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**The human rights of trafficked
women**

An essay with the focus on Sweden

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Summary

This is a thesis analysing the human rights of women who are trafficked to Sweden for the purpose of sexual exploitation.

Sexual slavery is a highly lucrative global industry controlled by powerful criminal organisations. These groups make an estimated \$7 billion a year on trafficking. Young women are often lured into prostitution rings by advertisements for domestic positions abroad and find themselves bought and sold via catalogues or by close family members. Once in the country of destination they are enslaved, beaten and raped, before being traded from one master or brothel owner to the next, frequently working up to 18 hours a day. They are at the mercy of the brothel owner, finding themselves in many cases illegally without a passport in a foreign country.

Trafficking is a rather new phenomenon in Sweden that has not been analysed from a human rights perspective. Sweden has a criminal law approach to the problem and looks upon the women as illegal immigrants who are deported as soon as evidence of the crime is secured.

The first three chapters are mainly dedicated to presenting the factual situation of women trafficked to Sweden. I considered that necessary in order to understand the following analysis of international human rights law.

Chapter 5 and 6 are analytical. In chapter 5 I present and analyse relevant human rights instruments, the ECHR, the ICCPR, the CEDAW and the Convention relating to the status of refugees. The conclusions reached in chapter 5 on what rights trafficked women have under international law are compared with Swedish law and practice in chapter 6.

My conclusions are that the trafficked women must be protected and provided with an effective remedy against their perpetrators. Some of them might be refugees entitled to asylum. They can further not be deported without considering the situation the women face upon return. Automatic deportation violates the prohibition of non-refoulement.

My thesis is in some parts innovative and my conclusions differ from state practice regarding certain areas. For this reason I clearly state what conclusions are my own and what conclusions are confirmed by authoritative sources.

I give my recommendations on necessary and desirable changes in Swedish law and practice in the last chapter.

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CteDAW	The Committee on the Elimination of Discrimination against Women
CTOC	The United Nations Convention against Transnational Organized Crime
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	The European Union
HRC	The Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGO	Inter-governmental Organisation
IHF	International Helsinki Federation for Human Rights
IHRLG	International Human Rights Law Group
IOM	International Organisation for Migration
ODCCP	United Nations Office for Drug Control and Crime Prevention
OPC	The Task-force on Organized Crime in the Baltic Sea Region
mpsg	membership of a particular social group
NCID	The National Criminal Investigation Department
NGO	Non-governmental organisation
RC	The Convention relating to the Status of Refugees
RP	The Protocol relating to the Status of Refugees
STV	The Foundation Against Trafficking in Women
Trafficking Protocol	The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
UDHR	The Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
VC	The Vienna Convention on the Law of Treaties

1 Introduction

Marcella's boyfriend, who was part of a local criminal gang engaged in prostitution, sold her in Teplice, the Czech Republic. During her journey to Sweden she was raped and threatened to death. She was taken to Stockholm, locked up in an apartment and forced to prostitution. This business generated over 200 000 Swedish Crown in two months. Marcella only got cigarettes and condoms. The police detected the brothel and Marcella was deported home to the Czech Republic.

Economic and sexual slavery is a highly lucrative global industry controlled by powerful criminal organisations, such as the Yakuza, the Triads and the Mafia. These groups make an estimated \$7 billion a year on trafficking. Young women and teenagers are often lured into prostitution rings by advertisements for domestic positions abroad and find themselves bought and sold via catalogues or by close family members.

Once enslaved, the 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 are at the mercy of the brothel owner, finding themselves in many cases illegally without a passport in a foreign country.

1.1 Presentation of the problem

What is it that makes trafficking in women such a complex problem? There are different ways of looking at and approaching the problem.¹

Trafficking is a *criminal problem*. It is considered unacceptable behaviour and perpetrators should be punished. This is often the way states look at trafficking; Sweden being no exception. This approach to combat trafficking aims at introducing heavier punishments, improving international police co-operation and other measures, which enable a more effective prosecution of the offenders. One problem from a human rights point of view with this approach is that the protection of the victims becomes subordinate. The women are used as witnesses without giving them corresponding protection.

States also tend to see trafficking as a *migration problem*. In Sweden the division for the fight against illegal migration within The National Criminal Investigation Department handles trafficking. This approach reflects states interest to protect itself from undesirable aliens. The solution to the problem is to keep the women outside Swedish territory. This is done by stricter border controls and

¹ The Dutch NGO The Foundation Against Trafficking in Women [henceforth called STV], which has worked with trafficking for over 10 years and has extensive knowledge in this field, describes different approaches to trafficking. Reproduced in Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 10-12. In SOU 2001:14 the 1998 Law Committee on Sexual Offences presents these different approaches in the introduction and they mention on a number of places that trafficking is a human rights problem. See for example page 424 and 426. But when it comes to concrete measures are conspicuous by their absence. Maybe this is natural since this is a criminal law committee.

immediate deportation of the women. The European approach has tended to identify trafficking with illegal migration and punish traffickers as procurers and smugglers of human beings. The women are looked upon more as illegal immigrants than victims of horrible human rights violations.²

The NGOs working with trafficking sees it first and foremost as a *human rights problem*. There are two different approaches that split the States, the UN organisation and the NGOs in two separate camps.³ One side sees both trafficking and prostitution as human rights violations⁴, which should be abolished. The other side does not see prostitution as such as a human rights violation. But the conditions some of the women in prostitution live under, especially trafficking victims, such as deceit, abuse, violence, debt-bondage, blackmail, deprivation of freedom of movement, as human rights violations.⁵

Trafficking can also be addressed as a *labour issue problem*. This approach sees trafficking as a result of the poor legal and social situation of women as workers and migrants. The solution is pensions and other social benefits to prostitutes who are seen as workers, "sex-workers". This is probably not a suitable approach in Sweden, regarding the fact that we penalised the purchase of sexual services two years ago. Another problem with this approach is that giving labour rights to women would maybe make life easier for women in prostitution who lived legally in Sweden, but it would not help victims of trafficking unless these rights are coupled with residence and working permits.

1.1.1 Purpose

The purpose of this thesis is to analyse trafficking in Sweden from a human rights perspective. I will try to identify the human rights of trafficked women and analyse which of these rights that are violated by the traffickers and by the Swedish State in their response to trafficking.

I admit that giving women rights or rather protecting their existing human rights alone may not provide solutions to problems that are rooted in deep structures of societies and are concerned with the function of market economy. But human rights are good tools to address this global problem since human rights are binding and create obligations on states to take action.

² Katharina Knaus, Angelika Kartusch and Gabriele Reiter, *Combat of Trafficking in Women for the Purpose of Forced Prostitution - International Standards*, 2000, page 38, [henceforth called Knaus]

³ This is seen in the process of preparing the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention against Transnational Organized Crime. See chapter 5.2.1.2 - The definition of trafficking

⁴ They see trafficking and prostitution as forms of sexual exploitation with trafficking as the cruellest form. They make no difference between so called voluntary and forced prostitution and argue that you can not eliminate violence from trafficking and prostitution, as the other NGOs are trying to do, because the violence is built into prostitution.

⁵ "Sex-worker" is a term used by many NGOs who argue that sex-work should be legal and recognised as a form of labour and focus on the need for labour protection instead of abolition. They see the abuse of women in the sex industry as accidental, not integral to prostitution; and the harm as random, incidental bad behaviour of a pimp or a buyer.

1.1.2 Definitions

The definition of trafficking has been the focus of a large part of the debate around trafficking. The stumbling block has been its relationship to prostitution i. e whether or not it should just cover so called forced prostitution and whether or not the consent of the woman should be relevant. Here both states and NGOs disagree.

In the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art 3 defines trafficking in persons as:

Article 3 Use of terms

For the purposes of this Protocol:

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

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;[...]

I have chosen to work with this definition since it is the only one agreed upon in a binding document, although it has not entered into force yet. The proposal of a new paragraph in the Swedish Penal Code making trafficking for the purpose of sexual exploitation a separate crime is based on this proposal.

1.1.3 Delimitations

I have chose to examine trafficking in women, i e adult women over 18 years old. To cover both girls and women would have been too much and I think the problem require different solutions and approaches for women and girls. Only trafficking for the purpose of sexual exploitation is covered.⁶

I have also limited this thesis to the rights that the women have in Sweden There are figures that indicate that this problem is increasing and it is crucial to deal with

⁶ This is not a failure to recognise trafficking for other purposes as equally important to deal with but the problems might require different solutions.

it before it becomes too big.⁷ Some background facts about the situation the women face in their home countries are presented for understanding why they leave and a presentation is given on the situation the women, especially women from Czech Republic, Bulgaria and the Baltic States, face upon return. This is necessary considering if the women have a right to stay in Sweden or can be sent back. These countries are chosen based on what countries have appeared in investigations and judgements on trafficking.

Since I have a human rights perspective and not a criminal law perspective I do not analyse the new Swedish legislation against trafficking, even though I think it is an important tool to combat trafficking. The same is valid for initiatives from the European Union. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, is dealt with though because it entails the first global definition. The vague protection the Protocol offers trafficking victims is also presented.

1.1.4 Method

My thesis is both descriptive and analytical. For my descriptive part I have searched through numerous reports from NGOs and IGOs in order to get a reliable picture of trafficking, the extent of the problem, how it works and whom it involves. I have contacted persons working with trafficking here in Sweden, i.e. Kajsa Wahlberg, detective inspector at the Swedish National Crime Investigation Department, Ingela Klinteberg, chief prosecutor, Office of the public Prosecutor, Karlskrona, Elisabeth Person, the Prostitutiongroup, Gothenburg and Mikael Bogavre, social worker in Malmö. I have also been in contact with NGOs both in Sweden, Foundation of Women's Forum/ Stiftelsen Kvinnoforum, National Organisation for Women shelters (ROKS) and Swedish Amnesty, and international NGOs, Kvinnefronten, Norway, AIDS Information and Support Center, Estonia and Animus Association, Bulgaria. The information used in this thesis is critically evaluated and the status of the used sources is indicated.

In the analytical part trafficked women's human rights are analysed according to the judicial method. The primary source of the examination is international human rights conventions. The conventions are interpreted according to the ordinary meaning of the words stated therein read in the context of the purpose of the convention in question. Relevant state practise is taken into account. As supplementary means of interpretation are non-binding documents from supervising organs and opinions from scholars taken into account.⁸

The Swedish laws are also analysed according to the doctrine on the hierarchy of judicial sources. The law, interpreted according to the ordinary meaning of the wording considering the context and purpose of the law, is the primary source. In order to determine the purpose of the law the Swedish hierarchy put more weight on preparatory works that what is done internationally.

⁷ KUT 1999:16 page 23-34, KUT 2000:1 18-26 and KUT 2001:1 14-27.

⁸ Art 38, Statute of the International Court of Justice, 26 June 1945, 1 U.N.T.S XVI and art 31-33 the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331, in force 27 January 1980.[henceforth called VC]

Trafficking has not been analysed thorough from a human rights perspective neither in the international context nor in Sweden. The new Protocol to combat trafficking elaborated within the United Nations together with a convention to combat organised crime and Swedish practice show how the phenomenon is mainly dealt with a criminal law approach. My thesis is therefore in some parts innovative and my conclusions differ from state practise regarding certain areas. For this reason I clearly state what conclusions are my own and what conclusions are confirmed by authoritative sources.

1.1.5 Outline

The first three chapter are mainly dedicated to presenting the factual situation of women trafficked to Sweden. I considered that necessary in order understand the following analyse of international human rights law.

I start in chapter 2 with a presentation of trafficking as a human rights problem and its links to prostitution, which is analysed from a human rights perspective. Chapter 3 is a survey of the situation in Sweden and the Swedish approach to trafficking. The situation women face upon return is presented in chapter 4. Chapter 5 and 6 are analytical. In chapter 5 I present and analyse relevant human rights instruments, the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth called ECHR)⁹, the International Covenant on Civil and Political Rights (henceforth called ICCPR)¹⁰, the Convention on the Elimination of All Forms of Discrimination Against Women (henceforth called CEDAW)¹¹ and the Convention relating to the status of refugees (henceforth called RC)¹². The conclusions reached in chapter 5 on what rights trafficked women have under international law are compared with Swedish law and practice in chapter 6.

I give my recommendations on necessary and desirable changes in Swedish law and practise in the last chapter 7.

1.1.6 Material

I have used very different kind of material in different chapters depending on the purpose of the chapter and the availability of relevant material.

Material used in chapter 2 includes Knaus *Combat Trafficking in Women for the Purpose of Forced Prostitution*, a study from the Ludwig Boltzman Institutes of Human Rights¹³, which analysis the phenomena of trafficking by

⁹ The European Convention for the protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No 5 [henceforth called ECHR]

¹⁰ The International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S 171 Into force in Sweden 23 March 1976. [henceforth called ICCPR]

¹¹ The Convention on the Elimination of all forms of Discrimination Against Women, 18 December 1979, 1249 U.N.T.S 13 [henceforth called CEDAW]

¹² The Convention relating to the Status Refugees, 28 July 1951, 189 U.N.T.S. 150, entered into force April 22, 1954 [henceforth called RC].

¹³ The Ludwig Boltzman Institutes of Human Rights was founded in 1992 and is a private research centre affiliated to the Faculty of Law at the University of Vienna. The Institutes

looking at its causes and conditions in both sending and receiving countries. The purpose of this study was to reveal the weakness of national and international law. It is important to bear in mind that this study argues that recognising sex work, i.e. prostitution, as a form of labour is the best way to combat trafficking.

International Human Rights Law *Group's Training Manual Trafficking in Persons: A Human Rights Issue*, a study designed to help people working in the field in Bosnia and Herzegovina. The study is more descriptive than analytical, mapping state obligations to combat trafficking. This is also a pro sex work study. Foundation of Women's Forum, is the most experienced Swedish NGO working with trafficking. In their report "*Trafficking in Women for the Purpose of Sexual Exploitation*", they map the situation in the Nordic and Baltic States. Information was collected through questionnaires and personal contacts with NGOs in respective countries.

Jeffereys is a feminist who worked with prostitution in UK and Australia for over twenty years and is a Senior Lecturer in the Department of Political Science at the University of Melbourne. *The idea of prostitution* analyses the changing concept of prostitution and explores the distinction between free and forced prostitution. The chapter concerning prostitution in Sweden is mainly based on the National Board of Health and Welfare report 2000:5 "*Knowledge of prostitution 1998-1999*". The general aim of this survey was to obtain an overall picture of the extent of prostitution in Sweden after the new prostitution legislation came into force.¹⁴

Chapter 3 is mainly based on three reports from the National Criminal Investigation Department (henceforth called NCID). The NCID is the Swedish national rapporteur on trafficking. Information in these reports came from regional and local police authorities, Europol, the Task-force on Organized Crime in the Baltic Sea Region (henceforth called OPC)¹⁵ and the Stop Trafficking in People Project.¹⁶ The reports presented and commented upon investigations and judgements concerning trafficking. One should bear in mind that trafficking is a relatively new phenomenon in Sweden. Local police often lack funds and experience to deal with the issue properly.¹⁷ Another problem with Swedish investigations is that the women are often reluctant, due to lack of protection, to

tasks include interdisciplinary research in the field of human rights and fundamental freedoms in both Austria and the rest of the world.

¹⁴ The following data collection methods was used: distribution of questionnaires to all local police authorities and police districts, all municipal social services, a selection of restaurants, hotels and similar companies and interviews conducted with key informants in the police, social services and healthcare services, as well as with a number of purchasers of sexual services.

¹⁵ This is a police co-operation between Sweden, Norway, Denmark, Finland, Estonia, Latvia, Lithuania, Russia, Poland and Germany working with organised crime. Since 1999 trafficking in women has been given some priority.

¹⁶ The Stop Trafficking in People Project is an EU financed project of networking between Finland, Sweden, Russia, Germany and Estonia.

¹⁷ Information from other sources, judgements, newspapers, the Foundation of Women's Forum "*Trafficking in Women for the Purpose of Sexual Exploitation*" complement the chapter.

inform the police of the treatment they have been exposed to and who their perpetrators are.

Chapter 4 is a survey of the situation trafficked women face upon return. Sensitive information has been checked in several sources, preferably information given in country reports to the Committee on the Elimination of Discrimination Against Women (henceforth called CteDAW) or by state representatives in IGOs such as the Council of Europe, the OPC., the United Nations Office for Drug Control and Crime Prevention (henceforth called ODCCP) and reports from the United States Delegation to the U.N Commission on Human Rights. Because of state reluctance to deal with trafficking information from NGOs are used as a supplement.

Especially the chapter on Bulgaria is based on information from Animus Association Foundation, a NGO who has worked with rehabilitation of women suffering of violence since 1996. It is the Bulgarian partner of the international project "La Strada", a program for the prevention of trafficking in women in Central and Eastern Europe. Country reports from the Boltzman Institute, Scheu *Legal Study on the Combat Trafficking in Women for the Purpose of Forced Prostitution in the Czech Republic* and Filipova *Legal Study on the Combat Trafficking in Women for the Purpose of Forced Prostitution in Bulgaria*. These studies describe the legal, social and political background of the problem in respective countries.

All the material, except for the country report from Bulgaria to the CteDAW, is from 1999 or newer.

Chapter 5 analysis international instruments. In addition to Convention texts are traditional sources for interpretative aid used.

The chapter on ECHR is mainly based on case law from the European Court of Human Rights. Also Danelius, who is Justice of the Swedish Supreme Court and member of the European Commission on Human Rights, *Human Rights in European Case Law, A commentary on the European Convention on Human Rights* are used.

The ICCPR is interpreted with the help of General Comments, Concluding Observations and views on individual Communications from the supervisory organ, the Human Rights Committee. Neither of these sources is binding under international law but is valuable interpretative help. Other material is Nowaks standard piece from 1992 *U.N Covenant on Civil and Political Rights, CCPR Commentary*. Nowak is Dr. iur. et habil, Professor of Law at the Austrian Federal Academy of Public Administration and Director of the Ludwig Boltzmann Institute referred to above.

CEDAW is interpreted with the help of non-binding documents, i e the Declaration on the Elimination of Violence against Women and Concluding Observations and General Recommendations from the CteDAW.

The chapter analysing the RC is based on state practise, meaning decisions in asylum cases from State Parties, on the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* and Conclusions

from UNHCR's governing body, the Executive Committee.¹⁸ Neither the Handbook nor the Conclusions are binding upon State Parties. Goodwin-Gill, *The Refugee in International Law* is a widely recognised source on interpretation of refugee law. Goodwin-Gill is Rubin Director of Research, Institute of European Studies, University of Oxford and Professor of Asylum Law at the University of Amsterdam. Hathaway, *The Law of Refugee Status* is another standard work on refugee law frequently referred to in the international debate. The new Protocol on trafficking elaborated within the United Nations is not in force yet. Therefore no case law and very little judicial material is available at present. For interpretation the preparatory works has mainly been relied on. Chapter six analysis Swedish law. As appropriate concerning interpretation of Swedish law preparatory works, such as government bills and Swedish Public Investigations, are used and case law from courts and the Aliens Appeals Board. Wikréns *Utlänningslagen, En kommentar* (A Commentary on the Swedish Aliens Act) are used as interpretative aid regarding Swedish refugee law. The Aliens Appeals Board often refers to this Commentary. It should be noted that only law and case law are binding (and case law only concerning the individual case), the other sources are just interpretative help.

¹⁸ The Executive Committee of the High Commissioner's Programme was created in 1958, pursuant to a request by the General Assembly. Its main tasks are to approve the High Commissioner's assistance programmes, advise the High Commissioner in the exercise of his/her functions (mainly on protection issues) and oversee the agency's finances and administration.

2 Trafficking as a Human Rights problem

2.1 Trafficking and its causes

Trafficking is the "...recruitment, transportation, transfer, harbouring or receipt of persons..." if improper means are used such as force, abduction, fraud or abuse of a position of vulnerability for an improper purpose such as prostitution, sexual exploitation, forced labour or other practices similar to slavery.¹⁹ My thesis is limited to trafficking for sexual exploitation.

One wonders what makes trafficking possible in the twenty-first century long after traditional slavery is abolished. There are a number of factors that effect this practise. My intention is to give you the most important ones both in the sending and in the receiving countries²⁰ here.

2.1.1 "Push-factors" in the sending countries

What makes women willing to migrate?

This is a generalised picture. I am focusing on Eastern Europe where most victims in Sweden come from today.²¹

The factors are economic, social, political and legal. With the transition to market economies in Eastern Europe and the former Soviet Union in the 90ies came increased poverty, unemployment and a reduction of social security system. Particularly in rural areas and particularly for women.²² Because of gender discrimination this affect women to a higher degree than men. Women are discriminated both at home, on the labour market and in the community. The typical young woman in a sending country is either undereducated or uneducated, which makes her less able to compete in a market economy. For many women sex work and domestic work are the only options available. Women have also often the prime responsibility for their children and the elderly without having any chance to get a "real" job.²³ Taken together women have good reasons to migrate. However there are very few ways of legally migrating into the EU,

¹⁹ See art 3 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, A/55/383 Annex II, 20 November 2000.

²⁰ The receiving country this thesis focuses on is Sweden. The choice of factors is influenced by that but they are general so I think they would be valid fore a many receiving countries in Western Europe, at least the ones that has the same policy in combating prostitution.

²¹ The causes of trafficking are a bit different, or maybe not different but more extreme, in Asia. Extreme poverty and devaluation of girl-children are big problems.

²² For example in Russia, Ukraine, Georgia, Poland and the Baltic states. Knaus page 14

²³ SOU 2001:14 page 421 and Knaus page 14

Sweden being no exception. This is why women rely on traffickers to get across borders.²⁴

I think that it is not poverty as such that push women in to the trafficking market. It is poverty combined with discrimination and lack of knowledge of the risks.²⁵ Another important factor is corruption in the legal system and within the police. Sometimes the is the policeman himself involved, getting his share of the profit and sometimes the police just do not pay attention because human rights violations against women is not a priority. Many governments in Eastern Europe have not even recognised trafficking as a problem²⁶

2.1.2 "Pull-factors" in receiving countries

What makes a country attractive for a trafficker?

First of all there must be demand for purchase of sexual services. This is the link between prostitution and trafficking. Since the overwhelming number of trafficked women is exploited in prostitution there must be a market for prostitution in the country of destination. This market may be legal or illegal, but it must exist. Another deciding factor is the risk of detection and punishment. The risks of detection must be relatively low and the profits relatively high. It is sad to say that it is less risky to sell human beings than it is to sell drugs and that profits are comparable. Many traffickers have moved away from selling drugs or arms to trafficking human beings.²⁷ Traffickers of women are difficult to convict because the victims are afraid to testify and penalties today are low, compared with selling drugs. Women unlike drugs can and are sold several times.²⁸ Weak or almost non-existent protection for the women in the receiving country is also important. Other important factors are the existence of organised criminal gangs, international transports and communications and strict migration policy in the receiving countries. Sweden is relatively spared from domestic organised criminal groups, but these groups operate globally. The factors described above decide where, not national borders.

²⁴ Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 11. See also Merja Pentikäinen, The Applicability of the Human Rights Model to Address Concerns and the Status of Women, The Erik Castrén Institute of International Law and Human Rights Research Reports 1/1999, Helsinki 1999, page 116, [henceforth called Pentikäinen]

²⁵ Off course poverty is a big cause but what I mean is that poverty because of discrimination hit women the hardest. Men get the good jobs first. There is a feminisation of poverty.

²⁶ Statements by Anita Gradin, former Swedish EU Commissioner, and Lise Berg, secretary of Margareta Winberg, Minister of Gender Equality Affairs at a international conferens about men's violence against women with the focus on prostitution by ROKS, Stockholm, 2-4 February, a summary can be found at ROKS homepage Available at: <http://www.info@roks.se> (last visited 7 February 2001)

²⁷ See SOU 2001:14 page 427, IHRLG "Training Manual" page 15 and Knaus page 15

²⁸ This will change if the new paragraph, making trafficking a crime of its own, proposed by the Law Committee on sexual offences enters into force. SOU 2001:14 page 463, which states prison from 2 to 8 years.

2.2 The victims

One can distinguish between mainly three types of victims of trafficking. The first group is those women who have been either kidnapped or completely duped and coerced into working with prostitution. They thought that they were going to work with e g domestic work or as waitresses. Once in Sweden their passport were taken from them, they were locked up and coerced to perform sexual services.

The second group consists of women, who were told half-truths by their traffickers about the work they should perform in Sweden. They were for example told that they were going to work as dancers or strippers but not as prostitutes. They can also be deceived about how much money they get to keep. They were promised a certain percentage but end up in debt bondage, meaning that the trafficker paid for the woman's transport, sometimes including a false passport, to Sweden. This debt must she later "work off" in prostitution. The debt is never paid off either because the work is not in proportion to the debt or because the women are sold to another trafficker or pimp before.

The third group is those women who knew that they were going to work in prostitution but who saw no alternative to support themselves. The traffickers exploited this vulnerable legal and economical situation women face in some countries.²⁹

There are those who talk about a fourth group consisting of women who are absolutely aware of the work they shall perform, who have no problem with it, who get a fair share of the income and have relatively much freedom of movement. These women would according to the source not be considered victims of trafficking.³⁰

This categorising focus on how and why the women entered prostitution. I think it is important to point out that regardless of how they entered, i e whether they knew they were going to work as prostitutes or not, they end up in a situation where they are heavily abused and their human rights are seriously violated. Initial knowledge about what kind of work they are expected to perform does not justify that abuse or make them less victims.

