human beings.²¹² In Finland, 10,000 to 15,000 Eastern European women are prostituted every year.²¹³

Furthermore, the National Criminal Investigation Department received information of different traffickers in interrogatories who affirmed Sweden was no longer an attractive market. They expressed having difficulties in gaining revenues because prostitutes had to be escorted to the buyers, Swedish men expressed serious fears of being arrested and demanded absolute discretion, and because they were forced to operate apartment brothels in more than one location and change them frequently, making it more expensive and harder to have local clients or contacts.²¹⁴ Victims have given testimonies stating that pimps and traffickers prefer countries such as Denmark, Germany, Holland and Spain where conditions are more attractive and prostitution is either legalized or tolerated.²¹⁵

3.2.1.3. General Observations regarding Destination Countries

One of the biggest problems regarding trafficking in women is the lack of information, research and data on the number of women that are trafficked to these countries, creating a climate of toleration to the phenomenon.²¹⁶

As has been shown in the previous section, several countries extend temporary residence permits to victims who are cooperating with the criminal procedure against traffickers. Even if this is better than the general deportation situation, it is far from ideal in the victim assistance approach. The risks a trafficking survivor is exposed to are immediately magnified in those cases where the victims cooperate with law enforcement agencies

²¹² G. Ekberg, *supra* note 4, p. 1199.

²¹³ *Ibid*, p. 1199.

²¹⁴ *Ibid*, p. 1201.

²¹⁵ *Ibid*, p. 1201.

²¹⁶ This was found in the reports of the countries here studied as well as in all receiving countries, such as the United Kingdom. *In*: L. Kelly and L. Regan, *supra* note 57, p. (v).

because the victims pose a much higher risk to the liberty of the traffickers.²¹⁷

This conditional help is unattractive to trafficking victims who sometimes prefer staying in the exploitative conditions that they live in rather than face risks that cooperation represents, including the trauma of the trafficking experience, fear of reprisals against the victim's family, the irregular migration situation, distrust of the police as corrupt (often due to experiences in countries of origin), the lack of local knowledge, the large debt owed to traffickers and small amount of provisions regarding trafficking victims in most countries.²¹⁸

Since destination countries often have more tools to protect trafficking victims, giving them this opportunity only if they help in the procedure, and only during it, is a very utilitarian tactic. If the victim has to return to her home country after helping in the procedure, she is more likely to suffer from persecution and mistreatment from the traffickers. This totally disregards the enormous risk that victims take by reporting the crime against traffickers, despite being in a disadvantaged and vulnerable position, and represents a poor attitude regarding the international obligation of human rights protection of most of the receiving countries.²¹⁹

²¹⁷ IOM Victim Assistance Handbook, *supra* note 16, p. 5.

²¹⁸ H. Askola, 'Legal responses to trafficking in women for sexual exploitation in the European Union' 14: II *Modern Studies in European Law* (2007), p. 90.

²¹⁹ *Ibid.*, p. 90.

4. ONE WAY OUT: TRAFFICKED WOMEN AS A SOCIAL GROUP UNDER INTERNATIONAL REFUGEE LAW

This chapter analyses the main proposition of this thesis: the possibility of giving refugee status to trafficked women for the purpose of sexual exploitation based on their membership in a “particular social group”.

It studies the definition of a refugee under the 1951 Refugee Convention, concentrating on the meaning and interpretation of the fourth ground of the Convention. Subsequently, it examines the relationship between International Refugee Law and trafficking in women. By doing this, it proves that a woman, who may suffer from gender-related persecution due to her previous victimization in the trafficking crime, can be considered a member of a particular social group.

Trafficked women who have to return to the sending countries may be persecuted for gender-related reasons on the grounds of something other than a membership of a particular social group. For example, women can be more vulnerable to being trafficked and persecuted by the traffickers in a particular country because of her ethnicity or nationality. However, the ground of membership of a particular social group has been used in most of the gender-based claims and continues to be used even though it is the least clear ground of the five grounds of the definition.²²⁰

It has been established by experts and IGOs that the return to the country of origin by the victim of trafficking is not always the best solution if she fears persecution or threats to their life or freedom in the concerning country. If this is the case, victims and/or organizations that deal with

²²⁰ UNHCR Social Group Guidelines, *supra* note 29, para. 1

assistance and victims should have the possibility of claiming asylum or other protection mechanisms available in the destination country.²²¹

Refugee Law can be of assistance to trafficked persons if there is a well-founded fear of persecution.²²² A relatively new interpretation of the definition of a refugee under the 1951 Refugee Convention classifies women that have been trafficked for sexual exploitation as members of a particular social group that fear gender persecution in their countries of origin if forced to return. Various national courts use this interpretation to include women who are victims of crimes such as female genital mutilation, forced marriage and stoning.²²³ However, it is still not a common practice with victims of trafficking for sexual exploitation.

It will be argued in this chapter that such an interpretation can be justified, thereby providing these women with a choice to apply for asylum in the country where they have been trafficked to and sexually exploited.

Countries and law enforcers must interpret Refugee Law using a gender sensitive approach. The main problem facing female asylum seekers is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds and their refusal to recognize the political nature of apparently private acts that are harmful to women.²²⁴

²²¹ IOM Victim Assistance Handbook, *supra* note 16, p. 55.

²²² United Nations Population Fund, *supra* note 58.

²²³ See section 4.2.1.2.

²²⁴ *Summary Conclusions: gender-related persecution*, *supra* note 14, p. 352

4.1 The Definition of a Refugee under the 1951 Refugee Convention

The 1951 Refugee Convention defines a refugee as a person who has a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political grounds. Additionally, the claimant must also be outside of his or her country of nationality and because of the persecution be unable or unwilling to avail himself or herself of the protection of that country.²²⁵

The Convention does not include gender or sex as one of the grounds of persecution; however, different countries have included gender-based persecution in their laws and policies.²²⁶ UNHCR has clearly stated the wide acceptance of the fact that gender can influence and/or dictate the type of persecution or harm suffered by the claimant. It has made it clear that properly interpreted, the refugee definition covers gender claims so that no additional ground is explicitly required.²²⁷

Historically, the definition of refugee has been interpreted from a male perspective, through male experiences and by men. Initially, asylum was mostly given to men who engaged in political acts and were persecuted on these grounds.²²⁸ Recent change includes the inclusion of more female experiences and perspectives in the creation of law and in the application of it in different cases. Some examples are CEDAW and other regional instruments dedicated to women's rights.²²⁹

When interpreting the 1951 Refugee Convention and its definition of a refugee, State Parties must understand that harmful practices or human rights violations based on gender-based motives cannot be justified in the basis of historical, traditional, religious or cultural grounds.²³⁰

²²⁵ Refugee Convention, *supra* note 12, article 1 (A.2).

