

Used, Abused, Arrested and Deported: The Case for Extending Immigration Benefits to Protect Victims of Trafficking and Secure the Prosecution of Traffickers

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Prologue:

Madeleina was a slight, delicate-looking 16-year-old girl from Moldova. She had left Moldova in 1998, when her sister's husband convinced her and another girl to go with a friend of his who promised to find them hostess jobs in Italy. She was given a fake passport, and after about a week of traveling, found herself locked in a brothel in what she later discovered was the Republic of Serbia, Bosnia and Herzegovina. A woman interpreting for the brothel owner told her that she had been sold to him to be his "wife." The brothel owner forced Madeleina to have sex with him and his friends and told her that she could begin working off her debt to him immediately. He told her that she already owed him more than \$2000 for her purchase price and working papers.

She had no money and no friends. She could not speak the local language and the owner threatened her regularly, beating her and telling her that police would arrest her if she tried to leave. There were at least 11 other girls and women at this brothel, all foreigners. Most of them were from Moldova or Romania, and the brothel owner tried to keep them separated as much as possible to prevent their collusion and escape. The owner sometimes forced them to take drugs to keep them more compliant, the cost of which was added to their debt. The brothel owner kept Madeleina for about 5 months, forcing her to have sex with as many as 20 men a day. She thought that some of the men who came as customers to see her were local police. She also knew that Russian and either American, Canadian or British men, and she thinks Italian, had visited her and had sex with her, in addition to local men.

When police raided that brothel, she was taken by car to Arizona Market, near Brcko, where cars and goods and women are sold. Two international men purchased her; she thinks they were Swiss and American peacekeepers. These two men put her in a car and took her to an apartment in Tuzla where they kept her locked up and came to visit her every 1 to 2 days, often with friends, and forced her to have sex with them. Over the course of these months, Madeleina had begun to teach herself some Serbian language.

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One day, after no one had visited her for several days and she was running out of food, the landlord of the apartment opened the door and told her to get out. It was winter, and she went out with no warm clothes to find the local police, not because she believed the police would help her, but because she knew she would freeze to death with no place to go.

The local police promptly jailed her for prostitution. A Human Rights Officer with the Organization for Security and Cooperation in Europe intervened, and Madeleine was transported to Sarajevo to a makeshift shelter, just being established by international and local non-governmental organizations.²

Introduction:

Trafficking in human beings is an extremely lucrative business, with profits estimated at \$5 to 10 billion per year³ and a seemingly endless supply of persons to traffic, estimated at between 700,000 and 4 million new victims per year.⁴ Trafficked persons, typically women and children, can be sold and resold, and even forced to pay back their purchasers for the costs incurred in their transport and purchase.⁵ In fact, the US Central Intelligence Agency estimates that

² As related to the author during her tour with OSCE in Bosnia and Herzegovina. For similar stories, see MARTINA VANDENBERG, HUMAN RIGHTS WATCH, TRAFFICKING PROJECT, HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION, Vol. 14, No. 9 (D) (2002) [hereinafter Vandenberg]; John McGhie, *Bosnia –Arizona Market: Women for Sale*, (UK Channel 4 News television broadcast, June 8, 2000), available at <http://fpmail.friends-partners.org/pipermail/stop-traffic/2000-August/000113.html> (last visited June 29, 2003); William J. Kole and Aida Cerkez-Robinson, *UN Police Accused of Involvement in Prostitution in Bosnia*, ASSOCIATED PRESS, June 28, 2001; Colum Lynch, *U.N. Halted Probe of Officers' Alleged Role in Sex Trafficking*, WASHINGTON POST, December 27, 2001, at A17, available at <http://www.washingtonpost.com/wp-dyn/articles/A28267-2001Dec26.html>.

³ *Trafficking in Human Beings in Southeastern Europe*, United Nations Children's Fund (UNICEF)/United Nations Office of the High Commissioner for Human Rights (UNOHCHR)/Organization for Security and Cooperation in Europe-Office for Democratic Institutions and Human Rights (OSCE-ODIHR) 2002, at xiii [Hereinafter "Joint Report on Trafficking"] (stating that trafficking in human beings is the third most lucrative organized crime activity after, and often conjoined with, trafficking in arms and drugs). See also, Gillian Caldwell, "Crime and Servitude: An Expose of the Traffic in Women for Prostitution from the Newly Independent States," *Global Survivor Network*, Vol. 3 (1997), available at <http://www.globalsurvival.net/femaletrade/9711russia>, (citing 1988 German police estimates that traffickers earned US\$35-50 million annually in interest on loans to foreign women and girls entering Germany to work as prostitutes).

⁴ U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 1 (2002).

⁵ The Sex Trade: Trafficking of Women and Children in Europe and the United States: Hearing on Human Rights Before the House Subcomm. on International Operations and Human Rights, 106th Cong. 24 (1999) (Testimony of Laura Lederer, Director, The Protection Project) (hereinafter, The Lederer Report) (women in North America are sold for as much as \$16,000 to each new brothel owner, and have to pay or work off a debt of \$20-40,000 each time they are resold); See also, Jennifer Lord, *EU Expansion could fuel human trafficking*, UNITED PRESS INTERNATIONAL, November 9, 2002, available at <http://caymannetnews.com/Archive/Archive%20Articles/November%202002/Issue%20286%20Wed/EU%20Expansion.html>.

traffickers earn \$250,000 for each trafficked woman.⁶ Economic instability, social dislocation and gender inequality in transitioning countries foster conditions ripe for trafficking.

Trafficking in human beings involves moving persons for any type of forced or coerced labor, for the profit of the trafficker.⁷ Several countries are finally adopting domestic legislation to criminalize trafficking in human beings, although many continue to punish the victims of trafficking, charging them with prostitution, possession of fraudulent documents or working without authorization.⁸ Many international organizations and consortiums of grassroots anti-trafficking organizations have also put forward models for combating trafficking.

None of these models is yet terribly effective, for a variety of reasons. At the forefront of these reasons is the fact that several countries have yet to adopt anti-trafficking laws.⁹ Second, of those that have, many completely fail to implement those laws even after undertaking domestic and international obligations.¹⁰ A third major reason is that some governments have failed to incorporate the advice of grassroots and international anti-trafficking organizations that have worked for years drafting recommended legislation based upon their observations in the field.¹¹

⁶ Caldwell, *supra* note 3, at 10.

⁷ While there are a multitude of definitions of trafficking, the most widely used definition derives from the current legal standard bearer, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. A/55/25, 55 U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/2890 (2000) [hereinafter *The Protocol*]. Article 3 of *The Protocol* defines trafficking as: “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of 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.” To date, 117 countries have signed the Protocol, which needs another fourteen countries to ratify it in order to reach the forty requisite for entry into force. See United Nations, Office of Drugs and Crime website at http://www.unodc.org/unodc/en/crime_prevention.html. Only for the purposes of narrowing discussion will this paper emphasize trafficking for sex work. This narrow focus should not be viewed as support for a definition of trafficking that bifurcates trafficking that results in sex work from other forms of trafficking (such as indentured domestic service, forced labor, forced marriage, subjugation in making pornography, etc.). All trafficking in human beings is a violation of human rights in that it involves affronts to human dignity and arguably constitutes a form of slavery.

⁸ See *infra* text and accompanying footnotes at Part III (A).

⁹ In South Eastern Europe, for instance, Croatia, Bosnia and Herzegovina, and The Republic of Serbia and Montenegro, have no distinct criminal offense for trafficking, despite being known countries of origin, transit or destination, although a law is under consideration in Serbia. For review of laws related to trafficking in these countries, see KRISTI SEVERANCE, AMERICAN BAR ASSOCIATION, CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, SURVEY OF LEGISLATIVE FRAMEWORKS FOR COMBATING TRAFFICKING IN PERSONS 2-3 (2003), [hereinafter *ABA CEELI Report*] available at <http://www.abanet.org/ceeli/publications/conceptpapers/humantrafficking/home.html>.

¹⁰ See discussion *infra* Part II (B) (1).

¹¹ See discussion *infra* Part III (D).

A particular contemporary problem is trafficking for the sexual exploitation of women¹² in and from Central and Southeastern Europe.¹³ Currently, Central and Southeastern Europe are the primary sources from which women are drawn into global sex traffic through Europe,¹⁴ and some countries in this region are actively engaged in developing anti-trafficking initiatives pursuant to their obligations as signatories to the 2000 Protocols to the UN Convention on Transnational Organized Crime.¹⁵ In addition, the Balkans has the additional unique element of the presence of international peacekeepers and humanitarian workers, which in many respects exacerbates the problem.¹⁶

This paper will, in Part I, discuss the recent increase in trafficking. Part II will explore how and why governments have failed to effectively address the problem, despite being aware of its existence for decades. Part III illustrates that two dominant anti-trafficking models have emerged in recent years, one of which is oriented towards prosecution of traffickers while the other emphasizes victim protection. Part IV proposes a specific combination of the best of the two models, recommending several additional elements to create a new model that will more effectively combat trafficking, highlighting immigration benefits, and responds to anticipated arguments against such an expansion.

The principal recommendation of this article is that the best of the “jail the offender” and “protect the victim” models should be combined. The new model should incorporate advice from grassroots organizations that work directly with

¹² For the purposes of simplicity, the paper will refer to women in particular, and use the feminine pronouns when referring to victims of trafficking, as the majority of victims of trafficking for sexual exploitation are women and girls.

¹³ Since the early 1990’s countries in political and economic transition in Central, Eastern and South Eastern Europe and the Former Soviet Union have not only become main countries of origin for trafficked persons, but also of destination and transit. See, ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE/OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW 22 (2001) [hereinafter OSCE Reference Guide]. South Eastern European countries offer the unique combination of being countries deeply mired in trafficking, and simultaneously interested in entering the European Union. As such, they are in the process of bringing their legislation and administrative bodies into compliance with European standards, and are particularly useful for viewing the process of developing anti-trafficking initiatives. The Czech Republic, Slovakia, Slovenia, Hungary, Poland, Cyprus, Malta, Estonia, Lithuania and Latvia are set to join the EU on 2004, while Romania, Bulgaria and Turkey all have active applications for EU membership. See European Union Website, Candidate Countries, at <http://europa.eu.int/comm/enlargement/candidate.htm>.

¹⁴ Central and Eastern Europe have surpassed Asia and Latin America as countries of origin since the breakdown of the Soviet Union in 1989. See OSCE Reference Guide, *supra* note 13, at 9. Since the early 1990s, politically and economically transitioning countries in Central, Eastern and South Eastern Europe and the Former Soviet Union have become main countries of origin, destination, and transit. *Id.*

¹⁵ U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, Supp. No. 49, at 44, U.N. Doc. A/45/49, *opened for signature* December 2000, [hereinafter The Convention]. The Republic of Serbia and Montenegro, and Bosnia and Herzegovina have ratified the Convention, and its Protocols. All other South Eastern European countries are parties and it remains unclear as to how they will implement their commitments.

¹⁶ See discussion *infra* Part II (B)(2). International Administration is still in effect in Kosovo (through the U.N. Mission in Kosovo, pursuant to U.N. Resolution 1244), and partially in Bosnia and Herzegovina (through the Office of the High Representative, pursuant to the General Framework Agreement for Peace or the “Dayton Accord”).

trafficked persons, in order to craft anti-trafficking programs that promote protection of victims. This new model should include immigration protection, should hit traffickers where it hurts, and should prioritize full implementation.