²⁹ Knaus page 15 compared with Swedish cases described in the National Criminal Investigation Department's (henceforth called NCID) reports on trafficking in women (see chapter 3) and in judgements on trafficking i e case no. B 579-00, Malmö District Court, 13 June 2000 and case no. B 6613-99, Stockholm District court, 28 July 2000; case No. B 622-00, Court of Appeal (Hovrätten över Skåne and Blekinge), 10 August 2000 and case No. B 5842-00, Court of Appeal (Svea Hovrätt) and articles in the media i e Aftonbladet, 6 June 2000 and 10 October 1999; and Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 11. See also Technical Cooperation Centre of Europe and Central Asia "Profile of victims of trafficking from the Czech Republic: Background study prepared for the IOM Information Programme to Prevent Trafficking in Women in the Czech Republic", 1999, page 9-11 and 14 [henceforth called TCCECA Background study]

³⁰ Knaus page 15. I do not know if this is a myth created to legalise prostitution and the sex industry. I have not read of any practical case that looked like this but maybe one should not rule out the theoretical possibility.

The abuse is part of the cynical industry, with the purpose of breaking down their self-esteem and thereby make it possible to keep them in prostitution.³¹ Maria Chomarova, psychotherapist at Animus Association³² describes it as traffickers use violence to make their victims obey them unconditionally. When people are put in extreme situations they only concentrate on survival. The manipulation system includes the rule never give the victim a chance to rest and think about her situation. The 16-20 hour working day off course bring the trafficker big profit but it is also a tool to keep the woman from taking control of her situation. The isolation has two purposes. It is necessary in order to avoid detection by the police but also useful manipulation. If the women's only contact with the world goes through the trafficker she can never challenge the information he gives to her. He only sends one message: she is worth nothing, what happened is her fault and that she owes him money.³³ Most of the victims that manage to get away from their traffickers are in urgent need of psychological and medical help.³⁴

2.3 The link to prostitution

The overwhelming number of women involved in trafficking is exploited in prostitution. It is prostitution that creates trafficking and not the other way around. By this I do not mean to say that trafficking for other reasons are less important or less serious, but I think it is important to see the link and not treat trafficking and prostitution as two totally separate problems. If trafficking shall be effectively combated one need to address prostitution too.

2.3.1 Prostitution from a human rights perspective

For reasons given in the previous chapter and in order to understand why it is so difficult to agree internationally on a common definition and policy to combat trafficking I think it is important to analyse prostitution. The same arguments that divide NGOs equally divide Europe and the human rights organisation within the United Nations.³⁵

³¹ SOU 2001:14 page 422-424

³² Animus Association, a NGO for women with helping professions such as psychologists, psychiatrists, psychotherapists, medical doctors, social workers, etc.

³³ Maria Chomarova, "The experience of Survivors". Reproduced in Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" Resourcebook, page 18-19, November 1999 Available at: <<http://www.qweb.Foundation of Women's Forum/ Stiftelsen Kvinnoforum.se/trafficking/index.html>>

³⁴ The woman need medical help and to be tested for HIV and other STD's, sexually transferable diseases. She also often need help with emotional problems. See Naddeja Kostadinova, psychoteraphist, Animus Association "Victims of trafficking need help" Reproduced in Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" Resourcebook, page 15-17, November 1999 Available at: <<http://www.qweb.Foundation of Women's Forum/ Stiftelsen Kvinnoforum.se/trafficking/index.html>>

³⁵ See chapter 5.2.1.2 - The definition of trafficking

During the 1960s and 1970s the debate changed around prostitution. In the so-called sexual revolution historians created the myth of "the worlds oldest profession" and sociologists presented prostitution as just sex. In the 1970s a prostitutes rights movement developed and first prostitutes rights groups in UK made an economic analysis of prostitution. The purpose was to fight legal discrimination and police harassment that prostitutes faced. In the US the prostitutes rights movement took a different approach. COYOTE³⁶ transformed prostitution into sex work. They used the vocabulary of work, choice and civil rights. They not only tried to legitimise prostitution; they celebrated it. The views from COYOTE got legitimacy from a successful myth that it was an organisation of prostitutes and ex-prostitutes.³⁷ In the 1980s this movement began organising internationally. The liberal climate in the Netherlands stimulated the movement there. Feminists and anti-prostitution activists were criticised for not listening to the women.³⁸

The same arguments as used by the pro sex work NGOs today. Choice has been transformed into an argument about consent to distinguish between forced and free prostitution. It is argued that the only way to protect women in prostitution is to give them labour rights.³⁹ This view is challenged by other NGOs and feminists who holds that consent is not a good way to determine human rights violations in an environment of oppression and discrimination.⁴⁰

2.3.1.1 Is prostitution a human rights violation?

In Sweden we consider prostitution to be harmful. Jeffereys consider it male sexual violence.⁴¹ I wanted to examine if prostitution is contrary to women's human rights.

The Declaration on Elimination of Violence Against Women, article 2, only characterised forced prostitution as violence. Even though the article clearly stated that it is a non-exhaustive enumeration the mentioning of forced prostitution indicates that at least there was no consensus on whether prostitution as such was considered as violence against women. Art 6 CEDAW require State Parties to suppress all forms of traffic in women and *exploitation of prostitution of*

³⁶ "Cast Off Your Old Tired Ethics" from San Francisco

³⁷ Jeffereys writes that only 3% of the 30 000 members were prostitutes or ex-prostitutes.

³⁸ Jeffereys page 65-74

³⁹ See for example Knaus, Filipova and Scheu. This view is shared by e.g. the Dutch NGO The Foundation Against Trafficking in Women and International Human Rights Law Group.

⁴⁰ See e.g. Coalition Against Trafficking in Women, European Women's Lobby and International Federation for Human Rights. Sheila Jeffereys is a feminist who worked with campaigns against prostitution in UK and Australia for over twenty years and is a Senior Lecturer in the Department of Political Science at the University of Melbourne. See also Eric Goldscheider, Prostitutes work but do they consent?, Boston Globe, 2 January 2000. The biggest problem to oppose choice is that some prostitutes speak of choice, but it is a question on who to believe. A small number gave a positive picture of prostitution, but they got much attention in the media. A careful research by Hoigard and Finstad in 1992 does not support this picture. See Hoigard and Finstad "Backstreet: Prostitution, Money and Love". Neither do people working in the field in Sweden. Information from Elisabeth Persson, Prostitutiongroup, Gothenburg and Mikael Bogavre, social worker, Malmö.

⁴¹ Jeffereys chapter 9 and 10.

women. If this means all prostitution is not clear from the text but if you look at the General Recommendations from the monitoring body⁴² in reference to violence against women only trafficking and other forms of abuse in prostitution seems to be encompassed by the article.⁴³ In country reports some countries use the term forced prostitution while others talk about prostitution in general. They describe prostitution as undesirable and worth counteracting. None of the countries though consider prostitution as such a human rights violation.⁴⁴

The new UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (henceforth called Trafficking Protocol) says that consent should not matter when it comes to trafficking but whether this alter the distinguishing between forced and free prostitution is not clear. The interpretative notes clearly establishes that the Trafficking Protocol only address trafficking and not prostitution as such.⁴⁵

2.3.2 Prostitution in Sweden

In Sweden there are relatively few women active in prostitution. The 1995 Prostitution Commission estimated the number of women in prostitution in Sweden to 2500.⁴⁶ This is largely due to the Swedish tradition of high equality between sexes and a well-developed social insurance system.⁴⁷ The impression from the police and social workers is that prostitution among Swedish prostitutes is not very organised. Pimps are not that common and most of them have

⁴² Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women establishes the Committee on the Elimination of Discrimination against Women to oversee the implementation of its provisions. The Committee acts as a monitoring system to oversee the implementation of the Convention. The Committee makes General Recommendations on the interpretation of the Convention.

⁴³ General Recommendation No. 19 (eleventh session 1992) Contained in Document A/47/38. This is the latest one on gender violence. See para 13-16 and especially para 15 that states " Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence."

⁴⁴ In the latest Concluding observations from Finland's Country report the Committee looks deeply into the situation for prostitutes and trafficked women and expresses concern at the increased incidence of trafficking in women and exploitation of prostitution of women. Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Finland. 02/02/2001. CEDAW/C/2001/I/Add.3 Twenty-fourth session The Committee considered the third and fourth periodic reports of Finland (CEDAW/C/FIN/3 and 4) at its 494th and 495th meetings, on 22 January 2001.

⁴⁵ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto A/55/383/Add.1 page 12 para 64. Jeffreys seems aware of the fact that prostitution as such, even if she thinks that it should be, is not recognised by the international community as a human rights violation. On page 303-305 she argues that adopting a new Convention outlawing all violence against women *including* prostitution would be the best way forward.

⁴⁶ Compare with around 20 000 in the Netherlands. The government bill 1997/98:55 page 102. It is a very uncertain figure since a common assumption is that about 1/3 of all prostitution consists of street prostitution, and that 2/3 takes place in concealed form.

⁴⁷ The government bill 1997/98:55 page 102

relationship, as boyfriend or former boyfriend to the woman. This might change though.⁴⁸

In Sweden prostitution as such is not defined as male violence. Both the the1995 Commission and the National Board of Health and Welfare, in its survey "Knowledge of prostitution 1998-1999" defined prostitution as:

*"Prostitution is when at least two parties buys or sells sexual services for compensation (usually financial); which constitutes a prerequisite for the sexual service"*⁴⁹

Prostitution is thought of as socially unacceptable and harmful both to the prostitutes and to the customers. From 1 January 1999 purchase of sexual services was outlawed.⁵⁰ The legislation was considered to have normative effect, mostly on the customers but also on the prostitutes.⁵¹

Both positive and negative experiences of the effects of the prostitution law were expressed in the National Board of Health and Welfare's survey. Most of them were in favour of the legislation. It was seen as an important standpoint. One obstacle pointed out by the interview subjects was the lack of resources and the fact that street prostitution was prioritised in this context, placing work involving other forms of prostitution, like the in-door prostitution trafficked women are mostly used in, at a disadvantage.⁵²

To conclude one can say that there is a market for sexual services in Sweden. The market is mainly illegal. Pimps, procurers and customers are outlawed, the only ones not considered to commit a crime are the women themselves. Before the new law outlawing purchase of sexual services was enacted it was estimated that about 125 000 Swedish men buy sexual services every year. Whether this has changed is remains a question.

⁴⁸ Elisabeth Persson, Prostitutiongroup, Gothengurg.

⁴⁹ The National Board of Health and Welfare report 2000:5 "Knowledge of prostitution 1998-1999" page 12.

⁵⁰ Lag (1998:408) om förbud mot köp av sexuella tjänster, i e Act relating to a ban on purchase of sexual services.

⁵¹ The government bill 1997/98:55 page 100. There were a proposal to outlaw even the prostitutes but it was not considered reasonable to punish the weaker party that was being exploited. Did it have any effect? Comparisons between 1998 and 1999 do not show that any radical changes. Apart from the temporary disappearance of street prostitution, the meeting places and contact methods associated with hidden prostitution have increased somewhat. See The National Board of Health and Welfare report 2000:5 "Knowledge of prostitution 1998-1999".

⁵² The National Board of Health and Welfare report 2000:5 "Knowledge of prostitution 1998-1999" page 32-34.

3 The situation of trafficking in Sweden

3.1 The extent of the problem

It is difficult to say how many women that are trafficked to Sweden per year. The dark figures are expected to be high, since the women are used in covert forms of prostitution. The victims are very reluctant to make contact with the Swedish police or even with social workers, due to language problems, lack of knowledge and fear of the authorities.⁵³ Trafficking is detected by search by the police, not by reporting. The fact that trafficking is not a crime of its own in the Swedish Penal Code further complicates an examination on extent of the crime.⁵⁴ The crime procurers are used, but not all procurers are involved in trafficking. Although trafficking is not a new phenomenon in the world the Nordic countries have been relatively spared. It was not until 1998 trafficking got attention by the government and the police in Sweden.⁵⁵ Since then the NCID have been reporting regularly on the situation in Sweden. So far three reports have been published.

3.1.1 KUT 1999:16 - the first report

In the first report only few cases were reported and even less were investigated. Some police authorities held that trafficking did not exist in their district or that they did not have any information on it. In most of the districts trafficking and prostitution was not given priority. Where efforts were made, i. e in the biggest cities Stockholm, Gothengurg and Malmö, it was concentrated on street prostitution, which is visible and easier to effect.⁵⁶

From social workers and police officers working on the ground came information that the number of prostitutes from Eastern Europe were increasing, especially from Estonia, Latvia and Lithuania after the visa requirements were abolished for citizens from these countries 1997.⁵⁷ Beside the Baltic States other victims of trafficking came from Poland, Russia, The Czech Republic, Slovakia and former Yugoslavia. The traffickers are mostly men from the women's home countries

⁵³ Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 12

⁵⁴ This will probably change soon. See chapter 6.1.2.1 - Criminal law prohibiting trafficking

⁵⁵ Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 12-14.

⁵⁶ KUT 1999:16 page 23-29

⁵⁷ Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 14. See also KUT 1999:16 page 34 and SOU 2001:14 page 428

resident in Sweden.⁵⁸ There were indications on links between trafficking and other forms of organised crime.

3.1.2 KUT 2000:1 - the second report

In the second report the number of reports and investigations⁵⁹ on trafficking has increased and the problem has been more visible to the police. Judging from the investigations initiated the trafficking business seem more extensive, involve a larger number of women and are more organised than before.⁶⁰ It is hard to say whether this depends on changes in the crime or whether it is due to the fact that the police was more experienced and better equipped to detect trafficking. There was no change in the women's or the traffickers' country of origin.⁶¹

In the second report I think there was a little change in the approach to the victims of trafficking. In the first report it was stressed that trafficked women in Sweden knew that they were going to work as prostitutes and share their profits with the pimp. You got the impression that the women were in prostitution on a voluntarily basis and free to come and go as they chose.⁶² The victims are described differently in the second report. It is stated that most of the women are young with little life experience, poor, vulnerable and deceived to work with prostitution in the west.⁶³ Reports from police authorities in Sweden inform about violence and threats against the women.⁶⁴

3.1.3 KUT 2001:3 - the third report

The number of investigations presented in the report is still too small to answer the question of the extent of the problem. Supplementary information from NGOs⁶⁵ and foreign police authorities are used to get a better picture of the reality. In the beginning of 2000 people working on the field saw a decrease in the number of prostitutes.⁶⁶ This can be a consequence of the large attention that some investigations got in the media⁶⁷ and of the new legislation in Sweden

⁵⁸ KUT 1999:16 page 33, SOU 2001:14 page 429 and Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 13.

⁵⁹ Even though most of the investigations are later closed because of difficulties in obtaining evidence.

⁶⁰ See e.g. Svea Court of Appeal, case no. B5842-00, 2000-11-10 a case from Stockholm involving 20-25 women. KUT 2000:1 page 24-25. This case is called the "Czech-Slovakia" case in the KUT reports.

⁶¹ It is still the Baltic States and women from Bulgaria, the Czech Republic, Poland and Slovakia that are presented in police investigations. KUT 2000:1 page 27

⁶² KUT 1999:16 page 34. See also RH 1999:109

⁶³ KUT 2000:1 page 12

⁶⁴ KUT 2000:1 page 26

⁶⁵ Le Foundation of Women's Forum/ Stiftelsen Kvinnoforum whose information the 1998 Law Committee on Sexual Offences also used.

⁶⁶ Which does not necessarily mean a decrease in the number of trafficked women but there is a relationship between prostitution and trafficking; without prostitution no trafficking.

⁶⁷ E.g. the Swedish evening paper "Aftonbladet" had a series of articles on the sex trade and they especially looked in to Svea Court of Appeal, case no. B5842-00, 2000-11-10, called the case of Gyllene Ratten from the name of the refugee camp where it took place.

prohibiting purchase of sexual services.⁶⁸ In the end of 2000 one could again see an increase of the number of prostitutes. Trafficked women are mostly used in covert forms of prostitution so this in- and decrease seen in street prostitution is not necessary true for the number of trafficked women. It was estimated that 200-500 women were trafficked to Sweden during the year 2000.⁶⁹ In July 2000 came the judgement from the Stockholm District Court in the so-called case of "Gyllene Ratten". This case involved organised trafficking business at another level than the cases previously investigated. At least 20 women have been trafficked to Sweden and the women were constantly watched, threatened and raped by the traffickers. The defendant had been involved in similar activity in Copenhagen, Oslo and Brussels.⁷⁰

3.1.4 The picture given by the media

The picture of trafficking given in the media is a bit different, or at least more emotional, than the picture you get from reading the KUT reports that do not discuss exactly what kind of treatment the women are exposed to by their perpetrators.⁷¹ In the newspapers you can read about girls who were locked up in apartments forced to take customers and had to work as prostitutes on the street in the nights. Their pimps, who may be the one who trafficked them or who have "bought" the women from traffickers, constantly watched them. They are frequently beaten and threatened by their pimps and never see any of the money the pimp made on this business. Nils-Eric Schultz, public prosecutor in the "Gyllene Ratten" case⁷², said that this case involved violence and treatment of women that have not occurred in Sweden before.⁷³ After some about a month or two are women sent home again or sold to another pimp and replaced by new women.⁷⁴

⁶⁸ KUT 2001:3 page 30. This deterrent effect of the new law penalising the sex buyers is controversial. For example Knaus argue that the law fails in combating prostitution because despite a decrease in street prostitution the covert forms of prostitution increased and that the non-penalisation of the prostitutes in fact encouraged more illegal migrant women to work in Sweden. (There are of course other aspects you have to take in to consideration when discussing this law. One is that the women are looked upon as victims and not perpetrators. And the law is an important standpoint that the Swedish society do not accept purchase of human beings, which is expected to have a normative effect.) Another, in my view more valid argument, is the fact that criminalising the buyers have negative effects on combating trafficking. Buyers were potential information sources but they are now very reluctant to give any information to the police or even to NGOs and they can not be forced to witness in court because they would then incriminate themselves. Knaus page 44

⁶⁹ KUT 2001:3 page 30.

⁷⁰ Stockholm District Court, case no B6613-99, 2000-07-28, page 19 and 32 f.

⁷¹ This is rather natural considering the different purposes of the KUT- reports and the media.

⁷² Svea Court of Appeal, case no. B5842-00, 2000-11-10. This case is called the "Czech-Slovakia" case in the KUT reports.

⁷³ Svante Lindén "Sexhandeln är vår tids slaveri" (Sex trade is the slavery of our time) Aftonbladet 10 October 1999.

⁷⁴ Jens Kärrman, "Jag drogades och såldes till Sverige" (I was drugged and sold to Sweden), Aftonbladet 6 June 2000

3.2 What happens to the women if the crime is detected?

As I explained in the introduction is trafficking a complex problem, which involves different areas of law. This becomes very obvious when the police detects the crime. As a criminal problem there is an interest to take legal measures against perpetrators and prosecutes them. In order to do that the victims are valuable sources of information. Trafficking is also looked upon as a migration problem where the Swedish State has an interest of keeping illegal immigrants out of the country. The Swedish Aliens Act therefore gives the Swedish police authority, but no obligation, to deport the women immediately.⁷⁵ An alien can be deported if it can be assumed that he/she will not support oneself in an honest way. To work with prostitution is not considered an honest way.⁷⁶ In practice this means that the women will be sent to their countries of origin the next day. If it can be assumed that they are victims of crimes, such as rape, procuring, illegal coercion ect this is reported to the police. The ambition is also to have a hearing with the woman in a court to secure evidence.⁷⁷

According to Ingela Klinteberg is there no possibility today to let the women stay in Sweden, neither during trial nor on a permanent basis. Illegal immigrant shall be deported as soon as possible. This is under investigation but the Swedish practise is still immediate deportation.⁷⁸

⁷⁵ Swedish Aliens Act chapter 4 para 2.

⁷⁶ SOU 2001:14 page 468. See also Wikrén and Sandsjö, Utlänningslagen -En kommentar, sixth edition, 1999 [henceforth called Wikrén]

⁷⁷ Interview with Kajsa Wahlberg detective inspector (kriminalinspektör) at NCID

⁷⁸ Information from Ingela Klinteberg, chief prosecutor

4 The situation the women face upon return

This chapter describe the reality trafficked women face after deportation. The purpose is to show that women's fears of returning home must be taken seriously and automatic deportation is highly questionable to certain countries.

I have chosen study the Baltic States, Bulgaria and the Czech Republic, based on the fact that these countries have appeared in Swedish investigations and judgements involving trafficking. It is interesting to go in depth in some countries but for the purpose of showing how the global trade in women work I have chosen to discuss other relevant countries in the end of this chapter.

I want to stress that this survey only gives a generalised picture of the situation women face upon return and is not a complete mapping of the situation.

4.1 Estonia

Trafficked women deported to Estonia are left with no protection, social support or rehabilitative services for victims of trafficking. It might be possible to get some medical help though.⁷⁹ Because of her background as a prostitute the woman will face stigmatisation. Prostitution is legal but considered morally wrong. Prostituted women are considered bad women⁸⁰ not worth spending tax money on. Very few NGOs are working with trafficked women and they have a health approach to the problem and do not see it as a human rights issue.⁸¹

According to a report from the OPC trafficking is connected with organised crime although there is disagreement on the level of organisation.⁸² This is confirmed by other reports.⁸³

⁷⁹ Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 18-19 and International Helsinki Federation for Human Rights (IHF), A Form of Slavery - Trafficking in women in OSCE Member States, Report to the OSCE Supplementary Human Dimension Meeting On Trafficking in Human Beings, Vienna 19 June 2000 [henceforth called A Form of Slavery] page 22

⁸⁰ Prostitutes are considered the one to blame for STD:s instead of seen as victims of STD:s, which might be closer to the truth.

⁸¹ Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 18-20. This was confirmed by Selve Ringmaa, Estonian Women's Studies and Resource Centre in a written inquiry. The perception in Estonia seem to be that women migrated voluntarily for prostitution and that some form of coercion only exist in very limited number of cases. See OPC Report on the "fact-finding mission" conducted in November 2000 by the National Commissioner of Police for the Baltic countries regarding trafficking in women, published by the National Commissioner of Danish Police, Department A. [henceforth called the OPC report]. See also Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 17.

⁸² The OPC report. See footnote 81.

⁸³ A Form of Slavery page 21 and Department of State Human Rights Reports for 2000, released by the U.S. Department of State in February 2001, the United States Delegation to the U.N Commission on Human Rights, Estonia, Section 6 Workers Rights under F.

The Estonian Government is reluctant to deal with the problem and the needs of the victims. There is no state policy against trafficking despite pressure from NGOs.⁸⁴ Trafficking in women is not a special crime but traffickers could be punished since procuring, kidnapping and extortion is prohibited.⁸⁵ Trafficking is not prioritised by the police and according to International Helsinki Federation for Human Rights (IHF), who has collected information from courts, police, border guards and the Interpol, no trafficker has yet, i.e until 2000, been prosecuted.⁸⁶ This is probably a result of the fact that women do not turn to the police for protection and do not report cases of trafficking. Trafficked women have several reasons for this choice. Estonia has no victim or witness protection suitable for trafficking victims.⁸⁷ The fact that trafficking is facilitated with organised criminal groups makes women reluctant to report especially if their safety can not be granted. Thirdly an eventual trial will mean humiliating publicity and stigmatisation for the woman.

4.2 Latvia

The situation of returned Latvian women is very similar to the one in Estonia, which means lack of social security and rehabilitation possibilities. Indeed many of the women seen in street prostitution in Latvia are returned victims of trafficking.⁸⁸ According to the OPC report it is typically for Latvian trafficked women to be away for a couple of months, return to Latvia for a short time and then leave again. The report does not reveal why women choose to leave again or if they even make that choice of their own. Trafficking is considered to be organised crime exercised by a networks that buy and sell women internationally.⁸⁹

In May 2000 the Latvian Criminal Code was revised and trafficking was made a special crime but law enforcement does not seem prioritised. There were no prosecutions of traffickers by the end of 2000 and Latvia still lack suitable victim and witness protection. There are also indications that the policemen are regular

Trafficking in persons, Available at: <<http://www.humanrights-usa.net/reports/estonia.html>> (last updated 6 March 2001) [henceforth called the USA report on Estonia]

⁸⁴ Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 25 and A Form of Slavery page 21-22. Confirmed by Selve Ringmaa, Estonian Women's Studies and Resource Centre in a written inquiry. She added that the question of trafficking has not been raised on governmental level and that public knowledge is very low. Most people seem to think that the problem does not exist in Estonia.

⁸⁵ See Estonian Criminal Code Art. 124.1- taking a hostage, Art. 124.3 - illegal deprivation of liberty, Art. 115 - rape and Art.118 procuring.

⁸⁶ One investigation is pending. A Form of Slavery page 21-22.

⁸⁷ KUT 1999:16 page 17. Jüri Kalikov, The Head of AIDS Information and Support Center, Tallinn, confirmed this in a written inquiry.