²²⁶ See section 4.2.1.1

²²⁷ UNHCR Gender Persecution Guidelines, *supra* note 28, p. 3.

²²⁸ H. Crawley, *Refugees and Gender: law and process* (Jordan Publishing limited, Bristol, UK, 2001) p.68.

²²⁹ UNHCR Gender Persecution Guidelines, *supra* note 28, p. 2.

²³⁰ *Ibid*, p. 3.

UNHCR has stated that article 1A(2) must be interpreted from a gender perspective to include situations of violations of human rights and persecution suffered by both men²³¹ and women for gender reasons.²³² This interpretation of the definition and other dispositions of the 1951 Convention should be done according to the general principles of treaty interpretation contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties²³³, which are generally accepted as declaratory of customary international law.²³⁴

According to article 31 of the VCLT, interpretation of a treaty must be done according to the ordinary meaning of its terms, in their context, and in light of the “object and purpose”.²³⁵ The application of this general principle of treaty interpretation to the phrase of ‘particular social group’ has been carried out by different judges and bodies of experts like UNHCR and IOM.

The preamble of the 1951 Convention reflects its purpose, which is to ensure that all human beings enjoy fundamental rights and freedoms without discrimination. Consequently, it is necessary to analyse Refugee Law within the wider humanitarian and human rights context.²³⁶

Furthermore, article 31(3)(b) states that the relevant subsequent developments of the treaty and its interpretation must be taken into account. This means that any subsequent agreement or practice of the parties

²³¹ For the premise of men as victims of gender-related persecution, *see also*: N. LaViolette, ‘Gender Related Refugee Claims: Expanding the Scope of the Canadian Guidelines’ 19(2): 169-214 *International Journal of Refugee Law*, p. 203. Gender being a social construction, when some men and/or sexual minorities transgress a society’s norms, they can also fear persecution related to gender issues. These cases can be in the scope of crimes of honour, forced military service, transgender people and gay men. However, this issue is not going to be developed in this investigation, because it falls out of the scope of it.

²³² UNHCR Gender Persecution Guidelines, *supra* note 28, p. 2.

²³³ *Vienna Convention on the Law of Treaties*. (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 31(1). Hereinafter VCLT.

²³⁴ E. Lauterpracht and D. Bethlehem, ‘The scope and content of the principle of non refoulement: Opinion’ in E. Feller et. Al. (ed.), *Refugee Protection In International Law: UNHCR's Global Consultations on International Protection* (UNHCR, Geneva, 2003) p. 103.

²³⁵ For treaty interpretation according to object and purpose see: *Reservations to the Convention on the Prevention of the Crime of Genocide*, Advisory Opinion, ICJ Reports, p. 15, at p. 23.

²³⁶ A. Edwards, ‘Age and Gender Dimensions in International Refugee Law’ in E. Feller et. Al. (ed.), *Refugee Protection In International Law: UNHCR's Global Consultations on International Protection* (UNHCR, Geneva, 2003) p. 47.

regarding the interpretation of the treaty must be considered.²³⁷ The International Court of Justice has also accepted the importance of these developments.²³⁸

Human rights are in constant evolution. Regarding this evolution and subsequent developments, Lauterpracht and Bethlehem quote Judge Weeramatry who observed in the *Gabcikovo-Nagymaros Project* case:

“Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of the time merely because they are taken under a treaty which dates back to a period when such actions was not a violation of human rights.”²³⁹

Using all these criteria, this subsection interprets the refugee definition to include women that have been trafficked for the purpose of sexual exploitation as members of a particular social group. This kind of interpretation includes a full understanding of the different impact of law and its interpretation on women *vis à vis* men.²⁴⁰

4.1.1 ‘Membership of a Particular Social Group’ as a Ground of the Definition

4.1.1.1 Understanding the Concept

Membership of a particular social group is the fourth ground of the definition and it is the one with the least clarity; its potential breadth makes it a plausible vehicle for refugee claims that do not easily fall under the

²³⁷ E. Lauterpracht and D. Bethlehem, *supra* note 234, p.104.

²³⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16 at *para.* 53.

²³⁹ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgement, ICJ Reports 1997, p.7, at pp. 114-115. In: E. Lauterpracht and D. Bethlehem, *supra* note 234, p.105.

²⁴⁰ A. Edwards, *supra* note 236, p. 48.

other four grounds.²⁴¹ It has been invoked by, *inter alia*, women, families, tribes, occupational groups and sexual minorities.²⁴²

The inclusion of this category was apparently initially motivated by the restructuring of society being embarked on in socialist countries and the attention received by landowners, capitalist class members, independent business people and middle class families. However, the original purpose behind the inclusion of this term does not prevent it to develop progressively, as the other grounds have done.²⁴³

There are two different approaches when interpreting the content or meaning of a particular social group. One is the ‘protected characteristics’ or ‘immutability’ approach, which claims that shared immutable characteristics (or characteristics so fundamental to human dignity that a person should not be compelled to forsake it) of members of a group is what defines the social group to which the persons having that immutable characteristics belong. Families, homosexuals and women are included in this approach.²⁴⁴

The second approach is the ‘social perception’ approach, which examines whether a group shares a common characteristic that makes it a cognizable group or sets it apart from society. This approach also includes women, families and homosexuals, but it might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity, such as an occupation or social class.²⁴⁵ It “includes voluntary associations based on characteristics that are fundamental to human dignity but perhaps, changeable”²⁴⁶, such as human rights activists. In this category, what is recognized as the basis for a social group is not the shared possession of a voluntarily assumed characteristic, but the voluntary association of its group members. It would be unfair to ask

²⁴¹ A. Aleinikoff, ‘Protected characteristics and social perceptions: an analysis of the meaning of “membership of a particular social group”’, In: E. Feller et. Al. (ed.), *Refugee Protection In International Law: UNHCR's Global Consultations on International Protection* (UNHCR, Geneva, 2003) p. 264

²⁴² UNHCR Social Group Guidelines, *supra* note 29, p. 1.

²⁴³ G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Third edition, Oxford University Press, 2007) p. 74.

²⁴⁴ UNHCR Social Group Guidelines, *supra* note 29, pp. 2-3.

²⁴⁵ *Ibid*, p. 3.

²⁴⁶ A. Aleinikoff, *supra* note 241, p. 269.

group members to forsake the association (not the characteristic) because it is, in itself, part of their dignity.²⁴⁷

The definition of a particular social group provided by the UNHCR covers both approaches:

“...a group of persons who share a common characteristic other than the 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.”²⁴⁸

The grounds for a particular social group can overlap with other grounds in one same claim, such as race or religion. UNHCR affirms that there may be cases when the mere membership can be a sufficient ground to fear persecution.²⁴⁹ However, to substantiate the whole claim the other elements of the definition (well-founded fear of persecution and inability or unwillingness of the State to protect) must be present and mere membership of the group is not enough.

