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The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in a Post-9/11 World

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Abstract

This article addresses an urgent humanitarian crisis affecting unaccompanied or abused refugee children and widowed, divorced, abandoned or abused female heads of refugee households. Such women and children suffer the consequences of the post-9/11 U.S. refugee resettlement backlog more severely than the general refugee population. They are far more at risk of life-threatening harm such as trafficking, sexual exploitation and rape. Moreover, they are far less likely to present a threat to U.S. national security than many people who are able to secure visas to the United States quickly and with fewer background checks. Despite their vulnerability and lack of security threat, however, they continue to languish in extremely dangerous refugee camps. This article proposes a solution that would allow such women and children to avoid the resettlement delays and enter the United States through an expedited visa system. The expedited visa system would reduce the refugee backlog and do so in a way that ensures that the most vulnerable refugees receive protection at the earliest possible opportunity.

THE W VISA: A LEGISLATIVE PROPOSAL FOR FEMALE AND CHILD REFUGEES TRAPPED IN A POST-9/11 WORLD

MARISA SILENZI CIANCIARULO[1]

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I. Introduction
II. The Refugee System
    A. The United Nations High Commissioner for Refugees ("UNHCR")
    B. The U.S. Refugee Resettlement Program
        1. Women and Children in Refugee Camps
        2. A New Crisis Calls for a New Solution
III. Expedited Visa Relief for Vulnerable Refugees: The "W" visa.
    A. "W" Visa Eligibility Requirements
        1. Applicants Must Dwell in a Refugee Setting.
        2. Applicants Must Demonstrate that They are at Risk of Harm Due to Their Sex and/or Age.
    B. Non-immigrant Visas and Immigrant Visas
        1. Existing Models of Immigrant and Non-immigrant Visas for Vulnerable Groups
            a. Special Immigrant Visas
                i. "VAWA" Self-petition
                ii. Special Immigration Juvenile Visa ("SIJV")
                iii. Special Immigrant Visas for Amerasians ("SIV")
            b. Non-Immigrant Visas
                i. "T" Visa
                ii. "V" Visa

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2. Obtaining Lawful Permanent Residence Through a W Visa
C. Less is More: Statutory Limit
D. Fraud Prevention Measures
1. Prevention of Fraud by Principle Applicants
2. Prevention of Fraud by Applicants for Derivative Benefits
IV. Conclusion

I. Introduction

Sahra Dirie is a refugee from Somalia.[2] She fled her country with her husband and their children when civil war broke out in 1991.[3] They sought refuge in neighboring Kenya, where they were placed in the Garisa refugee camp. There they lived in a tent and relied on handouts from international humanitarian organizations to survive. The camp was dirty, disease ridden and violent. The Kenyan police who patrolled the camp beat and raped its inhabitants with impunity.

Sahra came to know of this all too well when a Kenyan police officer raped her. In Somali culture, the victim of rape brings shame upon a woman and renders her a disgrace to her family.[4] This being the case, Sahra did not tell anyone except her sister in the United States what happened to her. She believes her husband suspected it, however, because he abandoned her and the family shortly after the rape. At the time he left, Sahra was pregnant, she believes from the rape.

Sahra was left with her six other children and only her elderly mother to help her care and provide for them. A few months later, in 2002, Sahra's mother received word that she had been

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[2] Interview with Shukri Dirie, sister of Sahra Dirie, in Washington D.C. (July 8, 2003). *See generally* Women's Commission for Refugee Women and Children, http://www.womenscommission.org/index.html (providing resources and background information regarding Sahra Dirie and refugees in general). *See generally* the International Rescue Committee, http://www.theirc.org/ (providing resources and background information on refugees).

[3] Civil war erupted in Somalia at the beginning of January 1991. Deposed Somali dictator Siad Barre fled into exile as militias from rival clans flooded into the capital city of Mogadishu. The clan militias embarked on a campaign of brutality, rape, killing and looting. Members of unprotected minority clans, such as Sahra's Darod clan, were their principal targets. Thousands of Somalis fled Mogadishu to outlying areas and to neighboring Kenya and Ethiopia. The exodus increased in proportion when the militias eventually spread to the more remote areas of the country. Internally displaced Somalis fled the country and became refugees, straining the already burdened camps in Kenya and Ethiopia. Thirteen years later, despite a provisional government's attempts to restore order in Mogadishu, warlords continue to control most of the city as well as the rest of Somalia. *See* Amy E. Eckert, Comment, *United Nations Peacekeeping in Collapsed States*, 5 J. INT'L L. & PRAC. 273, 282-84 (1996). *See also* The World Factbook, *Somalia*, Central Intelligence Agency, *at* http://www.cia.gov/cia/publications/factbook/geos/so.html#Govt (last modified May 11, 2004).

[4] *See* Karl Vick, *For Somali Refugees, No Safe Haven; Fear of Rape Grips Women in Camps*, WASH. POST FOREIGN SERVICE, June 3, 1999, at A19 (discussing conditions in refugee camps and cultural stigma rape carries in Somali culture).

approved for resettlement in the United States.[5] After Sahra gave birth, she went to the resettlement interview with her mother, believing that she would be accompanying her mother to the United States. The representative informed them that Sahra, due to the fact that she was over twenty-one years of age, did not qualify to join her mother.[6] Moreover, Sahra had never registered as a refugee with the camp authorities and thus had not been identified as an applicant for resettlement in her own right.[7]

Sahra's mother received final approval on her application for refugee resettlement. She was ill and had little choice but to leave Kenya for the United States. Sahra was left alone with her children in the refugee camp.

After her mother's departure, Sahra lost hope in the refugee system. She took her children to live in a shantytown on the outskirts of the camp in a misguided effort to escape violence and despair. Humanitarian groups worked to secure a new resettlement interview for Sahra based on a different category of resettlement reserved for at-risk women and children. By the time the humanitarian groups managed to secure a new resettlement interview in early 2004, however, camp officials could not locate Sahra and her children. Their fate is unknown.[8]

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[5] *See* U.N. HIGH COMM'R FOR REFUGEES, *Protecting Refugees: Resettlement*, *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=PROTECT&id=3b8366bc4&ID=3b8366bc4&PUBLISHER=TWO (last visited Feb. 2, 2005) [hereinafter UNHCR, *Resettlement*] (explaining definition and reasoning for resettlement). The U.N. High Commissioner for Refugees ("UNHCR") defines resettlement is the permanent relocation of refugees to a safe third country. It is an option for those refugees who cannot return to their home country due to past persecution or a fear of future persecution, and for whom integration in the country of refuge is not feasible.

[6] *See* 8 U.S.C. § 1157(c)(2) (2002) (identifying which relatives may accompany or follow to join persons granted refugee status in United States). The statute permits a "child," defined at 8 U.S.C. § 1101(b)(1) (2000) as "an unmarried person under twenty-one years of age" to accompany or follow to join a parent, but does not permit adult daughters and sons to do so. *Id.* *See also* Immigration and Nationality Act ("I.N.A."), § 101(b)(1) (2000) (codified as amended at 8 U.S.C. § 1101(b)(1) (2000)).

[7] Telephone interview with representative of UNHCR, in (Nov. 19, 2004) (during which representative requested anonymity). *See generally* Women's Commission for Refugee Women and Children, http://www.womenscommission.org/index.html (providing resources and background information). *See generally* the International Rescue Committee, http://www.theirc.org/ (providing resources and background information).

[8] E-mail from Christopher Nugent, Christopher Nugent, Senior Counsel at Holland and Knight, to author (July 30, 2004, 15:09:02 EST) (on file with author) (referencing March 26, 2004 e-mail from UNHCR representative who wishes to remain anonymous). The UNHCR representative wrote that Shukri Dirie had left her a voice mail

The conditions in Sahra's refugee camp are similar to those found in refugee camps all over the world and are partly to blame for her ordeal. Violence, poverty and disease are common in refugee camps and affect the entire refugee population.[9] Women and children, particularly unaccompanied children[10] and women who are single heads of households, are even more susceptible to camp conditions and to a broader range of violent acts and persecution because of their age and/or sex.[11] Due to cultural traditions and camp logistics, women are also less likely to have a voice in camp management or, in the case of children as well as women, even to be registered as refugees.[12] This lack of visibility increases the risk that women and children refugees, even more so than the rest of the refugee population, will suffer severe abuse and deprived of refugee benefits.

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message stating that Sahra Dirie may have returned to Somalia, despairing of ever joining her sister and mother in the United States. *Id.*

[9] For a discussion of the conditions in refugee camps for women and children, see *infra* notes 72-89 and accompanying text. *See generally* Jean Ward, *If Not Now, When? Addressing Gender-based Violence in Refugee, Internally Displaced, and Post-conflict Settings: A Global Overview*, The Reproductive Health Response in Conflict Consortium, *at* http://www.womenscommission.org/pdf/ifnotnow.pdf (Apr. 2002) [hereinafter Ward].

[10] *See* UNHCR, *Protecting Children: Number of Unaccompanied Children Seeking Asylum Steady Despite Wars and Forced Conscription*, UNHCR NEWS STORIES, Nov. 13, 2001, (explaining what constitutes unaccompanied child and providing statistics on how many are in refugee camps). The term "unaccompanied children" refers to children without custodial parents or official guardians.

[11] *See* UNHCR, RESETTLEMENT HANDBOOK, § 4.5.2 at 17 (Nov. 2004), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=PROTECT&id=3d4545984&ID=3d4545984&PUBLISHER=TWO [hereinafter UNHCR, RESETTLEMENT HANDBOOK].

> For purposes of resettlement, UNHCR considers as women-at-risk those women or girls who have protection problems particular to their gender, whether they are single heads of families, unaccompanied girls, or together with their male (or female) family members. Refugee women or girls may be at risk of or have suffered from a wide range of protection problems, including expulsion, *refoulement* and other security threats, sexual violence, physical abuse, intimidation, torture, particular economic hardship or marginalization, lack of integration prospects, community hostility, and different forms of exploitation. Such problems and threats are often compounded by the effects of past=persecution sustained either in their country of origin or during flight. The trauma of having been uprooted, deprived of normal family and community support systems and cultural ties, the abrupt change in roles and status, the fact or threat of violence, or the absence of male family members (while not an absolute condition), may render some refugee women or girls particularly vulnerable. These are contributing factors in determining whether resettlement is the appropriate solution.

Id.

[12] For a discussion of the lack of the input from women and children in refugee camp management, see *infra* notes 85-89 and accompanying text.

The nature of the U.S. Refugee Resettlement Program also played a significant role in the outcome of Sahra's case. U.S. national security concerns and shifting policy priorities combine with corrupt practices on the part of resettlement applicants and aid workers to create a labyrinthine resettlement process that often seems illogical and inefficient.[13] As a result, individuals like Sahra, who have not committed fraud, do not present national security risks, and are a high priority for humanitarian assistance, nevertheless slip through the gaping cracks that plague the system.

The U.S. government's decision to halt refugee resettlement for over two months in the wake of the September 11, 2001 terrorist attacks has intensified the debate over refugees and scrutiny of U.S. resettlement practices.[14] The suspension caused a backlog in which over 100,000 refugees cleared for resettlement could not take the final steps in their journey and travel to the United States.[15] Although some of those refugees have reportedly resolved their cases and entered the United States,[16] the debate between national security and refugee needs rages on, and the United States continues to fail to meet it annual resettlement ceiling.

This Article proposes a vehicle, in the form of a new non-immigrant visa, for expeditiously resettling those refugees who are most at risk of harm and least threatening to U.S.

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[13] For a discussion of the U.S. policy and lengthy resettlement process, see *infra* notes 93-106 and accompanying text.

[14] For a discussion of current U.S. policy on the admission of refugees post-9/11, see *infra* notes 93-112 and accompanying text.

[15] *See* George Gedda, *Admission of Refugees into U.S. Down*, ASSOCIATED PRESS, Oct. 3, 2003, *available at* http://www.unrefugees.org/archives.cfm?ID=576&cat=Archives [hereinafter Gedda, *Admission of Refugees*] (noting in fiscal year 2002, United States fell short of its 70,000-person refugee admission ceiling by 42,971). Fiscal year 2004 saw a shortfall of 17,125. *See* U.S. DEP'T. OF STATE, BUREAU OF POPULATION, REFUGEES AND MIGRATION, *Summary of Refugee Admissions Fiscal Year 2003* (Sept. 30, 2003), *available at* http://www.state.gov/documents/organization/38023.pdf [hereinafter U.S., *Refugee Admissions 2003*]. In total, 101,674 refugee allocations have gone unfilled since fiscal year 2002. *See* U.S. DEP'T. OF STATE, PRESS BRIEFING, *Refugee Admissions for Fiscal Year 2004*, (Oct. 4, 2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/36717.htm. [hereinafter U.S., *Refugee Admissions FY 2004*].

[16] *See* David A. Martin, *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement*, at 133 (Sept. 29, 2004), *available at* http://www.state.gov/documents/organization/36495.pdf [hereinafter Martin, *Reforms*] (stating that most of the cases affected by the immediate aftermath of the September 11, 2001 terrorist attacks "have been located and dealt with").

national security: abandoned or abused female and child refugees whose sex and/or age make them particularly vulnerable to harm. This Article will refer to the visa as a "W visa."[17] The W visa would be available to eligible refugees who have not yet resettled in the United States due to post-9/11 security measures as well as to eligible refugees who, like Sahra Dirie, are denied resettlement on certain non-security related grounds.

The Article focuses on women and children rather than other at-risk refugee populations, such as the sick or elderly, because of the unique situation of women and children.[18] While all refugees may encounter human rights abuses and hardships such as deprivation of food or shelter, women and children are more at risk for all types of human rights violations because of their subordinate status and subjugation within most refugee populations.[19] Their subordinate status is evident in the actual or perceived lack of redress available for crimes committed against them, especially sex crimes;[20] prevalence of physical abuse towards wives and children;[21]

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[17] *See* 8 U.S.C § 1101(a)(15)(v) (2000); I.N.A. §101(a)(15)(v) (2000). The last statutory visa designation is the "V" visa.

[18] *See* Jonathan Todres, *Women's Rights and Children's Rights: A Partnership with Benefits for Both*, 10 CARDOZO WOMEN'S L.J. 603, 605 (noting that "political obstacles, such as not having the right to vote, and developmental issues, such as the more limited verbal skills of younger children, make children more susceptible to exploitation"). Professor Todres also identifies a number of practices to which women are vulnerable due to their gender, such as "domestic violence, incest, rape, trafficking and forced prostitution, child marriages, dowry-related violence, and female genital mutilation." *Id*. at 606.

[19] *See id.* (stating that "[p]rejudicial practices against women and girls, particularly in developing countries, are often rooted in traditional cultural views of male-dominance").

[20] *See, e.g.*, Elizabeth A. Kohn, *Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia*, 24 GOLDEN GATE U. L. REV. 199, 204-07 (1994) (noting lack of attention paid to wartime rape by international community). *See also*, Ward, *supra* note 9, at 55. The laws of Thailand, where thousands of Burmese refugees reside, permits perpetrators of statutory rape to marry their victims in order to escape punishment, and resolves cases of rape of a married woman by offering financial compensation to the woman's husband. *Id.*

[21] *See* Ward, *supra* note 9, at 9. In a 1998 survey conducted by the International Rescue Committee, seventy-nine percent of Afghan women refugees reported having been beaten by their husbands. *Id*. Pathfinder International and the Azerbaijan Sociological Association conducted a study of female Azerbaijani refugees and internally displaced persons that revealed that twenty-three percent of women interviewed had been beaten by their husbands. Twenty-six percent declined to answer the question. *Id*. at 73. Thailand does not criminalize domestic violence. In fact, Thai law actually discourages victims of domestic violence as well as other gender-based violence from seeking redress against their abusers. *Id*. at 55.

harmful cultural practices such as female genital mutilation;[22] lack of visibility/ leadership positions;[23] and growth in the trafficking of women and children worldwide.[24] Traditions of subjugation usually predate the refugee flow but conflict and the resulting displacement often exacerbate the situation.[25] Although United Nations High Commissioner for Refugees ("UNHCR") has taken significant measures to improve the safety of women and children in refugee camps,[26] such measures must compete against cultural norms in which subordination is

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[22] *See* World Health Organization, *Fact Sheet No. 241* (June 2000), *available at* http://www.who.int/mediacentre/factsheets/fs241/en/ (explaining female genital mutilation is removal of all or part of female genitalia for non-therapeutic reasons). Approximately two million women in twenty-eight different countries are at risk for FGM every year. *Id.* Estimates put the number of victims of FGM at between 100 million and 140 million. *Id*. Among refugee populations, FGM is most common among women from Somalia, and to a lesser degree, Sudan. *See* Women's Commission for Refugee Women and Children, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation*, at 25 (May 2002), *available at* http://www.womenscommission.org/pdf/unhcr.pdf [hereinafter Women's Commission, *UNHCR Policy*]. For a discussion of other harmful cultural practices that exist in many cultures and tend to increase in post-conflict situations, such as early marriage and dowry, female infanticide, and enforced sterilization, *see generally* Ward, *supra* note 9.