I. The recent rise of trafficking in human beings

The horrific practice of trafficking in human beings has long been a serious problem throughout the world, but in the last fifteen years trafficking originating from Europe has been on the rise. Trafficking in Europe has been fueled by the social dislocations, increasing pockets of poverty, gender imbalance, bureaucratic chaos, and legislative vacuums resulting from the collapse of communism.¹⁷

Women already disenfranchised within their communities are most often those who fall prey to traffickers: ostracized minorities, women without employment or future economic prospects, and girls without family members to look out for them or who have fallen outside of the educational system.¹⁸ These girls and women are lured by traffickers into leaving their countries, believing that they will work in the West as dancers, hostesses or nannies, and instead find themselves forced to have sex for the profit of men and women who purchased them.¹⁹

In order to secure their silence and compliance, traffickers threaten, beat, rape, drug, and deprive their victims of legitimate immigration or work documents. Women are forced to sell themselves in brothels, often receiving several clients per day.²⁰ They rarely see any wages for their work; in fact, most victims are kept in indentured servitude and told that they owe their traffickers or the brothel owners for their own purchase price and for the price of procuring working papers and travel documents.²¹

The rings of traffickers are often vast, extremely well connected to police and government officials, well hidden, and reach across borders and continents.²² Traffickers in human beings are also known to traffic in weapons and drugs, and to use trafficking in human beings to bring in initial cash flow to support the

¹⁷ See JENNA SHEARER DEMIR, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, EVALUATION AND POLICY ANALYSIS UNIT, TRAFFICKING OF WOMEN FOR SEXUAL EXPLOITATION: A GENDER BASED WELL-FOUNDED FEAR? 1 (2003), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/openssl.pdf?tbl=RESEARCH&id=3e71f84c4&page=publ> (arguing that women disproportionately suffer the effects of an economic upheaval); USAID, REFUGEE REPORTS (2000) (stating that between 70% and 80% of the unemployed in Russia are women) (citing MIKHAIL ADAMOVIC LEBED, LA STRADA, UKRAINIAN NGO, A FEW OBSERVATIONS ABOUT TRAFFICKING IN WOMEN BY A CRIMINOLOGIST (1998) (stating that women make up 70% of those involuntarily unemployed in Eastern Europe)).

¹⁸ Based on the author's discussion with anti-trafficking NGO's and UN officials in Bosnia and Serbia, and on direct discussion with trafficking victims.

¹⁹ *Id.*

²⁰ Vandenberg, *supra* note 2 at 18.

²¹ *Id.* at 4.

²² *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, E/CN.4/1997/47 (1997) (expressing concern about government complicity in trafficking).

riskier traffic in drugs and arms.²³ Human beings, being reusable commodities that can be sold and resold, are both more lucrative²⁴ and less risky to traffic than drugs and arms, in that traffickers of human beings are rarely prosecuted for this particular offense.²⁵

While between 700,000 and 4 million women are trafficked each year,²⁶ only a fraction of those are known to have received assistance in order to escape trafficking.²⁷ Many are re-victimized by being deported from the countries in which they are found,²⁸ sanctioned by law when attempting to return to their countries of origin,²⁹ and ostracized within their communities and families.³⁰

Governments appear to have recognized the importance of the issue, many having ratified international instruments established to eradicate trafficking in human beings. Nevertheless, trafficking is neither slowing, nor is the prosecution of traffickers or the protection of their victims becoming any more certain.

II. Governmental Failures to Confront the Issue

As early as 1904, concern over “white slavery,” in which European women were exported to the colonies, prompted the adoption of the International Agreement

²³ See AMY O’NEILL RICHARD, U.S. DEP’T OF STATE, CENTER FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 1 (1999), available at <http://usinfo.state.gov/topical/global/traffic/report/homepage.htm> [hereinafter CSI Report] (citing the INTERNATIONAL CENTER FOR MIGRATION POLICY DEVELOPMENT, SECRETARIAT OF THE BUDAPEST GROUP, DRAFT STUDY ON THE RELATIONSHIP BETWEEN ORGANIZED CRIME AND TRAFFICKING IN ALIENS (1999)). See also INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), APPLIED RESEARCH AND DATA COLLECTION ON TRAFFICKING IN WOMEN FOR SEXUAL EXPLOITATION TO, THROUGH AND FROM THE BALKAN REGION 7 (2001) [hereinafter IOM Report].

²⁴ See CSI Report, *supra* note 23, at 19.

²⁵ See discussion *infra* Part III (C)(2)(a).

²⁶ U.S. DEP’T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 1 (2002). The numbers for South Eastern Europe in particular are difficult to specify. For example, one Swedish NGO estimates that “500,000 women are trafficked into each year into Western Europe alone. A large proportion of these come from the former Soviet Union countries. Joint Report on Trafficking, *supra* note 3, at 4. IOM estimates that in 1997, “175,000 women and girls were trafficked from Central and Eastern Europe and the Newly Independent States.” *Id.* As of 2002, IOM estimates that 120,000 women and children are trafficked into the EU each year, mostly through the Balkans, and that 10,000 are working in Bosnia alone, mostly from Moldova, Romania and the Ukraine. *Id.*

²⁷ Joint Report on Trafficking, *supra* note 3, at xv (only seven percent of the foreign migrant sex workers known to be victims of trafficking receive any long term assistance and support).

²⁸ Vandenberg, *supra* note 2, at 38.

²⁹ GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN/FOUNDATION AGAINST TRAFFICKING IN WOMEN/ INTERNATIONAL HUMAN RIGHTS LAW GROUP, HUMAN RIGHTS STANDARDS FOR THE TREATMENT OF TRAFFICKED PERSONS, 15 (1999) available at <http://www.hrllawgroup.org/resources/content/IHRLG Trafficking Standards.pdf>. Countries from which trafficked persons originate are referred to as countries of origin. Countries through which victims are trafficked are called countries of transit, and destination countries are those in which victims ultimately find themselves engaged in sex work.

³⁰ *Id.*

for the Suppression of White Slave Traffic, addressing the fraudulent or abusive recruitment of women for prostitution in another country.³¹ The issue was addressed again in 1933 with the International Convention on the Suppression of the Traffic in Women of Full Age, by which parties agreed to punish those who procured prostitutes or ran brothels.³² In 1949, the United Nations adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.³³ Until 2000, the only other international treaty to address trafficking was the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], which required states to take all measures to suppress both trafficking and “exploitation of prostitution,” meaning forced prostitution.³⁴

Beginning in the late 1980’s, the European Union [hereinafter the EU] and the UN began addressing the issue repeatedly, yet little progress was made and the collapse of communism flooded trafficked persons throughout Europe. With trafficking recognized as a distinct problem since 1903, with the ratification of four treaties by many nations, and with trafficking recently and dramatically on the rise, why has so little progress been made?

A. Some Politicians Use Trafficking to Direct Attention to Unrelated Political Agendas

Trafficking is a low priority for many governments who pay lip service to solving the problem only to harness more support for other political objectives. Because of the visceral reaction trafficking elicits with the public, it has recently been used by politicians and governments to bolster other political agendas, such as curtailing illegal migration, fighting prostitution, and even combating terrorism.

³¹ International Agreement for the Suppression of White Slave Traffic, 1 L.N.T.S. 83 (entered into force May 18, 1901). The Agreement was ratified by Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal Russia, Spain, Sweden and Norway, Switzerland and the UK and consented to by their respective colonies, and dealt with European women being exported to the colonies for prostitution, sometimes forcibly. ~~*****~~

³² International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431, amended by the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, concluded at Geneva on 11 October 1933, Nov. 12, 1947, 53 U.N.T.S. 13.

³³ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 272, (entered into force July 25, 1951). . Parties agreed to “punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.” *Id.* at art. 2.

³⁴ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, at 183, U.N. Doc. A/34/46 , art. 6 (entered into force Sept. 3, 1981).

Some governments pretend to care about trafficking when the real objective is controlling unwanted migration.³⁵ Trafficking in human beings is a very serious topic in its own right, but the gravity and emotional impact of the topic unfortunately render it vulnerable to political manipulation. With illegal migration, smuggling, terrorism and prostitution now on many political agendas, the pledge to combat trafficking is misused as justification for “clamping down” on these other threats that also have immigration implications.³⁶ Authorities have remained cynical and hardened to the plight of victims who are easier to treat as prostitutes or illegal immigrants.³⁷

In fact, most countries still view the existence of trafficked women within their sovereign borders as evidence of a breach in security or the failure of their domestic immigration mechanisms.³⁸ Traffickers are often extremely savvy transnational organized criminals, while their victims are most often women and children already victimized by economic, political or social conditions in their home countries. Viewing trafficking as an immigration issue overly simplifies the complexity of preparing effective anti-trafficking measures.

As will be demonstrated in this section, politicians and governments have blurred the distinctions between illegal migration, trafficking, and smuggling, taking advantage of the current world fear of terrorism committed by legal and illegal immigrants, to restrict immigration and freedom of movement further. They have purposely co-mingled anti-trafficking initiatives with anti-prostitution initiatives. They have tried to further curtail migration by blurring the distinction between trafficking and smuggling. Finally, it is my opinion that some governments are motivated not by a keen belief in the necessity of curtailing trafficking, but by a desire to secure international financial assistance or enter the EU.

1. Prostitution

Prostitution and trafficking are not one and the same, yet some would treat them as such.³⁹ Prostitution involves persons willingly engaging in sex work.

³⁵ See CSI Report, *supra* note 23, at 31 (stating that “[d]efinitional difficulties still persist regarding trafficking in women. . . . Distinctions regarding trafficking in women, alien smuggling and irregular migration are sometimes blurred with INS [former US immigration department] predisposed to jump to the conclusion that most cases involving illegal workers are alien smuggling instead of trafficking cases”).

³⁶ See, e.g., Richard Monk, Study on Policing in the Federal Republic of Yugoslavia, (Unpublished OSCE Report) 21 (July 2001) (on file with author)[hereinafter Monk Report] (Commenting: “Additionally, these statistics [on successful anti-trafficking ventures] are used for various political purposes – for example, prevention of trafficking is used as an argument for refusing young women entry to a country or for refusing to issue them a visa, and then, in the police statistics, these cases are relabeled as successful cases of rescuing ‘victims of trafficking’”).

³⁷ See, e.g., CSI Report, *supra* note 23, at 31 (U.S. government officials cited as holding the opinion that trafficking victims are part of the conspiracy and therefore view them as accomplices).

³⁸ See, e.g. Monk Report, *supra* note 36 at 51 (stating that the Serbian Ministry of Interior is more interested in preventing illegal migration and securing borders than in providing victim protection).

³⁹ In explaining its priorities for 2003, the Stability Pact of South-Eastern Europe stated: “Attention will be drawn to maintain the differentiation between victims of human trafficking and prostitutes, which is currently becoming blurred, to the detriment of effective and targeted victim protection.” Special

Although there may be a gray area involving different degrees of consent, choice and free will, trafficking goes well outside of this gray area. While a valid argument could be made that gender imbalances in economic or social factors drive a woman to consent to such labor as her chosen profession, thus effectively removing her “will,”⁴⁰ trafficking involves clear deprivation of choice at some stage, either through fraud, deception, force, coercion or threats.

When it comes to trafficking, whether a woman was initially willing or unwilling when she entered into sex work should make no legal difference when the outcome is enslavement or forced servitude; a person cannot consent to enslavement or forced labor of any kind.⁴¹ While some trafficked persons may be willing to work in the sex industry, they do not anticipate being forced to pay off large forcibly imposed debts, kept against their will, have their travel documents taken from them, or to being raped, beaten and sold like chattel.⁴²

Nevertheless, within the community of NGO’s, international organizations, governments and working groups laboring to define and combat trafficking, the issue of prostitution regularly enters the deliberation. As recently as 2001, for example, some persons working for the UN Mission in Bosnia and Herzegovina and its partner organizations tasked with assisting the Bosnian government with eradicating trafficking refused to provide trafficking protection assistance to women who at any point willingly engaged in prostitution.⁴³

The Convention has encouraged countries to focus on coercion and use of force in identifying whether a woman is a victim of trafficking, rather than on whether she has ever engaged in prostitution. That the US government agency tasked with distributing funding to international trafficking initiatives recently determined that it would refuse to fight trafficking where doing so might appear to treat prostitution as a legitimate activity, speaks to the politicization of trafficking, a volatile topic easily used to affix other political agendas.⁴⁴ Even while most

Coordinator of the Stability Pact for South Eastern Europe, The Task Force on Trafficking in Human Beings, at <http://www.stabilitypact.org/trafficking.htm#four>. For more discussion on the Stability Pact, see discussion *infra* Part III (D) (3).