Furthermore, fear of persecution is not enough to identify the group. The group must share certain characteristics.²⁵⁰ However, the reaction to the behaviour of persons who have beliefs or values different to the social mores of the society, or are perceived as having them,²⁵¹ may provide evidence that a particular group exists.²⁵²

Case law and experts also state that the group does not have to be cohesive, which means the applicant does not need to show that all the members of the group know each other or are associated in any way. The important thing is whether there is a common element that the group shares. Additionally,

²⁴⁷ *Ibid*, pp. 269 and 270.

²⁴⁸ UNHCR Social Group Guidelines, *supra* note 29, p. 3.

²⁴⁹ United Nations 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, 1992, paragraphs. 77 and 79. Hereinafter UNHCR Handbook.

²⁵⁰ A. Aleinikoff, *supra* note 241, p. 267 and *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals) (1999) (www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm)

²⁵¹ A. Aleinikoff, *supra* note 241, p. 267.

²⁵² *Ibid*.

not all members of a group must be persecuted the size of the group is not relevant, and the persecutor does not have to be the State *per se*.²⁵³

The Council of Europe has not given a definition but instead has provided certain descriptors of a particular social group: (a) the fact of voluntary association; (b) involuntary linkages such as family, shared past experience or innate, unalterable characteristics; and (c) the perception of others.²⁵⁴ Several examples of possible characteristics of a particular social group are: sex, age, marital status, religion, family and kinship, past economic status/class, occupational history, disability, sexual history and ethnic, tribal or clan affiliation.²⁵⁵

4.1.1.2 “Membership of a Particular Social Group” in Case Law

National courts of different countries have analysed the particular social group definition, with more frequency countries with common law system, which also compare and study cases of other countries using the same system.²⁵⁶

One of the most renowned cases is *Canada v. Ward*, which involved the claim of a former member of the Irish National Liberation Army²⁵⁷ who feared persecution because he had been sentenced to death by the INLA for assisting in the escape of hostages. The Court denied his claim using a theory that reflects the immutability approach. It held that his fear of persecution was not because of his former membership of the INLA and that the INLA did not constitute a particular social group. His membership

²⁵³ UNHCR Social Group Guidelines, *supra* note 29, p. 4.

²⁵⁴ Cf. Council of Europe Committee of Ministers Recommendation Rec (2004)9 on the Concept of membership of a particular social group, in G. Goodwin-Gill and J. McAdam, *supra* note 243, *fn.* 161

²⁵⁵ H. Crawley and L. Trine, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, UNHCR, 2004 (EPAU/2004/05), para. 421.

²⁵⁶ A. Aleinikoff, *supra* note 241, p. 269

²⁵⁷ Hereinafter INLA.

“placed him in the circumstances that led to his fear, but the fear itself was based on his action, not his affiliation”.²⁵⁸

Another example is an Australian case of applicants who claimed fear of forced sterilization because of their non-compliance to the one-child policy in China. The claimants were also not considered part of a social group. In this case, even if the group would reach a demographic factor, they did not identify themselves as a group nor are they perceived as one.²⁵⁹ The Court held that what distinguished members of a country from one another is a common attribute and the societal perception that they stand apart.²⁶⁰

In another case, when the claimant was the child born out of the Chinese policies, the Court considered he was a member of a particular social group. These children are also known as ‘black children’ and were considered members of a particular social group because they are perceived and treated as a distinct group in China and because birth order is immutable.²⁶¹ This reasoning follows both the immutability as well as the social perception approach.

In the United States, the Board of Immigration Appeals²⁶² considers the characteristic of immutability as a constant in all the grounds of the 1951 Refugee Convention, including the ‘particular social group’ ground. In *Matter of Acosta*, members of a taxi driver collective were not found as a particular social group. However, they recognized that social groups can be based on gender, tribal membership, sexual orientation, family and/or shared past experience, such as former military leadership.²⁶³

²⁵⁸ *Canada (Attorney General) v. Ward*, Canada Supreme Court (1993, 2 SCR 689; 103 DLR (4th) p. 38. Hereinafter *Canada v. Ward*. In: A. Aleinikoff, *supra* note 241, p. 269.

²⁵⁹ *Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, (1997) 190 CLR 225; 142 ALR 331. In: A. Aleinikoff, *supra* note 241, p. 271.

²⁶⁰ A. Aleinikoff, *supra* note 241, p. 271.

²⁶¹ *Chen Shi Hai v. Minister of Immigration and Multicultural Affairs*, (2000) 170 ALR 553. In: A. Aleinikoff, *supra* note 241, pp. 271 and 272.

²⁶² Hereinafter BIA.

²⁶³ *Matter of Acosta*, Interim Decision No. 2986, 1985, 19 I. & N. Decisions 211, BIA, 1 March 1985. In: A. Aleinikoff, *supra* note 241, p. 276.

In the same country, the analysis of the Ninth Circuit Court of Appeals BIA in *Sanchez-Trujillo v. INS*, the Court did not find a group of young, urban, working-class males of military age in El Salvador as a social group because the group lacked of cohesiveness and homogeneity. The Court accepted the existence of voluntary associational relationship among the members, which conveys a common characteristic that is fundamental to their identity as a member of the group.²⁶⁴

The *Sanchez-Trujillo* decision was a criticised decision within the USA and abroad. The Court recently amended this weakness in *Hernandez-Montiel v. INS*, which declared that gay men with female sexual identities in Mexico constituted a particular social group. It acknowledged being the only Court following the voluntary associational relationship and solved this collision with *Acosta* by holding 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”.²⁶⁵ In several occasions, to be discussed below, women are accepted as a social group based on common characteristics of the sex, or of a group that they belong to that has a gender related origin²⁶⁶.

²⁶⁴ *Sanchez-Trujillo v. INS*, 801 F 2d 1571 (9th Circuit), 1986. In: A. Aleinikoff, *supra* note 241, p. 277.

²⁶⁵ *Ibid*, p. 278.

²⁶⁶ UNHCR Social Group Guidelines, *supra* note 29, p. 4.

4.2 The Nexus between International Refugee Law and Trafficking in Persons

This section intends to link Refugee Law with the interpretation of ‘membership of a particular social group’ and trafficking in women.