[23] *See* UNHCR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN, ¶¶ 82-85 (July 1991), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/+BwwBmexrMN_wwwwnwwwwwwwmFqA72ZR0gRfZNhFqo7E2RN02ItFqrpGdBnqBzFqmRbZAFqo7E2RN02IDzmxwwwwwww5Fqw1FqmRbZ/opendoc.pdf [hereinafter UNHCR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN] (reporting that representatives of international organizations and host countries met with male camp leaders on issues such as distribution of food and other items, even though it was the role of female camp inhabitants to cook, feed and clothe their families). Refugee women have traditionally lacked leadership positions in refugee camps, even in management areas in which their participation is vital. *See also*, UNHCR, SEXUAL AND GENDER BASED VIOLENCE AGAINST REFUGEES, RETURNEES AND INTERNALLY DISPLACED PERSONS, at 31 (May 2003), *available at* http://www.rhrc.org/pdf/gl_sgbv03_00.pdf [hereinafter UNHCR, SEXUAL AND GENDER BASED VIOLENCE] (noting that "[m]ost leadership structures in refugee situations are dominated by men."). UNHCR has attempted to increase the status and visibility of women in refugee camps by encouraging their assumption of leadership positions and including them in dialogues regarding camp management. *See generally* UNHCR, GOOD PRACTICES ON GENDER EQUALITY MAINSTREAMING: A PRACTICAL GUIDE TO EMPOWERMENT, at 3 (June 2001), *available at* http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5JGE4A/$FILE/hcr-gender-jun01.pdf?OpenElement.

[24] *See Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV – 2003)*, 16 INT'L. J. REFUGEE L. 153, 153 (2004) (identifying trafficking as a growing concern in refugee protection). For further discussion of the trafficking of female and child refugees, see *infra* notes 91-93 and accompanying text.

[25] Ward, *supra* note 9, at 8. *See generally* Berta Esperanza Hernández-Truyol, *Sex, Culture and Rights: A Re-conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607 (1997) (providing general discussion of social and legal entrenchment of subjugation of women worldwide).

[26] *See* UNHCR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN, *supra* note 23, ¶¶ 82-85 (noting that in 1991, UNHCR promulgated Guidelines for the Protection of Refugee Women and Children). The Guidelines suggested a number of measures to improve the situation of female and child refugees, such as ensuring that women participate in consultations regarding camp design and layout; distributing food directly to women; recruiting and training refugee women as health care workers. *Id*. ¶¶ 8, 86, 102. Ten years later, the Women's Commission for Refugee Women and Children examined the effects and success of the Guidelines. *See* Women's Commission, *UNHCR Policy*, *supra* note 22, at 2. The Women's Commission found that enrollment of refugee girls in school

entrenched, and against host countries who fail to implement, abide by or reinforce the measures.[27]

The proposed non-immigrant visa would provide expedited relief limited in scope and in immediate benefits conferred. It does not create a more expansive system because, in the post-9/11 world, such a system would likely be prone to legislative, regulatory and administrative delays.[28] Moreover, it is not an attempt to overhaul the U.S. refugee resettlement program, but rather a suggestion for a security-conscious but expeditious parallel vehicle for resettlement.

Part II of this Article describes the refugee system, including conditions in refugee camps, the particular vulnerability of orphaned or abandoned children and women who face gender-based harm, and the post-9/11 U.S. refugee resettlement crisis. Part III puts forth a legislative proposal for a new visa category for certain female and child refugees to help eliminate the resettlement backlog and to identify particularly vulnerable refugees whom refugee officials may fail to identify for resettlement. Part III also examines and critiques a proposed bill for certain female and child refugees that the Senate Judiciary Committee is currently considering and argues that the proposal put forth in this Article is more feasible. The Article concludes that a

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increased; women refugees were more involved in camp management decisions; and more female staff were working in health and education programs. *Id*. However, the Women's Commission also found that the implementation of the Guidelines had been "uneven and incomplete, occurring on an *ad hoc* basis in certain sites rather than in a globally consistent and systematic way." *Id*. at 2. *See generally* UNHCR, *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (1995), *available at* http://www.forcedmigration.org/sphere/pdf/shelter/unhcr/sexual-violence.pdf.

[27] *See* U.S. GOV'T ACCT. OFF., *Humanitarian Assistance: Protecting Refugee Women and Girls Remains a Significant Challenge*, GAO-03-663, at 6-7 (May 2003), *available at* http://www.gao.gov/new.items/d03663.pdf [hereinafter GAO, *Humanitarian Assistance*] (noting some governments prohibit international organizations from accessing their refugee populations, thus stymieing protection activities).

[28] *See* Child Status Protection Act, Pub. L. No. 107-108, 116 Stat. 927 (codified as amended in scattered sections of 8 U.S.C. § 1101 (2002)) (allowing children of recipients of certain immigration benefits to continue to qualify as derivative beneficiaries upon turning twenty-one). *See also* Trafficking Victims Protection Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (altering some provisions of Trafficking Victims Protection Act of 2000). Conversely, legislation severely limiting immigration benefits and expanding expedited removal has garnered widespread support in Congress. *See, e.g.*, REAL ID Act of 2005, H.R. 418, 109th Cong. §§ 101, 103-04, 201-02 (2005). Sponsored by Rep. James Sensenbrenner, the REAL ID Act seeks to raise the standard for asylum eligibility, require that driver's licenses contain information regarding the holders' immigration status in order for federal agencies to accept them as identification; and expand the definition of "terrorist" and "terrorist activity."

new immigrant visa category for unprotected women and children is consistent with the United States' tradition of creating visas to address humanitarian concerns, consistent with the United States' national security interests, and the most viable option for assisting refugees for whom the post-9/11 resettlement crisis has far worse consequences than mere deferment of an American dream.

II. The Refugee System

A. The United Nations High Commissioner for Refugees

Persons at risk of persecution arising from violent civil conflict, severe repression and political crises[29] often cross the border into a neighboring country or are evacuated to neighboring countries to seek temporary shelter.[30] Once in this second country, or country of first asylum, many live in an area designated for refugees,[31] usually a camp like the one in which Sahra lived. They remain there until they can return home or, if return does not seem likely, secure permanent resettlement[32] in a safe third country, or "receiving country."[33]

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[29] CHRISTINA BOSWELL, ADDRESSING THE CAUSES OF MIGRATORY AND REFUGEE MOVEMENTS: THE ROLE OF THE EUROPEAN UNION, at 6 (UNHCR, New Issues in Refugee Research, Working Paper No. 73, Dec. 2002) ("Repression is also likely to involve cracking down on dissidents and general infringements of civil liberties. Where the state is unable to consolidate a repressive regime in this way, a third possibility is descent into [generalized] violence or civil conduct.").

[30] *See* UNHCR, REFUGEES BY NUMBERS 2004, UNHCR/PI/NUMBERS/ENG 1, at 9 (Sept. 2004) [hereinafter UNHCR, REFUGEES BY NUMBERS] (noting that Afghan refugees sought first asylum in neighboring Pakistan and Iran; Sudanese refugees fled to the border nations Uganda, Chad, Ethiopia, Kenya, Democratic Republic of the Congo, and Central African Republic; and Burundian refugees sought refuge first in neighboring Tanzania, Democratic Republic of the Congo, Zambia, and Rwanda).

[31] *See* the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees, UNHCR, U.N. Doc. HCR/MMSP/2001/09 (2002) [hereinafter the 1951 UN Convention]. These conventions established the definition of a refugee.

> [A refugee is] 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 [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id. art. 1, at 16.

[32] *See* UNHCR, *Resettlement*, *supra* note 5 (explaining resettlement is one of three long-term solutions to a refugee crisis, other two are voluntary repatriation and local integration). "Through resettlement, refugees gain legal protection – residency and often eventually citizenship – from governments who agree, on a case-by-case basis, to

The United Nations High Commissioner for Refugees (UNHCR) is the principal international agency that provides aid to refugees.[34] UNHCR plays a major role in all areas of refugee life, from establishing and running refugee camps in countries that host refugee populations, to determining the most feasible solution for various refugee populations, to assisting with voluntary repatriation and working with receiving countries if repatriation is not an option. UNHCR performs its functions with the assistance of a vast web of international humanitarian agencies;[35] as well as officials from host countries,[36] and receiving countries,[37] and sending countries.

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open up their communities to new members." *Id.* Resettlement is often the only viable option for refugees who face persecution in their native countries and whose security remains at risk in their countries of first asylum, whose families have been divided by borders or even entire continents, who have suffered torture, or who have medical problems for which treatment is unavailable in their countries of first asylum. *See* UNHCR, RESETTLEMENT HANDBOOK, *supra* note 11, § 1.2-1.3.

[33] *See* UNHCR, EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, NEW DIRECTIONS FOR RESETTLEMENT POLICY AND PRACTICE, Standing Comm. 21st Meeting EC/51/SC/INF.2, at 3 (Jun. 14, 2001) [hereinafter UNHCR, NEW DIRECTIONS FOR RESETTLEMENT] (listing ten traditional receiving countries: Australia, Canada, Denmark, Finland, Netherlands, Norway, New Zealand, Sweden, Switzerland, and United States, accept a certain number of refugees for resettlement each year based on quota system). Eight emerging resettlement countries, Argentina, Benin, Brazil, Burkina Faso, Chile, Iceland, Ireland and Spain have agreed to establish formal resettlement programs as well as procedures for adjudicating resettlement requests. *Id*. The United Kingdom agreed in 2003 to do the same. *See* Kathleen Newland, *Refugee Resettlement in Transition* (Sept. 1, 2002), *available at* http://www.migrationinformation.org/Feature/display.cfm?ID=52. Belgium, France, and Germany accept refugees for resettlement on an ad hoc basis rather than maintaining an annual quota of refugees. *Id*.

[34] *See* UNHCR, HELPING REFUGEES: AN INTRODUCTION TO UNHCR, at 5 (2001), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/basics/+hwwBmeii6xeqxwwwwnwwwwwwwxFqAvxxvWW9WWwmFqtFEIfgIhFqoUfIfRZ2ItFqtxw5oq5zFqtFEIfgIAFqoUfIfRZ2IDzmxwwwwwww1FqtFEIfgI/opendoc.pdf (detailing size and achievements of UNHCR).

[35] *See generally* UNHCR, NGO PARTNERSHIPS IN REFUGEE PROTECTION: QUESTIONS AND ANSWERS (2004), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/+UwwBme3cibexxwwwwnwwwwwwwhFqo7E2RN02ItFqopwGBDnG5AFqo7E2RN02IcFqNNHZa7wGBDnG5rop5aoDa2nh1tnna7GdBnqBodDaDzmxwwwwwww1FqnN0bI/opendoc.pdf. (discussing UNHCR partners with international, national, faith-based, and intergovernmental humanitarian organizations to provide various forms of aid to refugees). Some groups receive financial support from UNHCR to perform specific services for refugees. *Id*. Others do not receive UNHCR financial support but collaborate closely with UNHCR to provide emergency relief and resettlement assistance. *Id*. at 7. Its partners include the International Federation of Red Cross and Red Crescent Societies (IFRC), World Health Organization (WHO), World Food Program (WFP), International Organization of Migration (IOM) and the United Nations Children's Fund (UNICEF). *See* UNHCR, *Basic Information about UNHCR: What Is UNHCR?, available at* http://www.unhcr.ch/cgi-bin/texis/vtx/basics/+7wwBmeWLQw_wwwwnwwwwwwwhFqoUfIfRZ2ItFqtxw5oq5zFqtFEIfgIAFqoUfIfRZ2IDzmxwwwwwww1FqtFEIfgI/opendoc.htm (last visited Feb. 6, 2005) [hereinafter UNHCR, *What is UNHCR?*].

[36] *See* UNHCR, REFUGEES BY NUMBERS, *supra* note 30, at 2 (noting term "host country" refers to countries of first asylum as well as resettlement countries). According to UN estimates, Iran, Pakistan, Germany and Tanzania are

The High Commissioner's advisory committee, the Executive Committee of the High Commissioner's Programme,[38] considers resettlement "a key instrument for ensuring the protection of refugees and for seeking durable solutions to their plight."[39] Of the 10,389,700 refugees that UNHCR estimated to be present in the world in 2003,[40] only about 100,000 received resettlement approval from receiving countries.[41] This low number evidences the magnitude of the plight of refugees as well as the complexity of the resettlement process.

In order to be identified for resettlement, a refugee must first register with UNHCR or other NGO,[42] then have an individual interview with a UNHCR or NGO representative,[43] then finally have an interview with a receiving country's immigration official. Such interviews allow

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the four major refugee hosting countries, estimated to host 1.3 million, 1.2 million, 980,000 and 690,000 refugees respectively. *Id.* The UN also considers the United States, Serbia and Montenegro, Democratic Republic of the Congo, Sudan, China and Armenia major refugee hosting countries. *Id.*

[37] *See* UNHCR, *What is UNHCR?*, *supra* note 35 (explaining receiving countries such as Canada, United Kingdom and United States also provide significant monetary aid to UNHCR). "More unorthodox, and at times controversial partners, have included U.N. peacekeepers in the former Yugoslavia, Kosovo and Timor, various militaries which provided logistical support in Rwanda and Kosovo and financial institutions such as the World Bank." *Id.*

[38] *See* UNHCR, *Background on the Executive Committee*, *available at* www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.html?id=3b4f09faa&tbl=EXCOM&P (last visited July 2, 2004) (noting Executive Committee of the High Commissioner's Programme, or EXCOM, created in 1959, consists of sixty-four member nations, all of whom are members of the U.N. and "have a demonstrated interest in and devotion to the solution of the refugee problem.").

[39] UNHCR, NEW DIRECTIONS FOR RESETTLEMENT, *supra* note 33, at 1 (detailing importance of resettlement in refugee process).

[40] *See* UNHCR, REFUGEES BY NUMBERS, *supra* note 30, at 6 (noting figure does not include asylum seekers, refugees who voluntarily return to their original countries, internally displaced persons, or stateless individuals).

[41] *See id.* at 8 (demonstrating how few refugees are accepted at receiving countries).

[42] *See* UNHCR, RESETTLEMENT HANDBOOK, *supra* note 11, § 1, at 6 ("In using resettlement more effectively as a durable solution, States and UNHCR are further asked to examine how to carry out earlier analysis of date deriving from refugee registration to anticipate the needs for resettlement of individuals or specific groups and to process more rapidly resettlement applications particularly in emergency situations."). The registration process involves a number of steps: (1) "simple enumeration or estimation" (counting of refugees); (2) "fixing the arriving populations with the standard UNHCR token or an equivalent" (providing refugees with wristbands or other temporary form of identification); (3) "creat[ing] [an] address system" (dividing the refugee camp into sections, blocks and, if possible, numbers); (4) "control sheet registration in combination with family cards" (providing formal registration cards to refugee families); (5) "distribution of assistance and services"; and (6) "identification of persons with special needs." *Id*. at 54-55.

[43] *See id*. § 6 at 8 (noting through specific sub-agreement, non-governmental organizations (NGOs) may run prescreening programs to assess protection and other needs in large refugee populations).

> The identification of an individual refugee in need of resettlement consideration is typically the result of a referral received from within UNHCR, from an organization external to UNHCR working with refugees, or from refugees themselves. The most effective and responsive resettlement procedures will include consideration of referrals from all three sources.