⁴⁰ NGO Consultation with the UN/IGO’s on Trafficking in Persons, Prostitution and the Global Sex Industry, “*Trafficking and the Global Sex Industry: The Need for a Human Rights Framework*,” June 21-22 1999, Room XII Palais des Nations, Geneva, Switzerland [Panel A and Panel B] (some IGO’s arguing that all prostitution is forced prostitution and calling for its abolition, with others arguing for a distinction between voluntary and forced prostitution in order to focus on preventing the worst forms of exploitation of prostitutes).

⁴¹ See, e.g., CSI Report, *supra* note 23, at vi. (“The Thirteenth Amendment outlawing slavery prohibits an individual from selling himself or herself into bondage, and Western legal tradition prohibits contracts consenting in advance to assaults and other criminal wrongs”). This argument is further developed in Part IV(A)(1).

⁴² See Vandenberg, *supra* note 2 at 16 (detailing common treatment and expectations of trafficked women).

⁴³ *Id.* at 13. This practice of excluding prostitutes from victim protection result from criteria set by donor agencies rather than international law; see e.g., *infra* note 45 and accompanying text.

⁴⁴ In its paper entitled, “Trafficking in Persons, The USAID Strategy for Response,” designed to implement several provisions within the Trafficking Victim’s Protection Act (TVPA), the US Agency for International

experts working in anti-trafficking initiatives agree that trafficking and prostitution are separate issues, to be handled separately as a matter of law, the United States took a step backwards in attempting to tackle prostitution under the guise of combating trafficking.

2. Smuggling

Politicians have also attempted to link smuggling and trafficking in order to achieve tightened border controls, towards the goal of reducing illegal migration and perhaps preventing terrorism. While most governments acknowledge that smuggling and trafficking are two distinct crimes, this has not prevented them from using trafficking statistics and horrific trafficking stories to justify tightened border controls, when the primary goal is not the elimination of trafficking, but the reduction of illegal migration, some of which occurs via smugglers.

The United States Department of State, for instance, opened the Migrant Smuggling *and* Trafficking in Persons Coordination Center in December of 2000, even while acknowledging, “at their core . . . these related problems are distinct.”⁴⁵ The US government nevertheless justified combining the two issues by pointing out “these related problems result in massive human tragedy and affect our national security, primarily with respect to crime, health and welfare, and border control.”⁴⁶ By way of another example, the Canadian government supported a study jointly reviewing both smuggling and trafficking, even while pointing out the legal distinctions between the two.⁴⁷ The study was justified under the premise that “as human smuggling and trafficking are increasing, the tightening of border controls has taken on a new urgency from the fear of terrorism in the West, as well as restrictive measures placed on irregular migratory movements.”⁴⁸

Smuggling involves delivering persons to the country they wish to enter, initiated by the potential migrant. Smuggling often takes place under horrible and possibly

Development (USAID) states that it will only work with [e.g. fund] local NGO’s “committed . . . to combat trafficking *and* prostitution,” [emphasis added], explaining that:

“[a]n effective anti-trafficking strategy depends upon partnerships. Organizations advocating prostitution as an employment choice or which advocate or support the legalization of prostitution are not appropriate partners for USAID anti-trafficking activities. The degradation and abuse of women who are *victims* of prostitution and the stigma associated with prostitution in many places reinforce the U.S. position that organizations or groups promoting prostitution or its legalization should not be supported.” [Emphasis added].

USAID, “Trafficking in Persons, The USAID Strategy for Response,” working paper, 2001, on file with author.

⁴⁵ U.S. DEP’T OF STATE, INTERNATIONAL INFORMATION PROGRAMS, FACT SHEET, MIGRANT SMUGGLING AND TRAFFICKING IN PERSONS CENTER, at <http://usinfo.state.gov/topical/global/traffic/00121501.htm>.

⁴⁶ *Id.*

⁴⁷ JACQUELINE OXMAN-MARTINEZ, SYRACUSE UNIVERSITY/CANADIAN CONSULATE GENERAL, HUMAN SMUGGLING AND TRAFFICKING: ACHIEVING THE GOALS OF THE UN PROTOCOLS? 1 (2003), available at <http://www.maxwell.syr.edu/campbell/XBorder/OxmanMartinez%20oped.pdf>.

⁴⁸ *Id.*

life threatening conditions, but smuggled persons are left to their own devices upon delivery. Smuggling is not as lucrative for the perpetrators, as smugglers usually make only a short-term profit on the act of moving a person, while traffickers regard people as highly profitable, reusable, re-sellable and expendable commodities.⁴⁹

In order for anti-trafficking initiatives to be effective, they must be separated from those that target smuggling and illegal migration. Politicians must make the eradication of trafficking and the protection of trafficked persons into a prioritized goal, distinct from the elimination of smuggling or the tightening of border controls.

3. Some governments are motivated by a desire to meet requirements to enter the European Union or obtain financial assistance

As always where international politics and financial assistance meet, the EU and the United States, among other institutions and governments, are conditioning financial assistance⁵⁰ and entry into the EU⁵¹ on the willingness of a country to develop legislation to curtail trafficking within and across their borders. Countries set to enter the European Union in 2004⁵² are eager to pass legislation recommended by the EU and the Council of Europe, and join working groups that address stemming the flow of trafficking and smuggling.⁵³

⁴⁹ In the last decade, Southeast Asia alone has produced three times as many victims of trafficking than produced during the entire history of slavery from Africa. Refugee Reports, Vol. 21 No. 5 (2000) (400 years of slavery from Africa produced 11.5 million victims; victims of trafficking in the 1990s in Southeast Asia are estimated to be 33 million).

⁵⁰ The United States Trafficking Victims Protection Act of 2000, H.R. 3244 ENR, U.S.C. ??, §§ 109.110 106th Cong. (2000) [hereinafter TVPA], for instance, requires an annual submission to Congress by the Department of State on the status of trafficking in each country. Financial assistance is tied directly to the level of each countries' compliance with U.S. directives. U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 6 (2002) ("Beginning in 2003, those countries ranked lowest in this report "will be subject to certain sanctions, principally termination of non-humanitarian, non-trade-related assistance. Consistent with the Act, such countries also would face U.S. opposition to assistance . . .from international financial institutions. . .").

⁵¹ Mr. Scheffer, Minister of Foreign Affairs for the Netherlands, in his speech to the Dutch Chairmanship to the Organization for Security and Cooperation in Europe, suggested that the Council of Europe "inspires" and the European Union "motivates" countries wishing to enter the EU to accede to the various EU and Council of Europe recommendations, which include establishing anti-trafficking initiatives. See Recommendation of the Committee of Ministers to Member States on Action Against Trafficking in Human Beings, Eur. Consult Ass., Session ?, Doc. No. ? (2000). (adopted by the Committee of Ministers on 19 May 2000, at the 710th meeting of the Ministers' Deputies).

⁵² For list of applicant countries to the EU, see *supra* note 13.

⁵³ My experience working with Ministries of Justice, Interior and Human Rights in Bosnia and Herzegovina, Croatia, and The Republic of Serbia and Montenegro was that high level government authorities were typically keen to attend high level working groups addressing the drafting of trafficking legislation, but much harder to pin down when it came to establishing work plans to train field level government authorities.

Passing recommended legislation and making real efforts to stem the flow of trafficking, however, are often two different things. When countries simply adopt legislation in order to secure entry into the EU or to meet financial assistance requirements, there is no real ownership or commitment to eradicating trafficking. The legislation, no matter how meticulously in conformity with international standards, will not be fully or adequately implemented at the local level without serious political will.

B. Governments Ignore Obvious Problems with Anti-Trafficking Initiatives

Many countries have now finally adopted some domestic legislation addressing trafficking, and most have eradicated earlier laws that punished trafficked persons for immigration or prostitution offenses.⁵⁴ By no means, however, have all countries adopted laws to specifically target trafficking.⁵⁵ In Bosnia, for example, the UN Mission reported that of sixty-three cases brought against traffickers in 2000, only three were successfully prosecuted.⁵⁶ Of those three, the defendants were *all* tried on charges related to prostitution, not trafficking.⁵⁷ In one of the three cases, three trafficked women and two brothel owners were arrested in a raid. Although the defendants admitted that they had purchased the women for prices ranging between \$592 and \$1162, the court convicted the three women for prostitution and dropped the charges against the male defendants.⁵⁸

One purpose of this article is to point out reasons why no current laws are very effective in the fight to eradicate trafficking.

1. Governments fail to prioritize the implementation of anti-trafficking laws

A piece of legislation is useful to trafficked persons and threatening to violators only if it is implemented and known by the traffickers to be fully in force. No matter how great the economic or political pressure applied by the EU or the USA to encourage countries to introduce legislation to prosecute traffickers, no

⁵⁴ See discussion *infra* Part III (A). As recently as 1998, in Israel for example, a victim's best hope was to have the brothel or massage parlor she worked in raided by police. She would then be taken to prison, not a shelter or detention center, and offered two options: be deported and have criminal prostitution charges dropped, or file a complaint against her trafficker or those holding her in involuntary servitude. If she chose to file charges, however, she would remain in prison until a trial was held. Not surprisingly, no women between 1984 and 1998 chose to testify against their traffickers in Israel. Most traffickers were well aware that the laws favored them, if only because the women they trafficked were illegally in the country and were engaging in criminal activity. Michael Specter, *Traffickers' New Cargo: Naïve Slavic Women*, NEW YORK TIMES, January 11, 1998.

⁵⁵ Bosnia, Serbia, Montenegro and Croatia, for example, have no distinct criminal offense for trafficking. See, ABA CEELI Report, *supra* note 9, generally for updates on domestic trafficking legislation.

⁵⁶ Vandenberg, *supra* note 2, at 36.

⁵⁷ *Id.*

⁵⁸ *Id.*

incentive can create the political will to *implement* legislation if such will or ability does not exist or is not prioritized.⁵⁹

Coordination among responsible agencies to implement the law is often flawed in the best of circumstances, further obstructing implementation.⁶⁰ Meetings are held at the highest levels and those in attendance come away full of self-congratulations that plans are being made and laws adopted. Yet out in the community, brothels are raided and no screening is done for victims of trafficking; victims identify themselves to police and face prosecution;⁶¹ traffickers supply false passports to border police,⁶² and the girls and traffickers are waived through. For example, during my tenure in Belgrade, a brothel was raided and trafficked women were placed in jail, rather than the new shelter for trafficked persons, on the very same day that a high-level regional meeting took place in Belgrade between ministries and Stability Pact, UN and OSCE officials to discuss follow up victim protection mechanisms for the new shelter. There seemed to be no communication between those making the decisions to adopt new laws and practices and those carrying them out in the field, and an inability or unwillingness to train these low-level government employees.

2. Governments fail to penalize or even acknowledge the complicity of peacekeepers and international workers in trafficking

Despite a growing awareness that peacekeeping forces and humanitarian workers regularly and knowingly obtain the services of trafficked women and sometimes even engage in or aid and abet trafficking, governments have failed to publicly

⁵⁹ One way to encourage implementation of anti-trafficking laws is for the EU and USA to condition their assistance on implementation, rather than on simple passage of anti-trafficking laws, a recommendation made in this paper, and finally acknowledged in the 2003 Trafficking in Persons Report, U.S., DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 2 (2003); available at: <http://www.state.gov/g/tip/rls/tiprpt/2003/21262.htm>.