Victims of trafficking are not *per se* of concern to International Refugee Law or the UNHCR. However, as stated by the UN Trafficking Protocol and acknowledged by the UNHCR Executive Committee,²⁶⁷ individuals who have been trafficked outside their country can have international protection needs arising out of their trafficking experience.²⁶⁸

UNHCR has established that there is no doubt that rape and other forms of sexual violence, such as trafficking, are acts that inflict severe pain and suffering. They are also used as forms of persecution, whether perpetrated by the State or private actors.²⁶⁹ Even if States ratify the Trafficking Convention and/or issue special laws condemning the crime, this is not in itself sufficient to determine the validity of a victim’s claim for refugee protection because States may nevertheless continue to condone or tolerate the practice or not be able to stop it efficiently.²⁷⁰

Trafficking for sexual exploitation is a form of gender-related violence or abuse that can be considered a form of torture and cruel, inhumane or degrading treatment.²⁷¹ It can impose restriction on a woman’s freedom of movement and even take her life. Even more, the victims may face serious repercussions after their escape or upon return like reprisals or retaliation, re-trafficking, severe community and/or family ostracism and discrimination.²⁷²

²⁶⁷ UNHCR Executive Committee *Conclusions No.96 (LIV) and No. 97 (LIV)*. Hereinafter EXCOM.

²⁶⁸ UNHCR Executive Committee, *Proposals for an Executive Committee Conclusion on the protection of victims of trafficking seeking asylum. Informal Consultative Meeting*, (2007)(www.unhcr.org/excom/EXCOM/45a753642.pdf)

²⁶⁹ UNHCR Gender Persecution Guidelines, *supra* note 28, p. 3.

²⁷⁰ *Ibid*, p. 4.

²⁷¹ *Ibid*, para. 18.

²⁷² *Ibid*, para. 18.

UNHCR affirms that in individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation can be a basis for a refugee claim, where the State is unable or unwilling to provide protection against the harm or threats of harm described above.²⁷³ Therefore, trafficked women and girls seeking asylum should have access to asylum procedures and an examination should take place regarding circumstances under which the refugee definition applies to trafficked persons.²⁷⁴

Refugee Law can protect victims of trafficking from falling back into the hands of their traffickers. However, this is just one possible solution. Challenges arise from the fact that many victims were have been persecuted in their countries of asylum and may thus continue facing protection problems, even if granted the refugee status in the destination country.²⁷⁵

4.2.1 The Link between Gender Related Persecution and the Membership of a Particular Social Group

The persecution that most trafficked women fear is linked to their insubordination towards their traffickers and their participation in prostitution. Both situations are related to gender relations established in their societies that put women in subordinate and secondary position in relation to men. It is particularly interesting to study the social group consisting of women that have been trafficked for the purpose of sexual exploitation and are likely to be persecuted because they have worked as prostitutes, escaped, returned home or even worse, participated in criminal procedures.

Within the rare case law and doctrine written on this subject, it is accepted that in order to grant refugee status to a woman fearing gender persecution without changing the refugee definition, the key is to determine the linkage between gender, the feared persecution and one or more of the definition

²⁷³ *Ibid.*, para. 18.

²⁷⁴ UNHCR Social Group Guidelines, *supra* note 29, para. 20.

²⁷⁵ UNHCR Executive Committee, *supra* note 268, p. 2.

grounds.²⁷⁶ It is also important to note that, if one cannot prove the membership of a social group or other ground, the refugee claim may also be substantiated by the State's unwillingness to protect her for reasons of a Convention ground, such as the case of a domestic abuse victim that gets no protection from her partner by the State.²⁷⁷

4.2.1.1 Gender-Related Persecution

Persecution is the sustained or systematic failure of State protection in relation to one of the core entitlements recognized by the international community.²⁷⁸ It has two elements: the risk of a serious harm and the failure of State protection.²⁷⁹

As mentioned previously, gender refers to social construction of power relations between women and men and the implications of these relations for women's and men's identity, status, roles, and responsibilities. Sex is biologically determined.²⁸⁰ It is important to clarify that most of the human rights violations that endanger women regarding gender persecution are based on gender and not sex, however sex can be part of a claim.²⁸¹

Refugee Law uses the term 'gender-related persecution' to include a variety of different claims in which gender is a relevant consideration in the determination of refugee status.²⁸² It refers to the causal relationship between the persecution and the reason for the persecution, i.e. when the reason for the persecution is related to a person's gender. It refers to people who are persecuted because they refuse to conform to expectations they are subjected to because of their gender.²⁸³

²⁷⁶ Canadian Immigration and Refugee Board. *Women Refugee Claimants fearing Gender-related Persecution*, Guidelines issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, 1996 (www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm). Hereinafter Canadian Guidelines.

²⁷⁷ UNHCR Gender Persecution Guidelines, *supra* note 28, p. 5.

²⁷⁸ R. Haines 'Gender-related persecution', In: E. Feller et. Al. (ed.), *Refugee Protection In International Law: UNHCR's Global Consultations on International Protection* (UNHCR, Geneva, 2003) p. 327.

²⁷⁹ *Ibid.*, p. 330.

²⁸⁰ *Summary Conclusions: gender-related persecution*, *supra* note 14, p. 351

²⁸¹ UNHCR Gender Persecution Guidelines, *supra* note 28, p. 2.

²⁸² *Ibid.*

²⁸³ B. Collier, *supra* note 89, p. 10.

Fear of persecution is the central part of the refugee definition. Women usually experience persecution different from men,²⁸⁴ however, this does not mean that every persecution feared by a woman will be gender persecution. Women may fear persecution for the same reasons as men or by certain types of violence directed only to them. When women suffer abuse because of the gender division in social roles or because of the particular relationship between women and State, this amounts to gender persecution.²⁸⁵

Gender persecution can be linked to political purposes, including the conformity to a particular religious, cultural or social view of society, although this is not always done. However, gender persecution is a kind of persecution suffered by women as women and not just specifically because of a political opinion or ethnicity.²⁸⁶ Another interpretation can be that the lack of compliance with certain social norms of some women in their society is a political statement and that gender persecution should always be attributed to political grounds in the Refugee Convention. This interpretation is used in the Netherlands, but most countries link gender persecution to the fourth ground of the Convention.²⁸⁷

In practice, most of the cases where these theories are applicable are when women refuse to conform with the gender-specific roles of a given society, which leads to persecution and abuse because they transgressed the roles that this particular society imposes upon them.²⁸⁸ In this line of thought, trafficked women escaping and/or denouncing traffickers not only participated in an activity seen as ‘dirty’ and ‘immoral’ in most societies, but they are also rebelling against the submissive role towards their traffickers and will probably suffer from persecution.

Gender persecution can be conducted by private individuals or by the State when the laws and policies and judiciary system condemn women for violating rules that are clearly against their human dignity and basic human

²⁸⁴ R. Haines, *supra* note 278, p. 330.

²⁸⁵ N. LaViolette, *supra* note 231, p. 172.

²⁸⁶ G. Goodwin-Gill and J. McAdam, *supra* note 243, p. 83.

²⁸⁷ A. Aleinikoff, *supra* note 241, p. 285.