⁸⁸ Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation" page 22

⁸⁹ Some police sources are convinced that these groups also traffic drugs and weapons while other sources are of the opinion that trafficking in women is so profitable and has so low risks that other selling drugs and weapons seem unattractive. See footnote 81. Prices of women of course vary from 5 000-20 000 USD per woman depending on looks and age.

clients in prostitution.⁹⁰ The Government has not earmarked any money to deal with the victims of trafficking.⁹¹

4.3 Lithuania

Among the Baltic States Lithuania seem to be the country from which most women are trafficked to the EU. Lithuania is different from the other Baltic States in that prostitution is legal.⁹²

Upon return Lithuanian women have no social safety net or rehabilitation assistance that will help them to get their life back together.⁹³ The women, who are often terrified that their traffickers will find them and hurt them or their family rarely turn to the police for protection. The reason is not only the lack of adequate witness and victim protection according to the Lithuanian Law. Trafficked victims and their families are often so intimidated by the trafficker and his criminal group that they choose not to report. There is also widespread distrust of the police because of problems with corruption in Lithuania. The women are not sure whose side the police are on.⁹⁴ According to IHF victim reports show that the policemen and local authorities in Lithuania are often protecting traffickers and their mediators and profit from trafficking themselves.⁹⁵ The sale of and trafficking in women seem to be very well organised in Lithuania.⁹⁶

Trafficking is prohibited⁹⁷ but because of women's reluctance to report cases, corruption and insufficient responses to the problem from the Government the law is not very effective.⁹⁸ The Ministry of Interior is reluctant to see the scope of the problem and reduces it to a problem between parents and their children. The result is that state efforts are just preventive and does not help returned victims.⁹⁹

⁹⁰ Sanna Björling, Foundation of Women's Forum/ Stiftelsen Kvinnoforum, "Prostitution is the only alternative"

⁹¹ See the USA report on Estonia.

⁹² Foundation of Women's Forum "Trafficking in Women for the Purpose of Sexual Exploitation", page 17.

⁹³ Ibid. page 18-19 and Department of State Human Rights Reports for 2000, released by the U.S. Department of State in February 2001, the United States Delegation to the U.N Commission on Human Rights, Lithuania, Section 6 Workers Rights under F. Trafficking in persons Available at: <<http://www.humanrights-usa.net/reports/lithuania.html>> (last updated 6 March 2001) [henceforth called the USA report on Lithuania]

⁹⁴ The USA report on Lithuania. This was confirmed by the Lithuanian representative at an international conference "Men's violence against women with the focus on prostitution" in Stockholm, Sweden, February 4 2001. She said that the since organised crime is behind trafficking the women are too scared to testify. A summary of the conference is available at: <http://www.info@roks.se> (last visited February 7 2001)

⁹⁵ A Form of Slavery page 40-41

⁹⁶ Committee on the Elimination of Discrimination Against women, CEDAW/C/LTU/1, Initial report of States parties, Lithuania, 16/06/2000 Part I, page 8

⁹⁷ See art 131(3) Lithuanian Criminal Code.

⁹⁸ A Form of Slavery page 40-41 and the USA report on Lithuania.

⁹⁹ Committee on the Elimination of Discrimination Against women, CEDAW/C/LTU/1, Initial report of States parties, Lithuania, 16/06/2000 Part I, page 9. See also A Form of Slavery page 41-42.

4.4 Bulgaria

This chapter is mostly based on information from Animus Association Foundation.¹⁰⁰

Bulgarian women arrive with no money or residence terrified that their former traffickers or his contacts in Bulgaria will find her. She has probably been told several times that disobedience on her part will have very bad implications on her or her family.¹⁰¹ There is no state sponsored program to protect and help victims of trafficking and only a few NGOs working with trafficking. Social services are only available if the woman has previous work experience.¹⁰²

Prostitution in Bulgaria is well organised and closely connected to organised crime. Procurers usually have more than one woman who they constantly watch and control. Trading in women between pimps is common even within the country.¹⁰³ Bulgaria is not only a country of origin for trafficked women but also a country of transit or destination for women from Ukraine, Lithuania and Russia.¹⁰⁴ Another characteristic of prostitution in Bulgaria is violence. Each act of disobedience from the women is severely punished.¹⁰⁵

Trafficking is not a special crime in Bulgaria but procuring¹⁰⁶ and the other acts connected with trafficking are illegal. Despite this no traffickers has been prosecuted and pimps go unpunished. If they are arrested they are mostly released within 24 hours. According to Kojouharova from Animus Association Foundation this is mostly due to corruption and bribery. This is confirmed in the

¹⁰⁰ The Animus Association Foundation is a NGO who has worked with rehabilitation of women suffering of violence since 1996. Animus Association is the Bulgarian partner of the international project "La Strada", a program for the prevention of trafficking in women in Central and Eastern Europe. The program is performed in the Netherlands, the Czech Republic, Ukraine, Poland and Bulgaria and is financed by the EU and the Government of the Netherlands.

¹⁰¹ Information from Nadia Kojouharova, psychotherapist and member of the from Animus Association Foundation. Published in an article called "Trafficking in women in Bulgaria: The starting point of La Strada-Bulgaria" [henceforth called Kojouharova] page 8. See also Rossitza Pencheva Filipova, Legal Study on the Combat of Trafficking in Women for the Purpose of Forced Prostitution in Bulgaria, published by the Ludwig Boltzman Institute of Human Rights in Vienna, Sofia March 2000 [henceforth called Filipova] page 21

¹⁰² Prostitution is not illegal in Bulgaria but neither considered work experience. See Kojouharova and Department of State Human Rights Reports for 2000 released by the U.S. Department of State in February 2001, the United States Delegation to the U.N Commission on Human Rights, Bulgaria, Section 6 Workers Rights under F. Trafficking in persons, Available at <<http://www.humanrights-usa.net/reports/bulgaria.html>> (updated 6 March 2001) [henceforth called the USA report on Bulgaria]

¹⁰³ Committee on the Elimination of Discrimination Against women, CEDAW/C/BGR/2-3, Second and third periodic reports, the Republic of Bulgaria, 3/11/1994 page 16 para 61. Kojouharova page 4-5 and the USA report on Bulgaria

¹⁰⁴ In Bulgaria is link between prostitution and trafficking very clear and shows that trafficking can not be combated without addressing prostitution. It is prostitution that creates trafficking not the other way around.

¹⁰⁵ Battering, hunger and sexual violence is used. See Kojouharova page 7 and the USA report on Bulgaria.

¹⁰⁶ See Section 155/1 Bulgarian Criminal Code.

USA report on Bulgaria where some judges have stated that they fear reprisals from organised crime figures. The USA report on Bulgaria also point at involvement of local police and Filipova states that trafficking is facilitated by the crime bribery.¹⁰⁷

La Strada in the Czech Republic are concerned about the Czech Republic policy to expel women who are trafficked from Ukraine, Lithuania, Russia and Bulgaria since they consider that there is great risk that the organised criminal groups are waiting for the women upon return. Ready to traffic them to another country or to the same country under a different identity.¹⁰⁸

4.5 The Czech Republic

Upon return women from the Czech Republic are left with no financial resources, no accommodation and no protection. The Czech law has no provisions for social security of trafficked women so not even minimal support is given by the state.¹⁰⁹

La Strada in the Czech Republic, the one NGO specially working with trafficking in the Czech Republic, are trying to provide the victims with the basic needs but one NGO can not fill the gap of state failure to protect the victims.¹¹⁰

Trafficking for the purpose of sexual exploitation is a crime in the Czech Republic¹¹¹, but opinions differ on how effective the regulation is. The effectiveness is largely dependent on victims reporting offences to the police and being willing to witness against their perpetrators. The Czech Republic have very limited protection for women who would report their case to the police. As a witness there is a possibility for the women, who very often is threatened to death by her traffickers, to ask the prosecutor to testify anonymously. There is otherwise no protection for the victims either during investigations, proceedings or in the future. Probably because of lack of protection witnesses frequently change their testimonies during the investigations and in court.¹¹² Regarding compensation for pain and physical injury this is regulated in a thirty years old law that entitles the women to very low compensation.¹¹³ Since the women have nothing to gain the victims of trafficking seldom turn to the police for protection. Reporting to the police would mean stigmatisation and social condemnation for being prostituted and it would place the woman at high risks of revenge from her traffickers and of being re trafficked to pay of the rest of her "debt".¹¹⁴

¹⁰⁷ Kojouharova page 5-6 and Filipova page 15.

¹⁰⁸ Harald Scheu and Stanislava Hybnerová, Legal Study on the Combat of Trafficking in Women for the Purpose of Forces Prostitution in the Czech Republic, published by the Ludwig Boltzman Institute of Human Rights in Vienna, Prague September 1999, [henceforth called Scheu], page 25

¹⁰⁹ A Form of Slavery page 17 and 19. See also Scheu page 19

¹¹⁰ A Form of Slavery page 19

¹¹¹ See art 246 the Czech Republic Penal Code.

¹¹² In the event of a trial the woman has no right get legal representation unless she pays for it herself, which she off course has no financial possibility to do. See the Czech Republic Penal Code art 50 and also Scheu page 20.

¹¹³ Law No 32/1956 Coll. See Scheu page 20.

¹¹⁴ Scheu page 7 and A Form of Slavery page 18.

Prostitution in the Czech Republic is a big and growing problem and is to a large extent controlled by criminal groups involved in the international prostitution market. The Czech Republic is a country both of origin, transit and destination. Czech, Bulgarian, Ukrainian, Russian and Lithuanian women are bought, sold and trafficked and criminal groups make huge profits. This is confirmed in an alarming study from the Ministry of Interior.¹¹⁵ Despite this the Government in the Czech Republic pay very little attention to the problem of trafficking. Prostitution and trafficking are neglected areas in the Czech Republic.¹¹⁶ Victims are thought of as partly responsible for what has happened to them because it was their own decision to trust a trafficker and go abroad, some of them aware that they were going to work as prostitutes.¹¹⁷

4.6 Other relevant countries

The prostitution and trafficking market is global, even though women from certain areas are predominantly trafficked to certain regions and countries.¹¹⁸ Still almost all Eastern European countries are relevant for trafficking in Sweden and if one considers the risk of re-trafficking upon return even more countries would have to be considered. It is out of the scope of this thesis to make a complete mapping of the situation in all potential countries but something will be said about Russia, Ukraine and Poland.

The prostitution market has shown to be flexible and change with the rest of the society. New technology made the market more mobile with increased use of the Internet and mobile phones, and routes change with political changes in migration policy. Because the routes used by criminal organisations vary and constantly change it is very difficult to give new and reliable information.¹¹⁹ What seem to

¹¹⁵ A study from the Ministry of Interior confirms that prostitution has grown enormously during the last years, that it is linked to organised crime and that it generates big amounts of money. See Scheu page 7 and 23. Also TCCECA Background study, page 4-7. See also ODCCP Trafficking in Human Beings - The Case of the Czech Republic, 2000, Available at http://www.odccp.org/trafficking_projects_czech_republic.html (last visited 20 June 2001) [henceforth called The Case of the Czech Republic] and Department of State Human Rights Reports for 2000 released by the U.S. Department of State in February 2001, the United States Delegation to the U.N Commission on Human Rights, the Czech Republic, Section 6 Workers Rights under F. Trafficking in persons, Available at <<http://www.humanrights-usa.net/reports/czechrepublic.html>> (updated 6 March 2001) [henceforth called the USA report of the Czech Republic]

¹¹⁶ Violence against women is generally not a priority in the Czech Republic.

¹¹⁷ The media often presents prostitution as a profitable work and only rarely presents trafficking as the cruel and serious human rights violation it is. Scheu page 7-8 and 20.

¹¹⁸ Trafficking in Migrants Bulletin No 23 April 2001, "New IOM Figures on the Global Scale of Trafficking" See also STV, Country Report: Netherlands/Central Europe, page 2

¹¹⁹ Something can be said though. The so-called northern route goes through Russia and the Baltic States to the Nordic countries and then south to the European countries. There are other routes called the Balkan route, and further south-east routes through Ukraine, the Czech Republic and Slovakia. There also seem to be routes through Bulgaria, Romania and Hungary to get to Austria and Germany. See Budapest Group of the International Centre for Migration Policy Development (IGO), The relationship between organised crime and trafficking in aliens, page 37-39.

decide what route to take is how easy it is to get across borders, legally or illegally.

Sweden became a party to the Convention on the Application of the Schengen Agreement¹²⁰ (henceforth called Schengen Convention) which means the abolishing of border controls between the State Parties. This is likely to have an impact on the trafficking market in Sweden, if the problem is not effectively addressed before. Just as Sweden experienced an increase of women from the Baltic States when visa requirements were abolished there might be an increase in women from other countries that have been trafficked across borders of another Schengen country.¹²¹ Finland for example, who is a State Party to the Schengen Convention has problems with hundreds of Russian women who are transported in busses to northern Finland on weekends.¹²² With no border controls there is a risk that these busses will equally come to Sweden. According to the police in northern Sweden, Norrbotten, are there indications that this has already started.¹²³

Trafficking in Russia is a growing problem and facilitated by organised criminal groups probably involving the Russian Mafia.¹²⁴ Indeed trafficking in women is considered to be the most profitable business for organised crime in Russia.¹²⁵ The Government is aware of the problem but show no interest in dealing with it. Corruption among local police and authorities is common and returned victims of trafficking are not provided with any protection.¹²⁶ Russian organised crime

¹²⁰ The 1990 Convention on the Application of the Schengen Agreement of 14 June 1985 relating to the Gradual Suppression of Controls and Common Frontiers, between the Governments of the States Members of the Benelux Economic Union, the Federal Republic of Germany and the French Republic. Entered into force in Sweden 25 March 2001. See Agreement on the Accession of the Kingdom of Sweden to the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders signed at Schengen on 19 June 1990, Official Journal L 239 , 22/09/2000 p. 011 - 012

¹²¹ KUT 2001:1 page 30

¹²² KUT 1999:16 page 18 and KUT 2000:1 page 9

¹²³ KUT 2001:1 page 25. In organised crime, like any other "business", is the goal to maximise profit, which can be done by expanding the market. See also Leif Svanberg, "Norrbottniska hallickar bidrar till prostitutionens spridning" (Pimps from northern Sweden contribute to the spreading of prostitution), Haparandabladet, 27 July 2001.

¹²⁴ Department of State Human Rights Reports for 2000 released by the U.S. Department of State in February 2001, the United States Delegation to the U.N Commission on Human Rights, Russia, Section 6 Workers Rights under F. Trafficking in persons, Available at <<http://www.humanrights-usa.net/reports/russia.html>> (updated 6 March 2001) [henceforth called the USA report on Russia]; KUT 2000:1 page 10, The relationship between organised crime and trafficking in aliens" , prepared by the Budapest Group of the International Centre for Migration Policy Development (IGO), page 41. See also Vanessa von Struensee (law attorney) "Globalized, Wired, Sex Trafficking In Women And Children" published in E law - Murdoch University Electronic Journal of Law, Vol 7, No 2, June 2000. Available at: <http://www.murdoch.edu.au/elaw/issues/v7n2/struensee72_text.html> [henceforth called Struensee]

¹²⁵ See United Nations Office for Drug Control and Crime Prevention, Available at: <<http://www.uncjin.org/CICP/cicp.html>> (last visited 4 May 2001). See also Struensee.

¹²⁶ Very few women file complaints or testify against perpetrators and those who do might risk their lives. The USA report on Russia and Struensee.

operates internationally, trafficking not only Russian women but also women from the Baltic States.¹²⁷ The Russian Mafia seems to have contacts with criminal groups in other countries like Ukraine.¹²⁸

Ukraine is not only a significant sending country but also a transit country for Russian trafficking. The Ukrainian Ministry of Interior estimated in 1998 that over 400 000 Ukrainian women had been trafficked in the past decade to Europe and to the rest of the world.¹²⁹ There are reports from the south of Sweden, Skåne, that Ukrainian women have been seen in prostitution, so some of them might be trafficked to Sweden. Trafficking in Ukraine is gradually replacing traditional epicentres of global trafficking like Thailand and the Philippines. Organised criminal groups facilitate trafficking. The problem is becoming a higher priority for the Government but due to lack of funds and corruption there is no effective policy to combat trafficking. No governmental assistance is given to the returned women.¹³⁰

According to a report by the U.S. Department of State in February 2001 Poland is another country that is both a sending, transit and even a country of destination. Bulgarian, Ukrainian and Latvian women are trafficked to Poland, for a few months and then trafficked further to the west. The trafficking market in Poland is very violent and increasingly organised. Women who do not serve a minimum number of clients are threatened and those who resist are beaten or raped.¹³¹

Women who witness against traffickers belonging to organised crime would according to the Polish police be in great danger.¹³²

The Polish policy is to deport foreign women victims who are trafficked to Poland. This is according to a police source not very effective. There are cases where the same women have been arrested and deported several times under different identities.

To conclude I can say that at first glance deportation might seem as a good solution to trafficking, but the reality is more complicated. Deportation means

¹²⁷ Struensee

¹²⁸ Gillian Caldwell, Steven Galster, and Nadia Steinzor of the Global Survival Network, *Crime & Servitude: An Exposé of the Traffic in Women for Prostitution from the Newly Independent States*, 1997, Chapter 5 - "The Mafiya Connection"

¹²⁹ NGOs claimed that the number was higher. Trafficking in Migrants Bulletin No 23 April 2001, "New IOM Figures on the Global Scale of Trafficking"

¹³⁰ La Strada Ukraine offers some limited support but lack funds. Department of State Human Rights Reports for 2000 released by the U.S. Department of State in February 2001, the United States Delegation to the U.N Commission on Human Rights, Ukraine, Section 6 Workers Rights under F. Trafficking in persons, Available at <<http://www.humanrights-usa.net/reports/ukraine.html>> (updated 6 March 2001) [henceforth called the USA report on Ukraine]. See also Minnesota Advocates for Human Rights, *Trafficking in Women: Moldova and Ukraine*, December 2000, especially page 29. Available at:<<http://www.mnadvocates.org/women/publications/TraffickingReport.pdf>>

¹³¹ Department of State Human Rights Reports for 2000 released by the U.S. Department of State in February 2001, the United States Delegation to the U.N Commission on Human Rights, Poland, Section 6 Workers Rights under F. Trafficking in persons, Available at <<http://www.humanrights-usa.net/reports/poland.html>> (updated 6 March 2001) There are even reports of women who have been killed. See also The USA report on Ukraine.

¹³² KUT 2000:1 page 22-23

returning home indebted with no money and probably very limited chances of getting a job.¹³³ It is highly questionable whether deportation will help the women to get away from her perpetrators. In many cases women who return find their traffickers waiting for them at home ready to traffic them again. Refusal is often met with very brutal methods. Turning to the police for protection is not always an alternative either because of corruption or state inability to deal with organised crime. The governments in Eastern Europe often show lack of interest to combat trafficking and help victims.¹³⁴

¹³³ See Ch. 2.1.1 "Push-factors" in the sending countries "

¹³⁴ See Ch. 4 The situation the women face upon return See also Lise Bergh, the secretary of state for Margareta Winberg's, the Swedish Minister of Equality. At an international conference "Men's violence against women with the focus on prostitution" in Stockholm, Sweden, February 4 2001 she talked about the indifference the Governments in Eastern Europe showed. They did not consider trafficking in women as an important question but rather wanted to discuss privatisation's of coal mines. A summary of the conference is available at: <http://www.info@roks.se> (last visited February 7 2001). See also IHRIG "Training Manual" page 130.

5 Analysis - International obligations

Trafficking violates a number of the victim's human rights. Sweden has ratified a number of international conventions undertaking the responsibility for protecting these rights.¹³⁵ One can divide the obligations concerning trafficking in three groups:

1. To prevent trafficking. By this I mean to address the root causes and facilitating factors of trafficking.
2. To investigate and prosecute traffickers. States have an obligation to punish those who violate the human rights of others.
3. To protect the human rights of the trafficked persons, meaning to protect victims and provide them with an effective remedy.

My thesis is mainly concerned with the group three, but the other groups are important and they all work together and can not be taken out of that context and addressed separately.¹³⁶

I will start by analysing relevant international human rights instruments. I have preferred to present binding instruments over non-binding unless there are particular reasons for doing otherwise. Regarding the scope of basic human rights, such as prohibition of torture, non-refoulement, slavery and right to a fair trial, which are found in both ICCPR and ECHR, the substance of the articles are mainly discussed with reference to ECHR, which is the first instrument analysed. The ECHR has the status of law in Sweden, which makes it directly applicable, and has extensive case law regarding the Convention rights.¹³⁷ A more thorough study on the differences between ICCPR and ECHR would be out of the scope of this thesis.

The prohibition of non-refoulement will be discussed both with reference to ECHR, RC and ICCPR, because these articles differ a bit in scope.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (henceforth called CAT) will not be discussed because its definition torture require state involvement even though the state does not have to be the direct perpetrator.¹³⁸ My conclusion is that it does not cover trafficking. Since ECHR give equal protection I find this unnecessary to investigate the scope of the Convention and its definition of torture further.

¹³⁵ There are no reservations relevant for this thesis.

¹³⁶ Therefore Criminal Law instruments will be briefly analysed in chapter 5.2 - International criminal law documents concerning trafficking

¹³⁷ See SFS 1994:1219

¹³⁸ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 U.N.T.S. 85. See art 1 that require that the act of torture to be committed [...] *by or at the instigation of or with the consent or acquiescence of a public official or another person acting in an official capacity* [...]

The Slavery Convention from 1926 and the Supplementary Convention on Abolition of Slavery is not analysed even though it probably is applicable to trafficking in women.¹³⁹ The reason for this is that these conventions merely obliges State Parties to abolish slavery and therefore do not add anything in terms of enhanced protection since both prohibits slavery. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others is not analysed since Sweden is not a State Party.¹⁴⁰

5.1 International human rights instruments

Start with general human rights instruments and continue with more specialised instruments.

5.1.1 European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the protection of Human Rights and Fundamental Freedoms¹⁴¹ is a multilateral regional treaty and binding upon Sweden. The European Court of Human Rights (henceforth called ECtHR) is the supervising organ whose judgements are final and binding upon the parties.¹⁴²

5.1.1.1 The scope of application

The Conventions art 1 establishes that the state has responsibility to "everyone within its jurisdiction". The victim does neither have to be a citizen of the country concerned nor of any other country of the Council of Europe.¹⁴³ Jurisdiction not restricted to territory but certainly applies to individuals within the territory. That means that the Convention is applicable to both legal and illegal, documented and undocumented migrants.¹⁴⁴

5.1.1.2 State obligation

The primary aim of the Convention is to protect individuals against actions by the state, and not actions between individuals. This does not mean that the state only have "negative obligations" meaning that the state shall *refrain from* certain acts. The state also has "positive obligations" to take action to ensure that the rights and freedoms granted in the ECHR. How far these positive obligations go is not yet established and depends on the right in question. According to case law the main

¹³⁹ Slavery Convention 1926, 60 L.N.T.S. 253 and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 226 U.N.T.S. 3, entered into force 30 April 1957.

¹⁴⁰ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271, 2 December 1949, entered into force 25 July 1951.

¹⁴¹ The European Convention for the protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No 5

¹⁴² ECHR art 52-53

¹⁴³ Mole Nuala, Luke Clements and Alan Simmons, *European Human Rights: Taking a Case Under The Convention*, Second edition, 1999 page 14, [henceforth called Mole]

¹⁴⁴ Hans Danelius, *Mänskliga rättigheter i europeisk praxis - En kommentar till Europakonventionen om de mänskliga rättigheterna*, 1997, page 47, [henceforth called Danelius] and Mole page 14.

obligation of the states seem to be to provide fundamental protection for individuals against violations and to provide effective remedies. The state shall prohibit, by law, private actions interfering with ECHR and if necessary investigate, prosecute and punish those breaking the law.¹⁴⁵

5.1.1.3 Protected rights

There is no article in the ECHR that deals explicitly with trafficking and as a consequence there is no definition of the act¹⁴⁶. The purpose of this chapter is, even so, to analyse what protection the ECHR offers victims of trafficking.

5.1.1.3.1 Art 3 - The prohibition against torture, inhuman and degrading treatment

Article 3 entails a prohibition against torture and inhuman or degrading treatment or punishment, but leaves the terms undefined. Case law establishes the meaning of the terms in practise. It is hard to draw a distinct line between "torture" and "inhuman or degrading treatment or punishment", but "torture" implicates involvement or intent on behalf of the state. The treatment and abuse trafficked women are exposed to emanates from private individuals, the traffickers, and not from the state. Therefore this analysis has its basis in the terms "inhuman or degrading treatment or punishment". Even if the traffickers are the direct perpetrators the state has an obligation to protect human beings under its jurisdiction from treatment contrary to art 3.

The first step will be to analyse if the treatment the women are exposed to amounts to the level of severity required by art 3. The abuse varies from case to case. Some women are aware of that they have to work in prostitution but deceived concerning the working conditions, others are forced to prostitution. Since prostitution as such is not considered a human rights violation this practise taken alone will probably not be considered contrary to art 3. Trafficked women are mostly subjected to other forms of abuses such as physical and sexual violence and crimes against their freedom of movement. To determine whether this treatment taken together amount to torture or inhuman or degrading treatment I have looked at case law.

In recent case law child abuse has been classified as treatment contrary to art 3. The acts involved beating with a garden cane, not giving the child enough food and clothes, locking the child out of the house and other forms of physical abuse. The ECtHR said that art 3 require states to take measures to provide effective protection to children and "other vulnerable persons" and to take reasonable steps

¹⁴⁵ Danelius page 63. See also e.g. Case of A. V. The United Kingdom, European Court of Human Rights, 23 September 1998, Reports 1998-VI No 90 page 2692. The case is about child abuse. In para 22 the Court says that art 3 read in conjunction with art 1 require states to secure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment *including* such ill-treatment administrated by *private individuals* [my italics]. The government in the United Kingdom did not contest this responsibility.