Id. § 6 at 6.

UNHCR, humanitarian agencies and NGOs to elicit information from potential resettlement applicants and determine whether they meet the definition of a refugee.[44] Some receiving countries also employ interviews to ascertain whether resettlement applicants meet the definition of a refugee, but also to determine whether resettlement applicants meet country-specific requirements for proof of identity, family relationship, credibility and resettlement eligibility.[45]

The needs of refugees and the needs of receiving countries are often at odds and thus create a cyclical dilemma. On the one hand, refugees' desperate longing to find a permanent safe living situation often leads to the commission of fraud in applying for refugee benefits,[46] which in turn leads to receiving countries placing more restrictions on resettlement.[47] On the other hand, a lack of willingness on the part of many countries to accept refugees is obviously a contributing factor to the severe shortage of resettlement opportunities. As the number of

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[44] *See id.* § 6 at 16 (stating that interviews are always necessary in resettlement selection process and offering detailed guidance in how UNHCR staff should conduct interviews). *See generally, id.* § 4 (specifying information which UNCHR and NGOs should elicit from resettlement applicants in order to determine whether applicants meet definition of refugees and qualify for resettlement, including, *inter alia*: harm that applicants suffered in their home country, reasons why applicants fear returning to their home country, whether internal relocation in home country or permanent status in country of first asylum is possible, special medical needs, and whereabouts of family members).

[45] *See* UNHCR, NEW DIRECTIONS FOR RESETTLEMENT, *supra* note 33, at 3 (noting methods for accepting refugees vary by country). Resettlement criteria usually goes well beyond the refugee definition. For example, Australia's Department of Immigration and Multicultural Affairs "decision-makers" evaluate whether applicants for resettlement in Australia have other suitable durable solutions available to them, and whether "permanent settlement in Australia is the appropriate course for the individual and would not be contrary to the interests of Australia." *See* UNHCR, RESETTLEMENT HANDBOOK AND COUNTRY CHAPTERS, ch. Australia, at 3 (June 2004), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3c5e542d4. Canadian visa officers must decide whether applicants for resettlement in Canada (except for particularly vulnerable applicants) have the potential to become self-sufficient in Canada within three to five years. In making this determination, visa officers take into account factors such as "education, presence of a support network (family or sponsor) in Canada, work experience and qualifications, ability to learn to speak English or French and other personal suitability factors such as resourcefulness." *See* UNHCR, RESETTLEMENT HANDBOOK AND COUNTRY CHAPTERS, ch. Canada., at 2 (June 2004), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3c5e55594.

[46] *See* Martin, *Reforms*, *supra* note 16, at 10 ("In any selective system, fraud is an inescapable problem."). This is especially true in the refugee arena, where "[g]oing to America is the holy grail of refugee life. People will cajole, bribe, threaten and kill for the opportunity." Sasha Chanoff, *After Three Years: Somali Bantus Prepare to Come to America*, REFUGEE REP., Nov. 2002, at 1, *reprinted in* Martin, *Reports*, *supra* note 16, at 10.

[47] *See* UNHCR, NEW DIRECTIONS FOR RESETTLEMENT, *supra* note 33, at 3 (demonstrating growing government restrictions on refugee admissions in preventing fraud). *See generally id.* at pt. II, § D, and pt. III, § X.

refugees worldwide remains fairly constant from year to year,[48] the cycle of fraud (on the part of resettlement applicants) and unwillingness to participate in resettlement programs (on the part of receiving countries) continues. As a result, a phenomenon called "refugee warehousing" has emerged, in which millions of refugees live in refugee camps or surrounding areasfor ten years or more, usually in a state of dependency and without adequate access to basic rights such as employment, freedom of movement and education.[49]

Amina M. and her family have experienced refugee warehousing firsthand. Amina was born in Somalia in 1978. She lived with her family in the capital, Mogadishu. When she was twelve years old, war broke out in Mogadishu. Like Sahra Dirie, Amina and her family belonged to a small tribe that the larger tribes targeted for rape and murder. Amina's father disappeared amid the chaos. Realizing that the family needed to flee the city, Amina's mother went out to look for him. When she did not return, Amina and her aunt went to look for her. They found her dead in the street from a gunshot wound.

Amina fled Mogadishu and soon Somalia with her sister, brothers, aunt and cousins. The two oldest brothers became separated from the rest of the family and went to a camp in Ethiopia. Amina went with her younger sister and brother and her extended family to a Kenyan refugee camp. They lived there for two years, then in a house nearby for seven years. During those nine years, neither Amina nor her brothers and sisters never received an offer of resettlement. By the time they left Kenya to seek asylum in the United States, Amina was twenty, and her younger

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[48] *See* UNHCR, REFUGEES BY NUMBERS, *supra* note 30, at 18 (noting between 1997 and 2002, worldwide refugee population remained between 10,389,600 and 12,062,500).

[49] *See* Merrill Smith, *Warehousing Refugees: A Denial of Rights, a Waste of Humanity*, U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURV., at 38 (2004), *available at* http://www.refugees.org/data/wrs/04/pdf/38-56.pdf ("Warehousing is the practice of keeping refugees in protracted situations of restricted mobility, enforced idleness, and dependency—their lives on idefinite hold—in violation of their basic rights under the 1951 UN Refugee Convention."). There are approximately 7.35 million warehoused refugees. *See* U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURV., at 1 (2004), *available at* http://www.refugees.org/article.aspx?id=1156 [hereinafter WORLD REFUGEE SURV.]. *See also*, the 1951 UN Convention, *supra* note 31.

sister and brother, ages fourteen and eleven respectively, had no recollection of life outside the refugee camp area.[50]

Refugee warehousing highlights the increasing challenge of reconciling the receiving countries' need to protect the integrity of their resettlement processes with the refugees' urgent humanitarian needs. Measures that are "capable of responding both to [refugees'] special needs and to the urgency of the required response"[51] must also meet the security, social and economic needs of the receiving country. The inherent tensions between the needs of refugees and those of receiving countries is most apparent in the U.S. refugee resettlement system.

B. The U.S. Refugee Resettlement Program

The United States, as well as refugee-accepting countries around the world, recognizes that refugees make important contributions to their adopted countries.[52] As United Nations Secretary-General Kofi Annan stated, "Refugees are the great survivors of our time."[53] They have overcome war, persecution, hunger, disease and malnourishment. They carry their strength and resourcefulness with them to their new homes. Although myths prevail that refugees drain

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[50] Interview with Amina M., a former client, (2001) (using pseudonym to protect client's anonymity). Today, Amina lives and works in the United States. She is putting her sister through college, and hopes to do the same for her younger brother. She was reunited with her two older brothers in the last two years, and all have asylum in the United States. They recently established contact with a man they believe to be their father. He has been living as a refugee in Ethiopia since 1991.

[51] UNHCR, NEW DIRECTIONS FOR RESETTLEMENT, *supra* note 33, at 2 (expressing why systems of resettlement are so urgent).

> The effectiveness of resettlement cannot simply be measured in numbers. Ensuring that there are sufficient places available to meet the resettlement needs of refugees is only part of the challenge. Systems and procedures must be responsive particularly to urgent needs. The integrity of the process depends on how the cases are profiled and how rapidly they can be accepted.

Id.

[52] *See* REFUGEE COUNCIL, CREDIT TO THE NATION: REFUGEE CONTRIBUTIONS TO THE UK, at 2 (June 2002), *available at* http://www.refugeecouncil.org.uk/downloads/rc_reports/credit.pdf. "Far from being a drain on Britain's finances, over the years refugees have had a positive economic impact, bringing new skills and ideas into the country, and putting the resourcefulness and determination that drove them to seek asylum to use in British workplaces. . . . Our refugee communities have also helped to shape the British cultural landscape, generating artists, musicians, sports-people, chefs and innovative thinkers. . . ."

[53] Kofi Annan, Notes Key Role of Asylum Countries- Urges Continued Aid for Resettlement Efforts, Message on World Refugee Day (June 20, 2001), *in* U.N. Doc. SG/SM/9386 (articulating hardships and barriers refugees overcome in plight to survive and find new homes).

public resources and rely heavily on public assistance, states with refugee populations have found that the reality is quite the opposite.[54] The majority of resettled refugees have proven themselves to be highly self-sufficient contributing members of society.[55]

In order to resettle in the United States, refugees must undergo a rigorous screening process administrated by the Bureau of Populations, Refugees and Migration ("PRM") of the Department of State in conjunction with the Department of Homeland Security[56] and the Office of Refugee Resettlement ("ORR") of the Department of Health and Human Services ("HHS").[57] Applicants for admission to the United States must (1) meet the definition of a refugee,[58] (2) be

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[54] *See, e.g.*, Maryland Office for New Americans, *Refugees Rebuilding Lives, available at* http://www.dhr.state.md.us/mona/who.htm#population (last visited Feb. 20, 2005) (stating that resettled refugees contribute significantly to U.S. economy and culture by working hard, starting new businesses, purchasing homes, consuming goods and services, and strengthening the social fabric of the country); Texas Dept. of Human Services, New Americans in Texas: An Overview of Immigrants and Refugees (Nov. 2002) at 27, 51 (indicating that of the estimated 27,123 refugees living in Texas, only 460 receive Temporary Assistance to Needy Families, 2,547 receive food stamps, and 2,279 receive medical benefits, remaining at 0.15% of the total number of Texas recipients of those services); Gov. Dirk Kempthorpe, Official Proclamation, June 20, 2004, *available at* http://gov.idaho.gov/mediacenter/proc/proc04/procjune/proc_refugee.htm, (last visited Feb. 20, 2005) (stating that Idaho "celebrates the contributions refugees make to our prosperity, our cultural enrichment and the character of all of our people"); Iowa Dept. of Human Services Bureau of Refugee Services, *Myths about Refugees, available at* http://www.dhs.state.ia.us/refugee/bureau/myths.asp (last visited Feb. 20, 2005) (emphasizing that refugees pay taxes, are self-sufficient, and enrich their communities by sharing their "talents, skills, culture and customs").

[55] *See* UNHCR, *Gallery of Prominent Refugees, available at* http://www.unhcr.ch/promref/ (last visited Feb. 11, 2005) (providing information on dozens of prominent refugees in United States and around world, including Isabel Allende, acclaimed author who fled Chile after military coup led by General Augusto Pinochet and now lives in San Rafael, California; late philosopher Hannah Arendt, who fled to United States from Nazi-occupied Europe; Nobel laureate Joseph Brodsky, who sought refuge in United States after his writings led to his persecution by Soviet authorities; famous actress Marlene Dietrich, whose family was persecuted by Nazis for her refusal to support them; Albert Einstein, a refugee from Nazi Germany; Walter Lam, a Ugandan refugee who fled to United States and later founded Alliance for African Assistance, a nonprofit organization that assists refugees from all over world; and Rep. Tom Lantos, who came to United States after World War II, only person in his family to have survived Holocaust).

[56] Formerly the Immigration and Naturalization Service (INS).

[57] *See* UNHCR, RESETTLEMENT HANDBOOK AND COUNTRY CHAPTERS, ch. U.S.A., at 2 (June 2004), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3c5e5a764 [hereinafter UNHCR, COUNTRY CHAPTER: USA] (describing resettlement policies and procedures in United States).

[58] *See* 8 U.S.C. § 1101(a)(42) (2000) (providing definition of refugee).

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . .

Id.

among those refugees whom the President determines to be of special humanitarian concern,[59] (3) be otherwise admissible under U.S. law,[60] and (4) not be "firmly resettled"[61] in another country.[62]

In addition to relying on the above criteria to screen resettlement applicants, the United States employs a priority system to determine in what order to accept applicants who meet the basic eligibility criteria. Pursuant to 8 U.S.C. § 1157(e), the President submits an annual report to the Congress detailing his recommendations for refugee admissions.[63] The report is a core part of an annual consultative process involving the presidential administration, Congress, representatives of state and local governments, public interest groups, non-governmental organizations, and others concerned with refugees.[64] The end result of the annual consultative process is the priority system for refugee resettlement.

Every year, the United States gives the highest priority to refugees whom UNHCR or the U.S. embassy refers for resettlement due to "urgent humanitarian concerns."[65] These individuals

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[59] *See* 8 U.S.C. § 1157(a)(3) (2003) ("Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination by the President after appropriate consultation.").

[60] *See* 8 U.S.C. § 1182 (2004), I.N.A. § 212 (2004) (classifying groups of aliens ineligible for visas or admission).

[61] *See* 8 U.S.C. § 1158(b)(2)(A)(vi) (2004), I.N.A. § 208 (b)(2)(A)(vi) (2004). *See also* 8 CFR 208.15 (2005) (providing guidance on determining whether an applicant for asylum was firmly resettled in another country).

[62] *See* UNHCR, COUNTRY CHAPTER: USA *supra* note 57, at 1 (noting five key criteria for refugee admission in U.S.).

[63] *See* 8 U.S.C. § 1157(e) states that the report must include:

> (1) A description of the nature of the refugee situation. (2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came. (3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement. (4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States. (5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees. (6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States. (7) Such additional information as may be appropriate or requested by such members.

Id.

[64] *See* UNCHR, COUNTRY CHAPTER: USA, *supra* note 57, at 2 (noting key actors President consults with before creating U.S. refugee policy).

[65] U.S. DEP'T. OF STATE, DEPT. OF HOMELAND SECURITY, DEPT. OF HEALTH AND HUMAN SERVICES, *Proposed Refugee Admissions for FY 2005 – Report to the Congress*, at 7 (Sept. 2004), *available at*

receive Priority One, or P-1, status.[66] P-1 refugees generally include those who face compelling security concerns in the country of first asylum, victims of torture or violence, at-risk women, persons in urgent need of medical care, and persons who have suffered persecution because of their political, religious or human rights activities.[67] P-1 referrals must still establish past persecution or a well-founded fear of future persecution in the country from which they fled prior to being accepted for resettlement.[68]

Upon receiving a referral from UNHCR or an NGO for P-1 processing, applicants for resettlement in the United States must proceed through several more levels of adjudication. First, the U. S. Department of State evaluates the cases based on the applicants' situation in the country of first asylum, the conditions from which they have fled, U.S. national interest, and other humanitarian considerations.[69] Second, applicants who appear to have suffered persecution or to have a well-founded fear of future persecution[70] and who otherwise fall within the United States' resettlement priorities must then meet with a U.S. immigration official to determine

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http://www.state.gov/g/prm/asst/rl/rpts/36116.htm (discussing U.S. policy to take refugees with most urgent need with higher priority).

[66] *See id.* (describing how U.S. designates refugees for processing). In addition to P-1 processing, the United States also designates "groups of special concern" for Priority Two, or P-2, processing and relatives of nationals of certain countries for Priority Three, or P-3, processing. *Id*. The Bush Administration identified a number of groups for P-2 resettlement in fiscal year 2005, including human right activists in Cuba; Iranian members of religious minorities; Jews, Evangelical Christians, and certain members of Orthodox churches in the former Soviet Union; Meskhetian Turks in Russia; and Hmong in Thailand. *Id.* at 8. The Bush Administration designated fourteen countries (Burma, Burundi, Colombia, Congo-Brazzaville, Congo-Kinshasa, Cuba, Ethiopia, Eritrea, Haiti, Iran, Liberia, Rwanda, Somalia and Sudan) for P-3 family-based resettlement for fiscal year 2005. *Id*. at 9.

[67] *See* UNHCR, COUNTRY CHAPTER: USA, *supra* note 57 at 2 (stating which persons are defined as Priority One in U.S.).

[68] *See id.* (discussing well-founded fear interview, process by which refugees discuss their fear about returning to their native country).

[69] *See id.* at 4 (noting procedures which U.S. uses to determine whether to accept refugees).

[70] *See* Matter of Mogharabbi, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (holding that an individual's fear of persecution is well-founded if he or she "(1) possesses a characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could . . . become aware, that the [individual] possesses this belief or characteristic; (3) the persecutor has the capability of punishing the [individual]; and (4) the persecutor has the inclination to punish the [person]") (quoting Matter of Acosta, 19 I. & N. Dec. 211, 226 (B.I.A. 1985)).

whether they qualify for admission as a refugee.[71] Once the immigration authorities approve an applicant for resettlement, the applicant must undergo a medical examination and security checks before travel arrangements to the United States can be made. The entire process, from UNHCR referral to departing for the United States, can sometimes take years. For women and children, even those who qualify for P-1 processing as at-risk refugees, the ever-increasing wait to leave the refugee camp can have severe consequences for their health and well-being, even more so than for other refugees.