²⁸⁸ N. LaViolette, *supra* note 231, p. 173.

rights. However, women are often victims of so-called private violations, carried out by persons who are ignored or not properly apprehended by the State because they are a reflection of the society's patriarchal nature.²⁸⁹ In the case of trafficking, these individuals can be family members, close acquaintances and/or the traffickers.²⁹⁰

International Criminal Law, especially the Rome Statute and the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, has contributed tremendously to the inclusion of a gender perspective in the application of law and the understanding of gender persecution and gender-based crimes.²⁹¹ However, this is only in the context of a war crime or a crime against humanity that requires a widespread or systematic attack against the civilian population, therefore most cases of gender-based persecution are not included.²⁹²

Discrimination can also be a form of persecution, and separate measures of discrimination that do not in themselves amount to persecution may be considered persecution on cumulative grounds.²⁹³ This does not mean that every human rights violation will amount to persecution. It would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned.²⁹⁴ Separate measures of discrimination may give rise to a reasonable fear of persecution if they produce a feeling of apprehension and insecurity as regards his future existence.²⁹⁵ Finally, gender persecution can also come in the form of sexual discrimination, discriminatory protection provisions, discriminatory legislation and discriminatory legal, administrative, police and/or judicial measures that are implemented in discriminatory manners.²⁹⁶

Some examples of the most common types of serious harm suffered by women for gender-related reasons are: female genital mutilation,

²⁸⁹ *Ibid*, p. 173.

²⁹⁰ J. Raymond, *supra* note 17, p. 3

²⁹¹ UNHCR Gender Persecution Guidelines, *supra* note 28, *para.* 5.

²⁹² Rome Statute, *supra* note 108.

²⁹³ H. Crawley and L. Trine, *supra* note 255, p. 42.

²⁹⁴ R. Haines, *supra* note 278, p. 331.

²⁹⁵ UNHCR Handbook, *supra* note 249, *para.* 55.

²⁹⁶ H. Crawley and L. Trine, *supra* note 255, p. 42.

infanticide, forced marriage, spousal abuse, involuntary abortion, forced sterilization, sexual assault, dowry-related murders, honour crimes, widow burning, mandatory dress codes and trafficking in women.²⁹⁷

When considering a gender persecution-based claim, States must consider international jurisprudence and International Human Rights Law instruments²⁹⁸ such as CEDAW, the Declaration on the Elimination of Violence against Women²⁹⁹, CAT, and the *Belém do Pará* Convention. Gender based violence is considered discrimination within the meaning of CEDAW. It impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general International Law or other human rights conventions.³⁰⁰

UNHCR has specific guidelines on gender related persecution and EXCOM has repeated several times the necessity of the inclusion of sexual violence and gender related persecution in the consideration of refugee status,³⁰¹ especially when the Guidelines on the Protection on Refugee Women were launched in 1990.³⁰²

In November 2003, the European Parliament adopted a resolution on the violations of women's rights that called upon Member States, "when considering applications for, and possible recognition of, refugee status, to take into account persecution and/or the fear of persecution which may be suffered by women on account of their sex"³⁰³. It included acts of physical or mental violence, including acts of sexual violence.³⁰⁴

National legislation of different countries has also included the matter of gender persecution. In 1993, the Immigration and Refugee Board of Canada

²⁹⁷ N. LaViolette, *supra* note 231, p. 173.

²⁹⁸ *Ibid.*, p. 177.

²⁹⁹ *Declaration on the Elimination of Violence Against Women*, (adopted 20 December 1993) 49 UNTS 217.

³⁰⁰ Committee on the Elimination of all Forms of Discrimination against Women, *supra* note 95, *para.* 7.

³⁰¹ UNHCR Executive Committee, Conclusions No. 73 (XLIV) of 1993 in Refugee Protection and Sexual Violence; No. 77 (XLVI) of 1995; No. 79 (XLVII) of 1996; No. 98 (LIV) of 2003; No. 99 (LV) of 2004.

³⁰² *Ibid.*

³⁰³ European Parliament, *Resolution on the violation of women's rights and EU international relations*, 2003 (2002/2286 (INI), article 13.

³⁰⁴ *Ibid.*, *para.* 11.2(a).

adopted guidelines entitled “Women Refugee Claimants Fearing Gender-Related Persecution”³⁰⁵ following a discussion of whether persecution directed specifically at women should be taken into account in a refugee determination process.³⁰⁶ The Canadian Guidelines were the first of their kind worldwide, modelling the ones now used by countries such as the USA, Australia and the United Kingdom. They have been qualified by UNHCR as having a profound influence on women’s rights in International Refugee Law; a giant step forward on the long road towards gender equality.³⁰⁷

In 1998, Norway introduced gender guidelines on determining refugee status, followed by the United Kingdom two years later. In 2000, after other countries approved gender-persecution guidelines, there was already a widespread practice that gender can influence or dictate the type of persecution or harm suffered and the reasons of this treatment. Sweden has separate guidelines, one on women and one on sexual orientation. Other countries such as Ireland, Panama, South Africa, Germany and Venezuela have identified sex, gender and sexual orientation as grounds for claiming refugee status. Another group of States has referred solely to gender-related persecution instead of adding another ground, such as Switzerland, Guatemala and Austria.³⁰⁸

Regarding trafficking in human beings, EXCOM has emphasized the special attention trafficked women and children need because they are more vulnerable to particular forms of persecution.³⁰⁹ Forced prostitution and sexual exploitation raise many of the same issues as other gender-related forms of persecution, issues such as recognition of the severity of the harm inflicted, recognition of non-State agents and failure of State protection, and the establishment of a convention ground.³¹⁰

³⁰⁵ Canadian Guidelines, *supra* note 276, in: N. LaViolette, *supra* note 231, p. 169.

³⁰⁶ N. Lavolette, *supra* note 231, p. 170.

³⁰⁷ *Ibid.*, p. 179.

³⁰⁸ A. Edwards, *supra* note 236, p. 56

³⁰⁹ UNHCR Executive Committee, *supra* note 268, p. 2.

³¹⁰ H. Crawley and L. Trine, *supra* note 255, *para.* 136.

4.2.1.2 Women as a Particular Social Group

4.2.1.2.1 Theory and International Law

The notion of women being members of a particular social group is relatively new, however it has been developed by experts, UN bodies and in relevant case law.