¹⁴⁶ Although the Parliament Assembly of the Council of Europe have agreed on a definition of trafficking and forced prostitution. See Recommendation 1325 (1997) of the Parliamentary Assembly on traffic in women and forced prostitution in Council of Europe member states, 23 April 1997

to prevent such ill-treatment which authorities had or ought to have knowledge of.¹⁴⁷ I think there are similarities between the situation trafficked women and abused children are exposed to. Children are vulnerable and dependent upon their parents. Trafficked women are also vulnerable. They are in a foreign country with no identity papers, no knowledge of the language, constantly watched and punished severely for disobedience. Similarly they are dependent on their traffickers for food and shelter. I would argue that the treatment the women are exposed to amounts to treatment contrary to art 3. This means that trafficked women in Sweden has a right not to be exposed to this kind of treatment and the Swedish State has an corresponding obligation to protect the women and provide an effective remedy against their perpetrators. Trafficking must be prohibited, violations investigated and traffickers prosecuted and punished.

5.1.1.3.1.1 *Non-refoulement*

The Swedish practise once the women are detected is immediate departure. The ECHR does not prohibit expulsion of aliens. But if there are substantial grounds for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country, expulsion is contrary to art 3.¹⁴⁸

In *H.L.R. v. France* the risk of treatment contrary to art 3 emanated from threats of reprisals from private subjects, drug traffickers. The Court said:

*"Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."*¹⁴⁹

The threshold for showing substantial grounds is high. To show a general situation of violence in the receiving country is not enough. The state must also be unable to provide protection to the individual. Stemming from what I have written previous about the situation awaiting the women upon return there is a risk that Sweden violates art 3 when automatically sending the women back without even considering the situation facing them. This is true especially regarding the countries such as Lithuania, Russia, Bulgaria, the Czech Republic, Poland and Ukraine where there are strong indicators that the traffickers are waiting for the women by

¹⁴⁷ *A. v. the United Kingdom* (see footnote 145) para 22- 24; reaffirmed in *Z and others v. the United Kingdom*, European Court of Human Rights, 10/05/2001, para 70- 75.

¹⁴⁸ See the *Soering v. the United Kingdom*, European Court of Human Rights, 7 July 1989, Series A no. 161, page 35, paras. 90-91; the *Cruz Varas and Others v. Sweden*, European Court of Human Rights, 20 March 1991, Series A no. 201, page 28, paras. 69-70; the *Vilvarajah and Others*, European Court of Human Rights, 30 October 1991, Series A no 215, page 34, para. 103; the *Chahal v. the United Kingdom*, European Court of Human Rights, 15 November 1996, Reports of Judgments and Decisions 1996-V, page 1853, paras. 73-74, and page 1855, para. 80; and *H.L.R. v. France*, European Court of Human Rights, Reports 1997-III, page 745, 29/04/1997, para 34.

¹⁴⁹ *H.L.R. v. France* para 40

the boarder ready to traffic them to another country and where the state show inability or unwillingness to deal with the problem.¹⁵⁰

Humanitarian reasons have also been used to prevent states from expelling aliens. In *D v United Kingdom* a prisoner convicted for drug trafficking had served his punishment and was to be sent back to his country of origin, St Kitts. He was in the final stages of AIDS and had no prospect of medical care or family support if he were expelled.¹⁵¹ The Court stated:

*[...] given the fundamental importance of Article 3 (art. 3) in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art. 3). To limit the application of Article 3 (art. 3) in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.*¹⁵²

The exceptional circumstances lead to this conclusion. The Court emphasised that this judgement could not be relied on in general to claim entitlement to benefit from medical, social or other forms of assistance in the expelling state.¹⁵³ This later statement has recently been confirmed. In *Bensaid v. the United Kingdom*¹⁵⁴ a man who suffered from schizophrenia were to be deported to Algeria. Medical treatment was available there but under much less favourable conditions. The Court stated that this was not decisive and continued:

*The Court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of the D. case (cited above) where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts.*¹⁵⁵ [my emphasis]

¹⁵⁰ See chapter 4

¹⁵¹ *D. v. the United Kingdom*, European Court of Human Rights, Reports 1997-III, 02/05/1997.

¹⁵² *Ibid.* para 49

¹⁵³ *Ibid.* para 53 -54

¹⁵⁴ *Bensaid v. the United Kingdom*, European Court of Human Rights, Application number 00044599/98, 06/02/2001. This judgment is not final. Pursuant to Article 43 § 1 of the Convention, any party to the case may, within three months from the date of the judgement of a Chamber, request that the case be referred to the Grand Chamber. The judgement of a Chamber becomes final in accordance with the provisions of Article 44 § 2 of the Convention.

¹⁵⁵ *Ibid.* para 40

The threshold is high. Regarding trafficking cases this means that the lack of appropriate rehabilitation facilities in the women's country of origin will not be enough. Neither would the fact that they would get better help here in Sweden. Even if they were HIV positive this may not be enough unless they had developed AIDS and would get no medical assistance in their home country. This leads to the conclusion that to prevent expulsion one has to show that the situation awaiting the women is one where the traffickers are waiting for them and where the government can not provide appropriate protection. Given the facts in previous chapter 4 this risk has to be investigated before deportation.

I want to point out that this prohibition against non-refoulement entails no right to residence or asylum. But if Sweden can not send the woman back to her country of origin it might be difficult to find another safe country that would accept the women. The fact that trafficking is a crime that operates internationally further complicates it. Sweden would have to find another safe country to send her to.¹⁵⁶

5.1.1.3.2 Art 4 - The prohibition against slavery

Slavery and art 4 has not been defined by the ECtHR. It is likely though that the ECtHR would follow the international opinion and consider trafficking a contemporary form of slavery.¹⁵⁷ This means that Sweden has to not only refrain from committing trafficking, it also has an obligation to prevent private individuals from subjecting other individuals to trafficking, punish those who do, and protect victims and provide them with remedies.¹⁵⁸

It is possible that this art 4, considering its absolute character, entails a prohibition against non-refoulement. I have not seen this argument invoked in practise but one could argue that it would be equally important to protect people from slavery as it is to protect people from torture and inhuman or degrading treatment. There is structurally nothing in the ECHR that hinder such an interpretation and the ECtHR has not stated that the argumentation leading to the prohibition of deportation is limited to art 3.¹⁵⁹ In the event of a woman facing a real risk of re-trafficking it is possible that it would not only be contrary to art 3 to send her back but that it would also violate art 4.

¹⁵⁶ See also the Swedish legislation that affords protection to persons that risk treatment contrary to art 3 in chapter 6.1.4.2

¹⁵⁷ See e.g. Fact Sheet No.14, Contemporary forms of Slavery published by the United Nations Centre for Human Rights at Geneva, Switzerland. It states that "*The word slavery today covers a variety of human rights violations. In addition to traditional slavery and slave trade, these abuses include[...] the traffic in persons and the sale of human organs, the exploitation of prostitution [...]*" See also European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur Thierry Cornillet, "Draft Report on the situation as regards fundamental rights in the European Union (2000) (2231/2000(INI), published 9 April 2001. This report places trafficking in human being under the prohibition of slavery.

¹⁵⁸ See chapter 5.1.1.2 - State obligation and Van der Mussle v Belgium, European Court of Human Rights, 1983, Series A, no 70, para 40

¹⁵⁹ Gregor Noll, at a lecture in Refugee Law at the Raoul Wallenberg Institute, 12 February 2001.

5.1.1.3.3 Art 5 - The right to liberty and security

Art 5 states that everyone has a right to liberty and security. Even though the article clearly states liberty *and* security the ECtHR has not given the term security any independent meaning. Art 5 seems to only protect against arbitrary arrests and detentions.¹⁶⁰

5.1.1.3.4 Art 6 - The right to a fair trial

Art 6.1 gives basic guarantees in both criminal and civil proceedings and states that everyone is entitled to a fair trial in determination of one's civil rights and obligations. My purpose is to investigate what right to a trial for compensation art 6 gives victims of trafficking.

Art 6 gives an independent right to a fair trial even the right itself, the right to compensation in this case, is not covered by the ECHR.¹⁶¹ Even so, art 6 is not applicable to any claim a person might want to bring before a court. There must be a genuine dispute of a serious nature concerning a civil right that has its basis in national law.¹⁶² The term civil right has an autonomous meaning in the ECHR, independent of national classifications of private or public law.¹⁶³ The ECtHR has not given a precise definition but it is sufficient that the outcome of the proceedings is "decisive for private rights and obligations".¹⁶⁴ According to case law the right to compensation for criminal injuries is a civil right as long as it is provided for by the national law and not given purely on a discretionary basis.¹⁶⁵ The right to a fair trial entails a right to access to a court. In an early decision, *Golder v. The United Kingdom*¹⁶⁶, the ECtHR makes clear that the right to access is inherent in and necessary for the right to fair trial. The right to access belongs to everyone within the State's jurisdiction, which means that at least as long as the women are on Swedish territory they have this right.¹⁶⁷ This will probably not affect the State Parties' right to send home illegal aliens though. The prosecutor, who can present their private claims, can protect their right to compensation.¹⁶⁸

¹⁶⁰ Danelius page 90-121.

¹⁶¹ Art 13 ECHR gives everyone whose rights and freedoms have been violated a right to an effective remedy before a national authority. The article does not require that a victim has to have access to a court and the article is considered subsidiary to art 6.

¹⁶² Danelius page 125

¹⁶³ It is not the same as a right covered by private law. Clayton page 626

¹⁶⁴ *H v France*, European Court of Human Rights, 1989, Series A, no. 162-A para 47

¹⁶⁵ *Masson and van Zon v Netherlands*, European Court of Human Rights, 1985, Series A, no. 327-A para 46-52

¹⁶⁶ *Golder v. the United Kingdom*, European Court of Human Rights, 1975, Series A, no. 18 para 35. The ECtHR said:

"It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."

¹⁶⁷ See art 1 ECHR

¹⁶⁸ A problem though is that this Swedish law is probably not enforceable in the woman's home country.

5.1.1.3.5 Art 13 - The right to an effective remedy

Violations of the ECHR shall first and foremost be dealt with on the national level. Everyone whose rights or freedoms have been violated has a right to an effective remedy before a national authority. The ECHR do not require a judicial procedure but the remedy must be effective, meaning that the authority handling the complaint must have competence to decide whether or not the ECHR has been violated and to correct an eventual violation.¹⁶⁹

In *Chahal v. The United Kingdom*, concerning an Indian citizens expulsion, the ECtHR concluded that the British authorities had just taken consideration to national security and not analysed whether or not the complainant had a real risk of being exposed to treatment contrary to art 3 upon return.¹⁷⁰ The remedy was not considered to be effective. This conclusion is interesting regarding women trafficked to Sweden. The Swedish practice of immediate deportation means that no consideration are taken to the fact that these women may risk treatment contrary to art 3. Unacceptable according to the ECHR. The woman must have a legal possibility to an effective remedy against expulsion and a factual possibility to use the remedy.¹⁷¹

5.1.1.3.6 The right to compensation

The right to compensation is not clearly established under international law. Art 13 gives everyone whose Convention rights have been violated a right to an effective remedy. If internal law fails to grant full reparation, art 50 ECHR gives ECtHR authority to grant the *injured party just satisfaction*. The injured party is not considered to be the other state parties to the ECHR, but the individual victim.¹⁷² The ECtHR has awarded compensation in numerous of cases, not only in cases where the state is the direct perpetrator, but also where the state has failed to ensure the rights in ECHR. In *A v. the United Kingdom*, a case concerning child abuse, the perpetrator was the boy's stepfather. The ECtHR said that art 1 read in conjunction with art 3 required states to secure that individuals within their jurisdiction were not subjected to degrading treatment *including* such ill-treatment by *private individuals*. The English law protected parents if the punishment were moderate and reasonable. This was not considered to give

¹⁶⁹ Danelius 300-302

¹⁷⁰ See *Chahal v. the United Kingdom*.

¹⁷¹ Danelius page 300-302 Claims of compensation for violations of human rights have already been analysed since art 6, the right to a fair trial for determination of ones civil rights, afford a more extensive protection and is considered to be *lex specialis* to art 13.

¹⁷² In an early case the European Commission of Human Rights stated: "*The obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.*" See *Austria v. Italy*, Yearbook of the European Convention of Human Rights 1961, page 116 ff. (at page 140). See also Art 25 ECHR that give persons claiming to be victims of a violation the right to complain to the Commission.

adequate protection and the *government* were required to amend the law and pay 10 000 GBP in damages to the boy.¹⁷³

My conclusion is that the victims of human rights violations have a right to compensation. If the direct perpetrator is not the state then he/she is primarily responsible for paying damages. But if the State does not provide the necessary facilities, i.e. access to a fair trial and adequate laws concerning compensation then the state can be responsible for paying compensation to the victim.

Regarding trafficking this means that even if traffickers are the direct perpetrators, violating art 3 and 4, causing the physical suffering the Swedish State has a responsibility to protect the women and to help her obtaining compensation in case of a violation.

Regarding violations of non-refoulement the Swedish State is the perpetrator and therefore liable for compensation if art 3 has been violated.

5.1.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights¹⁷⁴ is a global multilateral human rights instrument which together with the International Covenant on Economic, Social and Cultural Rights (henceforth called ICESCR)¹⁷⁵ represent the most authoritative universal minimum standard of present international human rights law.

The Human Rights Committee (henceforth called HRC) is the supervisory organ. The Committee has the authority to examine state reports, give General Comments on the interpretation of the ICCPR and to consider complaints of alleged violations between states.¹⁷⁶ The HRC can also consider communications from individuals against State Parties that has ratified the Optional Protocol.¹⁷⁷ Sweden has ratified both the ICCPR and its Protocol.¹⁷⁸

5.1.2.1 Scope of application

Each State Party has undertaken to respect and ensure the ICCPR to *all individuals* within its territory *and* subject to its jurisdiction.¹⁷⁹ The HRC has given a General Comment on the position of aliens under the Covenant. It states that in general the rights protected by the ICCPR apply to everyone, irrespective

¹⁷³ See footnote 147 See also *H.L.R v. France*, page 758 para 40 and *Costello-Roberts v. the United Kingdom*, European Court of Human Rights, 25 March 1993 Series A, No 247-C, page 58 para 27.

¹⁷⁴ The International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S 171 Into force in Sweden 23 March 1976.

¹⁷⁵ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 [henceforth called ICESCR]

¹⁷⁶ Art 40 and 41 ICCPR. Interstate complaints require declarations from the State Parties in question that they recognise the HRC's competence.

¹⁷⁷ Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S 302. Into force 23 March 1976.

¹⁷⁸ See SÖ 1971:42 and the government bill 1971:125; SÖ1971:43 and the government bill 1971:125.

¹⁷⁹ Art 2 ICCPR. Compare art 1 ECHR that only require "within its jurisdiction".

of reciprocity and irrespective of nationality, and must be guaranteed without discrimination between citizens and aliens.¹⁸⁰ The General Comments further clearly states that the ICCPR entails no right to enter the territory of a State Party and that art 12, the right to free movement and art 13, that give procedural guarantees in expulsion cases only applies to aliens *lawfully* on the territory.¹⁸¹ Trafficked women are in some cases illegal immigrants, either because they did not enter Sweden lawfully but violated visa restrictions or because they entered with false documentation. Even those who entered legally are not protected from expulsion as such.

Apart from art 12 and 13, the other rights, such as the protection against torture, non-refoulement and slavery must be granted to trafficking victims as long as they are on Swedish territory.

5.1.2.2 State obligations

The ICCPR is not Swedish law like the ECHR, but Sweden has an obligation to implement the rights. The general obligation concerning implementation, stated in art 2, is to *respect*, meaning to refrain from restricting the exercise of the protected rights and to *ensure*, meaning to take positive steps to ensure the necessary conditions for the enjoyment of the rights and to protect individuals from interference from others. How far this duty goes and what it means in practise depend on the formulation of the right in question.¹⁸²

The ICCPR entails no specific protection against trafficking. In its Concluding Observations of Kyrgyzstan, though, the HRC expressed grave concern over the violence against women and the increasing phenomena of trafficking in women. The Committee went on to say:

*"[...]The State party should ensure that existing laws relating to violence against women and trafficking are vigorously enforced; adopt effective measures to protect women; provide victims of violence and abuse with a measure of compensation and rehabilitation; and combat trafficking in all appropriate ways, including the prosecution and punishment of those responsible. Specific legislation on the prohibition and punishment of domestic violence and trafficking in women should be enacted. "*¹⁸³

5.1.2.3 Rights of the women

Despite no explicit provision against trafficking in women the HRC has clearly stated in its Concluding Observations of Nepal that:

¹⁸⁰ The Human Rights Committee, General Comment 15, The position of aliens under the Covenant, 11/04/86, para 1 and 2. [henceforth called the HRC's General Comment 15]

¹⁸¹ Ibid. para 5 and 9

¹⁸² See Manfred Nowak, U.N Covenant on Civil and Political Rights - CCPR Commentary, 1993, page 36-39, [henceforth called Nowak] . The limits of state obligations will therefore be further discussed in the context of the specific rights.

¹⁸³ Concluding observations of the Human Rights Committee : Kyrgyzstan. 24/07/2000. CCPR/CO/69/KGZ, para 14

*"[...]The persistence of practices of debt bondage, trafficking in women, child labour, and imprisonment on the ground of inability to fulfil a contractual liability constitute clear violations of several provisions of the Covenant."*¹⁸⁴

The Committee does not say which rights that are violated. I have decided to analyse the prohibition against torture, slavery and the right to security and an effective remedy.

5.1.2.3.1 Art 7 - the prohibition against torture

According to art 7 *"no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*. The right is non-derogable¹⁸⁵ and very similar to art 3 ECHR. The aim of the art is to protect the dignity and physical integrity of the individual.¹⁸⁶ Neither the Covenant nor the HRC defines actions covered by art 7. It is likely, though, that art 1 CAT will be used as interpretative aid limiting the term "torture" to acts of public individuals that intentionally inflict severe pain on a human being for a certain purpose.¹⁸⁷

According to the HRC art 7 is not limited to acts by public officials.¹⁸⁸ The term inhuman or cruel treatment cover according to case law the imposition of severe suffering that lack one of the criteria to qualify as torture.¹⁸⁹ Degrading treatment focus more on the humiliation of the victim, regardless of whether this is in the eyes of the victim himself/herself or in the eyes of others.¹⁹⁰

I would say that the main difference between ICCPR and ECHR relevant to the protection of trafficked women is the lack of case law establishing that art 7 ICCPR is applicable even to acts without any state involvement whatsoever. Despite this my conclusion is that maybe not all but some trafficked women are exposed to treatment contrary to art 7. As a consequence Sweden has an

¹⁸⁴ Concluding observations of the Human Rights Committee: Nepal : Nepal. 10/11/94. CCPR/C/79/Add.42, para 7. See also Concluding observations of the Human Rights Committee : Argentina. 03/11/2000. CCPR/CO/70/ARG, B. Positive aspects, para 5 *"The Committee welcomes recent developments in which some of those responsible for the most serious violations of human rights, including forced disappearances, torture and removal of children from their parents for purposes of illegal adoption or trafficking, are being brought to trial. [...]"*; and Concluding observations of the Human Rights Committee : Mongolia. 25/04/2000. CCPR/C/79/Add.120, para 8.: *"Many areas of concern remain in relation to discrimination against women and the inability of women fully to enjoy Covenant rights (arts. 3 and 26 of the Covenant). In particular, attention has been drawn to: [...] (d) Failure to prosecute persons engaged in organizing prostitution or to adopt effective measures to combat trafficking in women; [...]"*

¹⁸⁵ Art 4 ICCPR.

¹⁸⁶ The Human Rights Committee, General comment 20, Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10/04/92, para 2. [henceforth called the HRCs General Comment 20]

¹⁸⁷ Nowak page 129

¹⁸⁸ the HRCs General Comment 20 para 2 says *"[...] It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."* See also para 13.

¹⁸⁹ Nowak page 131-132 with references.

¹⁹⁰ Ibid. page 133 with references

obligation to prohibit trafficking, investigate claims of trafficking, punish perpetrators and provide victims with an effective remedy.¹⁹¹

5.1.2.3.2 Non-refoulement

Art 13 gives procedural guarantees to trafficked women lawfully in Sweden.¹⁹²

This only protect the women against automatic or arbitrary expulsion and not against expulsion as such.

The HRC has interpreted art 7 as encompassing an obligation not to extradite, expel or deport any person who is in danger of torture, cruel, inhuman or degrading treatment or punishment upon return to another country.¹⁹³

This interpretation of the prohibition of torture is very similar to the ECtHR's interpretation of art 3 ECHR.¹⁹⁴ Despite this the HRC has not received any individual communications from asylum seekers, which means that case law on the scope of the prohibition as lacking.¹⁹⁵ The only thing I can say is that according to Nowak the term treatment means an act or omission of an individual.¹⁹⁶ This leads me to the conclusion that the HRC might not take humanitarian grounds into consideration as the ECtHR has done in *D v United Kingdom*. Considering the limited application of humanitarian grounds this might not mean any practical difference for trafficked women in Sweden.¹⁹⁷

5.1.2.3.3 Art 8 - the prohibition of slavery

Art 8 ICCPR states that no one shall be held in slavery and that slavery and slave trade must be prohibited. It further states that no one shall be held in servitude.

The article is very similar to art 4 ECHR. According to Nowak, who bases his reasoning on the preparatory works of the ICCPR, the terms slavery and slave trade will be defined according to the Slavery Convention¹⁹⁸ and encompass only traditional forms of this practise.¹⁹⁹ The term servitude though will according to him include trafficking.²⁰⁰ The United Nations Centre for Human Rights interprets

¹⁹¹ Art 7 and 2(3) in combination with the HRCs General Comment 20 para 8, 13 and 14. See also Nowak page 136.

¹⁹² In the HRC's General Comment 15 the Committee further states in para 9 that: "[...] if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13."

¹⁹³ The HRCs General Comment 20 para 9.

¹⁹⁴ See chapter 5.1.1.3.1.1 - Non-refoulement

¹⁹⁵ Brian Gorlick, Human Rights and Refugees: Enhancing Protection through International Human Rights Law, 69 Nordic Journal on International Law 2, page 117-177 (at page 174).

See also Nowak page 137

¹⁹⁶ Nowak page 128

¹⁹⁷ See chapter 5.1.1.3.1.1 - Non-refoulement

¹⁹⁸ International Slavery Convention, 1926, 60 L.N.T.S. 253. Art 1(1) defines slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. The 'slave trade' was defined in art 1(2) as "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general every act of trade or transport in slaves."

¹⁹⁹ A French proposal to replace slave trade with trade in human beings, to cover also trafficking in women, was expressly rejected. Nowak page 147.

²⁰⁰ Nowak 148

the term slavery on the contrary as including trafficking in persons and the Working Group on Contemporary Forms of Slavery has dealt with trafficking for a long time.²⁰¹ The HRC has not given a General Comment on the interpretation but since both slavery, slave trade and servitude are non-derogable I find it unnecessary to develop this analysis further. There is agreement that trafficking in women is contrary to art 8.

In order to ensure art 8 Sweden must take positive measures, prohibit, investigate and punish traffickers with proportionate punishments.²⁰²

5.1.2.3.4 Art 9 - the right to safety

Art 9 states that everyone has the right to liberty and security. The right to liberty is interpreted as a prohibition against arbitrary detentions.²⁰³

Regarding the interpretation of the right to security are the preparatory works and the General Comment²⁰⁴ of little help. Art 5 ECHR similarly grants a right to liberty and security. As seen in chapter 5.1.1.3.3 does the ECtHR not attribute any independent right to security beyond the right to liberty from arbitrary arrests and detentions.

Nowak holds that a systematic interpretation would give individuals an independent right to security. This would be a right even against interference from private individuals.²⁰⁵ This view has been confirmed in *W. Delgado Paez v. Colombia*. The author, a religion and ethics teacher in secondary school, fought with his superiors due to his advocacy of "liberation theology". He was forced to teach manual labour and received harassment, death threats and direct attack about which authorities did nothing. After unknown perpetrators killed his colleague Mr Delgado fled to France. The HRC concluded that Colombia had violated art 9 (among other rights) on the ground that the State Party had not been taken appropriate measures to protect Mr Delgado's security. The HRC went on to state:

*Although in the Covenant the only reference to the right to security of person is to be found in article 9, there is **no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty**. At the same time, State Parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction just because he or she is not arrested or otherwise detained. States are under an obligation to take reasonable measures to*

²⁰¹ See Fact Sheet No.14, Contemporary forms of Slavery published by the United Nations Centre for Human Rights at Geneva, Switzerland. It states that "*The word slavery today covers a variety of human rights violations. In addition to traditional slavery and slave trade, these abuses include[...] the traffic in persons and the sale of human organs, the exploitation of prostitution [...]*". For a recent report from the Working Group on Contemporary Forms Of Slavery see E/CN.4/Sub.2/2000/23, 21 July 2000

²⁰² Nowak page 145.

²⁰³ Nowak page 159-161

²⁰⁴ The Human Rights Committee, General Comment 8, Right to liberty and security of persons (Art. 9), 30/07/82, [henceforth called the HRC's General Comment 8] .

²⁰⁵ Nowak page 162

protect them. An interpretation of article 9 that would allow a State Parties to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant"²⁰⁶ [my emphasis]

Applied in trafficking cases this means that Sweden has an obligation to ensure women's safety and security as long as they are on Swedish territory. What concrete measure that must be taken is hard to say but measures must be appropriate.