1. Women and Children in Refugee Camps

As discussed above, less than ten percent of the world's refugee population receives approval for resettlement each year.[72] Those who do must wait years for their applications to be processed, security checks to be completed and travel arrangements to be made. Those years are spent living in refugee camps, many of which are overcrowded, isolated, disease-ridden and violent.[73]

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[71] *See* 8 C.F.R. § 208.13(a) (2005) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). The situation of refugees often makes it difficult for them to provide documentary or third party testimonial corroboration of their claims, but U.S. regulations governing asylum, in conformity with U.N. recommendations, specifies that an applicant's credible testimony is sufficient to establish eligibility. *Id.* *See also* UNHCR, 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 (Jan. 1992), ¶ 196 [hereinafter UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA] ("In most case a person fleeing from persecution will have arrived with the barest necessities and very frequently even without documents. . . . [I]f the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt.").

[72] For a discussion of the statistics regarding the current refugee population, see *supra* notes 47-49 and accompanying text.

[73] *See* WORLD REFUGEE SURV., *supra* note 49, at 38-110 (describing lives and living conditions of refugees throughout the world, including Lebanon, Africa, Pakistan and Europe). *See also* UNHCR, *Life in a Refugee Camp – The Inside Story*, REFUGEES MAG, Sept. 1, 1996, issue 105(describing in detail conditions of Ethiopian refugee camp to illustrate challenges that refugees and aid workers face on daily basis). *See also* UNHCR, *Health: Familiar Images*, REFUGEES MAG., Sept. 1, 1996, issue 105. Factors inherent in a camp situation include "overcrowding, which facilitates the transmission of infections diseases; poor nutrition and consequent lower immunity; lack of clean water; poor sanitation; and inadequate shelter." *Id.*

Women and children comprise between seventy-five and eighty percent of the total worldwide refugee population, or approximately eight million individuals.[74] Despite their large numbers, however, women and children tend to suffer the effects of refugee camp conditions more severely than the adult male refugee population.[75] Although women and children constitute the vast majority of refugees worldwide, basic necessities and services for them are scarce. Women and girls are vulnerable to gender-based violence and persecution such as rape, forced marriage, female genital mutilation ("FGM") and sexual slavery and exploitation while living in refugee camps.[76] Refugee children are at risk for death from preventable diseases; rape, sexual slavery and sexual exploitation; and forcible conscription into militias.[77]

A number of factors combine to create circumstances that affect female sole heads of households and unaccompanied minors with particular severity. Poverty, patriarchal cultural attitudes, camp design and management, and lack of funding and budget shortfalls contribute to the plight of all refugees, but are leading causes of the age- and gender-specific hazards

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[74] *See* UNHCR, *Women – Seeking a Better Deal*, REFUGEES MAG, Apr. 2, 2002, at 7 (noting that UNHCR cares for 21.8 million refugees, half of which are women).

[75] *See* GAO, *Humanitarian Assistance*, *supra* note 27, at 25 (revealing GAO found "the conditions in refugee camps create an ongoing environment in which women and girls are vulnerable to sexual exploitation and abuse of power.").

[76] *See* UNHCR, PREVENTION AND RESPONSE TO SEXUAL AND GENDER-BASED VIOLENCE IN REFUGEE SITUATIONS, at 4 (Mar. 2001), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/+owwBmeOYnR_wwwwGwwwwwwwhFqA72ZR0gRfZNtFqr72ZR0gRzFqmRbZAFqA72ZR0gRfZNDzmxwwwwwww1FqmRbZ/opendoc.pdf [hereinafter UNHCR, PREVENTION AND RESPONSE TO SEXUAL AND GENDER-BASED VIOLENCE] (discussing forms of sexual and gender-based violence which occur in home, community, and culture; forms can be physical, sexual and psychological). *See* UNHCR, HANDBOOK FOR REGISTRATION: PROCEDURES AND STANDARDS FOR REGISTRATION, POPULATION DATA MANAGEMENT AND DOCUMENTATION, pt. 1 at 9, ¶ 5 (Apr. 25, 2002) *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?id=3f8e93e9a&tbl=MEDIA [hereinafter UNHCR, HANDBOOK FOR REGISTRATION] (emphasizing dangers refugee girls face "particularly at risk of being excluded from or abused during the registration process.").

[77] *See* UNHCR, PREVENTION AND RESPONSE TO SEXUAL AND GENDER-BASED VIOLENCE , *supra* note 76, at 4 ("There are many factors contributing to acts of sexual and gender-based violence in any setting. In general, the overriding causes are gender inequity, assertion of power, and lack of respect for human rights."). *See also* UNHCR, HANDBOOK FOR REGISTRATION, *supra* note 76, pt. 1 at 10, ¶ 1 ("Humanitarian workers may extort bribes or sexual favors from teenage girls in exchange for access to registration formalities.").

discussed above.[78] UNCHR'S efforts to address those issues through targeted programs for women and children[79] have not been sufficient, and the conditions remain in place today.

Poverty, in large part a consequence of budget shortfalls and lack of funding, has resulted in a shortage of food, clothing and other goods in many camps.[80] Shortages have in turn led to one of the main gender- and age-specific harms prevalent in refugee camps: sexual exploitation. Aid workers, camp managers and camp residents have forced women and girls to engage in sexual bartering in order to secure vital, scarce items.[81] Shortages also create health hazards particular to women, such as lack of nutrition for nursing mothers and lack of sanitary products.[82]

Shortages, particularly of fuel, also highlight how camp management and design contribute to camp conditions particularly harmful to women and children. In refugee camps throughout the world, women and girls are responsible for preparing the family's meals. That includes gathering fuel with which to cook the meals. Refugee camps, however, tend to be short of firewood and other cooking fuel, necessitating that women and girls travel outside the camp for it. The distance of many refugee camps from urban centers, and the erosion of natural

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[78] *See* GAO, *Humanitarian Assistance*, *supra* note 27, at 3. Cultural relativism is also to blame for the proliferation of practices harmful to women and children. *Id.* Such arguments in essence state that violent and harmful acts such as female genital mutilation, bride burning, and spousal abuse should be protected cultural practices not subject to "imperialist" perspectives. *See* John Linarelli, *Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 981-982 (1997) (recognizing and providing protection against gender- and age-based harm does not impose cultural change on communities). Mechanisms such as these respect the rights of individuals who wish to depart from cultural norms that they find harmful and in violation of their human rights. *Id*. at 982.

[79] *See* GAO, *Humanitarian Assistance*, *supra* note 27, at 9 (reporting UNHCR efforts to combat sexual and gender-based violence among refugees, include involving refugee women in camp management). *See e.g*. UNHCR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN, *supra* note 23, ¶ 30-43 (promulgating such guidelines for protecting refugee women and children). *See* UNHCR, SEXUAL AND GENDER BASED VIOLENCE, *supra* note 23, at 31 (coordinating inter- and intra-agency conferences on sexual and gender-based violence).

[80] *See* GAO, *Humanitarian Assistance*, *supra* note 27, at 25 ("First, camps are sites of extreme poverty, and women are often reduced to exchanging sex for otherwise unavailable food and nonfood items such as clothing, shelter materials, and cooking items.").

[81] *See id.* ("Finally, some relief workers and refugee-led camp management staff hold cultural attitudes that are accepting of sexually exploitative arrangements and thus perpetuate the problem.").

[82] *See id.* at 10 ("The lack of sanitary materials has negative health, social, economic, and psychological implications for women.").

resources that may have existed nearby prior to the refugee influx,[83] often require that women and girls travel significant distances, sometimes up to thirty kilometers, to forage for fuel.[84] Upon exiting the camp, however, the women and girls face a much higher risk of attacks from locals, bandits, police and other potential attackers.[85]

Poor camp management and design also prevent female refugees from accessing even the minimal protection that UNHCR or other camp-administrating NGO's can provide. Registration, for example, though necessary in order to come formally under the protection of the organization running the camp, is often inaccessible to women and children due to lack of shade, water and other amenities necessary for women with children who must spend protracted periods of time awaiting processing.[86] As a result, males, the traditional heads of households, tend to register the family without the presence of female and child family members. In many such cases, the practice has been to provide only the "head of the family" with a registration card listing other family members. Not only does this practice permit the male head of the family to identify which members of his family should receive official refugee protection, but it gives him alone the right to receive the family's rations.[87] Many women and children thus remain faceless and unable to access protection and basic necessities.

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[83] *See* UNHCR, *Enivironment: Preventing and Repairing the Damage*, REFUGEES MAG., Sept. 1, 1996, issue 105 ("The situation in eastern Ethiopia is similar to the predicament experienced by other countries caring for large numbers of refugees – shrinking forests, poaching in game parks, pollution of water resources and soil erosion.").
[84] *See* Refugees International, *Kenya Visual Mission: Violence and Dependence in Kakuma Refugee Camp*, PHOTO REP., Oct. 7, 2003 (discussing problems facing women in collection of firewood, water, and other necessary supplies.)
[85] *See* GAO, *Humanitarian Assistance*, *supra* note 27, at 9 (noting fuel predicament is most prevalent in African refugee camps). *See* Mary Anne Fitzgerald & Shep Lowman, *Protect Refugee Women as They Gather Firewood*, INT'L. HERALD TRIB., July 27, 1998 (explaining that women are most vulnerable during firewood collection). *See also* Refugees International, *supra* note 84 (noting accompanying photographs include "Darfur 2004: Women travel to gather firewood" taken on November 5, 2004).
[86] *See* UNHCR, HANDBOOK FOR REGISTRATION, *supra* note 76, pt. 2 at 123 (discussing aspects that must be taken into account when choosing location for camp registration).
[87] *See* GAO, *Humanitarian Assistance*, *supra* note 27, at 9 (describing UNHCR's success in including some women in food distribution programs, but female participation remains low in some camps).

Patriarchal cultural attitudes also contribute heavily to gender- and age-specific harm in refugee camps. As discussed above, males, traditionally considered the "head of the household," often have the ability to conceal family members over whom they wish to retain control. One example of family members most at risk under this system include young girls for whom, depending on the culture, early marriage may bring a high bride price or dispense with the need to pay a dowry.[88] Another example is unrelated children, usually girls, living with families and providing unpaid labor.[89] Heads of households thus may have a financial disincentive for registering some children. Patriarchal cultural attitudes validate and reinforce the concealment of women and children and their submission to the will of the head of the household.[90]

The growing industry of human trafficking also poses grave danger for women and children in refugee settings .[91] Refugee camp poverty has created a lucrative market for human traffickers who prey on vulnerable people, especially women and children, and dupe them into

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[88] *See* UNHCR, HANDBOOK FOR REGISTRATION, *supra* note 76, pt. 1 at 10 (noting some girls who attempt to register may encounter extortion for sexual favors and other abuse from humanitarian workers).

[89] *See id.* at 9-10, (explaining why young girls are not registered at camps because of status as unpaid labor or to not interfere with dowries).

[90] *See generally* Ward, *supra* note 9 (detailing patriarchal attitudes and their consequences in refugee populations throughout world). For example, due to patriarchal attitudes in the Congo, domestic violence is the norm, polygamy and adultery are permitted for men but punished if committed by a woman, and dowry and inheritance laws severely inhibit women's independence. *Id*. at 22. Cultural attitudes in Afghanistan (before, during and after the Taliban) have included requiring women to cover their entire body while in public, holding women responsible for sexual violence inflicted upon them, and denying employment to women. *Id* at 46-47. East Timorese refugees are subject to Indonesian patriarchal cultural attitudes that favor polygamy, male domination within the family, and bias towards men in divorce proceedings. *Id*. at 62. Azerbaijani refugees maintain patriarchal cultural attitudes evident in the underemployment of women, exclusion of female leadership in both the public and private sphere, and the vesting of family authority in men to the extent that men have the right to cast election ballots for female members of the family. *Id.* at 72.

[91] *See generally* JOHN MORRISON & BETH CROSLAND, THE TRAFFICKING AND SMUGGLING OF REFUGEES: THE END GAME IN EUROPEAN ASYLUM POLICY? 1-2 (UNHCR New Issues in Refugee Research, Working Paper No. 39, Apr. 2001) (exploring in detail increasing problem of human trafficking targeting refugees and other migrants). The paper defines a trafficking victim as "someone who has been coerced in some way into being transported for the purpose of involving them in an exploitative practice." *Id*. at 53. *See also* International Organization for Migration, *Traffickers Make Money Through Humanitarian Crises*, TRAFFICKING IN MIGRANTS, July 1999 at 1-2 (reporting that human traffickers took advantage of ethnic cleansing in Kosovo and famine in North Korea to kidnap, dupe and coerce vulnerable women into exploitative situations.)

slavery with promises of legitimate work or marriage abroad.[92] The desire to escape the refugee camp also leads refugees to fall prey to traffickers offering to smuggle refugees into other countries, but who then endanger and exploit the refugee during or at the conclusion of the journey.[93]

UNCHR efforts have proven to be far from sufficient in addressing gender- and age-related violence and hardship in its refugee camps. Women with husbands often struggle to feed their children. Children with parents face bleak futures and wasted years. Yet single mothers and abandoned children, as well as women and children who suffer abuse at the hands of their would-be protectors, encounter an added layer of hardship and stigmatization.

2. A New Crisis Calls for a New Solution

In the post-9/11 world, refugees have been recast as national security threats. Many do not have proof of identity.[94] Many are Muslim and hail from predominantly Muslim countries.[95] The vast majority lives in conditions of desperate poverty that foment violence and desperation. For these reasons, refugees now endure significantly more scrutiny prior to being granted admittance to the United States.

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[92] *See* Mary A. Young, *The Smuggling and Trafficking of Refugees and Asylum Seekers: Is the International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organized Crime?* 27 SUFFOLK TRANSNAT'L L. REV. 101, 104 (identifying refugees' "desperation and willingness to risk their lives" as reasons for their susceptibility to falling prey to human traffickers). *See also* U.N. OFF. ON DRUGS AND CRIME, *Trafficking in Human Beings*, *available at* http://www.unodc.org/unodc/en/trafficking_human_beings.html (last visited, Feb. 9, 2005) (reporting that "[t]raffickers recruit victims through fake advertisements, mail order bride catalogues and casual acquaintances").

[93] *See* UNHCR, *UNHCR Urges Solutions for Refugees to Combat Trafficking*, UNHCR NEWS STORIES, Apr. 29, 2003, *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/+HwwBmeJz72KwwwwmwwwwwwwhFqnN0bItFqnDni5AFqnN0bIcFqPBGwhhoqAoDtawDma5M1ttcoDtadhaGnh1tnn5Dzmxwwwwwww1FqmRbZ/opendoc.htm (citing U.N. High Commissioner for Human Rights, Ruud Lubbers' statement that lack of durable refugee solutions leads refugees to "undertake a perilous odyssey halfway around the world in search of safety and better lives.").

[94] *See* UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA, *supra* note 71, ¶ 196 (stating that "[i]n most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.").

[95] *See* PATRICIA S. MALOOF & FARIYAL ROSS-SHERIF, MUSLIM REFUGEES IN THE UNITED STATES: A GUIDE FOR SERVICE PROVIDERS, app. 2 (2003) (indicating that between 2000 and 2003, Muslims made up average of over 30 percent of total resettlement admissions, and during that time period Muslim refugees hailed from up to fifty different countries).