In 1984, the European Parliament adopted a resolution calling on States to consider women who have been victims of persecution as belonging to a particular social group; however, most studies seem to prove that the majority of countries have not followed this resolution.³¹¹

EXCOM released a conclusion in 1985 that gave states the possibility to consider women persecuted for transgressing social mores as members of a particular social group.³¹² Since then, female claimants may fit within the refugee definition drawing by analogy in rights-based approaches in other circumstances by increasing understanding of the systematic character of the denial of the rights of women and by stressing obligations of States to protect human rights without distinction.³¹³ As it is very well put by Goodwin-Gill and McAdam, “gender is used by societies to organize and distribute rights and benefits, where it is also used to deny rights or inflict harm, the identification of a gender-defined social group has the advantage of external confirmation”.³¹⁴

The UNHCR’s Social Group Guidelines state that sex and gender can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.³¹⁵

In the following subsection the development of this concept in case law will be studied.

³¹¹ H. Crawley and L. Trine, *supra* note 255, *para.* 386.

³¹² UNHCR Executive Committee, Conclusion No. 39 (XXXVI) – 1985 – Refugee Women and International Protection, *para.* k.

³¹³ G. Goodwin-Gill and J. McAdam, *supra* note 243, *p.* 82.

³¹⁴ *Ibid.*, *p.* 84.

³¹⁵ UNHCR Social Group Guidelines, *supra* note 29, *p.* 3.

4.2.1.2.2 Case Law regarding Women as a Particular Social Group

Most of the cases regarding gender-related claims have involved domestic violence when the State is unwilling or unable to protect women from that country from such violence. In these cases the abuse suffered by women has gender-related motivations and the applicants need to demonstrate that the persecution suffered is based on this characteristic, namely female victims of domestic violence, married women, women of a certain nationality, etc.³¹⁶

There is a considerable amount of case law regarding women as a particular social group. Even in cases where gender persecution was not accepted, Courts have interpreted the meaning of particular social group and sustained the existence of gender-based social groups, such as the previously discussed *Canada v. Ward*.³¹⁷

The United Kingdom has one of the most developed guidance on defining a particular social group.³¹⁸ The most authoritative definition was given by the House of Lords in 1999, in the cases of *Shah* and *Islam*.³¹⁹ It recognized that three common characteristics shared by two Pakistani women seeking asylum that made them members of a particular social group; these characteristics were gender, suspicion of adultery and unprotected status.³²⁰

In this ruling, the mere fact of being a Pakistani woman was considered the delimiting issue of this social group by Lords Steyn, Hoffman and Hope, since it is known that they receive discriminative treatment in relation to the one received by men. They were considered a particular social group on the grounds that they were discriminated against as a group in matters regarding fundamental human rights because the state gave them no protection and

³¹⁶ A. Aleinikoff, *supra* note 241, p. 309.

³¹⁷ *Canada v. Ward*, *supra* note 258.

³¹⁸ H. Crawley and L. Trine, *supra* note 255, *para.* 390.

³¹⁹ *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals) (1999) (www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm)

³²⁰ *Ibid.*

they were perceived by the state as not being entitled to the same human rights as men.³²¹ The most important advancements in this cases are:

- The definition of particular social group does not require cohesiveness among members.³²²
- Even if not all members of the group were persecuted, the persecution feared by the applicants was sanctioned and tolerated by the state was for membership of this group and therefore, entitled them to asylum.³²³

In Belgium, an asylum claim made by a young girl from Cameroon who feared forced marriage to an older polygamous man was considered part of a particular social group, namely young Cameroonian women. The case took into consideration her age as well as the lack of protection regarding forced marriage by the State of Cameroon.

Women from Djibouti were also considered a social group by the Belgian government, in a case where a woman feared domestic violence after requesting divorce and preventing her husband from inflicting female genital mutilation to their daughter. Both this case and the latter one case cited Canadian *Ward* case and the British *Shah and Islam* cases.³²⁴

Germany also considers gender-based particular social groups. Examples of cases are a woman from Iran who refused to comply with the Iranian dress code, single women in Afghanistan, women who fear female genital mutilation, amongst others.³²⁵ Additionally, Germany's highest administrative court stated in 2000 and 2001 that gender alone has to be regarded as an asylum-related trait.³²⁶

The Australian High Court held that women in any society are a distinct and recognisable group and that their particular attributes and characteristics exist independently of the manner in which they are treated

³²¹ *Ibid.*

³²² H. Crawley and L. Trine, *supra* note 255, p. 93

³²³ G. Goodwin-Gill and J. McAdam, *supra* note 243, p. 84.

³²⁴ H. Crawley and L. Trine, *supra* note 255, paragraphs 433 and 434.

³²⁵ A. Aleinikoff, *supra* note 241, p. 285.

³²⁶ *Ibid.*, p. 285.

by either males or the State itself. Neither the conduct of aggressors and violence committed by the perpetrators nor the behaviour of those who exercise the protection of the law identify women as a group. Women would still constitute a social group if such violence were to disappear entirely.³²⁷ This definition is broad and can bring several discussions to the table, but it is mentioned here to demonstrate the existence of a growing acceptance of women as a social group in some countries.

However, not all countries interpret the definition this way. The Netherlands has recognized claims brought by women persecuted due to the actions of male relatives, without specifying the 1951 Refugee Convention ground used.³²⁸ Actually, an instruction manual work instruction on women in the asylum process issued by the Netherlands Immigration and Naturalization Service states that, in cases regarding gender claims should be granted primarily for reasons of political opinion (included imputed political opinion).³²⁹ In fact, the document denies women can be a particular social group, defining social group as a group with a common background, status or norms and values or common interests and stating that women are too diverse to be considered a social group.³³⁰ However, gender-based claims are taken into account as much as in other comparable systems internationally, just applying a different approach.³³¹

Sweden has previously sustained that women cannot be considered a social group, however, they are in process of correction by legislative changes.³³²

4.2.1.2.3 Specific Case Law regarding Trafficked Women for Sexual Exploitation as a Particular Social Group

As has been shown, several countries consider women in different circumstances members of a particular social group. However, case law

³²⁷ *Minister of Immigration and Multicultural Affairs v. Khawar*, High Court of Australia (2002, HCA 14, 11 April 2002. In: A. Edwards, *supra* note 236, p. 71.

³²⁸ A. Aleinikoff, *supra* note 241, p. 284.

³²⁹ *Ibid.*, p. 285.

³³⁰ H. Crawley and L. Trine, *supra* note 255, *para.* 381.

³³¹ A. Aleinikoff, *supra* note 241, p. 285.

³³² A. Edwards, *supra* note 236, p. 55.

considering trafficked women as a particular social group is not abundant. Some of these cases will be studied in this subsection.

Canada is one of the countries that has experience in this judicial discourse. From 1992 to 2002, eight cases in which trafficked women were considered a particular social group were discovered by a study made by Research and Evaluation Branch of the Royal Canadian Mounted Police.³³³ Not all of them attributed trafficked women as members of a particular social group, but the following did.