5.1.2.3.5 Right to trial

Art 14 ICCPR establishes equality before courts and gives everyone the right, in determination of his rights and obligations in a suit at law, to a fair and public hearing. The right to equality before courts read in conjunction with art 2(1) means that all persons without discrimination based on e.g sex, national or social origin or status has right to access to court.²⁰⁷ This leads me to the conclusion that trafficked women, despite that they may be illegal immigrants have this right as long as they are on Swedish territory.

The term rights and obligations in a suit at law has, just as the term civil right in the ECHR, an autonomous interpretation. The HRC tend to interpret the term broadly.²⁰⁸ Despite the fact that I have not been able to find an explicit statement by the HRC that compensation claims for personal injuries are included I would be very surprised if it was excluded.

To conclude give trafficked women a right to access to court and correspondingly obliges Sweden to provide independent courts and give trafficked women the possibility to present their claims for compensation on an equal basis with other individuals as long as they are on Swedish territory.

5.1.2.3.6 Art 2(3) - the right to an effective remedy

Every person whose rights or freedoms, protected by the ICCPR, has been violated has the right to effective remedy. This right includes a right to have the claim determined by a competent domestic authority. It does not need to be a court but an entirely political or administrative body is not acceptable.²⁰⁹ The determining factor, whether or not a remedy is in accordance with ICCPR, has less to do with formality and more to do with effectiveness.

In it's decisions the HRC, provided that there is a violation of the ICCPR, usually proceeds to ask the state to take appropriate steps to remedy the violation, i.e to ensure non-repetition, to investigate and to provide compensation.²¹⁰ Although

²⁰⁶ The Human Rights Committee, views on individual communications, No. 195/1985 p.43-49 W. Delgado Paez v. Colombia, para 5-6

²⁰⁷ Nowak page 239. See also The Human Rights Committee, General Comment 13 Equality before courts and the right to a fair and public hearing by an independent court established by law (art 14), 13/04/84 [henceforth called the HRC's General Comment 13], para 3

²⁰⁸ See Nowak page 242 with references.

²⁰⁹ Art 2(3) Bulgaria and c and Nowak page 58-59.

²¹⁰ The HRC does not do that only with reference to cases where a violation of the art art 9 and 14, art 2 para 3 expressly stating a right to compensation, but also to other cases. See for example Communication No 821/1998 : Zambia. 09/11/2000. CCPR/C/70/D/821/1998 para 7.

states have this obligation to investigate violations this does not give the individual a right to require criminal prosecution in the individual case.²¹¹ But if the Sweden proceeds to prosecute traffickers this will be considered to be an effective remedy. Whether the right to an effective remedy also includes a right to compensation will be analysed in the next chapter.

5.1.2.3.7 The right to compensation

The rights that might be violated in trafficking cases states no explicit right to compensation²¹² and the HRC lacks the ECtHR's formal competence, to grant the victim just compensation. The Committee has tried to develop a dialogue with the state parties. In its individual communications, the Committee invites the state concerned to inform the Committee of the measures taken to give effect to their views.²¹³ The HRC has stated, in its concluding observations, that trafficking is violating a number of rights in the ICCPR but the question of trafficking has not been brought before the Committee in an individual complaint yet.²¹⁴ It remains to be seen how the HRC looks upon a trafficked woman's claim for compensation. My conclusion is similar to my conclusion concerning the right to compensation according to the ECHR. If Sweden fulfil its obligations according to the ICCPR is it not responsible for trafficker's actions. But if trafficked women are denied protection of their human rights, e.g. access to court or expelled contrary to the prohibition of non-refoulement then there might be a right to compensation. I use the word might because the ICCPR entail no explicit right to compensation, just an effective remedy.

5.1.3 The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of all forms of Discrimination Against Women²¹⁵ is mainly a non-discrimination instrument. It has an autonomous

The case was about a Zambian advocate and chairman of a 13-party opposition alliance who were to attend a major political rally to launch a civil disobedience campaign when he was shot by the police. See also Human Rights Committee, Communication No 586/1994, : Czech Republic. 25/07/96. CCPR/C/57/D/586/1994, para 13. The case is about confiscation of property without compensation, with was considered a violation only in so far as the practice was discriminatory contrary to art 26 ICCPR. For an extensive list of early cases see van Boven "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", E/CN.4/Sub2/1993/8 [henceforth called the van Boven study] page 21-28

²¹¹ Nowak page 60

²¹² There are special provisions in ICCPR art 9 para 5 and art 14 para 6 dealing with unlawful detention and faulty criminal conviction.

²¹³ See for example Human Rights Committee, Communication No 821/1998 : Zambia. 09/11/2000. CCPR/C/70/D/821/1998, para 8. In 1990 a Special Rapportuer was appointed for the follow-up of HRC's views. One of his duties is to recommend to the Committee an appropriate remedy. See Report of the Human Rights Committee, Official Records of the General Assembly , A/45/55, Forty-fifth Session, Supplement No44, annex VI.

²¹⁵ The Convention on the Elimination of all forms of Discrimination Against Women, 18 December 1979, 1249 U.N.T.S 13

definition of discrimination in art 1. The purpose is to ensure women with the same level of protection of human rights as men.

5.1.3.1 The scope of application

The CEDAW contain no explicit article on the territorial scope of application. The general obligations of State Parties, though, are stated in art 2, 3 and 24. States shall establish legal protection of the rights of women, ensure effective protection against discrimination and take all appropriate actions to eliminate discrimination by private actors. My conclusion from this is that the state is, at least, responsible for actions occurring within the territory and under its jurisdiction.²¹⁶

5.1.3.2 State obligations

The main obligation for State Parties is to ensure equality between the sexes, both de jure and de facto. CEDAW also addresses situations where women are specifically disadvantaged. Art 6 in states:

"States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

This is not a clear non-discrimination provision, it is rather corrective in character. A weakness is that the provision is rather vague and programmatic and entails no specific obligations. The state obligation is not to guarantee that no trafficking will occur within its territory but to suppress trafficking. The term "appropriate measures" gives the state a margin of appreciation as to what measures to use but state allocations of its resources can be challenged.

The CteDAW has interpreted the meaning of article 6 when they consider state reports.²¹⁷ The Committee has recently been increasingly attentive to the problem with trafficking. The Committee asks for is higher protection of the victim's human rights, both in a possible court proceeding and in general, and increased international co-operation between receiving countries, countries of origin and transit countries.²¹⁸

²¹⁶ There is no General Recommendation on art. 2 CEDAW. But I have looked at other human rights instruments containing non-discrimination provisions such as ICCPR, ICESCR and ECHR and this seems to be the normal interpretation of the scope of application regarding protection against discrimination.

²¹⁷ The interpretations of the CteDAW are not binding but it has authority since the Committee is the monitoring organ that considers state implementation of CEDAW through the reporting system. See art 17-18 CEDAW

²¹⁸ See Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Germany. 02/02/2000. A/55/38, paras.287-333
"321. The Committee is concerned at the incidence of trafficking in women and girls.
322. The Committee urges the Government to recognize that trafficked women are victims of human rights violations in need of protection and, accordingly, to provide assistance to them. It also urges the Government to increase efforts of cross-border and international cooperation, especially with countries of origin and transit, to reduce the incidence of trafficking and to prosecute traffickers. It calls on the Government to ensure that trafficked women have the support that they need so that they can provide testimony against their traffickers. It also urges that training of border police and law enforcement officials

5.1.3.3 The right to non-discrimination

CEDAW does not give the women any special rights, but trafficked women as well as other women have a right not to be discriminated against. In CEDAW's General Recommendation 19 on Violence against women the Committee states that "*discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.*" Trafficking will undoubtedly qualify as gender violence.²¹⁹ The Committee further says that:

provide them with the requisite skills to recognize and provide support to victims of trafficking." See also Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Finland. 02/02/2001. CEDAW/C/2001/I/Add.3.

" 24. *Notwithstanding the extensive measures already undertaken by the Government, the Committee expresses concern at the increased incidence of trafficking in women and exploitation of prostitution of women.*

25. *The Committee urges the Government to intensify its efforts to increase cooperation between national and international authorities, particularly from the Russian*

Federation and the Baltic States, in order to envisage common action to prevent and combat trafficking and to use the Internet in order to disseminate information on the Government's actions against trafficking."; Concluding Observations of the Committee on the Elimination of Discrimination against Women: Austria. (Unedited advanced version) Twenty-third session 12-30 June 2000

"19. *The Committee is also concerned about the situation of trafficked women.*

20. *The Committee requests the Government to take responsibility in guaranteeing the human rights of all trafficked women and girls. It also urges the Government to increase its cooperation with countries of origin and other countries of destination so as to prevent trafficking and to penalize those who facilitate trafficking.* " ; Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Lithuania. 16/06/2000. CEDAW/C/2000/II/Add.5.

"35. *The Committee recognizes the efforts made by the Government [probably referring to a preventive programme launched in 1996. See Committee on the Elimination of Discrimination Against women, CEDAW/C/LTU/1, Initial report of States parties, Lithuania 16/06/2000 page 8] in addressing the issue of trafficking in women and girls, but notes with concern that the gravity of the problem is not reflected in the information provided in the report. The Committee draws attention to article 6 of the Convention and in this regard notes that criminal penalties imposed only on prostitutes entrenches sexual exploitation against women.*" And Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Romania. 23/06/2000. CEDAW/C/2000/II/Add.7.

"32. *The Committee, while appreciating the Government's efforts at combating trafficking in women, notes with concern that it has expanded in Romania as a country both of origin and transit.*

33. *The Committee recommends that urgent further steps be taken by the State party to prevent and eliminate trafficking in women, especially through a firm anchoring of this crime in legislation. This should also include increased cross-border and international cooperation especially with recipient countries, to eliminate the incidence of trafficking and to prosecute traffickers. It also recommends that it focus on the causes of trafficking through measures aimed at poverty alleviation and women's economic empowerment. It also encourages the Government to assist victims through counselling and reintegration. It also recommends that the Government pay due attention to article 6 of the Convention in the ongoing debate about the legislative approach to prostitution.*"

²¹⁹ In the Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993, art 2 trafficking and forced prostitution is considered violence against

"Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention."; and that *"discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5)[...] Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence²²⁰ to **prevent** violations of rights or to **investigate and punish** acts of violence, **and for providing compensation.**"²²¹ [my emphasis].*

What this mean in practise remains to be seen. The Optional Protocol that gives individuals a right to submit claims to the Committee has recently entered into force.²²²

5.1.3.4 The right to safety and security

The CEDAW does not state an explicit right to safety and security. The purpose of the whole Convention though is to ensure that women can enjoy their human rights in security by eliminating discrimination.

As stated above trafficking is contrary to art 1 CEDAW which obliges states to investigate, punish and provide compensation. What this means in terms of security during and after the judicial process is not clear but at least women must be provided with the same protection that men would be exposed to similar risks of violence from their former perpetrators.

In 1998 the General Assembly adopted a resolution with Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, to be used by Governments in their efforts to address, within the criminal justice system, violence against women. The Model Strategies are aimed at providing de jure and de facto equality between women and men, and not preferential treatment to women, in achieving access to justice, particularly in respect of acts of violence.²²³ These Model Strategies require measures to ensure victims and their families safety and protect them from intimidation and retaliation. These strategies are non-binding but I would argue that not providing trafficked women with appropriate protection against their perpetrators would impair trafficked women's right to safety according to the

women. See also The Beijing Platform for Action para 113 b which also recognises trafficking as a form of violence against women.

²²⁰ Due diligence means states indirect responsibility for acts of private persons if the state facilitates conditions or tolerates these acts, that is lack of efforts to prevent and correct private acts through executive, legislative and judicial organs.

²²¹ The Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, Violence against women, A/47/38, Eleventh session, 30/01/92.

²²² Optional Protocol to the Convention on the Elimination of Discrimination against Women, Adopted by General Assembly resolution A/54/4 on 6 October 1999, entry into force 22 December 2000, Sweden ratified 10 December 1999.

²²³ Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice General Assembly, A/RES/52/86, 2 February 1998, para 5 and 9

ICCPR and their right to equal access to justice, art 6 ECHR and art 14 ICCPR, and would accordingly be contrary to art 1 CEDAW.²²⁴

5.1.4 The Convention relating to the Status of Refugees

The Convention relating to the Status of Refugees²²⁵ is the most important international instrument regarding legal status and minimum rights and treatment of refugees.

5.1.4.1 Scope of application

The RC is applicable to refugees within the jurisdiction of a State Party to the Convention.²²⁶

5.1.4.2 State obligations

The main state obligations are the prohibition of non-refoulement meaning the prohibition to send a refugee back to persecution and the prohibition of discrimination meaning that refugees should at least receive the same rights and treatment as other aliens.²²⁷ The state also has to recognise and protect to persons fulfilling the refugee definition the rights provided for in the RC and to provide certain facilities to refugees.

5.1.4.3 Protected rights

The most interesting rights for trafficked women may be the rights to access to courts, to legal assistance and to social security. Art 16 and 24 require states to accord the same treatment to refugees as they accord to their nationals.²²⁸ Since these rights are dependent on whether the person is a refugee or not this will be analysed.

5.1.4.3.1 The right to refugee status

In art 1(2) the definition of who is a refugee is stated.

²²⁴ To analyse this further would be an essay of its own and out of the scope of this thesis. I just want to point at the fact that trafficked women's safety can not be ignored but must be protected. One would have to meet the argument that trafficking victims are not discriminated or treated differently because they are women but because they are aliens. There is nothing in the ECHR or ICCPR that restrict the right to safety and justice to citizens though. This right belongs to everyone and discrimination both on account of sex, nationality and social status is prohibited.

²²⁵ The Convention relating to the Status Refugees, 28 July 1951, 189 U.N.T.S. 150, entered into force April 22, 1954. Sweden ratified the RC on 26 Oct 1954.

²²⁶ The Protocol relating to the Status of Refugees removed the time limit and the geographical limitation . Protocol relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S 267, into force 4 October 1967, Sweden acceded the same date.

²²⁷ Art 3 and 7(1) RC

²²⁸ The right to engage in an employment for refugees lawfully staying in the country, which implies an admission on behalf of the state, may be interesting. According to this right refugees should have the most favourable treatment accorded to foreigners. See art 17 RC. Sweden has made a reservation to Article 17, paragraph 2, to the effect that Sweden does not consider itself bound to grant a refugee who fulfils any one of the conditions set out in sub-paragraphs (a) - (c) an automatic exemption from the obligation to obtain a work-permit.

Article 1 Definition of the term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

[...] (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [...]

The criteria will be discussed separately together with the specific problems facing trafficked women will be analysed.

5.1.4.3.1.1 "Well-founded fear of persecution"

The requisite well-founded fear involves one subjective element, fear. The woman must be afraid of persecution, analysed below, in her home country. It is not enough that she does not want to go home because of shame, economical reasons or that she will get better medial and social help here in Sweden, she must fear persecution.

Trafficked women have different reasons why they do not want to go home and it should be added that not all of them want to stay in Sweden. I will try to give a generalised picture, though. According to Nadejda Kostadinova, a psychotherapist working with trafficking in Bulgaria²²⁹ common fears among victims of trafficking are that people will find out that she has worked as a prostitute, that she will be an outcast of the society and have no other option but to continue with prostitution. Other common fears are HIV infections and other diseases, and inability to get any medical help. Most of all, though, the women fear that their traffickers are going to find them, punish them, and/or traffic them to another country.²³⁰

The fear must be supported by the factual situation in that country. The woman's story, her credibility and other information from the country in question will be taken into consideration. This is not an essay on the burden of proof in asylum cases but I think it is important to point out a few things. Hard evidence are likely to be absent so the woman's own statements, their force and trustworthiness must be relied on. Of course with a comparison with what is generally known about the conditions in the country for women in her situation.²³¹ Since the governments in many of these sending countries are reluctant to deal with the issue information from NGOs working on the field is valuable. The decision of whether the

²²⁹ She is working for a NGO called Animus Association. They provide counselling Program for psychological support for victims of trafficking and try to support returned women and help them with their immediate needs.

²³⁰ Nadejda Kostadinova "Victims of Trafficking Need Help"

²³¹ Guy S Goodwin-Gill, *The Refugee in International Law*, second edition, 1996, page 40-41, [henceforth called Goodwin-Gill] and UNHCR Handbook Part One, para 37-43

woman's fear is well-founded or not can not simply be based on the general conditions in the country but should regard the particular experiences of trafficked women.

It is also important to stress the fact that it is the risk of persecution *upon return*, i.e. in the future that is decisive. The RC requires neither that the woman has fled her home country by reason of persecution nor that she has actually been persecuted in the past.²³² Regards trafficked women this means that they might have left as migrants, meaning that they left voluntarily for reasons other than those contained in the refugee definition in order to take up residence elsewhere²³³ (See chapter 2.1.1 on why women leave their home country).²³⁴ Despite this, once here they become victims of horrific crimes might very well now have a well-founded fear because of the situation facing them upon return. The initial economic motive to leave does not deprive them of refugee status.²³⁵ My conclusion, based on chapter 4, is that fears of trafficked women may in many cases be very well-founded.

5.1.4.3.1.2 "Persecution"

The RC does not explain the term persecution and there is no universally accepted definition. From art 33 RC it may be inferred that threat to life and freedom for reasons of race, religion, nationality, membership of a particular social group or political opinion is always persecution. Scholars have analysed persecution and Goodwin-Gill states:

*Persecution within the meaning of the Convention thus comprehends measures taken on the basis of one or more of the stated grounds, which threaten deprivation of life or liberty; torture or cruel, inhuman or degrading treatment; subjection to slavery or servitude; non-recognition as a person (particularly where the consequences of such non-recognition impinge directly on an individual's life, liberty, livelihood, security or integrity); and oppression, discrimination or harassment of a person in his or her private, home or family life.*²³⁶

Hathaway defines persecution as:

*"sustained or systematic violation of human rights demonstrative of a failure of state protection."*²³⁷

²³² See Goodwin-Gill page 40-41 and UNHCR Handbook Part One, para 45.

²³³ UNHCR Handbook Part One, para 62-64

²³⁴ It is also good to keep in mind here that not all women leave voluntarily. Some are kidnapped or sold other chose to come to Sweden to get a job and make some money once here circumstances change.

²³⁵ James Hathaway The Law of Refugee Status, 1991, page 118-119, [henceforth called Hathaway]

²³⁶ Goodwin-Gill page 69

²³⁷ Hathaway page 105

Hathaway holds that the dominant view among scholars is that actions, which deny human rights in any key way and systematic denial of such rights, is the appropriate standard for persecution.²³⁸ Since not all human rights violations constitute persecution and since the violation must be linked with failure of state protection Hathaway developed a formula of what this means in practice.²³⁹

According to Hathaway depending on what human right is violated different criteria have to be fulfilled in order for a certain violation to constitute persecution. He distinguishes between different types of human rights violations. The first type is civil and political rights from which no derogation is permitted. This includes, among others, protection against torture and cruel, inhuman or degrading punishment or treatment and freedom from slavery. Failure to ensure these rights is always persecution according to Hathaway.

The second type is civil and political rights from which a non-discriminatory derogation is possible in time of a public emergency. This category entails the right to liberty and security and personal privacy and integrity.²⁴⁰ Failure to protect these rights generally is a violation of a state's obligation to ensure human rights and constitute persecution unless it is strictly required by a real emergency situation and applied in a non-discriminatory way.

The third type is economic, social and cultural rights protected in the ICESCR. These rights are not immediate and absolute in the same way as civil and political rights but states must take steps without discrimination, using the maximum of their available resources to progressively realise these rights.²⁴¹ While it is difficult to say generally what constitutes a violation of these rights state actions or neglect can be challenge and according to the Committee on Economic, Social and Cultural Rights State Parties have core obligations, such as to ensure essential primary health care and basic housing. A decision of whether the state has violated this basic obligation, though, must take the states resources and constraints into consideration.²⁴² Hathaway argues that a violation of these rights will *at an extreme level* be comparable with torture and then unquestionably constitute persecution. This view is sometimes misunderstood, why I feel the need to point out a few things. The position that violations of economic social and cultural can constitute persecution does not imply that every poor person is a refugee. State obligations are limited, except for some core rights, to take step s to implement the rights in a non-discriminatory way. Poverty as such is not a violation of the ICESCR.²⁴³ Also important is that poverty, limited medical care opportunities and unemployment in general in a country does not exclude the possibility of a person coming from such a country of being exposed to

²³⁸ Ibid. page 108

²³⁹ This formula is used in "Asylum Gender Guidelines" from 1998 introduced by Canada, Australia, the USA, UK and UNHCR.

²⁴⁰ See ICCPR art 9 and 17 and the derogation clause in art 4. See also ECHR art 5 and 6 and the derogation clause in art 15.

²⁴¹ See art 2 ICESCR

²⁴² Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties obligations (Art. 2, para.1 of the Covenant) 11/12/1990 para 9-10.

²⁴³ Ibid., especially para 5 and 9-10.

persecution. If the limited resources are used in a discriminatory way excluding certain groups of the population from obtaining certain services this practise might amount to persecution.

The rights relevant to trafficking in this category would from my point of view be the right to health and maybe also the right to work, just and favourable working conditions and gender equality.²⁴⁴ I want to make clear that I do not see trafficking or prostitution as a labour issue but the situation the women faces upon return may involve violations of these rights.²⁴⁵

To conclude I can say that persecution is a human rights violation of a certain degree that is linked to unwillingness or inability on behalf of the state to protect the individual. To structure the rest of the analysis I have chosen to deal with these two questions separately.

5.1.4.3.1.2.1 Is there a human rights violation that qualifies as persecution?

Women are often exposed to other forms of human rights violations, such as severe gender discrimination, rape and other forms of sexual violence, than the traditional refugee.

Trafficked women face discrimination and stigmatisation, because of their background as prostitutes and many of them will have no other option to support themselves but to continue to work in prostitution upon return. This will, taken alone, probably not qualify as persecution. Together with denial of social security and medical care on a discriminatory basis, though, this will at an extreme level qualify as persecution according to Hathaway's formula. If the discrimination reaches the threshold "extreme level" will has to be analysed in the individual case. Many trafficked women risk punishment by their traffickers and re-trafficking including inhuman or at least degrading treatment and once again enslavement. These are severe human rights violations. According to Hathaway's formula this treatment always qualifies as persecution.

5.1.4.3.1.2.2 Is the State unable or unwilling to protect the victims of trafficking?

The traditional refugee is persecuted by the government in his home country. From a literal interpretation of the RC it does not follow that it has to be the state it self that persecutes. Intent on behalf of the state is not required and the deciding criteria is lack of protection. State practise, though, differ a lot. Germany and France do not consider acts, which would constitute persecution if the government were supporting them, from private individuals as persecution in the meaning of the RC.²⁴⁶

Since this is an essay about Sweden and Sweden interprets persecution from private individuals as persecution I do not consider it necessary to analyse this question further (See chapter 6.1.4.1.2).

To conclude, denial of medical care and social security on a discriminatory basis is directly attributable to the state. The risk of harassment and further enslavement

²⁴⁴ See art 3, 6, 7, 9 and 12 ICESCR.

²⁴⁵ Hathaway page 116-124

²⁴⁶ Goodwin-Gill page 72-73 with references.

emanates from traffickers. As presented in chapter 4, though, several governments in the women's country of origin are unable, due to lack of resources and lack of interest, to protect the women from their traffickers upon return. Together this will constitute persecution.

5.1.4.3.1.3 *Persecution on account of membership in a particular social group*

Persecution as such is not enough for refugee status according to RC. The persecution must be based on one or more of the five grounds, i.e. race, religion, nationality, membership of a particular social group or political opinion enumerated in art 1 RC. The only suitable one for trafficked women seem to be "membership of a particular social group" (henceforth called mpsg). Mpsg is a vague term and neither the RC nor the preparatory works give much explanation of what the term means.²⁴⁷

The term has potential for development though along with the development of other human rights. According to Goodwin-Gill the core element of a social group should be shared interests, values or background, a combination both of factors which the members can control and of factors which are out of their control.²⁴⁸

The issue whether women can form a social group has been and still is under debate. The UNHCR is of the opinion that at least "*women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a particular social group*"²⁴⁹ State Parties to the RC interprets mpsg differently.²⁵⁰

²⁴⁷ The initial intention may just have been to protect known categories of people in need of protection. Goodwin-Gill page 46-47. The suggestion to add mpsg to the RC was a Swedish proposal and it was agreed upon without much discussion. See Alex Takkenberg / Christopher C. Tahbaz: *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating To The Status Of Refugees Vol. III Amsterdam 1988 A/CONF.2/SR.19 p.14*

²⁴⁸ Goodwin-Gill page 47.

²⁴⁹ See Executive Committee Conclusions No. 39 (XXXVI) - Refugee Women and International Protection, 1985 (k). This is just a recommendation to states on how to interpret the RC and not legally binding to the State Parties. This opinion is later reaffirmed in the Guidelines on the Protection of Refugee Women, prepared by the Office of the UNHCR, Geneva, July 1991, para 54 and 71 that states: "[...] Promote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered *a member of a social group for the purposes of determining refugee status*[...]."