⁶⁰ CSI Report, *supra* note 23, at 31-32. (Questions about whether the United States can be considered an example of the “best of circumstances” aside, the CSI Report states that at least in 1999, prior to passage of the TVPA, “information sharing among the various entities remain[ed] imperfect. Several Department of Justice [DOJ] offices look at the trafficking issue through the prism of their particular offices’ interest, be it eliminating civil rights violations, tackling organized crime, or protecting minors. Even within the [DOJ], information is not always shared. . . .”). *See also* Monk Report, *supra* note 36, at 76 (Although Serbia and Montenegro are actively participating in high level working groups to combat trafficking, including suggesting progressive programs for victim protection, the police force is incapable of coping with the scale of the phenomenon: “[a]part from within the border police departments, there is poor awareness and interest generally on the part of police and the public about the subject [of trafficking], and the prevailing disregard for gender equality contributes to indifference about the plight of victims. . . . Because of the lack of reciprocal agreements with neighboring States, the incompatibility of laws, the absence of [domestic] laws which enable successful prosecutions to be brought against the traffickers and pimps and the lack of [domestic] legal authority to produce evidence obtained by the internal use of technical and surveillance aids, victim’s cases are generally viewed as time and energy consuming and inevitably unproductive. The very fact that victim’s statements, both verbal and written, will be in a foreign language further reduces responsiveness”).

⁶¹ Vandenberg, *supra* note 2, at 13.

⁶² *See id.*, at 31.

address this issue. Trafficked women in Bosnia, for instance, report that approximately thirty percent of their clients are internationals.⁶³ Countries that had never before been countries of destination began receiving trafficked women when peacekeepers and international aid workers moved into Bosnia, Croatia and Kosovo.⁶⁴ Neighboring countries quickly became countries of transit and origin. While the use of trafficked women by international workers might constitute only a fraction of the total number of trafficked women and the fraction of those trafficked by international workers is even less, the participation of international humanitarian workers and peacekeeping forces in trafficking conveys a powerful symbolic message to local authorities and traffickers. The message is this: governments working to “democratize” developing countries do not really care about eradicating trafficking.

For years, international organizations operating in the Balkans have been unwilling to determine how they can best prevent their employees from frequenting brothels known to harbor trafficked women. In recent years, when it has become clear that most brothels in the Balkans, for instance, do contain trafficked women,⁶⁵ these international organizations have still failed to enforce internal rules or laws against frequenting brothels.⁶⁶

Ninety percent of foreign sex workers in the Balkans are estimated to be trafficked, although less than thirty-five percent are identified and deemed eligible to receive protection assistance, and less than seven percent actually do receive long-term support.⁶⁷ It is therefore well known among those charged with teaching Bosnians how to better enforce their laws, e.g. peacekeepers, the International Police Task Force [IPTF], and international humanitarian workers, that by visiting a prostitute, you stand a good chance of visiting a trafficked woman.⁶⁸ One would think, therefore, that workers paid by the foreign ministries whose goals are combating trafficking and promoting safety and democracy would be strictly forbidden to visit brothels; but they are not. In fact, sometimes they receive no punishment whatsoever even when caught engaging in such activity.⁶⁹ How can a victim of trafficking be expected to escape her captor and seek safety with the very men paying her captors for her services?

Some international organizations such as the OSCE and some branches of the UN have recently developed “Codes of Conduct” which implicitly forbid their

⁶³ *Id.* at 11. *See also*, 2003 Trafficking in Persons Report, *supra* note 59 at 36 (acknowledging that the international civilian and military personnel have contributed to trafficking in Bosnia).

⁶⁴ *Id.* at 4,11 (“According to [IGOs and NGOs] trafficking first began to appear [in Bosnia and Herzegovina] in 1995,” and “[L]ocal NGOs believe that the presence of thousands of expatriate civilians and soldiers has been a significant motivating factor for traffickers to Bosnia and Herzegovina”).

⁶⁵ *See id.* at 4 (227 of the nightclubs in Bosnia are suspected of harboring trafficked women).

⁶⁶ *Id.* at 41-60.

⁶⁷ *See* Joint Report on Trafficking, *supra* note 3, at xv.

⁶⁸ In Serbia for example, of 600 women questioned during brothel raids between January 2000 and July 2001, 300 were determined to be victims of trafficking. *See id.*, at 78.

⁶⁹ Vandenberg, *supra* note 2, at 62-67.

personnel from seeing prostitutes by exhorting that they not “engage in any activity unbecoming of a mission member,” subsequent to widely-publicized scandals involving international troops engaged in trafficking.⁷⁰ Nevertheless, several recent articles indicate that local police and international peacekeepers and humanitarian aid workers continue to be major users of brothels in the Balkans in particular.⁷¹ Developing and enforcing prohibitions against this practice are crucial, because the IPTF and peacekeepers are the very persons whose duty it is to work with local authorities to eradicate trafficking in this part of the world, and the victims are supposed to be looking to IPTF and peacekeepers for protection.⁷²

III. Models of anti-trafficking legislation

In recent years, two main anti-trafficking models have emerged. Some countries and international institutions, such as the United States and the European Union, promote anti-trafficking programs that emphasize the prosecution of traffickers. Other countries and institutions such as the UN High Commissioner for Human Rights and UNHCR are pressing for a victim-oriented or “human rights” approach to fighting trafficking.

Both models offer vast improvements over virtually any model used as recently as the late 1980’s, when horror stories were emerging and statistics were first being gathered to identify the problem.⁷³ These two dominant models have come about through a series of legislative drafts and counter-proposals made by various

⁷⁰ See Information on Website and Page cited, at www.osce.org/news/generate. As a result of allegations that UN personnel were involved in trafficking, purchasing women, and sexual misconduct, the UN changed its code of conduct for personnel in 2001 to specifically cover trafficking. OSCE adopted its code in June of 2000.

⁷¹ See, e.g., John McGhie, Bosnia –Arizona Market: Women for Sale, (UK Channel 4 News television broadcast, June 8, 2000, available at <http://www.neww.org/pipermail/women-east-west/2000-August/000395.html>); William J. Kole & Aida Cerkez-Robinson, *UN Police Accused of Involvement in Prostitution in Bosnia*, ASSOCIATED PRESS, June 28, 2001; Colum Lynch, *UN Halted Probe of Officers’ Alleged Role in Sex Trafficking*, WASHINGTON POST, December 26, 2001, at A17, available at <http://www.washingtonpost.com/wp-dyn/articles/A28267-2001Dec26.html>; Daniel McGrory, *Woman Sacked for Revealing UN Links with Sex Trade*, THE TIMES (LONDON), August 7, 2002; Robert Capps, *Crime Without Punishment*, June 27, 2002, at <http://www.salon.com/news/feature/2002/06/27/military/>; Robert Capps, *Outside the Law*, June 26, 2002, at http://www.salon.com/news/feature/2002/06/26/bosnia/index_np.html; *US Scandal, Prostitution, Pimping and Trafficking*, Bosnia Daily, Daily e-newspaper, July 25, 2001, No 42, at 1.

⁷² UNHCHR recently addressed this issue openly in its guideline covering “Obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel,” asking states to consider “[e]nsuring that staff employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions do not engage in trafficking and related exploitation or use the services of persons in relation to which there are reasonable grounds to suspect that they may have been trafficked.” *Recommended Guidelines and Principles*, U.N. High Commissioner for Human Rights, E/2002/68/Add.1, Guideline 10, ¶ 3. See discussion *infra* Part III(C)(2).

⁷³ For example, “in Milan [Italy] a week before Christmas [in 1987], the police broke up a ring that was holding auctions in which women abducted from the countries of the former Soviet Union were put on blocks, partially naked, and sold at an average price of just under \$1,000.” Michael Specter, *Traffickers’ New Cargo: Naïve Slavic Women*, NEW YORK TIMES, Jan. 11, 1998.

governments, international institutions and consortiums of interested international organizations and NGO's.

Both models contain provisions touching on enforcement and protection, but vary in their emphasis, according to their motivations. Governments and institutions interested primarily in curtailing organized crime or illegal migration craft prosecution-oriented models, while those interested primarily in human rights develop victim-protection models. Because these models cover, to varying degrees, everything from witness protection to victim restitution and minimum sentencing guidelines for traffickers, the following sections will focus on one aspect touched upon, but not satisfactorily covered in either model – immigration benefits for trafficked persons. Immigration solutions should be viewed as *both* a victim protection measure *and* a mechanism for enhancing prosecution of traffickers.

A. “Arrest and Deport the Victim”

As recently as the late 1980's virtually all countries simply deported women for violating immigration laws or punished them for violating prostitution laws. Government authorities tended to treat trafficked persons as criminals, rather than victims of both a crime and of human rights violations.⁷⁴ Governments were regularly jailing trafficked persons for violations of immigration status, unauthorized employment or prostitution, and deporting them.⁷⁵ Some countries, such as Bosnia and Herzegovina and The Republic of Serbia and Montenegro still arrest and deport, as a matter of practice,⁷⁶ even when it contravenes newly adopted laws or international obligations.

⁷⁴ OSCE Reference Guide, *supra* note 13, at 9.

⁷⁵ *Id.*

⁷⁶ Vandenberg, *supra* note 2, at 19; *See also infra* note 159, discussing the author's personal experience in Serbia.

Grassroots anti-trafficking workers state that prosecutors do not want to tackle the difficult charge of prosecuting a trafficker when they can win the easier charge of prosecuting the victim for prostitution, document fraud, or immigration or labor violations.⁷⁷ The deplorable treatment of trafficked persons by police, prosecutors and judges,⁷⁸ who are themselves sometimes complicit in the trafficking, serves only to discourage victims from agreeing to cooperate with prosecution. In one case in Bosnia and Herzegovina, a woman had been accepted into an IOM program as a trafficked person and agreed to testify against her “owner.” On the stand as a witness, the judge turned her into a defendant, charging her with use of false documents, despite the fact that she had just testified that her owner had purchased and provided her with a false passport, beaten her regularly and forced her to work in a brothel for a year without a salary.⁷⁹

B. “Jail the Offender”

This model emphasizes prosecution of the trafficker, and all examples of this model have certain elements in common, with different degrees of emphasis. They take illegal migration and the combat against organized crime, in this instance trafficking, as their starting point and focus on prosecuting traffickers. They use strong language when referring to law enforcement mechanisms for prosecuting traffickers, and weak language when discussing victim protection measures; and they condition those protection measures on the willingness or ability of a victim to aid the prosecution of traffickers.

1. Convention and Protocol developed by UN Crime Commission

The current legal standard-bearers for anti-trafficking initiatives, the Convention against Transnational Organized Crime [The Convention]⁸⁰ and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [The Protocol],⁸¹ are both wholeheartedly instruments that emphasize the prosecution of traffickers.⁸² Developed by a law enforcement body, the UN

⁷⁷ Vandenburg, *supra* note 2, at 19.

⁷⁸ In one case, a 15 and a 16 year old girl found locked in a room during a raid on a Bosnian nightclub were asked by investigative judges and the prosecutor whether they derived any pleasure from their sex work. This was only after they were pressured by the UN to take testimony from the girls at all. *Id.* at 36

⁷⁹ *Id.* at 39.

⁸⁰ G.A. Res. A/5/383.2, U.N. GAOR, *supra* note 7.

⁸¹ *Supplementing the United Nations Convention Against Transnational Organized Crime*, U.N. G.A. Res. 55/25, Annex II, 55 U.N. GAOR, Supp. (No. 49), U.N. Doc. A/45/49 (Vol. I) (2001).