In *Litvinov*, a Ukrainian woman immigrated to Israel to escape the persecution of Jewish citizens in her homeland. She later went to Canada and claimed refugee status based on her fear of persecution if she was required to return to Israel on basis of her religion, nationality, political opinion and membership of a particular social group.³³⁴ The first judge denied her claim; however in the appeal, Justice Gibson used the reasoning and definition of *Canada v. Ward* and considered the claimant was a Convention refugee.³³⁵

She was considered a social group defined by an innate or unchangeable characteristic, namely new citizens of Israel who are women recently arrived from former USSR countries and are not yet well integrated to the society. They are lured into prostitution, threatened and exploited by private individuals and can demonstrate that front-line authorities to whom they would normally be expected to turn for protection are indifferent to their plight.³³⁶

After 1997, and still within the definition that *Ward* offers of a particular social group, other cases came up.³³⁷ One successful case that

³³³ C. Bruckert and C. Parent, *Organized Crime and Human Trafficking in Canada: Tracing Perceptions and Discourses*, Research and Evaluation Branch, Royal Canadian Mounted Police, Ottawa, 2004 (www.dsp.-psd.pwsc.gc.ca/Collection/PS64-1-2004E.pdf).

³³⁴ *Litvinov* (1994) FCJ no. 1061 IMM-7488-93; A92-05295. In: C. Bruckert and C. Parent, *supra* note 333, p.16.

³³⁵ *Canada v. Ward*, *supra* note 258.

³³⁶ C. Bruckert and C. Parent, *supra* note 333, p.17.

³³⁷ *Ibid.*

involved a trafficked woman for sexual exploitation was *Y.C.K.*³³⁸ A twenty-one year old Ukrainian woman who fled to Canada thinking she would work as a waitress was forced to work in the sex trade and therefore escaped. In this case, she was considered to be a member of a particular social group impoverished young women from the former Soviet Union duped into the sex trade.³³⁹

This reasoning also considered the likelihood of the woman being subjected to persecution at the hands of the traffickers upon her return to Ukraine and the fact that the State would not provide a reasonable level of protection. In the *Y.C.K* case, the judge based his decision on a number of reports on human trafficking of different states, authors and IGOs such as IOM.³⁴⁰ The judge also stated that International Refugee protection would be a hollow concept if it did not encompass protection for persons in the claimant's situation.³⁴¹

Another similar Canadian case, however with different circumstances and justification, regarded a twenty-two year old citizen from Thailand. She had been working as a prostitute in debt bondage in France and before paying off her debt, was forced to return to Thailand. Afterwards, she was re trafficked into Canada and entered into further debt.³⁴²

She was granted refugee status on the basis of her well-founded fear of persecution by reason of her membership to a particular social group: women and/or former sex trade workers. In this case, the judge considered that the claimant fit in first category of *Canada v. Ward*, her innate characteristics was being a woman, and he considered this a major cause of her dilemma. Furthermore, by being a former sex worker, she was also part

³³⁸ *Y.C.K.* (1997) C.R.D.D. No. 261 No. V95-02914. In: C. Bruckert and C. Parent, *supra* note 333, p.17.

³³⁹ *Ibid.*

³⁴⁰ C. Bruckert and C. Parent, *supra* note 333, p.18.

³⁴¹ *Ibid.*

³⁴² GVP (1999) CRDD No. 289 No. T98-06186. In: C. Bruckert and C. Parent, *supra* note 333, p.19.

of the third category described in *Canada v. Ward*, groups associated by former voluntary status unalterable by their historic permanence.³⁴³

Another similar case is found in the United Kingdom. Although victims of trafficking are rarely granted asylum in the UK,³⁴⁴ this is what happened in the *Lyudmyla Dzhygun* case. The Immigration Appeal Tribunal granted asylum to a Ukrainian female victim of trafficking for the purpose of prostitution because of the government's inability to protect her from being persecuted by the traffickers if she returned home. She was also found to be a member of a particular social group, namely "women in the Ukraine who are forced into prostitution against their will".³⁴⁵

Trafficked women can base their asylum claim on the ground of membership of a social group and gender persecution. The social group can be different depending on the case. If there is a general situation of gender-based violence in a country, the group can be the women from that certain country. If the victim is a member of a minority who is specifically targeted by traffickers, the group can be women members of that specific minority in a certain country. It can also be related to age and social status, amongst other things.

³⁴³ GVP (1999) CRDD No. 289 No. T98-06186. In: C. Bruckert and C. Parent, *supra* note 333, p.19.

³⁴⁴ Joint Committee on Human Rights, *Memorandum from Oxford Pro Bono Publico*, (www.publications.parliament.gov.uk)

³⁴⁵ *Secretary of State for the Home Department v Dzhygun*, UK Immigration Appeal Tribunal Decision, 17 May 2000, appeal No. CC-50627-99 (00TH00728).

4.3 Complementary Protection of Trafficked Women in International Law

This section will seek to demonstrate that, where individual women do not meet the requirements of the refugee definition of the 1951 Refugee Convention, their expulsion may nevertheless be prohibited under other applicable human rights instruments.³⁴⁶

In the event that women trafficked for the purpose of sexual exploitation should not be considered refugees, there are other legal protection options to take into account. International Law has different dispositions that protect trafficking victims from being sent back to their home countries where they would suffer from persecution or danger; these protections are found in what is called subsidiary or complementary protection. Complementary or subsidiary protection acknowledges that there are people in need of international protection even if for some reason they do not fit in the definition of a refugee under the 1951 Convention.

A trafficked woman who has given evidence that there is a possibility of her suffering from torture or inhumane or degrading treatment is protected by the obligation of states not to return persons to a territory where they shall suffer harm or the right to *non-refoulement*. The principle of *non-refoulement*, or no return, is a principal of customary international law³⁴⁷ contained in several instruments such as article 33 of the 1951 Refugee Convention, article 3 of the CAT Convention,³⁴⁸ article 7 in combination of article 2(1) of the ICCPR, and article 45 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.³⁴⁹

Non-refoulement is also embodied in several regional instruments. In the Americas, it is contained in article 22(8) of the 1969 American

³⁴⁶ *Summary Conclusions: gender-related persecution*, *supra* note 14, p. 352

³⁴⁷ G. Goodwin-Gill and J. McAdam, *supra* note 243, pp. 345-354.

³⁴⁸ Even if torture is defined in this Convention as perpetrated by a State agent, it can be applicable in the cases where because of corruption, authorities have participated in or accompliced any of the acts involving trafficking. See: R. Piotrowicz, *supra* note 159, p. 274.

³⁴⁹ *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, (12 August 1949) 75 UNTS 287.