²⁵⁰ German case law on interpretation of the term mpsg is sparse and there seem to be uncertainty regarding the meaning of the term. It was stated in a decision from the year 1996 that "single women in Afghanistan" form a social group because they are without rights and face maltreatment and rapes regularly. It is not clear though whether the court thought the base for persecution was social group or political opinion because it also stated that authorities in Afghanistan think that women who show themselves alone in public hurt the moral code for reason of political opposition. *Verwaltungsgericht (i.e. Administrative Court) Frankfurt am Main, Urteil (i.e. judgement) v. 23.10.1996 - 5 E 33532/94.A (3), Die Neue Zeitschrift für Verwaltungsrecht (NVwZ) -Beilage 6/1997 page 46.* Female genital mutilation has also been reasons for grounding asylum, but a general discussion on what are the criteria of mpsg are missing. See *Verwaltungsgericht Magdeburg, Gerichtsbescheid v.*

Gender Guidelines have been introduced by Canada, Australia and the USA and is also used in the UK. According to these Guidelines, which are based on case law from the respective countries, a social group will exist if there is a group of individuals with particular characteristics, which is recognised as being different from other members of the society. The persecutors play an important part in the identification of the group. Their attitude against their victims is evidence of the groups shared characteristics, for which they are persecuted.²⁵¹ A particular social group can also be identified as a group of people who share inherited or unchangeable features or characteristics that the asylum seeker can not be expected to change. Examples of such characteristics are gender, race, marital status and sexual orientation.²⁵²

Two cases from the United Kingdom and one from Canada illustrate a gender sensitive interpretation of mpsg. In *Islam v Secretary of State for the Home Department* it was established that women from Pakistan form a particular social group because of the severe discrimination against women there and because of the fact that women as a group are unprotected by the Pakistani government.²⁵³

This reasoning was followed in *Dzhygun*. A Ukrainian woman was tricked by the Mafia into travelling abroad then held against her will, raped, sexually assaulted and forced into prostitution. She feared her life upon return to Ukraine. The Immigration Appeal Tribunal recognised the treatment she risked as persecution. It went on and stated that the persecution was based on mpsg, meaning women from Ukraine, because of severe discrimination and lack of protection.²⁵⁴

In a Canadian asylum case the Canadian Convention Refugee Determination Division recognised an Ukrainian woman who had been trafficked for prostitution by Ukrainian organised crime as mpsg, namely impoverished young women from the former Soviet Union. She was granted refugee status and the Board stated:

20.06.1996 - 1 A 185.95 -, NVwZ-Beilage 2/1998 page 18, and Verwaltungsgericht Trier, Urteil v. 27.04.1999 - 4 K 1157/98 -, NVwZ-Beilage I 7/1999 page 75. Even German scholars seem to lack interest of analysing mpsg. See an article by Dr. iur. Paul Tiedemann, judge of the Administrative Court Frankfurt am Main and lecturer of the Vocational College of Administration Wiesbaden. "Protection against persecution because of "membership of a particular social group" in German case law (and further considerations)" Available at: <<http://www.refugee.org.nz/PaulT.htm>> last visited 18/6 2001. This may have to do with the fact that Germany only recognises persecution from non-state actors as entitling to refugee status.

²⁵¹ The group must also have an independent existence though. See Immigration Appellate Authority- Asylum Gender Guidelines [henceforth called Asylum Gender Guidelines] page 38-42 with references. Available at:

<<http://www.unhcr.ch/refworld/refworld/legal/refpol/Ukgender.pdf>> For case law see especially U.K. House of Lords in *Islam v. Secretary of State for the Home Department* Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah, Immigration and National Law Review page 144, 1999

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Immigration Appeal Tribunal, „Dzhygun 00/TH/00728, 17 May 2000. The information about this case was given to me from Member States Sussanna Palsson, Protection Intern, UNHCR Branch Office, London. Unfortunately have I not been able to get a copy of the case and study it further myself.

*"[...] recruitment and exploitation of young women for the international sex trade by force or threat of force is a fundamental and abhorrent violation of basic human rights. International refugee protection would be a hollow concept if it did not encompass protection for persons finding themselves in the claimants situation."*²⁵⁵

The Swedish interpretation of mpsg is not clear. Social class, landowners and capital owners, certain groups of professions and members of certain organisations, e.g. union members are given as examples.²⁵⁶ Sweden has chosen a different approach to the relationship between mpsg and gender-related persecution. According to the Swedish interpretation gender can not be regarded as a social group. To include gender would, according to the Swedish government, be a too wide interpretation of the RC.²⁵⁷ This conclusion is further discussed in chapter 6.1.4.1.3 where the Swedish Aliens Act is analysed. It is difficult to say what interpretation is the correct one since there is no judicial supervising organ with the competence to give binding judgements on interpretation. The Swedish model though can and has been challenged.²⁵⁸ Other countries like Norway and Canada and UK have other interpretations that seem to be more in line with the interpretation of the UNHCR and seem to be in accordance with the development of human rights, discrimination of women. In the end it is a matter of interpretation and the VC²⁵⁹ is the relevant instrument. Counteracting discrimination is one of the purposes of the RC. Considering the developments in the human rights field and recognition of discrimination against women one could argue that it would be incompatible with most of the State Parties other international obligations, such as the CEDAW, which require not only equality in law but also in fact, to not interpret the RC in a gender sensitive way and thereby exclude many women from protection.

5.1.4.3.1.3.1 Are trafficked women members of a particular social group?

Trafficking is a form of gender-related persecution, but trafficked women are not persecuted solely because of their gender. They are members of a smaller group. One can label the group "trafficked women from State X" or "Prostituted women from State X".

The Asylum Gender Guidelines focus on shared and immutable characteristics. I would argue that trafficked women fulfil these criteria. They are young women with little life experience who have been prostituted and victims of trafficking. These are all characteristics, which can not be altered. The Guidelines

²⁵⁵ Neuenfeldt, Canadian Convention Refugee Determination Division, U95-02904, 26 November 1997.

²⁵⁶ Wikrén page 138. The Aliens Appeals Board frequently refers to this work.

²⁵⁷ The government bill 1996/97:25 page 98. See also the report from the Committee of Social Security's report 1996/97:SfU5 - "Swedish migration policy from a global perspective" page 46.

²⁵⁸ See chapter 6.1.4.1.3 - "Persecution on account of membership in a particular social group".

²⁵⁹ See footnote 8

identification of a social group also focus on how the rest of the society look upon the potential group. If the society looks upon the trafficked women as different from other women and especially if these women face discrimination this is an important identification factor. As stated in chapter 4 returned women face stigmatisation and exclusion from the society. Because of their involvement in prostitution they are thought of as bad women and face discrimination both regarding both in society in general and regarding social security and medical care.

Apart from the case *Dzhygun* have I not been able to find any European case law where trafficked women are given asylum.²⁶⁰ The European approach seems to be either immediate deportation, like in Sweden, or granting the victims temporary stay. Temporary residence permits are either unconditional or given only to victims of trafficking who press charges and/or witness against their perpetrators.²⁶¹

To conclude I would say that despite lack of case law confirming my outcome there is a theoretical possibility to interpret mpsg as including trafficked women. The last question if the women risk persecution *on account* of mpsg. Women from the countries I have examined are excluded from medical care on a discriminatory basis because they are prostituted women. Persecution from traffickers or members of that criminal gang is based on their status as prostitutes or victims of trafficking. Women in general are not exposed to the same risk of violence and from organised crime. This leads me to the conclusion that trafficked women are persecuted on account of their mpsg.

²⁶⁰ Neither have Agnete Ström, a women who is a member of a women's organisation in Norway called Kvinnefronten and who has worked for a couple o years with gender-related asylum and trafficking in women. Angelika Kartusch who is working at the Ludwig Boltzmann Institute of Human Rights, Vienna with a research project on anti-trafficking legislation has not either been able to find any asylum cases. But see cases from the United Kingdom in chapter 5.1.4.3.1.3 - Persecution on account of membership in a particular social group, especially footnote 253 and 254

²⁶¹ In Belgium are trafficked persons given a period of 45 days to decide whether or not to start proceedings against their traffickers. If they press charges they are granted a temporary residence permit for three months and a provisional working permit. If their testimony is important to the trail they can obtain residence and working permits for a year. During this year they are covered by the social security system. See Law containing provisions to combat trafficking in human beings and child pornography, 13 April 1995 and Instructions to the Foreign Department, the prosecuting authorities, the police and the social inspection service concerning assistance to victims of human trafficking. Knaus page 45 and KUT 2001:3 page 7. Spain has a similar system. See art 55 Organic Act 4/2000 of 11 January 2000. In Italy the law about Immigration provides for a special residence permit for trafficking victims regardless of whether they take the traffickers to court or not. The women enjoy a one-time renewable six months residence and work or study permit and get emergency health assistance. See art 18 of the Consolidation Act of the provisions concerning the regulation of immigration and law rules on the conditions of foreigners, Legislative Decree No. 286, 25 July 1998. . Until December 2000 400 such permits have been issued. See KUT 2001:3 page 7. For social protection see art 25 and 26 of the Rules for the implementation of the Consilidation Act, Presidential Decree No. 394, 31 August 1999.

5.1.4.3.2 Non-refoulement

Art 33 RC states that no state shall expel or return a refugee in any manner to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.²⁶² The rule applies to refugees within the meaning of art 1 RC. It is irrelevant whether the refugee has entered the territory of a state party legally or illegally and whether or not he/she has been formally recognised as a refugee under national alien law.²⁶³

The prohibition of refoulement in art 33 RC is very similar to art 3 ECHR. The main differences are that art 33 RC is only applicable to refugees²⁶⁴, meaning that the treatment they fear must be based on any of the grounds enumerated in art 33 and 1A2 RC.²⁶⁵

As discussed in chapter 4 the women's former traffickers often expose women and their families to severe harassment and many women are trafficked to another country, almost immediately after arriving to their country of origin. As concluded earlier, this treatment is based on their membership in a particular social group, meaning their status as prostituted women and victims of trafficking.

Art 33 protects against forcible deportation. The State Parties retain discretion both regarding the conditions under which durable asylum may be enjoyed or terminated.²⁶⁶ But if Sweden can not depart the woman to her country of origin, which is the only country that has an obligation to admit her, it might be impossible to depart her at all.²⁶⁷ While she stays in Sweden she has the right to enjoy most of the rights stated in human rights instruments, since they mostly does not distinguish between nationals and aliens. She has the right to protection, security and an effective remedy and compensation according to ECHR and ICCPR. The provisions in the Trafficking Protocol and CEDAW are also applicable as long as the women are on Swedish territory.

5.2 International criminal law documents

²⁶² Regarding trafficked women the state has an obligation not to deport those who has a real risk of their lives or freedom being threatened on account of membership in a particular social group.

²⁶³ See Executive Committee Conclusions No.6 (XXVIII) - Non-refoulement, (c) 1977, published in UN document series A/AC.96/549, para 53.3

²⁶⁴ Although one can say that it is also applicable to asylum seekers, at least during the determination period, because otherwise it would not give any effective protection. See Goodwin-Gill page 137. I think that this though is just another way of saying that the fact whether or not someone is a refugee is independent of any formal recognition on behalf of any State Party. Anyone who fulfils the criteria in RC 1A2 is a refugee.

²⁶⁵ Art 33 is, contrary to art 3 ECHR, not absolute. There is a derogation possibility with reference to national security or a final judgement of a serious crime. I do not consider this relevant regarding victims of trafficking who are often young women from poor countries, unlikely to be convicted of a serious crime or constitute any danger to society.

²⁶⁶ Goodwin-Gill page 151. The limits of this freedom are the RC, eventual extradition treaties and the prohibition of non-refoulement in other human rights instruments such as art3 ECHR.

²⁶⁷ Goodwin-Gill page 152

concerning trafficking

Since I have a human rights perspective and not a criminal law perspective I do not analyse international criminal law documents thoroughly. Something needs to be said about initiatives from the European Union and the Trafficking Protocol because these instruments effect the way women are treated by states and show how detrimental a criminal law approach is for the women if it is not complemented with protection of human rights.

5.2.1 The Protocol to Prevent, Suppress and Punish Trafficking in Persons

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children²⁶⁸, supplementing the United Nations Convention against Transnational Organized Crime²⁶⁹ (henceforth called CTOC), was drafted together or parallel to the CTOC. The rules are mainly constructed to address trafficking by organised criminal groups who traffic many women, and not trafficking done by someone occasionally. The latter case is considered to be a question solely for the domestic legislation.

Sweden has ratified the Trafficking Protocol and so has the other Member States of the European Union. Regarding the home countries of trafficked women only The Russian Federation and Bulgaria has signed the Trafficking Protocol. The Protocol has not entered into force.

5.2.1.1 The scope of application

Both the CTOC and the Trafficking Protocol are separate international instruments but according to art 37 in the Convention and art 1 in the Protocol must a state ratify the Convention before it can become party to the Protocol.²⁷⁰ According to art 4 the Trafficking Protocol is applicable when the offences are transnational and involve an organised criminal group.

5.2.1.2 The definition of trafficking

This is not the first international instrument dealing with trafficking in women, but it is the first one that contains a definition of trafficking.

The most disputed provision was the definition of trafficking. There were two camps favouring two different definitions. The so called "Option 1"²⁷¹ wanted a

²⁶⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children A/55/383 Annex II, 20 November 2000 [henceforth called the Trafficking Protocol]

²⁶⁹ The Convention against Transnational Organized Crime, adopted by the General Assembly November 2000, A/55/383

²⁷⁰ This implies that the protocols must be read and applied in conjunction with the Convention. The Convention contain the general provisions about co-operation and technical and legal assistance whereas the Protocol has more specific rules. The intention was that the Protocol shall supplement the Convention and adapts its general rules to the specific problems associated with trafficking.

²⁷¹ Option 1 was supported by many wealthy industrialised western countries (many of them so called receiving countries) like the Netherlands, Denmark, Germany, Canada etc , by

definition based on force or slave like conditions, in order to make a distinction between such acts and treatment that the trafficked persons consented to. Option 1 did not have explicit mentioning of prostitution or sexual exploitation. Since the term was thought to be undefined, to imprecise and emotive. They preferred just referring to exploitation in general.

The biggest differences between Option 1 and 2 was that Option 2²⁷² wanted a definition that stated that trafficking can occur with or without the consent of the victim. That made exploitation rather than coercion the focus of the definition.

Option 2 also explicitly referred to prostitution and sexual exploitation. The reason for this was that since sexual exploitation is the major purpose for which trafficking occurs a convention on trafficking should name and specify that purpose.

The final definition is a compromise of these two options. Trafficking is the "*...recruitment, transportation, transfer, harbouring or receipt of persons...*" if improper means are used such as force, abduction, fraud or abuse of a position of vulnerability for an improper purpose such as prostitution, sexual exploitation, forced labour or other practices similar to slavery. According to art 3 (b) consent is irrelevant where any of the means listed in (a) are being used.²⁷³

This definition means that all the types of victims I described in chapter 2.2 are included.

As explained in chapter these different ways of looking at trafficking has its base in different approaches to prostitution. Those who consider prostitution sex work favoured a definition based coercion to clearly separate this practise from prostitution in general. Others who want to abolish both phenomena focused on exploitation.

5.2.1.3 State obligations

The purpose of the Trafficking Protocol is to prevent and combat trafficking; to protect and assist the victims and to promote co-operation among states to meet

the UNHCHR (see A/AC.254/16, 1 June 1999), the Special Rapporteur on Violence Against Women (see E/CN.4/2000/68 para 13 where she talks about forced prostitution and thinks that trafficking shall be only slave-like practises) and most "pro-sex work NGOs". See "Victory in Vienna" a report by the Coalition Against Trafficking in Women, Available at: <<http://www.uri.edu/artsci/wms/hughes/catw/>>, last updated 29 Nov. 2000

²⁷² Option 2 was supported by the majority of countries, but many of them were less wealthy so called sending countries such as Argentina, Colombia, Egypt, Bangladesh, India etc but also countries like France, Belgium, Norway and Finland. Sweden changed its position during the eleventh position and offered a definition that helped to reach consensus. See previous footnote. It also got support from the Working Group on Contemporary Forms of Slavery that stated in its report E/CN.4/SUB.2/RES/2000/19 from 18 August 2000 para 41 that it: "urges the Ad Hoc Committee [on the Elaboration of a Convention against Transnational Organized Crime]. Several NGOs supported this option.

to ensure also that the protocol to prevent, suppress and punish trafficking in persons, especially women and children is not limited to forced or coerced trafficking but includes all trafficking, irrespective of the consent of the victim".

²⁷³ See chapter 1.1.2 - Definitions

those objects.²⁷⁴ The state parties undertake to make trafficking²⁷⁵ a crime under national law.

There is also a provision dealing with the demand. Article 9 para 5 require that states to adopt legislative or other measures to discourage the demand that fosters exploitation of persons, which leads to trafficking. Here is some recognition that trafficking can not be effectively combated without looking at the demand. It does not mention prostitution explicit, likely because it would have been impossible to gain consensus with such a formulation, but demand for sexual services and prostitution ought to be covered. The Interpretative notes however states that the State Parties are free to address prostitution the way they wish.²⁷⁶

5.2.1.4 Rights of the women

Even though the Trafficking Protocol is mainly a criminal law instrument one of its purpose is "*to protect and assist the victims of trafficking with full respect for their human rights*".²⁷⁷ With the exception of the right to compensation is it doubtful though whether the Protocol will add anything new to already existing human rights protection once it enters into force.

5.2.1.4.1 Right to non-discrimination

Article 14 says that the Trafficking Protocol must be interpreted in a non-discriminatory way, i.e. that persons shall not be discriminated against because they are victims of trafficking. One problem with this provision is that the women are often both victims and illegal immigrants and the states often treat them mainly as illegal immigrants. It would be hard to show discrimination on the basis of victim status and probably easier to argue in terms of gender discrimination.

5.2.1.4.2 Right to safety

According to art 6 para 5 the State Parties shall *endeavour* to provide for the physical safety of trafficking victims as long as they are on the territory.

Women trafficked to Sweden are immediately deported to their country of origin and consequently do not benefit at all from this provision. Regarding repatriation the Protocol states that repatriation shall be facilitated with due regard to the victims' safety and *preferably* be voluntary.²⁷⁸ According to the interpretative notes this is to be understood not to place any obligation on the State Party that return victims.

None of these provisions give trafficked women any rights. My conclusion is that a gender sensitive interpretation of the ICCPR would give the victims stronger protection.

²⁷⁴ Art 2 the Trafficking Protocol.

²⁷⁵ Also an attempt to commit trafficking and participating and organising such an offence must be a crime in the national penal code. Art 5 the Trafficking Protocol.

²⁷⁶ Interpretative notes page 12 para 64.

²⁷⁷ Art 2 (b) the Trafficking Protocol.

²⁷⁸ art 8 the Trafficking Protocol.

5.2.1.4.3 Right to information and legal assistance and counselling

Each State Party has an obligation to ensure *in appropriate cases* that victims get information about relevant court and administrative procedures and assistance to present their claims.²⁷⁹ The obligation is not further commented in the interpretative notes. Art 6 para 3 is even weaker and only obliges State Parties to *consider* to provide counselling and information to the victims of their legal rights in a language the victim understand. This obligation is only applicable as long as the victim is on the territory of that state.

5.2.1.4.4 Right to compensation

The Trafficking Protocol states a clear obligation to all State Parties to ensure in their legal systems that trafficking victims have a possibility to get compensation for the damage they have suffered. This obligation does not end if the woman is deported.²⁸⁰ This, I would say, will create a right to compensation one the Protocol enters into force.

5.2.1.4.5 Right to medical, psychological and material assistance

The State Parties only has an obligation to consider implementing these kind of services. This obligation ends when the women are deported.²⁸¹

5.2.1.4.6 Right to resident status

The question of refugee status for victims of trafficking was very controversial and subject to extensive discussions. The countries of destination generally took the position that victims should have no right to remain on their territory, as this would risk an increase of trafficking and illegal migration. The countries of origin generally wanted to give the victims more extensive protection with temporary and/or permanent resident status in appropriate cases.²⁸² The final text only obliges State Parties to *consider* allowing victims to stay in appropriate cases. Humanitarian and compassionate factors ought to be considered in the process.²⁸³ Art 14 is a saving clause stating that nothing in the Protocol shall effect the State Parties' obligations according to international human rights law and in particular the obligations in the RC and the principle of non-refoulement contained therein. To conclude the Trafficking Protocol is a criminal law instrument with the primary goal to combat organised crime within the territories of the state parties, which of course benefits the women if it is successful in combating trafficking. If it only succeeds with keeping the phenomena and the women out of Swedish territory it is doubtful whether this benefits the women. I think the main benefitter is the Swedish State.

²⁷⁹ Art 6 para 2 the Trafficking Protocol

²⁸⁰ Art 6 para 6 the Trafficking Protocol and Interpretative notes page 13 para 71 This right but does not preclude deportation though.

²⁸¹ Art 6 para 3 and Interpretative notes page 13 para 71.

²⁸² Summary of the United Nations Convention against Transnational Organized Crime and Protocols thereto. Available at: <<http://www.odccp.org/palermo/convmain.html>> (last visited 3 May 2001)

²⁸³ Art 7 the Trafficking Protocol.

5.2.2 The European Union initiatives against trafficking

The initiatives from the European Union has mainly a criminal law approach to trafficking and do not focus on protecting the victims human rights. The most important document is still the Joint Action from 1997.²⁸⁴ It contains binding, although not directly applicable, minimum standards that the Member States undertook to fulfil by the end of 1999. The Member States agreed to review their national legislation and criminalise trafficking.²⁸⁵ They further agreed to confiscate assets of trafficking business. The Joint Action does not say, though, whether these assets shall be used to compensate victims or to pay the state. The Member States are required to provide appropriate protection for witnesses who provide information.²⁸⁶ There is a recommendation to grant such witnesses temporary residence status during the judicial procedure. The protection is intended to ensure safety to women as witnesses so they can assist the prosecution of traffickers. It is not a recognition of the rights and needs of victims of trafficking and consequently women who do not testify are not protected by the Joint Action. Another weakness is that temporary residence permits do not address the danger of reprisals and re-trafficking facing many women upon return in their country of origin.

Another, though non-binding document is the Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation from 1997.²⁸⁷ Since this document has the same criminal law approach as the Joint Action it does not increase the protection for trafficking victims. The European Parliament has decided on a resolution in February 2000 about further action to combat trafficking in women. I found this document interesting, even though it is just a resolution, since it clearly point out that the women should be looked upon as victims.²⁸⁸ It states that temporary residence permits should be granted to trafficked women regardless of whether or not they want to testify and the resolution urges the states to grant permanent residence permits to victims on humanitarian grounds.²⁸⁹ It also states that persecution on account of gender and plainly trafficking should be a reason

²⁸⁴ Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and the sexual exploitation of children, (OJ L 063, 4.3.1997), page 2 [henceforth called Joint Action]. The Joint Action was adopted under the third pillar and is therefore not directly applicable.

²⁸⁵ The Joint Action did not require that trafficking was made a separate crime in their respective penal codes but a number of offences were enumerated that had to be punishable according to the Member States national criminal law with proportionate punishments. See definition in A and B Joint Action.

²⁸⁶ See Joint Action avd. II a and b

²⁸⁷ The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation , 26 April 1997

²⁸⁸ The European Parliament resolution on the Commissions note to the Council and the European Parliament on further action to combat trafficking in women (COM(1998) 726 - C5-0123/1999 - 1999/2125(COS), (OJ059, 23.02.2001, page 307) para 18.

²⁸⁹ Ibid. para 21.

for granting refugee status.²⁹⁰ The resolution is non-binding but interesting because it is directly contrary to the European approach to trafficking. Considering the fact that all Member States are parties to the ECHR and the RC I think it is important that attention is brought to the human rights of the women. The resolution from the Parliament is a good example of an instrument that both address the interest to combat trafficking effectively but does not fail to protect the women's human rights in the process.²⁹¹

²⁹⁰ Ibid. para 23.

²⁹¹ My only objection to the resolution is that it seem to separate between voluntary and forced prostitution and seem to be critical to the Swedish approach to outlawing prostitution. See para B and I.

6 Conclusion - What rights do the victims of trafficking have?

This chapter applies the conclusions I have reached in chapter 5 in the Swedish context. It analysis Swedish law and practice and concludes whether or not the Swedish response to trafficking is in accordance with its international obligations.

6.1.1 Right to safety and security

International obligations are vague. CEDAW require non-discrimination and case law regarding art 9 ICCPR show that death threats can not be ignored. Not even the Trafficking Protocol requires in absolute term's protection for trafficking victims.²⁹² The Joint Action from 1997 require witness protection, as long as the women are in Sweden. Otherwise is it difficult to say what the Swedish State must do in terms of victim protection.

That women need protection is clear. Testimonies are changed and withdrawn as a result of violence and threats of violence against trafficking victims and their families.²⁹³

The Swedish law provide for victim protection. Reprisals are of course prohibited.²⁹⁴ In appropriate cases victims do not have to be present during the judicial proceeding. The examination of the person injured can take place as a "video conference". This means that the victim is at a secret location. With the help of telecommunication both the persons present in court and the victim able to see, hear and communicate directly with each other.²⁹⁵ This method has been used in trafficking cases.²⁹⁶

Victim's safety can also in serious cases be granted through physical protection. Threatened and persecuted persons can be provided with a security parcel, that is a bag containing a safety phone (a mobile phone that directly alerts the police and can also be used to dial the national emergency centre), a stationary alarm system at home, an answering machine and an emergency bracelet. At very serious threats can body guard protection be provided. It is the Swedish Security Police that provide this service. There are no formal requirements based on the severity

²⁹² Art 6 para 5 only states that State Parties shall endeavour to provide protection, while the victim is on the territory of the state.