The situation of particularly vulnerable female and child refugees thus deteriorated even further after the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon. As part of its response to the attacks, the United States immediately suspended refugee resettlement for several months.[96] During that time, the U.S. government carried out new background checks and investigations of family relationships. The U.S. concluded that approximately forty percent of family-based, or P-3, refugees accepted for resettlement had committed fraud during the application process and did not actually have the relationship with their sponsors that they claimed to have.[97]

When the U.S. refugee resettlement program did resume in February 2002, it was with the implementation of new, far stricter security mechanisms that apply even to the highest priority refugees. First, refugees, including those already accepted for resettlement, now have to undergo new security checks prior to gaining admission to the United States.[98] Even prior to 9/11, the U.S. State Department checked all applicants for resettlement against the Refugee Information Entry Sub-system of the Consular Lookout and Support System ("CLASS"), a database searched using names and dates of birth.[99] CLASS contains the names of persons for whom the State

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[96] *See* U.S., *Refugee Admissions 2003*, *supra* note 15 (illustrating drop in refugee admissions during this time). *See also* T. T. Nhu, *Refugee Backlog Remains Sizable; Resettlement Program Resuming After Sept. 11*, SAN JOSE MERCURY NEWS, Feb. 27, 2002.

[97] *See* U.S., *Refugee Admissions 2003*, *supra* note 15 (noting fraud in refugee resettlement also results from refugee cultural norms that conflict with Western cultural norms). One example is polygamous marriages, which Western countries refuse to recognize in most cases. *See* Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage? Immigration Law's Conflicted Answer*, 32 HOFSTRA L. REV. 273, 279 (2003). Another common example is extended family relationships which do not comport with the Western concept of the "nuclear family" consisting of two married adults and their children. *Id*. at 290-293. Members of many refugee communities often consider nieces, nephews, grandchildren, and even non-blood-related children as part of their family, particularly in situations where the parents of the children are deceased. *Id.*

[98] U.S. DEP'T. OF STATE, DEPT. OF HOMELAND SECURITY, DEPT. OF HEALTH AND HUMAN SERVICES, *Proposed Refugee Admissions for FY 2004 – Report to the Congress* at 5 (Oct. 2003), *available at* http://www.state.gov/g/prm/asst/rl/rpts/25691.htm [hereinafter U.S., *Proposed Refugee Admissions FY 2004*] (stating CLASS checks are based on name and date of birth. A CLASS check is now done efficiently via WRAPS, triggered as soon as the OPE has acquired the basic individual information needed to perform the check, and the result is also recorded in automated fashion. Most cases clear this check and can then be scheduled for the remainder of the process).

[99] *See* Martin, *Reforms*, *supra* note 16, at 120 (citing 9 FAM Part IV Appendix D § 201).

Department has information, usually derogatory, pertaining to the individuals' application for entry into the United States.[100] In the post-9/11 era, the results of the CLASS check must now be completed and documented before resettlement offices may proceed any further on the case.[101] Although the U.S. State Department claims that the security checks now only take forty-five days to process, they took several months when these changes first came into effect.[102]

Other post-9/11 security measures, while not particularly time consuming compared to the CLASS check, have delayed travel in another respect: they have caused the amount of available flights for refugees to decrease significantly.[103] As of November 2001, all refugees who are fourteen years old or older at the time of their entry into the United States must undergo full fingerprinting upon arrival in the United States.[104] This process is so cumbersome that the government initially imposed a thirty-person per flight limit on refugees,[105] a limit which improvements in fingerprinting efficiency have allowed to increase only to thirty-five refugees per flight.[106] Adding to the need for a per flight limit on refugees is the 2002 Enhanced Border Security and Visa Entry Reform Act[107] requirement that all refugees receive an employment

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[100] *See* 9 FAM IV Appendix D § 200 (explaining CLASS, Consular Lookout and Support System).

[101] *See* Martin, *Reforms*, *supra* note 16, at 119 (stating that "[n]ew security measures adopted in November 2001 strictly require documentation in refugee files that such checks have been completed before the case can proceed"). Furthermore, the State Department has, since 9/11, been adding additional names and information to the CLASS database. Id.

[102] 2004 Annual Conference of State Coordinators of Refugee Resettlement (SCORR), Remarks at the Conference by Arthur E. Dewey, Assistant Secretary of State for Population, Refugees and Migration *at* http://www.state.gov/g/prm/rls/37912.htm (July 13, 2004); 2004 Annual Conference of Lutheran Immigration and Refugee Services (LIRS), Remarks to the Conference by Arthur E. Dewey, Assistant Secretary for Population, Refugees and Migration at http://www.state.gov/g/prm/rls/37914.htm (June 18, 2004); U.S., *Proposed Refugee Admissions for FY 2004*, *supra* note 98, at 5.

[103] *See* Martin, *Reforms*, *supra* note 16, at 130 (discussing the effect of fingerprinting and other post 9/11 security refugee flights).

[104] *See* Martin, *Reforms*, *supra* note 16, at 130 (noting a November 2001 decision to do full fingerprinting of all refugees 14 and older upon arrival).

[105] *See* Martin, *Reforms*, *supra* note 16, at 130 (stating that "INS imposed a 30 person per flight refugee limitation on arrivals").

[106] *See* Martin, *Reforms*, *supra* note 16, at 130 (explaining that after the government was able to transfer the fingerprint work to a subcontractor they raised the per flight quota to 35).

[107] Enhanced Border Security And Visa Entry Reform Act Of 2002, PL 107-173, 116 Stat 543 (2002).

authorization document "immediately upon [their] arrival in the United States" and that the document contain a photograph and fingerprint.[108]

The cumulative result of these measures is that thousands of refugees selected for resettlement who have been anticipating imminent departure and the start of a new life have reverted to the anxious waiting and uncertainty that had characterized the last several years of their lives. The United States, although it authorized the admission of 70,000 refugees,[109] only admitted 27,029 refugees in fiscal year 2002.[110] Fiscal year 2003 saw almost the same low number of refugee entries.[111] In fiscal year 2004, the United States fell short of its refugee admission ceiling by 17,125.[112]

One obvious step the United States can take to correct the refugee backlog is to increase the number of refugee slots available to make up for the tens of thousands who have been left behind in the wake of 9/11. The refugee statute specifically permits the President to increase the number of refugees admitted if such an increase "is justified by humanitarian concerns or is otherwise in the national interest."[113] The Bush Administration, however, has declined to do so, citing "the challenges of global insecurity, the logistical difficulty of accessing remote locations, and the changing face of refugee populations around the world."[114] Moreover, increasing the

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[108] *See* Martin, *Reforms, supra* note 16, at 130 (citing Pub. L. No. 107-173, 309, 116 Stat. 543 (2002)).
[109] Pres. Determ. No. 2-04, 66 FR 63487 (Nov. 21, 2001) (Presidential Determination on FY 2002 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and101(a)(42), Respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended; November 21, 2001); Immigration and Refugee Services of America, *Regional Refugee Ceilings and Admissions to the United States, Fiscal Year 1990-2003*, Refugee Reports, Dec. 31, 2003, at 9 (stating that prior to 2001, the United States imposed refugee admission ceilings ranging from 78,000 to 142,000 and the actual number of refugees admitted to the United States ranged from 70,000 to over 132,000 each year).
[110] Gedda, *Admission of Refugees, supra* note 15.
[111] *See* U.S., *Refugee Admission FY 2003, supra* note 15 (the United States admitted 28,422 refugees in the Fiscal Year 2003, 41,578 short of its ceiling).
[112] *See* U.S., *Refugee Admissions FY 2004, supra* note 15 (the United States admitted 52,875 refugees).
[113] INA §207(a)(1), 8 USC §1157(a)(1) (2002).
[114] U.S.,*Proposed Refugee Admissions FY 2004, supra* note 98, at 6.

number of available slots will not lead to an increase in arrivals absent a streamlining of the entire resettlement process.

The global insecurity and threats against the United States upon which President Bush based his refusal to increase the refugee resettlement quotahave indeed posed a significant challenge to refugee processing. Attacks by combatants in volatile areas against aid workers,[115] volunteer medical personnel[116] and foreign officials[117] combine with U.S. security measures to slow the process considerably.[118] Moreover, the very situations from which refugees are trying to escape present enormous obstacles to their goal. Forced displacement, violence, lack of infrastructure, illness and lack of stability are not ideal conditions for preserving formal identity documents such as passports, birth certificates, marriage certificates and the like. Many refugees thus commence the resettlement process with two substantial strikes against them: the inability to prove conclusively who they are and why they are refugees, and the presumption that they are involved with terrorism.

How real, however, is the threat posed by refugees? It is worth noting that the nineteen hijackers shared only one of the above characteristics applied to refugees: they were Muslims

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[115] *See* Agence France Presse, *UN refugee agency halts operations in troubled parts of Afghanistan*, Nov. 18, 2003, *available at* 2003 WL 71369210 (stating in November 2003, alleged Taliban gunmen shot and killed 29-year-old UNHCR aid worker Bettina Goislard in Afghanistan. She was the twelfth aid worker to be killed in Afghanistan since March 2003.); *See also*, GAO, *Humanitarian Assistance, supra* note 27, at 6 ("From 1997 through 2001, 106 relief workers were killed in the line of duty in Afghanistan, Angola, Rwanda and Sudan").

[116] Amir Shah, *Taliban Claims Responsibility for Foreign Workers' Deaths; Three Doctors Without Borders workers, two Afghans killed*, OAKLAND TRIB., June 3, 2004 *available at* 2004 WL 79860958 (stating [in] June 2004, Taliban militants claimed responsibility for murdering three members of a volunteer medical team in Afghanistan).

[117] *See* U.S., *Proposed Refugee Admissions FY 2004, supra* note 98, at 4-5 (indicating that direct threats to U.S. personnel at the Kakuma refugee camp in Kenya delayed resettlement processing).

[118] U.S. DEP'T. OF STATE, BUREAU OF POPULATION, REFUGEES AND MIGRATION; *Fact Sheet: U.S. Government to Expedite Refugee Processing Since September 11, 2001* (July 2003) *available at* http://www.state.gov/g/prm/rls/fs/2003/23356.htm [hereinafter U.S., *Refugee Fact Sheet*] ("According to the U.S. Dept. of State, 'initial overseas security concerns severely limited Immigration and Naturalization Service (INS) adjudications in the field. INS (now Department of Homeland Security/Bureau of Citizenship and Immigration Services DHS/BCIS) interviews overseas resumed in force in February 2002, but then were constrained again by security threats in East Africa, civil unrest in West Africa, and the war in Iraq'").

from Muslim countries.[119] All had passports with which to enter the United States, many of which contained legal visas.[120] Many came from well-to-do families, some of whom were shocked by and in denial of their relatives' involvement.[121] None of the hijackers were refugees, or applicants for refugee status.

That is not to say that a refugee could not be a terrorist, or that refugees should not be closely screened to detect past criminal activity or presence on a terrorist watch list. However, the methods and duration of such investigations do not correspond with the level of threat posed by applicants for various immigration benefits. For example, the United States suspended its refugee resettlement program in response to the September 11, 2001 resettlement attacks; however, it continued its expedited processing of nonimmigrant visas in Saudi Arabia.[122] This occurred despite the fact that thirteen of the eighteen hijackersfrom Saudi Arabia and the United Arab Emirates had received their visas through expedited processing.[123]

In light of the new challenges facing the U.S. Refugee Resettlement Program and its diminishing ability to reconcile national security concerns with the urgent needs of refugees, the most vulnerable refugees require a new legislative remedy. The most effective and expedient method for the United States to revive its commitment to refugees while maintaining security vigilance is to create an expedited visa system for a limited number of female and child refugees,

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[119] *See generally* Dafna Linzer, *Perspective: The 19 hijackers: still a tangle; One year later, little solid evidence has emerged about the men--or their suicide mission*, THE GRAND RAPIDS PRESS, September 8, 2002, *available at* 2002 WL 23825697 [hereinafter Linzer, *Perpective*].

[120] *Id.* (explaining that most hijackers entered the US legally).

[121] *Id.* (stating that most hijackers came from "secular, middle-class Arab families").

[122] *See* Tom Carter, *State Employee Whose Office Let Hijackers in U.S. Gets a Bonus*, WASH. TIMES, Oct. 23, 2002, *available at* 2002 WL 2920271 (reporting that the former head of the State Department's consular service ordered that the process known as Visa Express, by which Saudis could apply for nonimmigrant visas to the United States through travel agents or over the internet without having to attend an interview, continue after the September 11, 2001 terrorist attacks).

[123] *See* Suzanne Gamboa, *GAO: Visa Process Needs Tightening*, ASSOC. PRESS, Oct. 21, 2002 *available at* 2002 WL 101564600 (stating that 13 of the 15 hijackers where issued visas through an expedited process). "The GAO said it reviewed 18 visa applications submitted by the 15 hijackers from Saudi Arabia and United Arab Emirates. None of the applications was complete. The GAO also found that consular offices granted visas to 13 of those 15 hijackers without an interview." *Id.*

specifically those at risk of harm due to their sex and/or age. Such a system would remove qualified refugees from the resettlement backlog quagmire without creating the perennially feared flood of immigrants to the United States. Moreover, it would give a logical preference for resettlement to a group whose members face a high risk of being subjected to harm if they remain in refugee camps but present a low national security risk to the United States.

III. Expedited visa relief for vulnerable refugees: The "W" visa.

A non-immigrant visa that requires beneficiaries to complete certain security-related tasks prior to receiving permanent immigration status in the United States may present an opportunity to reconcile national security concerns with urgent humanitarian needs. I propose a W visa, which would benefit two groups of at-risk women and children living in refugee settings: (1) those who have been approved for resettlement but whose travel has been delayed indefinitely due to travel restrictions;[124] and (2) those who, like Sahra and Amina, fail to qualify for lower priority resettlement (due to lack of immediate family ties) or to be timely identified for high priority resettlement.[125] All women and children in refugee settings who demonstrate a credible fear of harm based on their sex and or age would qualify for the W visa, subject to an annual numerical limit.

At-risk female and child refugee camp-dwellers approved for resettlement since September 11, 2001 who have not departed for the United States due to travel restrictions would be the first to benefit from the W visa.[126] Normally, such refugees will already have received security and health clearances but encounter delays related to numeric travel restrictions for refugees. W visa holders would still be subject to the stateside verification, fingerprinting and employment

[124] *See supra* notes 99-109 and accompanying text (discussing travel restrictions and resulting delays in refugees' travel to resettlement countries).
[125] *See supra* notes 65-68 and accompanying text (discussing high priority resettlement criteria and procedures).
[126] In order to be effective, the application procedures for already approved refugees must be simple and streamlined so that eligible refugees avail themselves of the benefit and consular officials process the applications expeditiously.

authorization issuance to which other refugees are subject, but it need not occur immediately upon entry into the United States.[127] W visa holders would comply with the same security measures with which other travelers to the United States must comply, but would not be subject to the more onerous and time consuming security measures to which refugees must submit upon entry. W visa holders would thereby avoid the thirty-five-refugee limit on flights to the United States.

At risk women and children who do not qualify for P-3 resettlement with their family members, such as Sahra and Amina, also would be eligible to apply immediately for a W visa. Rather than receive a denial of their resettlement applications, resettlement officials would convert their cases into applications for W visas. Thus, family relationships failing to meet the requisite level of immediacy for resettlement purposes would not result in the stranding of an at-risk woman or child.

Providing visas to individuals facing hardship has a strong foundation in U.S. immigration law. Current immigration law provides relief in the form of immigrant visas and nonimmigrant visas to several vulnerable groups, including battered spouses of U.S. citizens and lawful permanent residents; abandoned or orphaned children; and victims of trafficking. Each visa category is specifically tailored to a narrow group of individuals in particular need of protection.

Last year, Congress considered a measure that would provide a permanent immigrant visa to women and children fearing sex- and age-related harm.[128] The Widows and Orphans Act of 2003 ("WOA") created a new category of special immigrant visas for females or children with "a

[127] The regulations implementing the legislation could direct that W visa holders report to their local DHS office within a certain prescribed time of entering the U.S.
[128] *See generally* Widows and Orphans Act, S.1353, 108th Cong. (2003).

credible fear of harm related to" their sex or age[129] and "a lack of adequate protection from such harm."[130] It did not contain a statutory limit or specifically pertain to refugees, although its drafters focused on refugees in their promotional literature and legislative roll-out.[131] The bill, despite bipartisan support,[132] remained stalled in the Judiciary Committee after its introduction in June 2003.

The legislation proposed in this Article differs in several respects from the WOA. First, it pertains not to all women and children with a credible fear of harm, but only to women and children living in refugee settings. Second, it advocates a non-immigrant rather than an immigrant visa. Third, it contains an annual numerical limitation. Each of these provisions and the rationale behind them are discussed below.