⁸² During negotiations for the Trafficking Protocol, NGOs argued for recognition of the rights of trafficked persons. However, as reported by Ann Jordan of the International Human Rights Law Group,

“[g]overnment delegates concentrated on creating a strong law enforcement instrument and many of them did not believe that human rights are appropriate in the Trafficking Protocol. Consequently . . . enforcement provisions in the Trafficking Protocol contain mandatory language, such as ‘states parties shall,’ while the protections and assistance provisions . . . contain weaker terms, such as ‘in appropriate cases,’ and ‘to the extent possible.’”

Crime Commission, the Convention and Protocol respond to the international battle against transnational crime.⁸³ While the Protocol takes steps in the direction of victim protection, it does not go far enough.

The Convention and Protocol provide a reference point for countries without domestic legislation to begin preparing anti-trafficking initiatives, but provide curiously broad and vague guidance on how to implement measures related to protection. On the one hand, for instance, the Protocol broadly requires states to “take or strengthen measures . . . to alleviate the factors that make . . . women and children [especially] vulnerable to trafficking, such as poverty, underdevelopment, and lack of equal opportunities.”⁸⁴ On the other hand, the protection measures they do require are limited generally to assistance that will render the victim able to serve as a witness against a trafficker.⁸⁵ Reflecting this prosecution emphasis, the Protocol only asks states to “consider” adopting measures that would permit trafficked persons to remain in the destination country, failing to overtly acknowledge, as will be argued within, that assisting with immigration solutions would also improve the availability of trafficked persons as witnesses.⁸⁶

2. United States’ Trafficking Victim Protection Act

The Trafficking Victim Protection Act [TVPA], another prosecution-oriented piece of anti-trafficking legislation, does include provisions for care of victims.⁸⁷ It even allows for the provision of temporary visas for victims, so-called T-visas, and further allows for the possibility of permanent residency. The TVPA conditions the permanent residency, however, on “cooperating with law enforcement officials,” towards the goal of prosecuting traffickers.⁸⁸ It also limits the number of T-visas granted to 5,000 (regardless of how many trafficked persons might qualify),⁸⁹ and limits T-visas to victims of “severe forms of trafficking.”⁹⁰ Finally, it relies heavily on economic sanctions to punish countries

IHRLG’s Annotated Guide, at 3 (citing Protocol Articles 6 and 7, and Convention Articles 24 and 25). For an analysis of both the Convention and the Protocol and how they relate to each other, see ANN JORDAN, INTERNATIONAL HUMAN RIGHTS LAW GROUP, ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL, (2002), available at http://www.hrlawgroup.org/initiatives/trafficking_persons/.

⁸³ As of January 2003, 21 of the 40 countries have ratified the Protocol. The Protocol cannot enter into force until 40 countries have ratified it and it cannot enter into force before the Convention, which also needs to be ratified by 40 countries.

⁸⁴ Trafficking Protocol, *supra* note 7, at art. 9.4.

⁸⁵ These include witness protection, the right to have her identity kept confidential and provision of shelter. *Id.* at art. 6.1.

⁸⁶ *Id.* at art. 7.

⁸⁷ TVPA, *supra* note 50.

⁸⁸ *Id.* § 106 (c)(3)

⁸⁹ *Id.* § 106 (e)(2).

⁹⁰ *Id.* § 107(c)(3). “Severe” is defined as “trafficking involving fraud, coercion or force or any trafficking involving a minor.” *Id.* § 103 8 (A) and (B).

of origin or transit for failing to effectively prosecute traffickers.⁹¹ While the concept of imposing economic sanctions for human rights violations is arguably sound, a country in political, administrative and economic transition is not likely to be able or willing to rally its resources to effectively combat trafficking even with loss of aid as an incentive.⁹²

Despite its heavy emphasis on prosecution, in 2001 and 2002, the Department of Justice successfully prosecuted only 36 cases, despite the Department of State's projection that more than 50,000 persons are trafficked into the US each year for the purposes of trafficking.⁹³ As of February 2003, two years after the TVPA went into effect, only 23 T-visas had been granted.⁹⁴

On the whole, and particularly in comparison with other anti-trafficking legislation, the TVPA is quite comprehensive. However, the legislation focuses too much on funding annual reports criticizing countries for failures to enact or adopt legislation, and too little on ensuring that anti-trafficking legislation and initiatives are actually *implemented*, and that US-funded programs are held accountable for producing results at a grassroots level.⁹⁵

3. European Union's Directives and Resolutions

In late 2001, following on its Resolutions on traffic in human beings and trade in persons and the 2000 UN Convention Against Transnational Crimes and its

⁹¹ *Id.* § 110(d)(1)-(5).

⁹² The agency responsible for distributing aid pursuant to the TVPA, the United States Agency for International Development [USAID], currently spends \$10 million annually in "programs specifically aimed at trafficking." See U.S. DEP'T OF STATE, THE HONORABLE ANDREW NATSIOS, U.S. AGENCY FOR INT'L DEV., PATHBREAKING STRATEGIES IN THE GLOBAL FIGHT AGAINST TRAFFICKING (2003), available at <http://www.state.gov/g/tip/c8628.htm>.

⁹³ *Id.*

⁹⁴ See Press Release, John Ashcroft, U.S. Attorney General, TITLE? (Feb. 24, 2003), available at <http://www.useu.be/Categories/Justice%20and%20Home%20Affairs/Feb2503HumanTraffickingVictims.html>. If the statistics cited by the United States government, CSI Report, *supra* note 23, at 1, are correct and 45,000 to 50,000 women and children are trafficked into the United States annually, while only 23 T-visas had been granted as of February 2003, there exists a serious problem either with information regarding the existence of T-visas reaching actual victims or with requirements being too stringent to allow victims to obtain T-visas.

⁹⁵ The U.S. Department of State has also released a "Model Law to Combat Trafficking in Persons," directed at those countries that have yet to adopt anti-trafficking laws. The model law does contain some victim protection measures, but many are conditioned upon furtherance of prosecution efforts. Notably, the Model Law, unlike the TVPA, explicitly directs that victims shall have immunity from prosecution for any criminal offense related to trafficking. U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, MODEL LAW TO COMBAT TRAFFICKING IN PERSONS, §§ 208, 300-312 (2003). Furthermore, on May 29, 2003, the U.S. Department of State hosted a conference called "Pathbreaking Strategies in the Global Fight Against Sex Trafficking," attended by grassroots organizations as well as members of foreign governments involved in combating trafficking, in which it finally listed "victim protection" ahead of prosecution, but noted that the recommendations "were not endorsed by the conference as a whole nor do they necessarily represent the policies of the United States government." U.S. DEPARTMENT OF STATE, PATHBREAKING STRATEGIES IN THE GLOBAL FIGHT AGAINST SEX TRAFFICKING, available at <http://www.state.gov/g/tip/c8628.htm>.

Trafficking Protocol, discussed above, the EU finally issued a “Proposal for an EU Council Framework Decision on Combating Trafficking in Human Beings.”⁹⁶

The proposal was drafted after pleas from the NGO and international community to address victims in the context of transnational anti-trafficking measures. Nevertheless, the EU has specifically emphasized the prosecution of traffickers as its primary objective. The amended EU proposal changed little, offering only temporary immigration protections to victims when and if they cooperated with prosecution endeavors. If trafficked persons did not have anything to offer prosecutors, they could be deported. In fact, the EU took great pains to point out that temporary residence permits were *not to be granted for the benefit of the victim*, but rather for the sole purpose of facilitating prosecution of traffickers.⁹⁷ States were not obliged to develop any programs or immigration measures to assist trafficked persons.

The Council Framework Decision on Combating Trafficking in Human Beings requires that by August 2004, member states must pass “effective, proportionate and dissuasive” legislation to penalize traffickers.⁹⁸ The framework decision is generally very skeletal, leaving much to states to decide in some respects, yet oddly specific when it comes to certain provisions such as setting the maximum penalty for trafficking at “no less than 8 years,” but not setting a minimum penalty. The Decision further elaborates on jurisdiction, granting each member state the right to prosecute trafficking when 1) the offense is committed on its territory, 2) the offender is its national or 3) the offense is committed for the

⁹⁶ This Proposal also attempted to correct an earlier gaff, in which the EU Commission introduced yet another definition of trafficking into the debate, mere weeks after the UN Trafficking Protocol had been opened for signatures. The EU, recognizing that this approach did little to add to the necessary harmonization of laws and definitions, agreed to use a definition modeled after the UN Protocol in its current draft. Council of European Union Proposal for a Council Framework Decision on combating trafficking in human beings. 599/1/01 Rev 1 DROIPEN 43 MIGR 41, 21 May 2001 (Art. 1).

⁹⁷ COM/2002/0071 final - CNS 2002/0043, Commission of the European Communities, Brussels, 11.02.2002, Section 2.3 of “Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities.” The title of Section 2.3 is, “Not a victim protection or witness protection measure,” should anyone miss the point:

This proposal for a Directive is concerned with a residence permit and defines the conditions for its issue. In this sense . . . *the proposal may appear to serve to protect victims. This is not, however, the case: the proposed Directive introduces a residence permit and is not concerned with protection of either witnesses or victims. This is neither its aim nor its legal basis.* Victim protection and witness protection are matters of ordinary national or European law. [Emphasis added].

Id.

⁹⁸ Framework Decision 2002/629/JHA, entered into force August 1, 2002. Member states are: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, the Netherlands, Austria, Portugal, Finland, Sweden and the UK. Candidate countries are: Bulgaria, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovenia, Slovakia and Turkey.

benefit of a person “established” in the territory of that member state.⁹⁹ Although anti-trafficking NGO’s and IO’s have been pushing the institutions of the European Union for six years to strengthen protection measures, the result has been that most decisions regarding the prosecution of traffickers have been left to individual member states and no victim protection requirements have been established.

a. Advantages to “Jail the Offender” Models

If implemented well, prosecution oriented models have the potential to deter traffickers by setting forth requirements, for example, to pass laws “dissuasive” to traffickers. To date, however, even supposedly dissuasive laws have not been implemented and applied in such a way as to actually dissuade traffickers.¹⁰⁰

Furthermore, if it were established that prosecution-oriented models increased the likelihood of prosecution of traffickers, these models could be considered advantageous. At present, however, the only certainty is that victims of traffickers who do not agree to cooperate with prosecutors are not offered protection.¹⁰¹ In essence, they are re-victimized by the government in their country of destination. Good prosecution-oriented anti trafficking models could begin to provide a deterrent effect; at present, however, with trafficking on the rise, it does not appear that any laws yet serve as a deterrent.

b. Drawbacks

Where restriction of migration or combating organized crime is the primary policy concern, states will naturally focus on law enforcement, and they may accordingly limit their protective responsibilities. They will not focus on extending immigration protections to trafficked persons, because the emphasis is on the state’s sovereign gate keeping role. They even forgo extending non-immigration related protections unless the trafficked person agrees to testify or assist with prosecution.

A prosecution-oriented approach that fails to place any premium on protection may contravene existing international law.¹⁰² Prosecution models may also simply be ineffective in the face of the multitudinous pitfalls to successful prosecution in countries where trafficking is most prolific: corrupt or inefficient

⁹⁹ *Id.* para. 10.

¹⁰⁰ See discussion *infra* Part III(C)(2)(i).

¹⁰¹ Except in the rare instances in which asylum has been granted “on account of membership in a particular social group.” See discussion *infra* Part IV (A)(6)(c)(ii)(b).

¹⁰² It is arguable that the International Covenant on Civil and Political Rights alone entitles trafficked persons to assistance and protection by virtue of their status as victims of crime whose human rights have been violated. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 arts. 2, 7, 8.

police and border guards; lack of an administrative structure to support the complex task of investigating, arresting, prosecuting and convicting traffickers; lack of communication between various agencies involved; failures or ineptitude within the judicial process; the preference of police to go for the easier arrest of the victim rather than of the trafficker; the preference of the prosecutors to go for the easier charges of “prostitution,” illegal immigration, unauthorized labor or fraudulent documents, (charging the victim), rather than prosecute for the trafficking; the difficulty of reaching across borders to find the perpetrators (particularly between unfriendly neighboring nations); and the reluctance or inability of national police to cooperate internationally to effectively attack organized crime.¹⁰³ Prosecution models barely begin to address any of these less legal and more systemic administrative hurdles to prosecution.