²⁹³ Police inspector Bo Lindquist and Nils -Eric Schultz, public prosecutor in the case called "Gyllene Ratten", Uppdrag Granskning, Swedish TV-programme, investigating journalism, 8 August 2001 channel 1.

²⁹⁴ Chapter 17 section 10 the Swedish Penal Code. If they take the form of direct physical violence are chapter 3 and 4 in the Swedish Penal Code applicable.

²⁹⁵ Lag (1999:613) om försöksverksamhet med videokonferens i rättegång, i e Experimental work concerning video conference in court Act, para 5.

²⁹⁶ In the case called "Gyllene Ratten" was one of the women threatened by the traffickers and their companions to death before the main session in court. In order to protect her, she was not present in court. Instead her examination took place on a secret location with the help of new technology. See footnote 293

of the crime for this kind of protection. The Swedish Government has stated, however, that bodyguard protection is very expensive and only a short term solution that shall only be granted to persons who risk being exposed to serious crimes directed at their life, health or freedom. Although trafficked women may qualify for this kind of protection in theory it should be noted that all persons, who have been granted this kind of protection are living in Sweden on a permanent basis.²⁹⁷

Physical protection might be necessary and very valuable for trafficked women during their stay in Sweden. Still, it does not help the women in the long run if they are immediately deported after the trail is over. As seen in chapter 4 women get no protection upon return in their home countries and are therefore easy targets for criminal gangs. If on the other hand the woman is given refugee and allowed to stay in Sweden she is entitled to protection by the Swedish police on equal footing with Swedish citizens.²⁹⁸ Protection can be complemented with measures within the national registration system such as secrecy marking, registration on the previous address and, in cases of risk of aggravated criminality²⁹⁹, assumed personal particulars.³⁰⁰

6.1.2 Right to access to justice in the Swedish course of law

Two types of legal action become relevant, criminal and civil action. First I will look at the possibility for the women to press criminal charges against their perpetrators. Then I will examine the possibility to bring civil action for compensation against their traffickers.

6.1.2.1 Criminal law prohibiting trafficking

Today trafficking is not a separate crime in the Swedish Penal Code. Most of the acts involved in trafficking are punishable, however, such as kidnapping, "setting someone in a position of distress"³⁰¹ and the use of illegal coercion. The aim of these crimes against the personal freedom is to protect individuals freedom of movement and action.³⁰²

Chapter 6 the Swedish Penal Code protects the sexual integrity. Relevant crimes are rape, sexual coercion, sexual exploitation and procuring.³⁰³ It should also be noted that purchase of sexual services is punishable under Swedish law.³⁰⁴

²⁹⁷ Information from Kajsa Wahlberg, at NCID and Council of Europe, Trafficking in Human Beings, Compilation of the main legal instruments and analytical reports dealing with trafficking in human beings at international, regional and national levels, National texts, volume II, Strasbourg, EG (2000) 2, 6 June 2000, page 106-108

²⁹⁸ Polislag (1984:387), Police Act, para 2

²⁹⁹ Sekretesslag (1980:100), i e Secrecy Act chapter 7 section 15 and Bokföringslag (1976:125), i e National registration Act para 16

³⁰⁰ Lag (1991:483) om fingerade personuppgifter, i e Assumed personal particulars Act. See also footnote 297

³⁰¹ Prohibiting someone to, with the use of coercion or fraud, induce another person to go abroad if there is a risk that he/she will be sexually exploited. The crime was actually directed to deal with trafficking in women but has not been used.

³⁰² The Swedish Penal Code chapter 4 para 1-2, 3 and 4

³⁰³ the Swedish Penal Code chapter 6 para 1,2,3 and 8.

The Law Committee on Sexual Offences came to the conclusion that not all stages of trafficking was punishable under Swedish law and that a new paragraph explicitly prohibiting trafficking in human beings would be appropriate.³⁰⁵ The new legislation should be based on the definition in the Trafficking Protocol. It would accordingly include acts against women who were kidnapped and taken to Sweden for sexual exploitation, women who were deceived about the work they were going to perform and women who knew that they were going to work as prostitutes but even so were considered to be deceived or exploited. The new crime should according to the Committee be considered a crime against the personal freedom.³⁰⁶

6.1.2.2 Criminal prosecution

To prosecute perpetrators that violate human rights are a part of State Parties positive obligations under international law. Both the ECHR and the ICCPR states that persons who have had their human rights violated has a right to an effective remedy. It does not need to take the form of a judicial procedure, but public prosecution is considered to be an effective remedy.

All the chief crimes that the women are subjected to such as kidnapping, illegal use of force, rape and other forms of sexual abuse are all objects of public prosecution. The same will be valid for the new legislation against trafficking.³⁰⁷

The public prosecutor has the authority and the duty to prosecute the suspected perpetrators for these crimes.³⁰⁸ He also has a duty to represent and prepare the victims private claim for compensation if it can be done without essential inconvenience.³⁰⁹

If action is taken by the prosecutor the women have no right to bring action against the traffickers on their own but they do have a right as the person injured to appear before the court. They also have the right to appeal.³¹⁰

If the public prosecutor chooses not to prosecute there is a theoretical possibility for the women to take action.³¹¹

It must be added that none of these rules is hindrance for the police to deport the women to their home countries.

6.1.2.2.1 The right to counsel in a criminal proceeding for the person injured

There is no international human right to counsel, but trafficked women have a right not to be discriminated against. This means that in so far as the Swedish law

³⁰⁴ Lag (1998:408) om förbud mot köp av sexuella tjänster, i e Act relating to a ban on purchase of sexual services.

³⁰⁵ SOU 2001:14 page 456

³⁰⁶ Punishable with 2-8 years of imprisonment (compare with grave procuring punishable with 2-6 years of imprisonment) SOU 2001:14 page 460-464.

³⁰⁷ The Swedish Code of Judicial Procedure, i e Rättegångsbalken, 18 July 1942, chapter 20 para 3

³⁰⁸ The Swedish Code of Judicial Procedure chapter 22 para 2 and 6

³⁰⁹ The Swedish Code of Judicial Procedure chapter 22 para 2

³¹⁰ The Swedish Code of Judicial Procedure chapter 20 para 8

³¹¹ The Swedish Code of Judicial Procedure chapter 20 para 8. The prosecutor has come to the conclusion, though, probably because the lack of evidence, not to prosecute.

provides for help to victims of similar crimes trafficked women can not be excluded on a discriminatory basis because they are women or victims of trafficking.³¹²

According to the Swedish Act of Counsel for the Person Injured victims of sexual crimes have right to counsel if they do not lack need of counsel. Even victims of crimes against their person and freedom have right to counsel.³¹³ The counsel, who is normally a lawyer or an attorney with a law degree³¹⁴, shall support the person injured and help the victim with her private claim for compensation.³¹⁵

There are only two obstacles. The first is that since the women are deported before the trial it is doubtful whether they *need* a counsel, whose task is to support the woman *during* the trial. The counsel shall support the victims private claim even if it is separated from the criminal proceeding, but have no authority to claim compensation in the absence of the person injured, which is often the case since the women are sent home.³¹⁶

If the public prosecutor decides not to take action there is no right to counsel according to this legislation.

6.1.3 The right to compensation

The right to compensation under international law is not totally clear. It can be argued though that both the ECHR and the ICCPR, despite no explicit provisions granting a right to compensation, entails such a right. Once the Trafficking Protocol enters into force trafficking victims has an explicit right to compensation. The right to compensation in the Swedish course of law is regulated in the Swedish Tort Liability Act from 1972.³¹⁷ Everyone who prepenesly or neglectfully causes personal injury or material damages are be liable for compensation.³¹⁸ The rules concerning personal injury are applicable to suffering caused by crimes against the personal freedom or by "other forms of harassment involving a criminal act".³¹⁹ Compensation for personal injury includes direct costs

³¹² CEDAW, especially art 15 and the Trafficking Protocol art 14.

³¹³ See The Act of Counsel for the Person Injured; i.e. Lag (1988:609) om målsägandebiträde) [henceforth called the Act of Counsel for the Person Injured]

³¹⁴ See Ibid. para 4 and the Legal Aid Act para 26 ; i.e. Rättshjälpslag (1996:1619) [henceforth called the Legal Aid Act]

³¹⁵ The costs will be paid according to the same rules as legal aid in civil cases, which mean that the state pays for most of the costs of 100 hours of work for the counsel and the costs of investigation, maximum 10 000 Swedish crowns. The Act of Counsel for the Person Injured para 5 and 6 and the Legal Aid Act para 15, 17, 27 and 34. The victim has pay a fee according to the rules in § 23.

³¹⁶ The Act of Counsel for the Person Injured para 3 and Per Olof Ekelöf, Rättegång II, eight edition, 1996, page 99 Since the counsel has no power of attorney but the status of counsel in the proceeding.

³¹⁷ The Swedish Tort Liability Act, i e Skadeståndslagen (1972:207) [henceforth called the Tort Liability Act]

³¹⁸ Ibid. 2:1

³¹⁹ Ibid. 1:3

for medical care, loss of income and compensation for physical suffering and lasting physical disabilities.³²⁰

In most cases concerning trafficking the question of compensation has not been raised.³²¹ This probably depends on the fact that in the absence of a separate provision outlawing trafficking the provision against procuring has been used. According to the preparatory works of the Tort Liability Act is procuring nor considered to be a crime against the personal freedom nor covered by the expression "other forms of harassment involving a criminal act"³²²

In "Gyllene Ratten" three of the trafficked women claimed compensation for physical suffering. Stockholm District Court discussed whether or not grave procuring is was crime entitling the victims to compensation. The court stated that even though the ordinary form of procuring was excluded in the preparatory works this did not necessary mean that the severe form of procuring was excluded. Grave procuring involves ruthless exploitation of another person. In this case the women were exposed to extensive abusive treatment. One of the women, Lydia, had been forced to prostitution, constantly watched and threatened with violence for any disobedience.³²³ Margit and Marcela had been locked up, not given any food for three days and had been raped by their trafficker. This treatment had violated the women's human dignity. The court concluded that the traffickers should pay the women 50 000 SEK each as compensation for physical suffering.³²⁴

This case was appealed to Svea Court of Appeal. The Court of Appeal also analysed the possibility to grant compensation to the women. It stated that consideration must be taken to the fact that the Swedish Penal Code has been revised numerous times since the Tort Liability Act was enacted. The purpose has been to strengthen the individual's protection against crimes against his/ her personal integrity. When a prostituted woman are exposed to the kind of treatment that had been shown in this case this must mean a violation of her personal integrity. Therefore was it possible to grant compensation to victims of grave procuring according to the Tort Liability Act 1:3. Margit and Marcela was granted 50 000 SEK each and Lydia got 100 000 for physical suffering. Margit and Marcela also got 85 000 each as compensation for the rape.³²⁵

To conclude I can say that today, only victims of grave procuring have a possibility to obtain compensation. The new Trafficking Protocol require State Parties to facilitate the possibility to get compensation, which makes a change

³²⁰ Ibid. 5:1

³²¹ See e.g. Court of Appeal over Skåne and Blekinge, case B622-00, 10 August 2000 and RH 1999:109.

³²² The crime procuring does have double protection interests, one of them being protection of the prostituted woman but the crime is constructed according to the presumption that the woman/women has chosen to work in prostitution and stays in prostitution voluntarily.

³²³ Stockholm District Court, case no. B6613-99, 28 July 2000, page 19

³²⁴ Ibid. page 81

³²⁵ Svea Court of Appeal, case no. 5842-00, 2000-11-10, page 28-29

necessary³²⁶. If the new Swedish legislation, making trafficking a separate crime, is enacted this will not be a problem any longer.

6.1.3.1 Civil action

Both the ECHR and the ICCPR grants a right to trial concerning claims of compensation provided that the compensation is provided for under national law. If the public prosecutor does not take the case to court or if he/she does not represent the victim's personal claim, the women have a right to bring a civil action against their perpetrators. Since this thesis cover trafficking in women only and not girls (under 18 years) I presuppose that they have capacity to act according to civil law and are therefore also competent to bring a civil action for compensation against their abusers.

6.1.3.1.1 The right to legal aid

I have not been able to find an explicit right to legal aid under international law. The Trafficking Protocol only requires State Parties to consider giving legal aid to victims. One could argue in terms of non-discrimination³²⁷, but it is doubtful that an eventual denial of legal aid would be considered discriminatory. Denial would probably be based on their status as illegal aliens and not on their status as women or victims of trafficking. The RC only require that refugee with habitual residence in Sweden are given the same treatment as aliens regarding legal aid.³²⁸ Legal aid in the Swedish course of law is given to persons who are in need of but can not afford legal counselling.³²⁹ Persons who are neither Swedish citizens nor resident or previously resident in Sweden can only get legal aid if there are special reasons. The rule is not much discussed in the preparatory works, perhaps because the forerunner Legal Aid Act from 1972 had the same rules.³³⁰ To sum up this chapter about the right to compensation I want to point out the following. The prosecutor is under an obligation to prepare and represent a claim concerning compensation for personal injuries for crimes relevant in trafficking cases, provided that this is not seriously inconvenient.³³¹ As seen above the court will determine the claim for compensation together with the prosecution. This seem to be the easiest way for trafficked women to get compensation for their

³²⁶ If not all trafficking cases were to be regarded as grave procuring, which is no the case today.

³²⁷ See CEDAW and Trafficking Protocol art 14.

³²⁸ RC art 16.

³²⁹ Expenses for 100 h of legal aid is strongly subsidised, you only have to pay back a low percentage of the cost relative to your income; the state pays for investigation costs up to 10 000 Swedish crowns and costs for evidence are compensated as legal aid costs. See and the Legal Aid Act para 6, 15, 17, 23 and 34. There are requirements regarding financial situation and insurance. Ibid. Para 6 and 9 that says that only physical persons with a financial basis under 260 000 Swedish crown and no legal expenses insurance covering the matter can get legal aid. I dear say that all trafficked women will meet that requirement.

³³⁰ The government bill 1996/97:9 page 211. The Government has the authority to enter into mutual agreements with other states that they will recognise each other citizens. Sweden has such agreements with all the EU countries. So women who are citizens in these countries might get aid. Presumably not many women from EU countries will be trafficked to Sweden, not before a possible enlargement of the EU to the east.

³³¹ The Swedish Code of Judicial Procedure 22:2

suffering. All the evidence of the abuse is here in Sweden and some of them seem to lack even the theoretical possibility to be granted compensation in their country of origin.³³²

Considering this I think that it is even more important that the Swedish prosecutor present the women's claim for compensation.³³³

6.1.4 Right to resident status?

The Trafficking Protocol entails no right for victims to stay in their country of destination. My analysis of the RC concludes that trafficked women who are denied social security and medical care at an extreme level and on a discriminatory basis are refugees. The same is true for trafficked women who risk severe harassment or re-trafficking and who lack protection from their country of origin.

The right to resident status in Sweden is governed by the Swedish Aliens Act³³⁴, which reflects Sweden's international obligations. First I will discuss the right to refugee status and then non-refoulement.

6.1.4.1 The right to refugee status

The right to refugee status, which entitles to resident status³³⁵, is stated in chapter 3 para 2 the Swedish Aliens Act. The refugee definition is equivalent to the definition in art 1A2 RC. A person with well-founded fear of persecution on account of race, nationality, membership in a particular social group or on account of religious or political opinion and who owing to such fear is unable or unwilling to avail himself to the protection of his home country is considered to be a refugee. To add some structure the criteria will be analysed separately as in chapter.

6.1.4.1.1 "well-founded fear of persecution"

The Swedish interpretation of well-founded fear seems, without going in to an in-depth discussion on the burden of proof, to be in accordance with international standards. The fear shall be supported by objective facts but past persecution is not a theoretical precondition. Since this mainly concern evaluation of the trustworthiness of the applicants story is it difficult to say anything in general, especially since no victim of trafficking has yet applied for refugee status in Sweden.

6.1.4.1.2 "Persecution"

There is no international consensus on the interpretation of the term persecution. Despite this the dominant international position seem to define persecution as a

³³² See chapter 4

³³³ This does not in itself exclude the possibility to send the woman home. The public prosecutor can represent the woman even in her absence. Returning home has other risks that might prevent her from enjoying her compensation and start a new life.

³³⁴ The Swedish Aliens Act (1989:529) [henceforth called the Swedish Aliens Act], preparatory works: the government bill 1988/89:86, 1988/89:SfU19 and 1988/89:SfU22.

³³⁵ See the Swedish Aliens Act chapter 3 para 4.

violation of a certain degree of basic human rights combined with unwillingness or inability on behalf of the state of origin to protect the individual.³³⁶

The Swedish Aliens Act does not define persecution. Its precursor did, though, and according to the government bill this old interpretation is still valid.

Persecution shall be directed against the refugees life or freedom or otherwise be of a serious character.³³⁷ This definition seems to be more influenced by art 33 RC than art 1A2.³³⁸ Wikrén and Sandsjö, i.e Swedish doctrine often referred to by the Swedish Aliens Appeals Board, seem to be more in favour of the international definition. And the Hathaway formula can be traced in leading cases from the Aliens Appeals Board, although this is not expressly referred to.³³⁹ My conclusion is that despite the statements in the government bill 1988/89:86 am I not sure that there is any discrepancy between the international and the Swedish interpretation of persecution.³⁴⁰

Regarding trafficked women the answer to whether or not they will risk persecution is dependent on the treatment they risk upon return to their countries of origin. Women fear different things (see chapter 4). That they risk stigmatisation and to become outcasts of their society will probably not be treatment amounting to persecution according to Swedish practise. Neither will the fact that the women will be more or less obliged to resort to prostitution, even though the Swedish prostitution policy is that is harmful and incompatible with values on equality between sexes.³⁴¹ At least it would be difficult to challenge a negative decision since there is no international consensus, not even in Western Europe, that prostitution is a violation of human rights.³⁴²

Victims of trafficking will, if this is not provided for in Sweden, be left without compensation and redress against their perpetrators. This is a violation of human rights, i.e art 2 ICCPR and art 6 ECHR³⁴³, but this will probably not either be a violation that amounts to persecution.³⁴⁴ Still it is an important factor though that supports the argument that the state is unwilling or unable to afford protection to the women. So far Swedish law does not seem to be in conflict with international law.

³³⁶ See chapter 5.1.4.3.1.2 - "Persecution"

³³⁷ See the government bill 1988/89:86 page 77 and Wikrén page 135.

³³⁸ See also UNHCR handbook para 51.

³³⁹ See e.g. Aliens Appeals Board 31-93 where an Iranian national was denied the possibility to work by the state on account of his religion. He was dismissed two times from his work and then prevented from starting his own business. The Aliens Appeals Board regarded this practice as persecution.

³⁴⁰ Of course there is only one correct interpretation of RC which must be governed by the VC and scholars only has the authority that their skilled arguments awards them. An in-depth discussion is out of the scope of this thesis.

³⁴¹ See chapter 2.3.2 - Prostitution in Sweden

³⁴² See chapter 2.3.1.1 - Is prostitution a human rights violation?

³⁴³ See chapter 4 -The situation the women face upon return and chapter 5.1.4.3.1.2.1 - Is there a human rights violation that qualifies as persecution?. On art 2 ICCPR see chapter 5.1.2.3.5 - Right to trail, 5.1.2.3.6 - Art 2(3) - the right to an effective remedy, 5.1.2.3.7 - The right to compensation. On art 6 ECHR see chapter 5.1.1.3.4 - Art 6 - The right to a fair trail, 5.1.1.3.5 - Art 13 - The right to an effective remedy, 5.1.1.3.6 - The right to compensation.

³⁴⁴ See the government bill 1996/97:25 page 90.

Many returned women are left without any rehabilitation possibilities, with no social security and lack proper medical and psychological care. This fact may at an extreme level be treatment amounting to persecution especially where the denial is based not purely on lack of resources in the country but on discrimination against women in general and prostitutes in particular. In Swedish case law, asylum seekers with severe diseases have been given residence permit in Sweden, but only on humanitarian grounds and not because of refugee status.³⁴⁵ Residence permit on humanitarian grounds regulated in chapter 2 para 4 5 is not a right on behalf of the alien but a possibility for the Swedish State to grant protection. Case law has been very restrictive and migration politics play a decisive role in the decisions. These decisions could be challenged under international law with arguments based on the Hathaway formula. If the discrimination results in denial of medical care, supported by a state policy not to waste money on bad women³⁴⁶, I would argue that this amounts to persecution in the sense of art 1A2 RC and consequently in the Swedish Aliens Act chapter 3 para 2.³⁴⁷ The second sentence in the Swedish Aliens Act chapter 3 para 2 is interesting. It states that the refugee definition is independent of whether the persecution emanates from state authorities or whether it is a result of inability on behalf of the state to provide protection. Treatment amounting to persecution by private individuals, in combination with lack of state protection is enough. This sentence was added in 1997 and is the Swedish interpretation of persecution. The deciding element is what kind of treatment the refugee risks not *whom* is persecuting.³⁴⁸ This means that the fact that it is private individuals, i.e. traffickers, that persecutes women will not be a problem in the Swedish course of law. Women trafficked by organised criminal gangs often fear revenge and re-trafficking.³⁴⁹ Internationally trafficking is facilitated largely by organised crime. As shown in chapter 4 the fear of these women could very well be well founded. There are information given by

³⁴⁵ See Aliens Appeals Board 16-93 where children from Kosovo with diabetes were given residence permit on humanitarian grounds. According to international information the lack of insulin in Kosovo at the time made adequate medical care impossible. In a leading case from the Government, which is the instance of appeal from the Aliens Appeals Board 10-93 two children from Bulgaria with haemophilia were denied residence permit since medical care was available in Bulgaria even though it was very expensive. Consideration was taken to immigration politics. It would be too expensive for Sweden to let them stay considering the number of children in the world with haemophilia. Even an HIV positive man from Ethiopia with an AIDS diagnosis was sent back since some medical care was available in his home country. See the Government 47-94.

³⁴⁶ See chapter 4 - The situation the women face upon return Especially chapter 4.1 - Estonia

³⁴⁷ The women's home countries are often poor with high unemployment and limited social security and medical care facilities. This applies to the whole population and as long as some primary health care is provided this is not a reason *per se* to grant refugee status. But trafficked women are often discriminated against, because they are women and prostitutes.

³⁴⁸ See the government bill 1996/97 page 97

³⁴⁹ If you look at the KUT reports from NCID these women seem to be few but they exist and there are indicators of increased involvement of organised crime even in Sweden. See chapter 4.6 - Other relevant countries, KUT 1999:16 page 18, KUT 2000:1 page 9 and Bengt Persson "Swedish men sell women for the Russian Mafia" an article in the Swedish paper Expressen, 24 July 2001.

NGOs that traffickers are often waiting for their victims upon return. The treatment the women risk from their perpetrators, violence and once again enslavement, are severe human rights violations that qualify as persecution in the absence of state protection.

To conclude, lack of basic health care in combination with discrimination can be argued to amount to persecution. The Swedish restrictive practise could be challenged. Risk of revenge or re-trafficking would according to my interpretation of the Swedish law theoretically be persecution if the state is unable or unwilling to protect the women. This has not been tried in practise yet.

6.1.4.1.3 "Persecution on account of membership in a particular social group"

Persecution must be based on one of the grounds enumerated in the Swedish Aliens Act chapter 3 para 2 which is a reproduction of the grounds in RC art 1A2. Membership in a particular social group is the most relevant one regarding victims of trafficking. As seen in chapter 5.1.4.3.1.3 there is no universally accepted definition of social group. According to the Swedish interpretation gender can not be regarded as a social group. To include gender would, according to the Swedish government, be a too wide interpretation of the RC.³⁵⁰ Case law concerning female genital mutilation confirms that gender is not regarded as a social group. The Aliens Appeals Board³⁵¹ quoted the UNHCR handbook that mpsg normally comprises of persons with similar background, habits or social status³⁵² and found this hard to reconcile with the opinion that women in general would be such a group. The Board went on to state that UNHCR:s Conclusion no 39 was just a recommendation and that even if one would limit the group to women from a certain country or a certain culture, "*it would not be reasonable to regard women as a group the rest of that population were not members of*".³⁵³ Instead gender can be ground for giving asylum seekers residence permit under a certain category "others in need of protection". This is not just a different term but means that the women will not be regarded as refugees, which means that they will not be protected by the RC, but just under Swedish national law.³⁵⁴

³⁵⁰ The government bill 1996/96:25 page 98. See also the report from the Committee of Social Security's report 1996/97:SfU5 -"Swedish migration policy from a global perspective" page 46. This conclusion was reached despite statements of the contrary from UNHCR Regional Office for the Nordic and Baltic States and other consultative bodies on a matter submitted to them for consideration. The Law faculty at the University of Lund stated that gender could be regarded as a social group and be the base for refugee status. Ibid. page 95-95.

³⁵¹ The Aliens Appeals Board reviews appeals against decisions by the Swedish Migration Board relating to residence permits, expulsion orders, declaration of refugee status, travel documents and Swedish citizenship. The overall objective is that cases should be reviewed in accordance with the principles of legal certainty and that the Board's activities should be characterised by humanity and expeditiousness. Sweden's international commitments must be taken into account.