A. W Visa Eligibility Requirements

1. Applicants Must Dwell in a Refugee Setting.

For practical purposes, the W visa is not intended for women and children worldwide who fear gender- and age-based harm. It specifically targets women and children in refugee settings in countries of first asylum, who are at greater risk of harm within the refugee setting because of their sex and/or age. In most cases, beneficiaries will have already demonstrated that they meet the statutory definition of a refugee. The visa also would be available, however, to

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[129] *See* Widows and Orphans Act, S.1353, 108th Cong. § 2(a)(3)(N)(ii)(II)(bb) & 2(a)(3)(N)(i)(II)(bb (2003) (creating a category for those with a credible fear of harm related to their sex and age respectively).

[130] Widows and Orphans Act, S.1353, 108th Cong. § 2(a)(3)(N)(i)(II)(cc) & § 2(a)(3)(N)(ii)(II)(cc) (limiting qualified refuges to females and children with "a lack of adequate protection from such harm").

[131] *See*, e.g., Office of Senator Sam Brownback, *The Widows and Orphans Act of 2003 (S. 1353): Why Legislation Is Necessary* (on file with author).

[132] *See* Bill Summary & Status for the 108th Congress, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01353:@@@P. Senator Sam Brownback (R-KS) introduced the bill. *Id.* Senators Jeff Bingaman (D-NM), Maria Cantwell (D-WA), Hillary Rodham Clinton (D-NY), Jon Corzine (D-NJ), Mark Dayton (D-MN), Michael DeWine (R-OH), Christopher J. Dodd (D-CT), Richard J. Durbin (D-IL), Russell D. Feingold (D-WI), Edward M. Kennedy (D-MA), Frank R. Lautenberg (D-NJ), Patrick J. Leahy (D-VT) and Arlen Specter (R-PA) have cosponsored the bill. *Id.*

those who do not necessarily meet the statutory definition of a refugee due to the gender basis of their fear of harm.

2. Applicants Must Demonstrate that They Have a Credible Fear of Harm Due to Their Sex and/or Age.

Most refugees live in fear of the violence, sickness and shortage of resources that characterizes refugee settings. The relief proposed in this Article, however, pertains to a limited group of persons in refugee settings whose vulnerability exceeds that of the general refugee population. Applicants for the limited, emergency relief proposed herein must therefore demonstrate that they have a credible fear of harm due to their sex and/or age.

The Widows and Orphans Act would have required that an applicant demonstrate a "credible fear of harm"[133] in order to qualify for relief, and the proposed W visa adopts this standard. The "credible fear of harm" standard is a welcome departure from the U.S. refugee law standard, which requires that an applicant demonstrate a "well-founded fear of persecution."[134] First, "credible fear" is a lower standard than "well-founded fear", which requires an analysis of whether the applicant possesses a characteristic that her persecutors wish

[133] Widows and Orphans Act, S.1353, 108th Cong. § 2(a)(3)(N)(ii)(II)(bb) & 2(a)(3)(N)(i)(II)(bb) (2003) (requiring applicants to establish a credible fear of harm). The term "credible fear" derives from the expedited removal portion of the immigration statute. *See generally* 8 USC § 1225 (1996). For purposes of expedited removal, an applicant possesses a "credible fear" if she demonstrates a "significant possibility. . . that [she] could establish eligibility for asylum." 8 USC § 1225(b)(1)(B)(v) (1996). In expedited removal proceedings, if the applicant fails to demonstrate a significant possibility of success in an asylum hearing in front of an immigration judge, the DHS may deport her without further review. *See* 8 USC § 1225(b)(1)(A)(i) (1996) (if determined inadmissible "the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum…or a fear of persecution"). An immigration judge may review a negative credible fear determination. *See* 8 C.F.R § 208.30(g)(1) (2005). However, many credible fear applicants do not have access to an attorney and are held in detention. Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 211-212, Spring 1999. The combination of lack of representation and possibility of prolonged detention discourage many applicants from seeking immigration judge review of their negative credible fear determinations. The combination of lack of representation and possibility of prolonged detention discourage many applicants from seeking immigration judge review of their negative credible fear determinations. *Id.* at 224. Immigration officials carried out 43,248 expedited removals in fiscal year 2003, accounting for twenty-three percent of all removals that year. U.S. DEP'T OF STATE, DEPT. OF HOMELAND SECURITY, *Immigration Information: Statistical Yearbook* (2003), at 149 , *available at* http://uscis.gov/graphics/shared/aboutus/statistics/ybpage.htm. Government statistics do not indicate how many of those removals were of people who had expressed fear of returning to their countries. *See generally Id.*

[134] 8 USC § 1101(a)(42)(A), I.N.A. §101(a)(42(A) (2000).

to overcome through punishment, whether the persecutors are aware that the applicant possesses the characteristic, and whether they have the capability and inclination to punish the applicant.[135]

Second, the term "harm" clearly denotes suffering that does not necessarily rise to the level of persecution, and thus eliminates a great deal of the subjectivity involved with refugee determinations. The Refugee Convention does not define "persecution" but rather leaves it to individual countries to interpret the term. The United States has followed the Convention and declined to define "persecution" by statute or regulation, but has rather left it up to the courts to decide when harm rises to the level of persecution.[136]

Generally, most courts agree that harm rises to the level persecution if it is severe in nature. Courts also have found, however, that severe harm alone does not constitute persecution under U.S. refugee and asylum law; rather, a government or an entity whom the government cannot or will not control must commit the harm.[137] Due to the often private nature of gender-based harm, adjudicating gender-based cases has proven to be a thorn in the side of U.S. courts and asylum adjudicators.[138]

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[135] *Matter of Mogharabbi*, 19 I&N Dec. 439, 445 (1987).

[136] *See Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 285 (4th Cir. 2004) (holding that shots fired at the applicant's home and threatening phone calls does not rise to the level of persecution); *Khalil v. Ashcroft*, 337 F.3d 50, 55 (1st Cir. 2003) (holding that denial of building permits and subjection to frequent lawsuits does not constitute persecution); *Milhalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004) (holding that detention for ten days accompanied by daily beatings and hard labor constitutes persecution, even in the absence of serious physical injury).

[137] *See* 8 U.S.C.A. § 1101(a)(42)(A), INA § 101 (as amended) (2000); *see also Llana-Castellon v. INS*, 16 F.3d 1093, 1097-98 (10th Cir.1994) (stating that the persecutor must be the government of one whom the government cannot or will not control); *Galicia v. Ashcroft*, 2005 WL 175500 *1 (1st Cir.) (2005) (stating that the persecutor must be aligned with the government or uncontrollable).

[138] *See* Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim's Particular Social Group*, 49 Loy. L. Rev. 287, 287 (2003) ("[O]ne of the primary arguments against granting refugee status to domestic violence victims is that domestic violence is private in nature and therefore is not the type of politically motivate harm entitled to international protection under refugee law").

The best example of the United States' ongoing struggle with how to deal with domestic violence victims seeking asylum is the case *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999). *Matter of R-A-* is the case of Ms. Rodi Alvarado Peña, a woman from Guatemala who was subjected to severe abuse between 1984 and 1994. Center for Gender and Refugee Studies, *Rodi Alvarado's Story*, *at* http://sierra.uchastings.edu/cgrs/campaigns/update.htm (last visited Feb.9, 2005). Her husband raped and sodomized her, broke windows and mirrors with her head, dislocated

The W visa, like the WOA, would endeavor to avoid the pitfalls associated with fitting gender and age-based harm into the fairly narrow parameters of the U.S. interpretation of the Refugee Convention.[139] Applicants for the W visa must show that they live in a refugee setting and have credible fear of harm on account of one or both of the protected characteristics: age and sex. Women who can demonstrate, for example, that the male head of the household is unable to provide the protection that is expected in the refugee's culture due to illness or disability, or that the male head of the household subjects or intends to subject them to harm, would meet this requirement without having to show further proof of actual or imminent harm. The same would apply to unaccompanied minors, particularly because their age and lack of proper adult care renders them susceptible to trafficking and sexual exploitation. Moreover, the

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her jaw, pistol-whipped her, threw a machete at her, and kicked her violently in the spine while she was pregnant. *Id.* Ms. Alvarado's repeatedly attempted to flee or husband and to obtain protection, to no avail. *Id.* The authorities refused to intervene because it was a "domestic matter." *Id.* Ms. Alvarado's husband threatened to "cut off her arms and legs, and...leave her in a wheelchair, if she ever tried to leave him." *Id.*

Ms. Alvarado finally fled to the U.S. and sought asylum. *Id.* Her attorneys argued that Ms. Alvarado belonged to a social group consisting of "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination." *Id.* The immigration judge found that Ms. Alvarado qualified for asylum and granted it. *Id.* The government appealed. *Id.* The BIA reversed the immigration judge's decision, holding that the social group as defined "was not recognized and understood to be a societal faction or otherwise a recognizable segment of the population." *Id.*

Attorney General Janet Reno vacated the BIA's decision and issued proposed regulations recognizing gender-related persecution claims. 65 Fed. Reg. 76588 (2000). The proposed regulations have never become final. In an order dated February 21, 2003, Attorney General John Ashcroft certified the BIA's decision for his own review pursuant to 8 CFR § 1003.1(h)(1)(i) and on December 8, 2003 ordered new briefings from the government and Ms. Alvarado's attorneys. Order of the Attorney General, *In re Matter of Rodi Alvarado Pena*, A.G. Oder No. 2696-2003, *available at* http://sierra.uchastings.edu/cgrs/documents/legal/ag-briefing12-03.pdf. In the conclusion to its brief, the government stated that "Alvarado has established statutory eligibility for asylum" and recommended that the Attorney General "remand this case to the Board with instructions to grant asylum without opinion." DHS Brief, *Matter of R-A*, Feb. 19, 2004, 43, *available at* http://sierra.uchastings.edu/cgrs/documents/legal/dhs_brief_ra.pdf. On January 19, 2005, the Attorney General declined to follow the government's recommendation and instead remanded the case to the BIA with instructions to await the final version of the 2000 proposed regulations. Center for Gender and Refugee Studies, *Landmark Decisions Delayed Once Again*, Jan. 21, 2005, *available at* http://sierra.uchastings.edu/cgrs/documents/media/cgrs_release_1-05.pdf.

[139] *See generally*, Canadian Council for Refugees, *Network on Women Fleeing Gender Based Persecution, Newsletter: Issue 1*, May 29, 2000, available at http://www.web.net/~ccr/newsgend.htm#DENMARK (last visited Feb. 18, 2005) (discussing treatment of gender claims in Europe). Unlike U.S. law, laws in Denmark, Ireland, Norway provide refugee protection for women fleeing gender based violence. Id. *See also*, Refugee Law Center, Inc., GENDER ASYLUM LAW IN DIFFERENT COUNTRIES: DECISION AND GUIDELINES (1999) *available at* http://www.web.net/~ccr/newsgend.htm#II (providing reprints of gender asylum law guidelines, case summaries and decisions from the United Kingdom, Canada and New Zealand).

harm need not be committed by a government or entity which the government cannot or will not control. In the case of refugees living in countries of first asylum, it is often a family member, local bandit, corrupt aid worker or trafficker who has committed or seeks to commit harm against the most vulnerable of the refugees.

B. Non-immigrant Visas and Immigrant Visas

As mentioned briefly above, the United States has a history of providing immigration solutions to particularly vulnerable individuals. These come in the form of both immigrant and non-immigrant visas. An individual living abroad who obtains an immigrant visa to the United States assumes lawful permanent resident status immediately upon entering the United States.[140] Non-immigrant visas, on the other hand, do not confer lawful permanent resident status on their holders. Their duration varies from a few days to several years, depending on the type of non-immigrant visa issued.[141] Those discussed below provide interim status to persons intending to immigrate permanently. The applicants for such visas usually must comply with several requirements prior to gaining permanent immigration status.

1. Existing Models of Immigrant and Non-immigrant Visas for Vulnerable Groups

a. Special Immigrant Visas

[140] Applicants for immigrant visas must have an approved petition by a U.S. citizen or lawful permanent resident immediate family member, a U.S. business, or a self-petition based on extraordinary ability. INA § 213A, 8 USC § 1183(A) (1996). All eligibility interviews, security checks and medical exams take place prior to entering the United States. Martin, Reforms, supra note 16, at 129.Immigrant visas are also available for individuals already within the United States. INA §245; 8 USCA § 1255(i) (2003). Persons residing in the U.S. who apply for and receive an immigrant visa may adjust their status to that of a lawful permanent resident if they meet other eligibility requirements. Id.

[140] Tourists and persons in the United States on business trips, for example, may receive permission to remain in the United States from a few days to several months. 9 FAM § 41.31. Students may remain for as long as they are enrolled in school and attending classes. 8 CFR § 214.2(f) (2005). Persons who apply for such visas usually must demonstrate non-immigrant intent; that is, that they are ready, willing and able to return to their countries of origin once they have completed their objective in coming to the United States. 9 FAM § 41.31.

[141] *See* 9 FAM § 41.31 (indicating that tourists and persons in the United States on business trips, for example, may receive permission to remain in the United States from a few days to several months). Persons who apply for such visas usually must demonstrate non-immigrant intent; that is, that they are ready, willing and able to return to their countries of origin once they have completed their objective in coming to the United States. Id.

i. VAWA Self-petition

The Violence against Women Act ("VAWA")[142] provides spouses and children who are victims of abuse committed by U.S. citizens ("USC's") and lawful permanent residents ("LPR's") the ability to "self-petition" rather than rely on their abusive spouses for immigrant petitions.[143] Prior to the 1994 passage of VAWA, battered or psychologically abused spouses of USCs and LPRs did not have immigration recourse if they chose to leave their abusive relationships.[144] A spouse who left an abusive relationship became an illegal alien with very little chance of legalizing her immigration status, as did her non-U.S. citizen children. The abusers thus had the power to use the threat of deportation to continue abusing their spouses and

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[142] Violence Against Women Act of 1993, HR 1133, 103d Cong. § 231(b) (codified at 8 U.S.C.A. § 1154(a)(1)(A)(iii) and (B)(ii) and (iii) ,INA § 204(a)(1)(A)(iii) and (B)(ii) and (iii) (1994)).

[143] *See* 8 U.S.C.A. § 1154(a)(1)(A)(iii) and (B)(ii) and (iii), INA § 204(a)(1)(A)(iii) and (B)(ii) and (iii) (1994) (granting domestic violence victims the right to self petition). Contrary to popular belief, non-citizen spouses do not incur any immigration benefits upon marriage to a USC or LPR. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Immigration through a Family Member, available at* http://uscis.gov/graphics/services/residency/family.htm (last visited Feb. 18, 2005) [hereinafter *Immigration through a Family Member*]. Any benefit the spouses may receive is contingent upon actions taken by the USCs and LPRs. Id. First, the USC or LPR must submit a petition to U.S. Citizenship and Immigration Services (CIS), a bureau within the Department of Homeland Security. 8 C.F.R. § 204.1(a)(1)(2005). Once CIS determines that a valid marriage has occurred and that the sponsoring party is a USC or LPR, the bureau notifies the non-citizen spouse that she may apply to become an LPR, a process known as adjustment of status. *Immigration through a Family Member*. The success of the adjustment of status application is contingent on the marriage to the USC or LPR still being intact and sound at the time of the adjustment interview and on the USC or LPR submitting an affidavit, supported by financial records, that he will support the non-citizen spouse. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Application Procedures: Becoming a Permanent Resident While in the United States*, available at http://uscis.gov/graphics/howdoi/LPRApplication.htm (last visited, Feb. 18, 2005).

[144] *See* Committee on the Judiciary, Report on Violence Against Women Act, accompanying H.R. Rep. No. 395, 103d Cong. 1st Sess. (1993):

> Current law fosters domestic violence in such situations by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse. Under the Immigration and Nationality Act, a U.S. citizen or lawful permanent resident can, but is not required to, file a relative visa petition requesting that his or her spouse be granted legal status based on a valid marriage. Also, the citizen or lawful permanent resident can revoke such a petition at any time prior to the issuance of permanent or conditional residency to the spouse. Consequently, a battered spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation. Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.

stepchildren.[145] VAWA allows abused spouses and children to self-petition without the consent or knowledge of their abuser.