Convictions are difficult to come by even in the best of circumstances. The list of hurdles is seemingly endless,¹⁰⁴ and the number of prosecutions, as compared to the reported numbers of trafficked persons, is infinitesimal.¹⁰⁵

1. Weak actual prosecutions and short sentences

While most countries currently have some legislation on the books that could be used to prosecute traffickers, typically having to do with illegally procuring persons for prostitution, these laws have had little impact on restricting traffickers or protecting trafficked persons, and are rarely, if ever, enforced. Bosnia, for instance, has successfully prosecuted only 11 traffickers to date, with the traffickers sentenced to between only 1 and 3 years, and the testimony of over 190 victim-witnesses was necessary to secure even these short sentences.¹⁰⁶ In Moldova, only 15 cases were brought against traffickers as of 2002, and all were

¹⁰³ See, e.g., Monk Report, *supra* note 36 (“[The police force’s] [d]ealing with sexual crime and domestic violence are impaired by poor perception of the seriousness and extent of each. Both require re-modelling and co-operation with non-government organisations, to provide for the rights of the victims. The investigation of trafficking in females for the purpose of prostitution, in drugs and other commodities, require strengthening not just by policing expertise but also by regional arrangements and co-ordinated assistance by regional organizations . . . There is no consistent co-ordination of the crime detection effort and [police] require advice on maximising local and national effort.” These hurdles are not limited to countries in transition.

¹⁰⁴ In Serbia and Montenegro, for example trafficked women pass through and arrive from Russia, Romania, Ukraine, Moldova. They work in Montenegro and then pass on to Albania, Italy, or gravitate to the international military communities in Kosovo or Bosnia. See Monk Report, *supra* note 36, at 77 (“Girls are provided with passports and visas and enter through Serbia. Club owners are seldom prosecuted on the grounds that the women choose prostitution of their own free will. Victims that are removed by police have few safe refuges. In Belgrade, the International Organization for Migration recently created a shelter with funding obtained from Austria. Police within both Serbia and Montenegro, encounter the frustration of victims’ unwillingness to give evidence. More women police investigators are needed and the disclosure by victims’ needs to be dealt with as part of a criminal continuum that should be maintained and added to as part of an intelligence picture”).

¹⁰⁵ See JOINT REPORT ON TRAFFICKING, *supra* note 3. See *infra* text p. 23 and accompanying footnotes.

¹⁰⁶ *Id.* at 67 (Identifying repatriation of the victims prior to trial was one of the most significant impediments to successful prosecution).

amnestied.¹⁰⁷ In 2002, 42 cases were initiated in Moldova, 8 of which were brought to court, while 19 are still pending, 2 were suspended and 13 dismissed.¹⁰⁸ Until 2003, in Serbia only one person had been charged,¹⁰⁹ but as of 2003, 104 persons had been charged with trafficking related offenses, although all cases are still pending.¹¹⁰

Even in the best of situations, when strong prosecution-oriented anti-trafficking laws are in place and the judicial system sound, the criminal sanctions that are applied are not a strong deterrent. In Austria, for instance, a trafficker found guilty of not only trafficking, but also bodily injury, rape, forced abortion, forgery and damage to property, and who had two trafficked persons testifying against him, was *still* only sentenced to eight years in prison.¹¹¹ In the United States, albeit prior to the passage of the TVPA, three defendants were allowed to plead guilty to conspiracy to violate anti-slavery laws, extortion, and transportation for illegal sexual purposes (rather than to more serious but harder to prove kidnapping and trafficking-related offenses) and were sentenced to only 2 to 8 years.¹¹² By way of comparison, those convicted of certain drug trafficking offenses were ordered to serve life sentences.¹¹³

If states with strong anti-trafficking laws are unable or unwilling to prosecute and sentence traffickers for a number of years sufficient to cause traffickers to reconsider the benefits of trafficking, then it is quite unlikely that states without sophisticated legal systems and laws will be able to do so. As this is a multi-billion dollar business, with a seemingly endless supply of trafficable persons and users, prosecution which threatens only a short prison sentence or small fine is unlikely to have an impact on traffickers who stand to make vast sums of money with little risk.

2. Weak victim protection

Weak protection hurts trafficked persons, adding further insecurity to their future prospects, but it also hinders the prosecution of traffickers. A trafficked person who does not feel that the police, prosecutors and judiciary are on her side is unlikely to come forward.¹¹⁴ States that emphasize prosecution of traffickers typically do not make victim protection a priority, until and unless the testimony of the trafficked person is necessary to effectively prosecute the trafficker, and

¹⁰⁷ *Id.* at 29.

¹⁰⁸ *Id.* at 80.

¹⁰⁹ *Supra* note 59 at 80.

¹¹⁰ *Id.*, at 133.

¹¹¹ OSCE Reference Guide, *supra* note 13, at 48-49 (citing Judgment Hv 6306/98 25 June 1999).

¹¹² CSI Report, *supra* note 23, at 48.

¹¹³ *Id.* at 33. In 1999, for example, the statutory maximum sentence in the United States for dealing ten grams of LSD or distributing a kilo of heroin was life, while the statutory maximum for sale of a person into involuntary servitude was only ten years per count.

¹¹⁴ Report of the Special Rapporteur, *supra* note 22, (commenting that obstacles to relying on victims to provide testimony against traffickers include fear of arrest, legal sanctions and reprisals by trafficking rings).

then such protection is offered only if the trafficked person is willing to testify, and often only for a limited duration determined by the length of the prosecution. This sort of conditional protection is too little, too late. Such an approach offers little incentive for trafficked persons to come forward, to remain and testify, and fails to sufficiently protect persons who have already been seriously harmed.¹¹⁵

Add to this the possibility of a corrupt, ineffective or transitioning judicial system, obstacles with which many countries of destination, origin and transit are burdened, and trafficked persons can expect to be guaranteed neither a fair nor a secure trial, either as witnesses or if prosecuted for labor or immigration violations.¹¹⁶ Even in countries with effective judicial systems, serious prejudices still exist against people who have been trafficked, which may also enhance victims' feelings of insecurity and inhibit them from coming forward.¹¹⁷ Thus, the women are victimized again and again as they pass out of the hands of traffickers and into the hands of authorities. While modern prosecution models offer a vast improvement when they eliminate the prosecution of victims for immigration or prostitution offences, they still leave much to be desired.

C. "Protect the Victim"

Broadly stated, examples of victim-protection models have certain elements in common, with different degrees of emphasis. They start from a human rights perspective and have protection of the victim as their primary aim. They promote prosecution of traffickers, but do not condition victim protection (excluding immigration protections, as discussed above) on the willingness or ability of the victim to assist with the prosecution.

IGO's, NGO's, and some UN bodies are pushing countries to adopt a victim-oriented approach to trafficking, also referred to as a "human rights" approach, which would emphasize protection of the victim. Provisions common to victim protection models are extending rights to victims and insisting that protection not be conditioned upon a victim's ability or willingness to assist with prosecution. Victim protection measures include assistance with psychological and social services, temporary employment and legal services, the provision of safe houses,

¹¹⁵ See HUMAN RIGHTS WATCH, COMMENTARY ON THE EUROPEAN COMMISSION PROPOSAL FOR A COUNCIL DIRECTIVE 'ON THE SHORT TERM RESIDENCE PERMITS ISSUED TO VICTIMS OF ACTION TO FACILITATE ILLEGAL IMMIGRATION OR TRAFFICKING IN HUMAN BEINGS WHO COOPERATE WITH THE COMPETENT AUTHORITIES 4 (2002), available at <http://www.hrw.org/campaigns/migrants/docs/recidence-permit.pdf> (noting that "no other victims of human rights violations are required to cooperate with authorities in criminal investigations or proceedings in order to enjoy the protection of the state") [hereinafter Human Rights Watch Briefing Paper].

¹¹⁶ Monk Report, *supra* note 36.(commenting that "[i]nternal reform of the police will only proceed as far as budget and political will, will allow. At present all three Ministers of the Internal Affairs [Federal, Montenegrin and Serbian] are supportive but face constant constraints on funding and distractions as a result of continuing political instability").

¹¹⁷ See, e.g., CSI Report, *supra* note 23, at 31. Police officers, too, are believed to hold the opinion that "trafficking victims [are] part of the conspiracy and consequently. . . accomplices." *Id.* at 35. Other INS agents believe that these cases are closer to "alien smuggling for prostitution" than trafficking, which would simply ignore the fact that force or coercion was involved. *Id.* at 36.

protection during the prosecution of their traffickers, and perhaps sustainable alternative employment programs. While no organizations have yet ventured to propose all those attributes in the form of draft legislation, a victim-oriented approach should also promote the extension of residence, asylum or third country hosting for trafficking victims, when repatriation to the country of origin or settlement in the country of destination would jeopardize the safety of the victim.

1. GAATW and its Partners

The Global Alliance Against Traffic in Women [GAATW], an organization working to develop effective anti-trafficking measures produced a definition of trafficking in 1997. Frustrated by what it deemed to be an irrelevant and irresponsible linking of prostitution to the issue of trafficking, to the detriment of protection for victims of trafficking, the GAATW and its partners developed the Human Rights Standards for the Treatment of Trafficked Persons [hereinafter “the Human Rights Standards”] in 1999.¹¹⁸ The Human Rights Standards required first and foremost that states recognize that victims of trafficking are not simply unwilling workers, but are victims of serious human rights abuses who should be protected by states not only from prosecution for immigration violations, labor violations and prostitution, but also from reprisals and other harm.¹¹⁹ Specifically, the Human Rights Standards required that states provide victims: access to justice, the ability to bring private actions and to seek reparations from their victimizers, health care, and other services. In so doing, the Human Rights Standards made the first attempt to place the emphasis in anti trafficking on victim protection.

In its contemplation of immigration protections, however, the Human Rights Standards only go so far as to suggest that temporary visas be granted to victims while criminal or civil actions are pending, that victims also be granted the right to seek asylum,¹²⁰ and that states repatriate victims who are willing and able to return to their countries of origin.¹²¹

2. United Nations High Commissioner for Human Rights

UNHCHR’s “Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the UN High Commissioner for Human Rights to the Economic and Social Council” [hereinafter UNHCHR Recommended Principals], released in May of 2002, came in response to the EU’s “Council Directive on the short-term residence permit issued to victims . . . who cooperate with the competent authorities.”

¹¹⁸ GLOBAL ALLIANCE AGAINST TRAFFICKING IN WOMEN (GAATW), HUMAN RIGHTS STANDARDS FOR THE TREATMENT OF TRAFFICKED PERSONS (Jan. 1999), *available at* <http://www.thai.net/gaatw>

¹¹⁹ *Id.* at art. II, ¶¶ 3-7.

¹²⁰ With consideration being given to the risk of retaliation victims might reasonably fear. *Id.* at art II, ¶¶ 17-20.

¹²¹ *Id.*

Like the Human Rights Standards, the Recommended Principles attempt to place victim protection squarely at the foundation of all anti-trafficking measures.¹²² The Recommended Principles stated in its first paragraph that “[t]he human rights of trafficked persons shall be at the center of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.”¹²³

The UNHCHR formally asks that states not detain victims for illegal entry or unlawful activity, that protection and care not be conditioned upon willingness to cooperate in legal proceedings against the traffickers,¹²⁴ that states provide protection and temporary residence during legal proceedings, and that they make available “legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.”¹²⁵ However, while insisting that non-immigration assistance (shelter, medical treatment, legal services) not be conditioned upon willingness to testify,¹²⁶ the Recommended Principles still allow states to condition *immigration* protection, in this case residency permits, on willingness to testify.¹²⁷

It is unclear why UNHCHR demanded so little and offered such minimal guidance regarding immigration protections in its Recommended Principles. Instead of requiring any immigration solutions, they ask states “to consider” some measures which “may include some or all of the following elements: [shelter, legal counsel, protected identity and] identification of options for continued stay, resettlement or repatriation”¹²⁸ and to “explor[e] the option of . . . third country resettlement.”¹²⁹ Most likely the Recommended Principles were watered down in order to make them politically palatable.