Convention of Human Rights³⁵⁰ and paragraph 5 of section III of the 1984 Cartagena Declaration.³⁵¹ In Africa, article 12(3) of the African Charter on Human and Peoples' Rights³⁵² and article II(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. In Europe, article 3 of the 1950 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁵³ In Asia, it is contained in article III(3) of the 1966 Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee.³⁵⁴

The Refugee Convention forbids State Parties to expel or return a refugee in any manner whatsoever to the frontiers of territories where his life of freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.³⁵⁵ Even if the wording of this article is the threat of a person's life or freedom, it has been stated that common sense dictates that its interpretation of it must be done in accordance to the core of the definition of the term refugee, namely, the person can not be returned when having a well founded fear of persecution.³⁵⁶ The intention of the drafters was never to create another standard for *non-refoulement* than the one for a refugee, as can be seen in the *travaux préparatoires*.³⁵⁷

³⁵⁰ *American Convention on Human Rights*, (adopted 21 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36, 1144 UNTS 123.

³⁵¹ E. Lauterpracht and D. Bethlehem, *supra* note 234, p. 123.

³⁵² *African [Banjul] Charter on Human and Peoples' Rights*, (adopted June 27, 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

³⁵³ *[European] Convention for the Protection of Human Rights and Fundamental Freedoms*, (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, 213 UNTS 222.

³⁵⁴ E. Lauterpracht and D. Bethlehem, *supra* note 234, p. 123.

³⁵⁵ Refugee Convention, *supra* note 12, article 33.

³⁵⁶ E. Lauterpracht and D. Bethlehem, *supra* note 234, p. 123.

³⁵⁷ *Ibid*, 123-124.

5. CONCLUSION

Trafficking of women for the purpose of sexual exploitation is an atrocious crime that violates the basic human rights of its victims. This study has shown that women who manage to escape or get arrested by the police must face more risks and dangers in their near future. These women do not get to feel safe or relieved of having escaped their traffickers, but become victims of the system once more. Instead of being protected and assisted by the countries that have been unable to protect them until their getaway, women are deported to their countries of origin, where they may be exposed to various kinds of gender persecution. It is shocking to think that, even if this is one of the most egregious violations of human rights the world faces today, it is also the only one that requires the victims cooperation with criminal proceedings in order for her to be entitled to protection, and even that merely temporary, from the State.

Human rights lawyers and International Human Rights Law operators must come to a solution to offer these women a possibility to recover from their horrible experiences and start a new life. Women have the ability to survive and overcome brutality, to rebuild their sense of self and reconnect to others. They will not be able to do so if after being deported, they must face discrimination, gender violence and threats of being re trafficked, or even killed.

It has been proven in this study that trafficked women for the purpose of sexual exploitation can constitute a 'particular social group' under International Refugee Law. The examination of certain examples can help support this conclusion.

Being a young woman from a country in which there is a high risk of being trafficked into prostitution (such as the Ukraine and other former Soviet Union countries, Thailand, Colombia, amongst others) constitutes an innate and unchangeable characteristic of a particular group that suffers from persecution where the State does not offer any sort of protection. Additionally, the social group can also be based on economic circumstances

of women or persecution on the basis of her participation in prostitution. The latter one covers the third category described in *Ward* and used by several countries: groups associated by former voluntary status unalterable by their historic permanence. It is therefore clear that Refugee Law constitutes a great tool in the defense and protection of female trafficked victims' human rights, embracing the object and purpose of the preamble of the 1951 Refugee Convention: to ensure that all human beings enjoy fundamental rights and freedoms without discrimination.

Conversely, this is just one of the options of victim protection and it should not overshadow the urgent necessity of incorporating victim's protection and assistance into national legislation. Both destination and sending countries must understand that this problem will not end unless all its dimensions are addressed. Poverty, forced migration, lack of education and working opportunities for women in developing countries, as well as the acceptance and legitimisation of prostitution as any other business or market, will only contribute to the growth of this problem.

There is an intrinsic relationship between trafficking in women and prostitution. It is hard to prove the consequences that the permissive and the restrictive model have on trafficking, as it is such a broad and complicated issue that involves several factors such as economic, political, social and cultural, amongst others. This work does not intend to make any conclusions regarding this discussion, but suggests the possibility of an interesting research matter.

However, the conceptual and philosophical position of this study is that any society that alleges to defend the principle of gender equality in all its manifestations should reject the idea that men can buy, sell and sexually exploit women as if they were commodities. The contrary is allowing the existence of a separate class of female human beings that is excluded from human rights protection, specifically the rights to equality and non

discrimination.³⁵⁸ Trafficking in women for the purpose of sexual exploitation relies upon and sustains prostitution and women's inequality.³⁵⁹

Poor women who are, because of their economic situation, forced to flee their home countries, prostitutes and trafficked women are human beings. Therefore, they should enjoy the protection that International Human Rights Law and International Refugee Law provide. In order to uphold the principle of gender equality, States must provide these victims with an adequate protection and assistance. Otherwise, they are sending out the message that these groups of women are different from all the other human beings, some sort of second-class citizens, who are not entitled to the minimum protection that International Law provides.

³⁵⁸ G Ekberg, *supra* note 4, p. 1189.

³⁵⁹ L. Kelly and L. Regan, *supra* note 57, p. 1.

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ANNEX I

International Instruments dealing with trafficking in human beings

1904 International Agreement for the Suppression of White Slave Traffic
(Amended by the 1949 Protocol)

1910 Convention for the Suppression of White Slave Traffic (Amended by
the 1949 Protocol)

1921 Convention for the Suppression of Traffic in Women and Children
(Amended by the 1947 Protocol)

1926 UN Convention on Slavery

1930 ILO Convention on Forced Labour (No. 29)

1933 International Convention for the Suppression of the Traffic in Women
of Full Age (Amended by the 1947 Protocol)

1947 Protocol to amend the Convention for the Suppression of the Traffic in
Women and Children, concluded at Geneva on 30 September 1921, and the
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1948 Universal Declaration of Human Rights

1949 Protocol amending the International Agreement for the Suppression of
the White Slave Traffic, signed at Paris on 18 May 1904, and the
International Convention for the Suppression of White Slave Traffic

1949 UN Convention on the Suppression of the Traffic in Persons and of the
Exploitation of the Prostitution of Others

1953 Protocol amending the 1927 Slavery Convention

1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

1957 Supplementary Convention on the Abolition of Slavery, the Slave trade, and Institutions and Practices Similar to Slavery

1966 The International Covenant on Economic, Social and Cultural Rights

1966 The International Covenant on Civil and Political Rights

1973 ILO Convention on Minimum Age (No. 138)

1975 ILO Convention 143 (the Convention Concerning Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment)

1979 UN Convention on the Elimination of All Forms of Discrimination against Women

1989 UN Convention on the Rights of the Child

1990 UN Convention on the Protection on the Rights of All Migrant Workers and Members of their Families

1993 Vienna Convention and Programme of Action

1995 Forth World Conference on Women in Beijing, Platform for Action

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