Under VAWA, a person qualifies for approval of a self-petition if she can show, *inter alia*, that she is residing in the United States; has resided with the USC or LPR spouse in the United States; and "has been battered by, or has been the subject of extreme mental cruelty perpetrated by" the USC or LPR during the marriage (or is the parent of a child who has suffered battery or extreme mental cruelty by the USC or LPR).[146] An approval of a VAWA self-petition allows the beneficiary and her minor children to apply for LPR status as if her spouse had petitioned for them.[147]

ii. Special Immigrant Juvenile Visa

The Special Immigrant Juvenile Visa ("SIJV") provides to abandoned and orphaned non-citizen children a means of gaining legal status.[148] A provision of the Immigration Act of 1990, the SIJV is available to minors present in the United States who have "been declared dependent on a juvenile court located in the United States . . . and who [have] been deemed eligible by that court for long-term foster care due to abuse, neglect or abandonment."[149] Children who qualify for the SIJV are eligible to apply for LPR status.[150]

Congress created the SIJV to provide humanitarian assistance to undocumented children living in the United States without adequate parental care.[151] Many of the intended beneficiaries

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[145] Amy Gottlieb, *The Violence Against Women Act: Remedies for Immigrant Victims of Domestic Violence*, NEW JERSEY LAWYER (Apr. 2004), at 2, *available at* http://www.afsc.org/nymetro/immigrantRights/resources/NJLawyerArticleVAWA.pdf.
[146] 8 CFR § 204.2(c)(1) (2005).
[147] Violence Against Women Act of 1993, HR 1133, 103d Cong. § 231(b) (granting victims of domestic violence the right to self petition); (codified at INA § 204(a)(1)(A)(iii) and (B)(ii) and (iii), 8 U.S.C.A. § 1154(a)(1)(A)(iii) and (B)(ii) and (iii) (1994)).
[148] 8 USC §1101(a)(27)(J),INA § 101(a)(27)(J)(2000).
[149] 8 USC §1101(a)(27)(J)(i), INA § 101(a)(27)(J)(i) (2000).
[150] 8 USC §1101(a)(27)(J), INA § 101(a)(27)(J), (2000) (according LPR status to recipients of the SIJV).
[151] 8 USC § 1101(a)(37(j)(i), INA § 101(a)(27)(J)(i) (2000); 8 CFR § 204.11(b) (2005).

were street children from Central America who had lost their caretakers, been abandoned or discarded by their caretakers, or left their caretakers due to abuse.[152] Others were unaccompanied minors who had been brought to the United States by smugglers, usually for the purposes of forced labor or the sex trade.[153] Still others were undocumented children living in the United States with undocumented parents or caretakers who later died or abandoned the children.[154]

Prior to the passage of the SIJV, such children faced dangers similar to those plaguing orphaned or abandoned children in refugee camps. If deported to their native countries or forced to remain underground as illegal immigrants in the United States, the children would likely have little or no access to public services, no adult caretakers, and few, if any, educational opportunities.[155] As unaccompanied minors, they would have been prime targets for gangs, militias, traffickers and other exploiters of children.[156] The SIJV provided a solution, albeit not a panacea,[157] for a vulnerable group of children who otherwise had no entitlement to immigration relief.

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[152] *See* Ang Lica Pence, *Children Flee Alone from Central and South America: Part one of a Two Part Story*, ARIZ. DAILY STAR, January 15, 1995, *available at* 1995 WL 3272290 (discussing the increasing number of central and south American children crossing the boarder in to the U.S.). *See also*, Symposium, *Transatlantic Workshop On 'Unaccompanied/Separated Children: Comparative Policies And Practices In North America And Europe*, 15 JRSTUD 102, 103-104 (2002) (discussing "street children or abandoned youth" from Central America).
[153] *Id.* at 114 (discussing smugglers and the sex-trade industry).
[154] *See generally Id.*
[155] Sally Kinoshita and Katherine Brady, SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN UNDER JUVENILE COURT JURISDICTION (2005) at 2, *available at* http://www.ilrc.org/resources/sijs/2005%20SIJS%20benchbook.pdf.
[156] For a discussion of the dangers present for female and child refugees, s*ee supra* notes 9-11 and accompanying text.
[157] The SIJV is still a relatively new remedy and one with several flaws. For example, a child who ceases to be dependent on a juvenile court prior to adjusting to permanent resident status is subject to revocation of an approved SIJV petition. 8 CFR § 205.1(a)(iv) (2005). This regulation fails to provide for children in states that terminate juvenile dependency at the age of 18. Sarah Ignatius and Elisabeth S. Stickney, IMMIGRATION LAW AND THE FAMILY § 14:79 (July 2003)[hereinafter IMLF]. Under the current regulations, children in such states lose their eligibility for an SIJV even though the statute provides that children under 21 may qualify for an SIJV. 8 USC § 1101(a)(27)(J), INA § 101(a)(27)(J) (2000); *see also* 8 CFR § 204.11(c)(11) (2005). Moreover, recent amendments to the INA have made it more difficult for SIJV applicants to qualify for a visa. IMLF § 14:79 ("Changes to the law enacted by Congress in 1997 threaten to raise new challenges for certain potential special immigrant juveniles."

iii. Special Immigrant Visas for Amerasians ("SIV")

In the 1980s, the United States created an immigration benefit in response to a humanitarian crisis involving the offspring of U.S. servicemen and Southeast Asian[158] women that were conceived during the U.S. presence in Southeast Asian countries, predominantly Vietnam, in the 1960s and 1970s.[159] After the withdrawal of U.S. troops and the rise of the communist government in Vietnam, children of U.S. servicemen, and often the children's mothers, became the targets of brutality, ostracism and discrimination at the hands of society and even their own families.[160] Although an orderly departure program[161] was already in place for individuals fleeing communist governments, the U.S. government created additional immigration relief for the Amerasian children and their families.[162]

For example, DHS must now "expressly consent to the dependency order serving as a precondition to the grant of special immigrant status." 1998 Appropriations Act, Pub. L. No. 105-199, 111 Stat. 2440 § 113 (1997) (codified at INA § 101(a)(27)(J)(iii), 8 USC § 1101(a)(27)(J)(iii) (2000)). *See* IMLF § 14:79 (stating that youth are ineligible unless DHS consents).

[158] The term "Southeast Asian" refers to natives of Cambodia, Kampuchea, Korea, Laos, Thailand and Vietnam.

[159] *See* Austin T. Fragomen, Alfred J. Del Rey, Jr., & Sam Bensen, *Orphans and Amerasian Children*, 1 ILMB § 3:13 (2004).

[160] *See generally* Benjamin Hu, "*Amerasians: Neither Here nor There; Bill Would Naturalize GIs' Children*," WASH. TIMES, Mar. 5, 2004, *available at* 2004 WL 64153142 [hereinafter Hu, *Amerasians*].

[161] U.S. CONSULATE, REFUGEE RESETTLEMENT SECTION, *About Us*, *available at* http://hochiminh.usconsulate.gov/wwwhref.html (explaining ODP).

> *ODP (based in Bangkok, Thailand) was an extraordinarily successful* program that resettled nearly 500,000 Vietnamese refugees and immigrants in the United States. It was established in January 1980, under a Memorandum of Agreement between the UN High Commissioner for Refugees (UNHCR) and the government of the Socialist Republic of Vietnam, to provide certain Vietnamese nationals in Vietnam a safe and legal means of departing the country. Initially, the United States and twenty-nine other nations participated in ODP, and under its auspices the U.S. processed for admission to the United States both refugee and immigrant visa beneficiaries. By the late 1980s, the refugee component of the U.S. ODP program focused primarily on those Vietnamese who either were detained in re-education camps for a minimum of three years because of their close association with pre-1975 U.S. programs and policies in Vietnam, or had been direct-hire employees of the USG for five or more years. On September 30, 1994, after fourteen years, registration for ODP refugee programs was closed. Prior to the deadline, the USG made a concerted effort to ensure that information about the registration deadline was disseminated in both Vietnam and the United States. The USG made the decision to end registration after determining that sufficient time had passed to permit persons interested in resettling in the United States to apply for a refugee interview. ODP itself closed in September 1999, and remaining case files were handed off to the Refugee Resettlement Section (RRS) of the U.S. Consulate General in Ho Chi Minh City.

Id.

[162] *See* Hu, *Amerasians*, *supra* note 160 (explaining immigration relief the United States created for Amerasians).

The plight of Amerasian children is comparable to the experiences of refugee women who are single heads of households (or abused by the male head of the household) and unaccompanied refugee minors. They have experienced various forms of abuse and domestic violence, including sexual abuse; they have experienced gender and class discrimination; the absence of a father has imposed an additional burden of social stigma and psychological stress beyond the difficulties of everyday life in postwar Vietnam; and they have encountered disproportionate difficulty in obtaining education and employment.[163]

Upon learning of the bleak lives of Amerasian children, and recognizing its responsibility to those children, the U.S. government passed two relief acts authorizing their entrance into the United States under special, non-refugee status.[164] First, the 1982 act to amend the Immigration and Nationality Act to provide preferential treatment in the admission of certain children of United States Armed Forces Personnel offered permanent residency status to Southeast Asian Amerasians.[165] It did not, however, make provisions for their mothers or other family

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[163] *See* Melinda Beck, Frank Gibney, Shawn Doherty, Holly Morris, Melinda Lu, Michael Reese and Monroe Anderson, *Where is My Father?*, NEWSWEEK, Apr. 15, 1983, at 55-57 (describing the severe discrimination and hardship that Amerasians and their mothers have experienced in their countries of birth). Tonette Orejas, *"What about Us?" Amerasians Ask*, PHILLIPPINE DAILY INQUIRER, March 5, 2003 (detailing the hardships Amerasians have experienced and continue to experience today). *See also*, 131 Cong. Rec. H1369-01, (1985) (statement of statement of Rep. Smith, New Jersey) ("Amerasian children are currently the object of either official or unofficial discrimination in the countries where they now reside. Vietnamese officials have called the problem of Amerasian children a burden, saying that their living conditions are generally worse than other Vietnamese children.… Since the Amerasian child has been abandoned by his or her American father, the opportunities for social acceptance, a good education, job, and marriage are almost nonexistent."); 133 Cong. Rec. E1687-01 (1987) (statement of Hon. Stewart B. McKinney) ("Many of these children, because of their mixed parentage, have been treated as outcasts in their respective countries, where they face a life full of hatred and bitter discrimination."); 149 Cong. Rec. E2104-01 (2003) (statement of Rep. Lofgren) ("Amerasian children] have lived through devastation during the Vietnam War, [and] have been mistreated by the Vietnamese government because of their mixed race …").

[164] *See Bring the Dust Children Home*, NEW YORK TIMES, July 12, 1982 *available at* 1982 WLNR 308158 (stating "for the children to be labeled refugees would paint Vietnam as a persecutor in world opinion"). The term "refugee" indicates that the person is fleeing persecution, casting the country from which they arrive in a negative light. Id. The non-refugee legislation thus represented an attempt at neutrality during a time of poor relations between the United States and Vietnam. Id.

[165] 1982 Act to Amend the Immigration and Nationality Act to Provide Preferential Treatment in the Admission of Certain Children of United States Armed Forces Personnel, Pub. L. No. 97-539, 96 Stat. 1716 (1982).

members.[166] Subsequent legislation, the 1987 Amerasian Homecoming Act, bestowed status upon Amerasians born in Vietnam between 1962 and 1976 and their families.[167] A bill proposed in 2003 that would have granted automatic citizenship to Amerasians, however, was not successful.[168]

b. Non-immigrant Visas

i. "T" Visas

Responding to an international humanitarian crisis involving the trafficking[169] of children and young women for sexual and labor exploitation, Congress passed the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA").[170] The VTVPA was a response to the growing trade in children and young adults for forced sexual and manual labor and the lack of

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[166] Hu, *Amerasians*, *supra* note 160.
[167] Amerasian Homecoming Act of 1987, 100 Pub. L. No. 202, 101 Stat. 1329 (1987).
[168] Amerasian Naturalization Act of 2003, H.R. 3360, 108th Cong. (2003).
[169] *See* UNHCR, Convention on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949 – revised in 1994), *available at* http://www.unhchr.ch/html/menu3/b/33.htm (defining trafficking as:

> illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers, and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labor, false marriages, clandestine employment, and false adoption.)

See also, UNHCR,Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime (2003), *available at* http://www.unodc.org/unodc/en/crime_cicp_convention.html#final (defining trafficking as:

> …the recruitment, transportation, transfer, harboring 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.)

[170] Victims of Trafficking And Violence Protection Act Of 2000, Pub. L. 106-386, 114 Stat. 1478 (2000).

adequate legislative means to address it.[171] According to State Department estimates, traffickers smuggle as many as 50,000 women and children[172] into the United States every year and force them to work in sweatshops, farms, strip clubs or brothels.[173]

Trafficked women and children usually come from poor towns and villages in Asia, Eastern Europe and Latin America. Many have fallen prey to kidnappers, family members who have sold them for cash, or duplicitous agents who purport to arrange legitimate employment.[174] Traffickers confiscate their victims' passports and use various forms of physical and psychological coercion to force their victims to provide labor or sexual services.[175]

Prior to the passage of the VTVPA, victims of trafficking had little recourse in immigration law. If they escaped their traffickers or were arrested during a raid, they faced

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[171] *See* Trafficking Victims Protection Act of 2000, HR 106-487 (II), at 3 (stating that "existing legislation and law enforcement in the United States and in other nations around the world have proved inadequate to deter trafficking and to bring traffickers to justice. . . ").

[172] Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* (Nov. 1999) at 3, *available at* http://www.cia.gov/csi/monograph/women/trafficking.pdf (estimating that 45,000 to 50,000 women and children are trafficked into the U.S. each year). Globally, between 700,000 and two million women and children are trafficked each year. *Id.*

[173] Mae M. Cheng, *Smuggled for Sex*, NEWSDAY, Mar. 15, 2001, at A06, *available at* 2001 WL 9221632.

[174] *See Id.* (revealing the story of Russian women who came to the United States under false pretenses only to be sexually exploited).

> In early 2001, immigration officials in Alaska investigated a strip club advertising Russian dancers. The officials discovered that the "exotic dancers" were actually four women and two teenage girls who believed they were coming to the United States to perform native and folk dances. When they refused to dance at the strip club, the traffickers confiscated their passports and plane tickets. When the dancers finally did dance nude, the traffickers retained their earnings.

Id. See also, Cesar Chelala, *The Perennial Scourge of Children's Prostitution*, *available at* http://www.elahemassumi.com/kisstext1.html (last visited Feb. 19, 2005) (discussing several girls who were kidnapped and sold into prostitution). *See also*, Jan Goodwin, *"I was sold for $200 and now I'm a sex slave,"* MARIE CLAIRE (July 2000) (describing the plight of kidnapped and sold children who are forced to work in brothels in India, which has a large and rapidly growing sex industry).

[175] *See* Trafficking Victims Protection Act of 2000, House Rep. No. 106-487 (II), at 2 (stating that traffickers use "physical violence, including rape and other forms of sexual abuse, torture, starvation, and imprisonment, . . . threats of violence, and . . . other forms of psychological abuse and coercion" to force victims to engage in sex acts or perform labor).

almost certain deportation.[176] The lack of recourse was a tremendous source of power and control for the traffickers.

The VTVPA created a new non-immigrant visa, called the T visa, to provide temporary relief to victims of trafficking crimes. The T visa allows victims of the most severe forms of trafficking, defined in part as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age,"[177] to remain in the United States temporarily (sometimes permanently), receive federal and state assistance, and receive police protection.[178] In fiscal year 2003, the Department of Homeland Security approved 297 applications for the T visa.[179]

ii. "V" Visa

Immigrant visa quotas follow a priority system that limits the number of persons allowed to immigrate to the United States based on the immigration status of the sponsoring relative. Spouses and minor children of U.S. citizens have priority and may apply to adjust their status or immigrate to the United States upon approval of the U.S. citizen's petition, whereas spouses and minor children of LPRs fall into the second-preference category and are subject to its numerical restrictions. As a result, spouses and children of LPRs must wait for an available visa number to become eligible for permanent residency, even if the government has approved a

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[176] Theresa Barone, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INTL'L & COMP. L.J. 579, 583 (2003).