3. Stability Pact of South Eastern Europe¹³⁰

¹²² Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the U.N. High Commissioner for Human Rights to the Economic and Social Council, E/2002/68/Add.1, (May 20, 2002)(Scheduled for discussion at the Substantive Session in New York, 1-26 July 2002).

¹²³ *Id.* ¶1.

¹²⁴ “States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. *Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.*” (Emphasis added). *Id.* at ¶8.

¹²⁵ *Id.* ¶ 11.

¹²⁶ *Id.* ¶ 8.

¹²⁷ *Id.* ,¶ 9 Guideline 4, ¶ 7.

¹²⁸ *Id.* at Guideline 5, ¶ 8.

¹²⁹ *Id.* at Guideline 6, ¶ 7.

¹³⁰ The so-called “Stability Pact countries” include the South Eastern European countries of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Serbia and Montenegro (and the region of Kosovo in an autonomous capacity, pursuant to UN Resolution 1244), Macedonia, Moldova, Romania, Slovenia, and Turkey. Pursuant to the Stability Pact South Eastern European Anti-Trafficking Ministerial Declaration of 13 December 2000, these countries play a particularly important role, as all are countries of origin, transit or destination for trafficking and sometimes all three. For information on the Stability Pact, see <http://www.stabilitypact.org/>

The Stability Pact for South Eastern Europe was adopted in 1999 after the war in Bosnia, at the EU's initiative, as an attempt to replace reactive crisis intervention with long-term conflict prevention strategies. More than 40 partner countries and organizations undertook to strengthen the countries of South Eastern Europe "in their efforts to foster peace, democracy, respect for human rights and economic prosperity in order to achieve stability in the whole region." At a summit meeting in Sarajevo on 30 July 1999, the Pact was reaffirmed, and priorities were established on which the member countries would work together. One such priority was combating trafficking.

In December 2000, at a Regional Ministerial Forum of the Stability Pact, 11 countries and one region signed the Palermo Declaration, undertaking the responsibility to address trafficking in human beings by implementing effective programs of prevention, victim assistance and protection, legislative reform, law enforcement and prosecution of traffickers.¹³¹ As part of its multi-year strategy, victim protection was identified as *the* priority for 2001, "because it is recognized as the most urgent need to be addressed and one that truly requires a response coordinated at the regional level." The Task Force of the Stability Pact placed emphasis on a core group of activities that they believe promote victim protection: 1) establishing regional "clearing points" for information on transnational trafficking (one person or place that would serve as a receptacle for information and statistics on regional trafficking issues) 2) establishing National Referral Systems for victims (mechanisms by which victims would be identified and referred to shelters and follow up assistance), 3) creating a network of shelters and safe houses, and 4) promoting the return and reintegration of victims.¹³² The first three points I would endorse; the last is too narrow and potentially harmful to victims for several reasons that will be discussed below.

The Stability Pact Task Force determined that in order to be successful, it must not only co-ordinate anti-trafficking activities, but also advocate for governments in the region to make anti-trafficking issues a priority. As such, the Task Force established persons whose primary responsibility is to promote the political will necessary to prioritize and combat trafficking within each member country. This is an excellent and necessary initiative.

One significant weakness with the Stability Pact framework is the emphasis on return and reintegration, most likely due to the fact that the International Organization for Migration [IOM], as a member of the Task Force on Trafficking, has undertaken responsibility to coordinate the physical movement of trafficked

¹³¹ The Palermo Declaration was signed by Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Federal Republic of Yugoslavia, the former Yugoslav Republic of Macedonia, Moldova, Romania, Slovenia, Turkey, Montenegro and Kosovo.

¹³² The Task Force on Trafficking in Human Beings, Special Coordinator for the Stability Pact of South Eastern Europe, at <http://www.stabilitypact.org/trafficking.htm#four> (last visited July 1, 2003). The 2003 priorities include witness protection and encouraging more countries to offer temporary residence to victims, as well as branching out to identify and target root causes of trafficking, including targeting users. *Id.*

persons and fund their temporary shelter. The immigration solutions envisaged by the Stability Pact are therefore in part limited to those within the IOM mandate – the temporary protection and return and reintegration of trafficked persons. The Stability Pact is silent on alternative immigration solutions as a means of victim protection. The Stability Pact plan would provide much stronger protection (and better possibilities for prosecution) if it did not limit immigration solutions to repatriation and reintegration.

a. Advantages to the “Protect the Victim” Model

1) Protects victims and promotes witness testimony in prosecution of traffickers

The benefit to the victim-oriented approach is that it not only protects trafficked persons, but also allowsthem to become better potential witnesses simply by virtue of securing their safety and physical presence and promoting their psychological capacity to testify. A victim-oriented or human rights approach “empowers” trafficked persons, not only to leave the cycle of trafficking, but also to become witnesses against their abusers by providing them with safety during the hearing and offering justice.

2) Discourages repeat trafficking

A victim-oriented approach “enables former victims to regain control over their lives in a safe manner.”¹³³ In order to begin to achieve this objective, victim-oriented approaches include scores of subsidiary programs to be conducted in countries of origin, transit and destination.

Unless the underlying causes, including social mores and economic and cultural practices that foster trafficking, are exposed and uprooted, women are likely to remain available to feed the trafficking machine, as social and economic marginalization only increases the susceptibility to trafficking. Furthermore, the social stigma attached to sex activities, even if undertaken by unwilling victims of traffickers, can be so great that women return to the sex trade even if repatriated, believing that they are “ruined” for marriage or any legitimate place in the society.¹³⁴

A risk of failing to attack trafficking from the victim-protection perspective is that women who do manage to escape trafficking as victims then become recruiters of other women, either to pay off their debt bondage, or to establish their own brothels, as they consider themselves already ruined, “marked” as prostitutes.¹³⁵ Anti-trafficking measures that include alternative job assistance and educate societies about trafficking, demonstrating that those who fall prey to traffickers

¹³³ IHRG’s Annotated Guide, *supra* note 82, at 4.

¹³⁴ HUMAN RIGHTS WATCH, A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND, (1993), *available at* <http://www.hrw.org/reports/1993/thailand>

¹³⁵ *Id.* at 231, 239.

are victims, have a chance of preventing the sort of marginalization that contributes to trafficking and re-trafficking.

3) Easier to protect victim than prosecute trafficker

It does not require as much legal definition to identify a trafficked person and provide assistance as it does to identify and prosecute a trafficker. A cynical, but unfortunately accurate, view in support of a victim-oriented approach is this: if neither the victim-oriented nor the prosecution-oriented approaches have been successful to date in reducing trafficking in human beings, at least the victim-oriented approach offers the opportunity to remove the victim from her current situation and protect her from future harm and victimization.

b. Drawbacks to “Protect the Victim” Model

One drawback to the victim-oriented approach is that it fails to get to the root of organized crime. As pointed out in earlier portions of this paper, however, organized criminals involved in trafficking are often also involved in trafficking weapons and drugs, as well as smuggling humans. A prosecution-oriented approach to combating trafficking, therefore, is similarly unlikely to reach the organized crime elements engaged in such a wide array of activities.

For all of the reasons highlighted in drawbacks to prosecution-oriented models, protection measures are similarly afflicted with implementation difficulties in countries with underdeveloped judicial systems and administrative structures.

Finally, and central to the thesis of this paper, none of the victim-oriented models thus far boldly endorses immigration solutions as a means of protection. This is particularly notable, as most examples of victim protection models emphasize the need for immigration solutions as a mode of victim protection, then fail to fully or adequately promote or provide for them.

IV. Recommendations

A. The best way to combat trafficking is to take the best from the two models and add the missing elements

The two anti trafficking approaches can be combined in order to effectively combat trafficking. Victims must be protected from traffickers, protected from prosecution for illegal immigration, labor violations or prostitution, and empowered to step out of the cycle of victimization. Traffickers must be identified and aggressively prosecuted, with alternatives to relying solely on the testimony of trafficked persons to prove the crime.

1. Alter perception of what constitutes a “trafficking victim”

Anti-trafficking laws and the persons determining who is eligible for “victim” protection measures must acknowledge that women can, and more and more often

do, consent to engage in commercial sex work, yet still not consent to working in debt-bondage or slave-like conditions. When considering whether or not a woman qualifies as a “victim” of trafficking, a better approach would be to look at her situation at each stage, and grant her status as a “trafficking victim” (or a woman in need of and qualified to receive the benefit of any available protection) if she were unable to exercise control over her own destiny at *any* point after entering into the flow of trafficking in human beings. This would, in fact, also be considered a human rights approach, in that it would focus on the violation of a woman’s rights at any stage in the process, rather than on her initial mindset. It would allow protection to be extended to the woman who, for example, took affirmative steps to migrate illegally, but did so because she thought that she was going to be working illegally as a waitress and instead found herself forced into in the sex trade. But, and significantly, it might also allow protection to be extended to a person who was coerced into being trafficked, but then willingly remained in the sex trade or returned to work in the sex trade after once being repatriated. Expanding protection to cover those persons who consent to illegal migration or to sex work does not offer a negative outcome, particularly if one goal is to ultimately curtail trafficking and re-trafficking through offers of assistance and alternatives to all trafficked persons.

Why extend the victim-protection eligibility determination process to look at the mindset of the person at any stage in the trafficking process? Because it could help more people, would harm no one and would not require significantly more state resources. In the course of my work in Bosnia and Herzegovina, I came across many government officials and even NGO staff whose duty it was to provide protection to victims of trafficking who believed that they should or were required by law to preclude from protection women who had ever willingly engaged in sex work, even if they were also enslaved or forced into labor. My proposal does give latitude to those who argue that dire economic or social conditions that disproportionately impact women also deprive her of her ability to give effective consent, or that trafficking is a form of slavery to which a woman cannot consent. It might be deemed paternalistic, in that it would allow one to argue that a woman who has consented to remain in or return to the commercial sex trade could still be considered a “victim” of trafficking for the purposes of offering her protection, but at least the option of seeking and receiving protection is open to her.

2. Start with a human rights perspective

Combining elements that promote the prosecution of traffickers with elements that protect and empower victims, anti trafficking programs could more effectively: 1) protect victims by providing immediate shelter as well as psychological and medical care; 2) pursue prosecution of traffickers by providing a safe space for victims to recuperate while freely deciding whether to aid prosecutors; 3) increase the feasibility of prosecuting traffickers by looking at the intent of the trafficker to profit from moving people; 4) empower trafficked

persons by creating labor training programs to mitigate gender-based economic inequity;¹³⁶ and 5) increase both the likelihood of victims providing testimony and the level of protection offered to victims by offering them permanent residency or asylum in the country of destination or in a third country.

a. Protect, Don't Prosecute the Victim

Traffickers must rejoice when the odd trafficked person is arrested or deported, as the inconvenience of losing the income from the one victim is offset by highlighting the threat of arrest and/or deportation, which serves to deter other victims from attempting to escape.