³⁵² See UNHCR Handbook para 77

³⁵³ Aliens Appeals Board 328-97

³⁵⁴ This means lower protection because the women lose e.g. the right to travel documents (art 27-28), and the advantageous rules concerning family reunion in the 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum

I find this restrictive interpretation a bit surprising considering the rather liberal interpretation of persecution and regarding the fact that Sweden was one of the states co-operating with the Executive Committee to prepare the Executive Committee Conclusion no 39, where states are recommended to consider women who transgress the social rules as a social group.

The Swedish interpretation of mpsg differ from other States approaches toward gender-based discrimination. I am not in a position to say which interpretation is right, but the Swedish version can be challenged and might be discriminating. Even so I do not consider the exclusion of gender in general as a social group decisive to whether or not trafficked women can form one. Trafficked women or prostitutes are a much smaller group than women in general and/or women from a certain culture. Trafficked women have shared and immutable characteristics, i.e. their gender, social status and their past as prostitutes and victims of trafficking. The rest of the society treats them as different from the rest of the population, they are "bad women" and often face discrimination. It remains to be seen how mpsg is interpreted in practise regarding trafficked women.

My conclusion regarding whether trafficked women are refugees and should be granted residence permit is that maybe not all of them but some will fulfil the criteria in art 1A2 RC and therefore also chapter 3 para 2 the Swedish Aliens Act. The Swedish approach of immediate deportation of all victims of trafficking, regardless of their country of origin, must I criticise. Since there are no Swedish asylum case yet where the applicant is a victim of trafficking it is difficult to respond to this practise in a more detailed way.

6.1.4.2 Non-refoulement

Even if you are a refugee, in order to get residence permit you must apply for asylum. In the absence of an application the Swedish State has an international obligation not to send anyone back to persecution, art 33 RC, or inhuman or degrading treatment, art 3 ECHR and 7 ICCPR.

These obligations are implemented in the Swedish Aliens Act. Para 1 chapter 8 implements art 3 ECHR and prohibits deportation to a certain country if there are legitimate reasons to believe that the alien will risk death penalty, corporal punishment, torture or inhuman or degrading treatment or punishment.³⁵⁵

Deportation to a country where there is a real risk of re-trafficking or other severe revenge actions from the woman's trafficker would be a violation of art 3 and consequently also of the Swedish Aliens Act chapter 8 para 1. This means that the Swedish law is in accordance with international obligations but that the Swedish application of the Swedish Aliens Act chapter 4 para 2, authorising the

lodged in one of the Member States of the European Communities, Official Journal C 254/97 19-08-1997 (p. 0001 - 0012) art 4 [henceforth called Dublin Convention] See Kristina Folkelius and Gregor Noll, "Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act", *International Journal of Refugee Law*, Vol. 10, No. 4 (1998).

³⁵⁵ H.R.L v France, see footnote 149. The absolute character of the Swedish Aliens Act chapter 8 para 1 has been confirmed in a leading case from the Swedish Government, see the Government 76-97.

police to deport women are not. The situation women face upon return must be investigated.

The prohibition of non-refoulement is complemented with a right to residence permit, chapter 3 para 3 1. Normally persons in this category are given permanent residence permits.³⁵⁶ This was done in order to implement art 3.³⁵⁷ Since art 3 does not contain any right to residence just a prohibition against deportation one think that the Swedish rule is more generous than it need to be. On the other hand only the country of nationality has an obligation to admit the woman, which means that it would be hard for Sweden to find any other safe country willing to accept her. Maybe this is a necessary complement. Just letting these women stay on Swedish territory without letting them into the integrate in society by excluding them from the security system and labour market and without letting them know how long they have permission to stay might in itself be treatment contrary to art 3.³⁵⁸

The Swedish Aliens Act chapter 8 para 2 implements art 33 RC and prohibits expulsion to a country where the alien risks persecution. The Swedish interpretation of persecution and mpsg has already been analysed and the Swedish interpretation of mpsg can be challenged.

To conclude, the Swedish practise of automatic expulsion is unacceptable both with regard to international and national law. Trafficking victims can not be sent back to a country where the traffickers are waiting for them and where the government provides no protection. This is contrary to both art 3 ECHR, art 7 ICCPR and art 33 RC. It is similarly contrary to the Swedish Aliens Act chapter 8 para 1 and 2. These state obligations must be observed ex officio and the women must be provided with an effective remedy.³⁵⁹

Even sending back to denial of medical care and social security might be contrary to the Swedish Aliens Act chapter 8 para 2, since this treatment might amount to persecution.

³⁵⁶ Wikrén page 151

³⁵⁷ The government bill 1996/97:25 page 100

³⁵⁸ Gregor Noll, lecture given in Refugee and Humanitarian Law at the Raoul Wallenberg Institute 12 February 2001.

³⁵⁹ See art 2(3) ICCPR, art 13 ECHR and *Chahal v. the United Kingdom*.

7 Recommendations

Trafficking is a rather new phenomenon in Sweden and experience is lacking. Internationally there are no signs of a decline in the number of victims of trafficking neither in Europe as a whole nor in the immediate surroundings of Sweden. Within the countries in the Schengen Agreement trafficking has become more common. Sweden has entered this agreement and it came into force in Sweden the 25th March 2001. There is a risk that the free movement for people from these countries will make it easier for the traffickers to travel across borders and result in an increase of trafficking.

Bearing this in mind I will end this thesis with a few recommendations.

The good aspects are that Sweden is still relatively spared from trafficking and organised crime. The government and the police are increasingly attentive to the problem and new legislation is proposed and debated. Sweden has also ratified the new Trafficking Protocol. I also find the Swedish prohibition of purchase of sexual services valuable. Since trafficking need a market for sexual services in order to exist, prostitution must be counteracted, if trafficking should be counteracted effectively.

Another positive aspects are the Swedish interpretation of persecution that includes actions by private individuals. This opens the possibility for female asylum seekers, trafficked women in this case, to get refugee. I agree with the Swedish opinion that the determining factor should be the kind of treatment the asylum seeker risks, not from where this treatment emanates.

A negative aspect of the Swedish approach to trafficking is first and foremost the automatic deportation of victims that has been the prevailing practises so far. This demonstrates the criminal law approach that Sweden has to trafficking and a failure to see the women as victims of terrible crimes in need of help and protection, something that will not be provided for them upon return. The possibility of granting temporary residence permits are under investigation ³⁶⁰ but according to the Swedish Minister of Justice, Mr Bodström, is the alternative to grant permanent residence excluded. According to him permanent residence permits would be a very dangerous development since it could be an incitement for women to come to Sweden. ³⁶¹ The fact that trafficked women are often deceived or even coerced to come to Sweden seems to be disregarded. But not only is the practice politically questionable my conclusion is that it also is contrary to our international obligations according to the ECHR and the RC.

³⁶⁰ SOU 2001:14 page 140

³⁶¹ Debate in the Swedish Parliament, 27 November 2000, 2000/01:34 "Answer to question 2000/01:119 concerning trafficking raised in the Parliament. See also Dagens Nyheter, a Swedish newspaper, 9 February 2001, head leader and 16 February 2001 on DN debatt (DN Debate); also Margareta Winberg and Maj-Inger Klingwall "Nya initiativ för att bekämpa sexhandeln" (New initiatives to combat trafficking), Sydsvenska Dagbladet 3 February 2001.

Another aspect that concerns me is the reluctance to recognise women from a certain country, culture or social class as members of a particular social group. This practise undermines the Swedish approach to gender related persecution.

My recommendations are therefore to stop the practise of immediate expulsion and to grant *all* victims of trafficking temporary protection during a period when they can decide whether or not they want to press charges against their perpetrators. Temporary protection does not solve the danger of reprisals and re-trafficking that women might risk upon return to their country of origin. For this reason women should be informed and given the possibility to seek asylum.

I further recommend an adoption of the new criminal law proposal making trafficking a separate crime and to make sure that trafficking victims have the possibility to obtain compensation from their perpetrators. The new crime makes trafficking a crime against the personal freedom and thereby solves the previous interpretative problems of the Tort Liability Act. Considering that trafficked women might lack even a theoretical possibility to get that at home I think it is important that the Swedish persecutor present their claims.

My last recommendation is to stop seeing trafficking as just a criminal law problem. If the Swedish State expect women to testify and help Sweden combat organised crime it must provide the women with protection against their perpetrators both during and after the trial. If we are serious to combat trafficking in women and helping the victims we must give them a chance to get their life back together. If this can not be done in their home countries we must let them stay. Just keeping the women out of Sweden is not combating trafficking and it is sure not helping the women.

Bibliography

Literature

- Danelius, Hans Mänskliga rättigheter i europeisk praxis - En kommentar till Europakonventionen om de mänskliga rättigheterna, Stockholm 1997
- Ekelöf, Per Olof Rättegång II, eight edition, Stockholm 1996
- Goodwin-Gill, Guy S The Refugee in International Law, second edition, Oxford 1996
- Hathaway, James The Law of Refugee Status, Toronto 1991
- Hoigard, Cecile and Liv Backstreets: Prostitution, Money and Love, Finstad, Cambridge, 1992
- Jeffreys, Sheila The idea of prostitution, North Melbourne
1997
- Mole*, Nuala
Clements, Luke and
Simmons, Alan European Human Rights: Taking a Case Under The Convention, Second edition, London 1999
- Nowak, Manfred U.N Convenant on Civil and Political Rights - CCPR Commentary, Kehl am Rhein 1993
- Pentikäinen, Merja The Applicability of the Human Rights Model to Address Concerns and the Status of Women, The Erik Castrén Institute of International Law and Human Rights Research Reports 1/1999, Helsinki 1999
- Takkenberg, Alex and
Christopher C. Tahbaz The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating To The Staus Of Refugees Vol. III Amsterdam 1988
- Wikrén Gerhard,
Håkan Sandsjö Utlänningslagen En kommentar, sixth edition, 1999

Articles

- Björling , Sanna "Prostitution is the only alternative"
Foundation of Women's Forum/
Stiftelsen Kvinnoforum
- Chomarova, Maria "The experience of Survivors". Reproduced in
Foundation of Women´s Forum "Trafficking in
Women for the Purpose of Sexual Exploitation"
Resourcebook, page 18-19, November 1999
- Dagens Nyheter Head leader, 9 February 2001
DN debatt (DN Debate) 16 February 2001
- Folkelius, Kristina and "Affirmative Exclusion? Sex, Gender,
Noll, Gregor Persecution and the Reformed Swedish Aliens Act",
International Journal of Refugee Law, Vol. 10, No.
4 (1998).
- Goldscheider, Eric "Prostitutes work but do they consent?", Boston
Globe, 2 January 2000
- Gorlick, Brian "Human Rights and Refugees: Enhancing Protection
through International Human Rights Law", 69
Nordic Journal on International Law 2, page 117-
177
- Kojouharova, Nadia "Trafficking in women in Bulgaria:
Animus Association The starting point of La Strada-Bulgaria"
Foundation
"Victims of Trafficking Need Help" Reproduced in
Foundation of Women´s Forum "Trafficking in
Women for the Purpose of Sexual Exploitation"
Resourcebook, page 15-17, November 1999
- Kärroman, Jens "Jag drogades och såldes till Sverige" (I was
drugged and sold to Sweden), Aftonbladet 6 June
2000
- Lindén, Svante "Sexhandeln är vår tids slaveri" (Sex trade is the
slavery of our time) Aftonbladet 10 October 1999.
- Persson, Bengt "Swedish men sell women for the Russian Mafia"
Expressen, 24 July 2001.

Svanberg, Leif	"Norrbottniska hallickar bidrar till prostitutionens spridning" (Pimps from northern Sweden contribute to the spreading of prostitution), Haparandabladet 27 July 2001
Tiedemann, Paul	"Protection against persecution because of "membership of a particular social group" in German case law (and further considerations)"
von Struensee, Vanessa	"Globalized, Wired, Sex Trafficking In Women And Children" published in E law - Murdoch University Electronic Journal of Law, Vol 7, No 2, June 2000
Winberg, Margareta and Klingwall, Maj-Inger	"Nya initiativ för att bekämpa sexhandeln" (New initiatives to combat trafficking), Sydsvenska Dagbladet 3 February 2001

Swedish Documents

Swedish Laws

Rättegångsbalk (1942)	The Code of Procedure
Brottsbalk (1962)	The Penal Code
Förundersökningskungörelsen (1947:948)	Preliminary Investigation Act
Skadeståndslag (1972:207)	The Tort Liability Act
Bokföringslag (1976:125)	National registration Act
Sekretesslag (1980:100)	Secrecy Act
Polislag (1984:387)	Police Act
Lag (1988:609) om målsägande-biträde	Act on Counsel for the Person Injured
Utlänningslag (1989:529)	The Aliens Act
Lag (1991:483) om fingerade personuppgifter	Assumed personal particulars Act
Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna	The Act on the European Convention for the protection of human rights and fundamental freedoms
Rättshjälpslag (1996:1619)	Legal Aid Act
Lag (1998:408) om förbud mot köp av sexuella tjänster	Act relating to a ban on purchase of sexual services.
Lag (1999:613) om försöksverksamhet med videokonferens i rättegång	Experimental work concerning video conference in court Act

Government Bills

government bill 1971:125
government bill 1988/89:86
government bill 1996/97:9
government bill 1996/97:25
government bill 1997/98:55

Swedish Public Investigations

SOU 1995:15 Sex trade. Report from the 1993 investigation on prostitution.
SOU 2001:14 The sexual crimes increased protection for the sexual integrity and adjacent questions. Report from the 1998

Other Swedish official documents

The department of Social Knowledge of prostitution 1998-1999
Services Linköping, 2000

Committee of Social "Swedish migration policy from a global
Security perspective", 1996/97:SfU5

Reports from the National Criminal Investigation Department, Intelligence Service, Illegal Immigration unit.

KUT 1999:16 Trafficking in women, Report on the situation June 1999
KUT 2000:1 Trafficking in women, The second report on the situation 1 July - 31 December 1999
KUT 2001:3 Trafficking in women, The third report on the situation 1 January - 31 December 2000

International Documents

International Conventions

Slavery Convention 1926, 60 L.N.T.S. 253

Statute of the International Court of Justice, 26 June 1945, 1 U.N.T.S XVI

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2 December 1949, 96 U.N.T.S. 271

The European Convention for the protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No 5

The Convention relating to the Status of Refugees, 28 July 1950, 189 U.N.T.S. 150

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 226 U.N.T.S. 3

Protocol relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267

The International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331

The Convention on the Elimination of all forms of Discrimination Against Women, 18 December 1979, 1249 U.N.T.S. 13

Optional Protocol to the Convention on the Elimination of Discrimination against Women, Adopted by General Assembly resolution A/54/4 on 6 October 1999

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 U.N.T.S. 85

The 1990 Convention on the Application of the Schengen Agreement of 14 June 1985 relating to the Gradual Suppression of Controls and Common Frontiers, between the Governments of the States Members of the Benelux Economic Union, the Federal Republic of Germany and the French Republic.

1990 Dublin Convention Determinin the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, Official Journal C 254/97 19-08-1997 (p. 0001 - 0012)

The Convention against Transnational Organized Crime, adopted by the General Assembly November 2000, A/55/383

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children A/55/383 Annex II, 20 November 2000

Documents from Council of Europe

Recommendation 1325 (1997) of the Parliamentary Assembly on traffic in women and forced prostitution in Council of Europe member states, 23 April 1997

Council of Europe, Trafficking in Human Beings, Compilation of the main legal instruments and analytical reports dealing with trafficking in human beings at international, regional and national levels, National texts, volume II, Strassbourg, EG (2000) 2, 6 June 2000,

Documents from the European Union

Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and the sexual exploitation of children, (OJ L 063, 4.3.1997)

The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation , 26 April 1997

The European Parliament resolution on the Commissions note to the Council and the European Parliament on further action to combat trafficking in women (COM(1998) 726 - C5-0123/1999 - 1999/2125(COS), (OJ059, 23.02.2001, page 307)

European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur Theierry Cornillet, "Draft Report on the situation as regards fundamental rights in the European Union (2000) (2231/2000(INI), published 9 April 2001

United Nation documents

General Assembly documents

Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993

Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1

Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/RES/52/86, 2 February 1998

Optional Protocol to the Convention on the Elimination of Discrimination against Women, Adopted by General Assembly resolution A/54/4 on 6 October 1999

Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto A/55/383/Add.1

Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime Report on the sixth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, A/AC.254/4/Add.3/Rev.4 (23 November 1999)

Human Rights Committee

Report of the Human Rights Committee, Official Records of the General Assembly, A/45/55, Forty-fifth Session, Supplement No44, annex VI.

Individual Communications

The Human Rights Committee, views on individual communications, No. 195/1985 p.43-49 W. Delgado Paez v. Colombia

Human Rights Committee, Communication No 586/1994, : Czech Republic. 25/07/96. CCPR/C/57/D/586/1994

Human Rights Committee, Communication No 821/1998 : Zambia. 09/11/2000. CCPR/C/70/D/821/1998

General Comments

The Human Rights Committee, General Comment 8, Right to liberty and security of persons (Art. 9), 30/07/82

The Human Rights Committee, General Comment 13 Equality before courts and the right to a fair and public hearing by an independent court established by law (art 14), 13/04/84

The Human Rights Committee, General Comment 15, The position of aliens under the Covenant, 11/04/86

The Human Rights Committee, General comment 20, Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10/04/92

Concluding Observations

Concluding observations of the Human Rights Committee: Nepal, 10/11/94. CCPR/C/79/Add.42

Concluding observations of the Human Rights Committee : Argentina. 03/11/2000. CCPR/CO/70/ARG

Concluding observations of the Human Rights Committee : Mongolia. 25/04/2000. CCPR/C/79/Add.120

Concluding observations of the Human Rights Committee : Kyrgyzstan.
24/07/2000. CCPR/CO/69/KGZ

The Committee on Economic, Social and Cultural Rights

Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties obligations (Art. 2, para.1 of the Covenant) 11/12/1990

The Committee on the Elimination of Discrimination Against Women

General Recommendations

The Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, Violence against women, A/47/38, Eleventh session, 30/01/92.

Country Reports

Committee on the Elimination of Discrimination Against women, CEDAW/C/LTU/1, Initial report of States parties, Lithuania 16/06/2000
Committee on the Elimination of Discrimination Against women, CEDAW/C/BGR/2-3, Second and third periodic reports, the Republic of Bulgaria , 3/11/1994

Concluding Observations

Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Germany. 02/02/2000. A/55/38

Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Lithuania. 16/06/2000. CEDAW/C/2000/II/Add.5.

Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Romania. 23/06/2000. CEDAW/C/2000/II/Add.7.

Concluding Observations of the Committee on the Elimination of Discrimination against Women: Austria. (Unedited advanced version)Twenty-third session 12-30 June 2000

Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Finland. 02/02/2001. CEDAW/C/2001/I/Add.3.

The 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, HCR/IP/4/Eng/REV.1 Reedited Geneva, January 1992

Executive Committee Conclusions No.6 (XXVIII) - Non-refoulement, 1977
Executive Committee Conclusions No. 39 (XXXVI) - Refugee Women and International Protection, 1985

Guidelines on the Protection of Refugee Women, prepared by the Office of the UNHCR, Geneva, July 1991

"Asylum Gender Guidelines" from 1998 introduced by Canada, Australia, the USA, UK and UNHCR

Other United Nations Documents

Special Rapporteur on Violence Against Women E/CN.4/2000/68

The United Nations Centre for Human Rights Fact Sheet No.14, Contemporary forms of Slavery, Geneva

The United Nations Office for Drug Control and Crime Prevention (ODCCP) Trafficking in Human Beings - The Case of the Czech Republic, 2000

van Boven , Theodor "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", E/CN.4/Sub2/1993/8

Working Group on Contemporary Forms of Slavery E/CN.4/Sub.2/2000/23, 21 July 2000
E/CN.4/SUB.2/RES/2000/19, 18 August 2000

Human Rights Reports from IGO's (other than the United Nations, the Council of Europe and the European Union)

Budapest Group of the International Centre for Migration Policy Development The relationship between organised crime and trafficking in aliens, 1999

Task-force on organized crime in the Baltic Sea region Report on the "fact-finding mission" conducted in November 2000 by the National Commissioner of Police for the Baltic countries regarding trafficking in women, published by the National Commissioner of Danish Police, Department A.

Technical Cooperation Profile of victims of trafficking from the Czech

Centre for Europe and Central Asia Republic: Background study prepared for the IOM Information Programme to Prevent Trafficking in Women in the Czech Republic, October 1999

Trafficking in Migrants No 23 Trafficking, April 2001 New IOM Figures on the Global Scale of Bulletin

U.S. Department of State, the United States Delegation to the U.N Commission on Human Rights Department of State Human Rights Reports for 2000, Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Russia and Ukraine, March 2001

Human Rights Reports from NGO's

Caldwell, Gillian; Galster, Steven and Steinzor, Nadia Crime & Servitude: An Exposé of the Traffic in Women for Prostitution from the Newly Independent States, 1997

Coalition Against Trafficking in Women "Victory in Vienna", Available at:<
<http://www.uri.edu/artsci/wms/hughes/catw/>>
last updated 29 Nov. 2000

Filipova, Rossitza Legal Study on the Combat of Trafficking in Women for the Purpose of Forced Prostitution in Bulgaria, published by the Ludwig Boltzman Institute of Human Rights in Vienna, Sofia 2000

Foundation Against Trafficking in Women/STV Country Report: Netherlands/ Central and Eastern Europe. In Foundation for Women, Thailand 1994

Foundation of Women's Forum Trafficking in Women for the Purpose of Sexual Exploitation - Mapping the Situation and Existing Organisations Working in Belarus, Russia, the Baltic States and the Nordic States, Stockholm 1998

Foundation of Women's Forum Trafficking in Women for the Purpose of Sexual Exploitation - Resourcebook, 1998

International Helsinki Federation for Human Rights A Form of Slavery - Trafficking in women in OSCE Member States, Report to the OSCE Supplementary Human Dimension Meeting On Trafficking in Human Beings, Vienna 19 June 2000

International Human Training Manual - Trafficking in Persons and

Rights Law Group	Slavery: A Human Rights Issue, Sarajevo 1999
Knaus, Katharina; Kartusch, Angelika and Reiter Gabriele	Combat of Trafficking in Women for the Purpose of Forced Prostitution - International Standards, Vienna 2000
Minnesota Advocates for Human Rights	Trafficking in Women: Moldova and Ukraine, December 2000
Scheu, Harald, and Hybnerová, Stanislava,	Legal Study on the Combat of Trafficking in Women for the Purpose of Forces Prostitution in the Czech Republic, published by the Ludwig Boltzman Institute of Human Rights in Vienna, Prague 1999

Table of Cases

Swedish Case Law

District Court

B 579-00	Malmö District Court, 13 June 2000
B 6613-99	Stockholm District court, 28 July 2000
B 622-00	Court of Appeal (Hovrätten över Skåne and Blekinge), 10 August 2000

Court of Appeal

B 5842-00	Court of Appeal (Svea Hovrätt),
-----------	---------------------------------

Swedish Asylum Cases

Aliens Appeals Board

Aliens Appeals Board 10-93
Aliens Appeals Board 16-93
Aliens Appeals Board 31-93
Aliens Appeals Board 328-97

The Swedish Government

Government 47-94

The European Court of Human Rights

A v. The United Kingdom, European Court of Human Rights, 23 September 1998, Reports 1998-VI No 90

Bensaid v. the United Kingdom, European Court of Human Rights, Application number 00044599/98, 6 February 2001. This judgment is not final.

Chahal v. the United Kingdom, European Court of Human Rights, 15 November 1996, Reports of Judgments and Decisions 1996-V
Costello-Roberts v. the United Kingdom, European Court of Human Rights, 25 March 1993 Series A, No 247-C,
Cruz Varas and Others v. Sweden, European Court of Human Rights, 20 March 1991, Series A no. 201
D. v. the United Kingdom, European Court of Human Rights, 2 May 1997, Reports 1997-III
Golder v. the United Kingdom, European Court of Human Rights, 1975, Series A, no.18
H v France, European Court of Human Rights, 1989, Series A, no. 162-A
H.L.R. v. France, European Court of Human Rights, 29 April 1997 Reports 1997-III
Masson and van Zon v Netherlands, European Court of Human Rights , 1985, Series A, no. 327-A
Soering v. the United Kingdom, European Court of Human Rights, 7 July 1989, Series A no. 161
Van der Mussle v Belgium, European Court of Human Rights, 1983, Series A, no 70
Vilvarajah and Others, European Court of Human Rights, 30 October 1991, Series A no 215
Z and others v. the United Kingdom, European Court of Human Rights, 10 May 2001

Asylum cases

The United Kingdom

U.K. House of Lords in Islam v. Secretary of State for the Home Department
Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah, Immigration and National Law Review page 144, 1999
Immigration Appeal Tribunal, ,Dzhygun 00/TH/00728, 17 May 2000.

Germany

Verwaltungsgericht (i e Administrative Court) Frankfurt am Main, Urteil (i e judgement) v. 23.10.1996 - 5 E 33532/94.A (3) , Die Neue Zeitschrift für Verwaltungsrecht (NVwZ) -Beilage 6/1997 page 46.
Verwaltungsgericht Magdeburg, Gerichtsbescheid v. 20.06.1996 - 1 A 185.95 - , NVwZ-Beilage 2/1998 page 18,
Verwaltungsgericht Trier, Urteil v. 27.04.1999 - 4 K 1157/98 -, NVwZ-Beilage I 7/1999 page 75.