[177] 8 CFR § 214.11(a) (2005); Victims of Trafficking And Violence Protection Act Of 2000, Pub. L. 106-386 § 103 , 114 Stat. 1478 § 103 (2000). The definition also includes "the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." 8 CFR § 214.11(a) (2005); Victims of Trafficking And Violence Protection Act Of 2000, Pub. L. 106-386 § 103 , 114 Stat. 1478 § 103 (2000).

[178] Victims of Trafficking And Violence Protection Act Of 2000, Pub. L. 106-386 § 107 , 114 Stat. 1478 § 107 (2000); *See generally* Elizabeth Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 Stanford J. of Intl. L. 1, Winter 2004 (providing feminist critique of current approaches to trafficking).

[179] U.S. DEPT. OF JUSTICE, *Report to Congress from Attorney General John Ashcroft on U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2003* (May 1, 2004) at 15, *available at* http://www.usembassy.it/pdf/other/050104TIP.pdf.

petition filed by their LPR relative. Due to the growing number of petitions and the static number of available visas, a backlog of more than four years has accrued,[180] during which time the beneficiary usually must wait outside the United States.[181]

The V visa provided a creative, though temporary, solution to the situation that faced LPRs and their immediate family members. The V visa allows persons whose LPR spouses or parents filed petitions at least three years prior to December 22, 2000[182] to enter the United States as non-immigrants.[183] The V visa holders are entitled to live and work in the United States until immigrant visas become available.[184] At that time, the V visa holders may apply to adjust their status to permanent residency in the United States.

2. Obtaining Lawful Permanent Residence Through a W Visa

The drafters of the Widows and Orphans Act suggested that beneficiaries enter the United States as immigrants, rather than non-immigrants, through a form of entry called humanitarian parole.[185] There are two reasons that such a plan may not be conducive to expeditious processing. First, because an immigrant visa confers permanent residence on its beneficiary, it is necessary that full security checks be completed prior to the issuance of the visa. Furthermore, the bill stipulates that WOA petitions be completed and beneficiaries paroled into

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[180] *See*, U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFFAIRS, Visa Bulletin No. 79, March 2005, *available at* http://travel.state.gov/visa/frvi/bulletin/bulletin_2111.html (indicating that in March 2005, immigrant numbers are available for beneficiaries with petitions filed in or before November 2000).

[181] *See* 8 U.S.C. § 1255(c), INA § 245(c) (2003) (delineating classes of beneficiaries who are not permitted to adjust status in the United States but rather must rely on consular processing, including those who entered the United States as crewmen or who entered the United States in transit without a visa). *See also*, 8 U.S.C. § 1255(a), INA § 245(a) (indicating that only beneficiaries who entered the United States legally may adjust status in the United States).

[182] 8 U.S.C. § 1101(a)(15)(V), INA § 101(a)(15)(V) (2000). The statute authorizing the V visa has not been renewed or updated to include spouses and children of LPR's who filed petitions after the December 21, 2000 deadline. *Id.*

[183] *Id.* The V visa is also available to spouses and children residing in the United States. *Id.* See also, 8 C.F.R. § 214.15(b) (2005) (stating that "[e]ligible aliens already in the United States may apply to [Citizenship and Immigration Services] to obtain V nonimmigrant status. . .).

[184] 8 C.F.R. § 214.15(g) (2005); 8 C.F.R. § 214.15(h) (2005).

[185] 8 U.S.C. § 1182(d)(5), INA § 212(d)(5)(2004).

the United States within forty-five days of the submission of the application.[186] Currently, refugee security checks alone take forty-five days.[187] It is highly unlikely that adjudication, full security checks and travel arrangements could be conducted properly in the timeframe imposed by the WOA. The more likely result is that yet another backlog would develop or that errors would occur due to hasty processing.

Second, humanitarian parole is a highly discretionary form of relief which the U.S. government utilizes only in extraordinary and exigent situations or when doing so would satisfy a significant public interest.[188] Adjudicators must consider applications for humanitarian parole on a case-by-case basis, and may only grant those which they deem urgent. [189] Once an individual receives humanitarian parole, she does not technically make an entry into the United States; rather, she is permitted to remain in the United States for a limited period of time until such time as parole is revoked or she changes to a more permanent status.[190]

The W visa would adopt the formula of those non-immigrant visas that are a stepping stone to lawful permanent resident status. Rather than confer permanent status on refugees for whom newly added security and eligibility checks could not be completed in a timely fashion, the law would grant them temporary non-immigrant status. A forty-five day time limit would be more feasible in this context and a necessary precaution against potentially life-threatening delays. Similarly, visa holders would have to comply with the additional security and eligibility checks (fingerprint and photo verification, for example) within thirty days of entering the United

[186] Widows and Orphans Act, S. 1353, 108th Cong. § 2(d) (2003).
[187] *See* Martin, *Reforms*, *supra* note 16, at 130 (indicating that background checks take 45 days).
[188] 8 U.S.C. § 1182(d)(5)(A), INA § 212(d)(5)(A); 8 U.S.C. § 1182(d)(5)(B), INA § 212(d)(5)(B) (2004).
[189] 8 U.S.C. § 1182 (d)(5)(A), INA § 212(d)(5)(A) (2004).
[190] *See* 8 U.S.C. § 1182(d)(5)(A), INA § 212(d)(5)(A) (2004) (stating that "[p]arole of such alien shall not be regarded as an admission of the alien….").

States. Like other refugees, W visa holders would be eligible to apply for lawful permanent residence one year after their entry into the United States.[191]

C. Less is More: Statutory Limit

In order to help the most vulnerable and at-risk refugees in a timely and effective manner during a time of increased hostility to non-citizens, an annual statutory limit is a necessary requirement for a bill intended to expedite the processing of refugees. A bill which allows for an unlimited flow of newcomers will not likely find favor among lawmakers in today's Congress, even among those lawmakers who recognize the desperate plight of abandoned female and child refugee camp dwellers. The reality of today's legislative attitude towards immigration, even refugees, is that the fewer non-citizens permitted to enter the United States, the more manageable and secure is our immigration system. Nevertheless, a bill benefiting a defined and limited group of needy refugees, who would otherwise qualify for entry to the United States but for faulty cogs in the resettlement wheel, may garner enough support to overcome restrictionist votes.

The W visa would contain an annual statutory limit. The limit would reflect the number of refugees affected by the post-9/11 backlog since 2001, plus allocate an additional 10,000 spots. That would place the annual limit at 60,000 for the next two years (reflecting the 50,000 refugee shortfall in fiscal years 2002 and 2003) and 30,000 in the third year (reflecting the 20,000 refugee shortfall in fiscal year 2004). The numbers for subsequent years would depend on the shortfalls for each prior fiscal year, but would never fall below 10,000. Such a provision would ensure that allocated refugee numbers not go to waste as they have for the past three fiscal years.

[191] *See* 8 U.S.C. § 1159 , INA § 209 (1996) (authorizing the adjustment of status to permanent residency of refugees who have been physically present in the United States for one year).

It may also preserve the viability of the bill in the face of restrictionist objections to increasing the number of refugees admitted to the United States.

D. Fraud Prevention Measures

Fraud is a serious and ongoing concern within the refugee resettlement program. The perception of resettlement officials is that many fraud-related abuses have occurred at various stages of refugee processing, such as resettlement applicants fabricating claims rumored to secure resettlement approval,[192] aid workers extorting bribes and sexual favors in exchange for benefits,[193] and refugees claiming non-family members as relatives.[194] The proposed visa attempts to minimize the chances for fraud, both in establishing eligibility and claiming family-based derivative benefits.

1. Prevention of Fraud by Principle Applicants

Eligibility for the W visa would be risk-based rather than strictly actual harm-based, thus rendering it less susceptible to fraud. The proposed visa seeks to protect not only those women and children who have already suffered age or gender-related violence, but also those who are at risk for it. The reports of UNHCR, the Department of State, and humanitarian agencies around the world agree that women and children refugees face a significantly increased risk of harm in refugee camps.[195] In the case of those applicants who are single female heads of households or

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[192] *See* Martin, *Reforms*, *supra* note 16, at 10 (suggesting that "applicants for resettlement may tailor their stories to fit what they understand to be the requirements of the [resettlement] program").

[193] *See* GAO, *Humanitarian Assistance*, *supra* note 27 at 22-26 (reporting that abuse and sexual exploitation of female refugees by aid workers is an ongoing problem in refugee camps).

[194] *See* Eduardo Aguirre, Jr., Director, U.S. Citizenship and Immigration Services, statement at Hearing on Oversight of U.S. Refugee Resettlement Program before the Senate Subcommittee on Immigration, Border Security and Citizenship, Sept. 21, 2004, *available at* http://uscis.gov/graphics/aboutus/congress/testimonies/2004/Aguirre_040921.pdf (stating that the Department of Homeland Security's "efforts to verify the claimed family relationships of all refugee applicants whose access to an interview is based on an Affidavit of Relationship filed by an anchor relative in the United States (commonly known as Priority 3 or P-3) are continuing and have resulted in the identification of numerous cases involving identity fraud and relationship misrepresentation").

[195] For a discussion of the risk of harm that female and child refugees face, *see supra* notes 74-93 and accompanying text.

abandoned children, their very inclusion in those categories renders them eligible for consideration and thus unlikely to fabricate claims of past harm.

The drafters of the included a provision barring certain spouses and parents of WOA beneficiaries from securing derivative benefits at any time in the future, presumably to prevent applicants from falsely claiming that family members were deceased in order to secure benefits.[196] Such a provision would also be necessary to preserve the integrity of the W visa system. The minor children[197] of gender-based beneficiaries and the minor siblings of age-based beneficiaries would qualify for a derivative W visa based on their family relationship to the principle applicant. However, certain spouses and parents of W visa beneficiaries would be permanently barred from receiving derivative immigration benefits through a W visa holder or a person who obtains LPR or citizenship by virtue of a W visa.[198]

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[196] Widows and Orphans Act, S. 1353, 108th Cong. § 2(b) (2003).

[197] Immigration law provides that the term "child" includes children and stepchildren under the age of twenty-one. 8 U.S.C. § 1101(b)(1), INA § 101(b)(1) (2000). For stepchildren, the marriage must have occurred prior to the child's eighteenth birthday. The only other age restriction in the immigration statute is for adopted children, who must have been adopted prior to the age of sixteen in order to qualify as a child for immigration purposes. *Id.* The W visa would rely on the definition of "child" contained in the INA.

In contrast to the visa proposed in this Article, the WOA provides that beneficiaries of the visa may apply for derivative status for siblings or children who are under the age of ten at the time the petition for the visa is filed. Widows and Orphans Act, S. 1353, 108th Cong. § 2(b)(5). Children age eleven and older apparently are not eligible to receive derivative status and must therefore qualify for a visa on their own in order to join their family in the United States. *Id.* This age limit, which does not appear in any other provision of immigration law, could have severe albeit unintentional consequences. *Id.* It is unlikely that a WOA beneficiary, particularly a mother, would leave behind a child simply because he is over ten years old. *Id.* It is also unlikely that an unaccompanied minor would choose to leave behind an older sibling for the same reason. Id. WOA beneficiaries may choose to forego their visas and remain with the rejected family members, thus thwarting the purpose of the legislation. *Id.*

Clearly, one way in which an older child or sibling of a WOA beneficiary could join his family is to qualify on his own. *Id.* However, the child must submit his own application and supporting documents, attend his own interview, and be processed separately from the rest of the family. Such a process would be burdensome and wasteful of consular resources. *Id.*

[198] W visa beneficiaries who cite spousal abuse, abandonment or death as the basis for their eligibility would not be permitted to petition for those spouses at any point in the future. Likewise, minor child W visa beneficiaries who cite parental abuse, abandonment or death as the basis for their eligibility would not be permitted to petition for those parents at any point in the future. These restrictions are similar to a provision in the Special Immigrant Juvenile statute, which prohibits recipients of the visa to petition for immigration benefits on behalf of their birth parents. *See* 8 U.S.C. § 1101(a)(27)(J)(iii)(II), INA § 101(a)(27)(J)(iii)(II) (2000) (stating that "no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege or status under this chapter). Like the WOA, the W visa

2. Prevention of Fraud by Applicants for Derivative Status

In the post-9/11 world, verification of identity and family relationship has become more important that ever. The findings of alleged fraud and abuse within the P-3 family-based resettlement category, at a time when U.S. national security was already a source of deepest concern, led to lengthy delays in all categories of resettlement processing.[199] In order to protect particularly vulnerable refugees from further delays brought on by security concerns, it is necessary that any new legislation pertaining to refugees incorporate measures ensuring the integrity of family relationships.

One way to ensure that derivative beneficiaries of the W visa actually belong to the family of the principle beneficiary is to conduct DNA tests as part of the prerequisites to attaining permanent immigration status.[200] Regulations implementing the W visa could direct that principle and derivative beneficiaries submit to DNA tests, in addition to the security checks, within the prescribed time period. The government may seek to negotiate a large-scale contract with DNA test providers in order to reduce the prohibitive cost that they currently carry.[201]

The legislation and its regulations must also recognize the existence of non-blood family relationships.[202] Many refugee families informally adopt children who are non-immediate family members and non-blood relations in the event of the death or disappearance of the children's caretakers.[203] In order to ensure that such relationships are bona fide, the regulations may

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would provide for a waiver for spouses and parents who were legitimately missing or presumed dead as a result of the civil conflict in the home country or conditions in the country of first asylum.

[199] *See supra* note 97 and accompanying text (discussing alleged fraud in the P-3 system and the United States' response).

[200] *See*, Martin, *Reforms*, *supra* note 16, at 88 (suggesting an increase in the use of DNA testing to prove family relationships in the refugee resettlement context).

[201] *See* Martin, *Reforms*, *supra* note 16, at 89 (discussing the current high cost ($300 per person) of DNA testing but suggesting that the cost will decrease as DNA testing becomes more frequent).

[202] *See* Martin, *Reforms*, *supra* note 16, at 94 (discussing "functional family relationships" that tend to arise when families take in abandoned or orphaned children during the time of conflict or in the refugee setting).

[203] Martin, *Reforms*, *supra* note 16, at 94.

require that the relationship existed for a certain length of time, such as two years prior to the application for the W visa, or, alternatively, from the time of the civil unrest began in the home country in cases where applicants have not accumulated two years of residency in a refugee camp.

IV. Conclusion

This article has discussed the dire circumstances of two particularly vulnerable groups – refugee women and refugee children – and discussed how a narrowly tailored non-immigrant visa could be a viable and efficient solution for those of them in the gravest and most immediate danger. This proposal is not intended as a panacea for the dire situation of the world's refugees; nor is it intended as a proposal for radically overhauling the refugee system. Rather, this Article endeavors to put forth a new solution for a new era of refugee resettlement. In this new era, the balance between security concerns and humanitarian concerns has shifted disproportionately to the side of security. The W visa attempts to tilt the scales back towards humanitarianism, albeit not to the pre-9/11 ratio.

Refugees of both sexes and all ages, internally displaced persons such as those in the Darfur region of Sudan, and refugees who reside outside of refugee camps face enormous hardship. It is beyond the capability of one country, however, to create durable solutions for every victim of civil unrest. Concerted, coordinated worldwide efforts are necessary to achieve a goal of such enormity.

Each country with the capability to resettle refugees is an important component of worldwide refugee resettlement, and the United States is the world leader in this respect. Its leadership and commitment to refugees, however, has suffered a setback, just as many aspects of U.S. society suffered a setback after September 11. This Article suggests a mechanism for

overcoming the setback and reasserting the United States' unmatched commitment to providing an opportunity for a new life to those refugees for whom no other durable solution exists.

Unaccompanied minors and families headed by single females, especially when compared to adult male applicants for student, visitor, and other non-immigrant visas, present a low security risk. Moreover, their need for humanitarian assistance is obvious: having fled persecution in their home countries, they encountered marginalization, violence, hunger and exploitation in their ostensible place of refuge. Providing them with expedited, priority resettlement benefits through a special visa category thus affirms the United States' commitment to refugees and to a rational approach towards reconciling national security concerns with humanitarian principles.