At a minimum, modern anti-trafficking programs must first ensure that victims of trafficking are not prosecuted as criminals. Second, they must protect victims by providing shelter with all necessary medical and psychological follow up care, including investing in programs that develop economic alternatives for trafficked women.¹³⁷ Third, they must create education campaigns that individually target the potential victim audience, the potential user audience, and the actual victims. The education campaigns should: inform potential trafficked persons and families about specific schemes known to be used by traffickers, educate potential victims regarding the known risks of accompanying smugglers, invest in programs that develop economic alternatives for potential trafficked persons, offer information about shelters and assistance to actual victims, and develop media campaigns to deter users of brothels and provide information about how to report the presence of trafficked persons. Finally, public awareness campaigns should be directed particularly at women refugees and potential immigration applicants, a plan endorsed by the Council of Europe's Committee of Ministers, providing these groups with information about legal migration options, however few, in order to make them aware of legal routes to obtaining visas and residence permits.¹³⁸

b. Address the social and economic reasons for vulnerability to trafficking

Trafficking in women is fueled by poverty, and women in transitioning and developing countries are exceptionally vulnerable.¹³⁹ Poverty conditions in these countries tend to impact women in particular, as their economic status is usually even lower in these countries. While the eradication of gender-based poverty is

¹³⁶ This huge task, however, might rightfully be deemed too large an agenda to tackle within an anti-trafficking initiative.

¹³⁷ TPVA, *supra* note 50, at § 106 (a)(5) (offering grants to NGOs in countries with trafficking problems to “advance the political, economic, social, and educational capacities of women” under the Prevention of Trafficking heading).

¹³⁸ Committee of Ministers Recommendation R (2000) 11 (Art. 11-12, 14-15, 25).

¹³⁹ Vandenberg, *supra* note 2 at 15 (from interviews with trafficking victims: “Due to the fact that the living conditions in [Moldova] are very hard and that I lost my job, I met a person . . . and she told me that . . . I could get a lot of money [in Italy] by working in the shop or as the cleaning lady in some hotel.” “...I want to buy a ticket to go back home and take some money back to feed my child. In the Ukraine we have nothing to eat”).

too large of an agenda to be tackled within an anti-trafficking scheme, the conditions that foster a vulnerability to trafficking must at least be addressed at some point.

In both the smuggling and trafficking scenarios, it is crucial to look at the reasons why a person would feel the need to leave her home country and travel abroad in search of work or escape from a violent or unsuitable life, but also to remember that some simply leave home in search of adventure or a better life and find themselves held against their will or forced into labor. Fully understanding the reasons why women fall prey to traffickers can help legislators determine how best to draft and implement anti-trafficking legislation. Without pretending to tackle wholesale economic and social reform, anti-trafficking initiatives could realistically include fact-finding to investigate precisely why women are leaving, education campaigns targeting potential victims and their families about the perils of accepting promises of foreign employment, information about legitimate options for migration, and extensive work with the governments and local NGO's to create alternatives to departure.

c. Address migration and immigration factors that sustain trafficking

A lack of viable and legal migration options leads people into trafficking. Fear of deportation often keeps them there. Some countries have already acknowledged these migration routes and begun instituting programs to allow for legal migration of potential victims of trafficking. Italy, for instance, has granted 5,000 work visas annually to Albanians, acknowledging that Albania is its largest source country for trafficking and smuggling.¹⁴⁰ Although only limited visas are offered, if persons understand that they have a legal possibility to apply to migrate, they may not believe that traffickers offer their only choice for migration.

3. Prosecute traffickers and those who aid and abet traffickers

Corruption is rampant among police, border police and other government officials responsible variously for perfecting immigration status, regulating the presence of foreigners, and enforcing the laws in countries with major trafficking problems. In Bosnia, for instance, trafficked persons regularly identify local police as clients and friends of “nightclub” owners.¹⁴¹ Police are known to tip off club owners before raids of those nightclubs suspected of harboring trafficked women, in order

¹⁴⁰ See OSCE Reference Guide, *supra* note 13, at 38. Although intended to curtail trafficking, this in fact reaches primarily persons who would be smuggled, not necessarily those trafficked, as evidenced by the fact that the vast majority of those granted visas were men, although they might have otherwise fallen into indentured servitude schemes. *Id.*

¹⁴¹ Vandenberg, *supra* note 2, at 18,28 (quoting an IOM trafficking expert as stating that “The local police is one of the main user groups – we proved that through interviews [with victims]. There are close connections to the bar owners and the traffickers. The women have nowhere to turn, and . . . I don’t know of a single case of a police officer who was [prosecuted]”).

to give owners time to hide women or supply false working papers.¹⁴² Police and administrative officials are also known to accept bribes, supply false papers or to turn a blind eye to the presence of undocumented foreigners.¹⁴³ The presence of police as guests in the nightclubs makes it highly unlikely that victims will ever turn themselves over to the police, if given the opportunity. It also makes it very unlikely that trafficked persons will have any desire to remain in the country of destination in order to supply testimony against their traffickers, assuming they are given the opportunity.

Even with trafficking on the agenda of so many countries, traffickers are still rarely prosecuted and the rare conviction almost never reflects the severity of the crime. Even in a country like Bosnia, in which the criminal code prohibits sale of human beings, rape, physical assault, kidnapping, slavery and labor violations,¹⁴⁴ traffickers know that they are unlikely to be charged with anything more severe than promoting or procuring persons for prostitution, if they are charged at all. Police blame this on the courts, claiming that if courts were more efficient and less corrupt, traffickers would be punished.¹⁴⁵ Judges and prosecutors blame this on the fact that the victims leave before trial and are unwilling to return to the country to testify during the hearing.¹⁴⁶ Neither side mentions lack of victim protection or even the deportation of victim-witnesses as a factor in failing to secure convictions against traffickers.

a. Make it a punishable offense for international workers to visit brothels

In countries in which international humanitarian workers and peacekeepers are present and trafficking is a known problem, these organizations should establish more effective internal investigation mechanisms and policies by which their employees will be subject to dismissal and prosecution in their home countries should they contribute to the trafficking problem. As it stands, buying another human being or having sex with women known to be trafficked is not an offense punishable by law (though it could be deemed rape), nor do culpable employees fear sanction in the form of being fired, even those hired through their foreign ministries.¹⁴⁷

Formally and publicly addressing the involvement of international and local military, police and government officials would send a powerful message that silence regarding use of trafficked women will no longer be tolerated. Publicly acknowledging that those tasked to combat trafficking can also be deeply embroiled in perpetuating it may also allow corruption in the combat against trafficking to be openly addressed, acknowledging that the use of trafficked

¹⁴² *Id.* at 18-19, 28.

¹⁴³ *Id.* at 18-19, 26-33.

¹⁴⁴ ABA CEELI Report, *supra* note 9, at 39-42. In March of 2003, a new Criminal Code came into effect in Bosnia, criminalizing trafficking. *See also*, 2003 TRAFFICKING IN PERSONS REPORT, *supra* note 59, at 36.

¹⁴⁵ Vandenberg, *supra* note 2, at 35.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, at 46.

women by international workers is an appalling symptom of the scant attention given to trafficking.

b. Make trafficking less economically appealing to traffickers

Trafficking is a lucrative business: because men seek out women with whom to have sex and are willing to pay for it; because there are few, if any, negative consequences to paying for sex even when the sex workers are likely to have been trafficked; because human beings can be sold and resold; because traffickers are not facing punishment; because trafficking is still quite easy. Some argue that legalizing prostitution would reduce the amount of money traffickers make buying and selling human beings, so that sex work would come out into the open and not have the premium price tag attached to it that “illicit” work does. I do not support legalization of prostitution as a means of eradicating trafficking, as many brothels host both trafficked women and willing commercial sex workers and consumers do not seem to differentiate between the two. Neither do I support criminalizing prostitution as a means of eradicating trafficking. Prostitution should not be tied to anti-trafficking measures. One way to reduce economic incentives for traffickers would be to sharply increase the penalties for engaging in trafficking, including forfeiture of assets and restitution to victims, and to enforce these penalties.

4. Implement the Laws

Practically speaking, the primary problem with both prosecution and victim - oriented anti-trafficking legislation as they currently stand, particularly in many Southeastern European countries, is that the legislation is only as good as its implementation. Whatever law is passed domestically, it must be fully implemented at every level. Police and border police must be trained; prosecutors and judges must be trained; NGO’s skilled in victim protection must be engaged; funds must be made available; shelter, repatriation and integration procedures and options must be known by each official likely to come in contact with a trafficked person; and victims must be educated about their rights and potential assistance. After years of experience arresting prostitutes or illegal migrants, it takes painstaking, regular, well-funded and technically proficient training to teach a police officer and border policeman how to recognize and what to do with a trafficked person, in order to comply with new laws and obligations. Unless all persons who might come into contact with a trafficker or a victim understand the law and every procedure attached to the law, little changes.¹⁴⁸ As much emphasis should be placed on making the laws work as on adopting them.

Countries such as the United States and organizations such as the EU, which have expressed an interest in funding programs to quash trafficking, should shift their

¹⁴⁸ See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, at art. 16 (1985)(recommending enhanced education and awareness of the applicable laws and procedures as a tool for positive change)[hereinafter Declaration of Principles]

efforts from funding high-level ministerial meetings and working groups regarding adoption of recommendations. Instead, they should devote at least fifty percent of their anti-trafficking budget on the massive job of disseminating information about new laws, procedures, regulations and policies at the grassroots level in countries of origin, transit, destination, and in their own countries, to ensure that those who are most likely to encounter a trafficked woman know how to recognize her, are sensitive to her needs, and can direct her to the appropriate shelter or protection organization.

6. Extend legal solutions

a. Promote international cooperation

A necessary element for improving prosecution would be extraterritorial jurisdiction, or the ability of a state to prosecute a perpetrator for offences that did not occur within its borders.¹⁴⁹ Currently, the Convention allows a state party to establish jurisdiction when a crime is committed against a national of that state, when it is committed by a national of that state, or when it entails a serious crime involving organized criminal groups.¹⁵⁰ The European Union has also recommended extraterritorial jurisdiction to secure prosecution.¹⁵¹ In order to become truly effective, all countries trying to combat trafficking must adopt such provisions.

b. Target Users of Brothels

No laws currently penalize users of brothels known to contain trafficked women. In this day, when it is becoming widely known in certain countries that most brothels and nightclubs contain or have contained trafficked women,¹⁵² countries will be considering whether to criminalize the use of these brothels, not only because users “assist” in the violation of prostitution laws, if such exist, but for using establishments known to harbor trafficked women. This could be particularly appropriate in regions in which international peacekeepers and humanitarian workers frequent brothels, knowing that they are filled with trafficked women.¹⁵³

Nevertheless, I would not endorse such a deterrent law at this time. Some countries have legalized prostitution and an obvious question would be who has

¹⁴⁹ Universal jurisdiction has not been applied to trafficking at this point, although it could be argued that as an extension of slavery, it should.

¹⁵⁰ CRIME CONVENTION, *supra* note 7, at art. 15. Austria, Belgium and Cyprus, for instance, have all adopted legislation allowing them to prosecute if the act violated national interests, if the person cannot be extradited or, in the case of Belgium and Cyprus, if they have simply been caught in the country. OSCE Reference Guide, *supra* note 13, at 51; *see also infra* notes 211-213 (citing criminal provisions specific to each country).

¹⁵¹ *See* Council Framework Decision, *supra* notes 96-98, and accompanying text.

¹⁵² *See* discussion *supra* pp. 11-14 and accompanying footnotes.

¹⁵³ *Id.*

the burden of demonstrating that a particular brothel harbored trafficked women rather than willing sex workers. As most states agree upon the necessity to distinguish prostitution from trafficking, as well as guaranteeing due process for defendants, such a law would be too difficult to enact without jeopardizing other rights. I would, however, strongly endorse education campaigns aimed at deterring users of brothels. These campaigns should be included in anti-trafficking legislation, containing information such as the fact that at least one trafficker in the US admitted purchasing HIV-positive women because he found them to be cheaper labor, having convinced himself and the women he trafficked that they had nothing left to live for.¹⁵⁴

c. Create Immigration Solutions for Trafficked Persons

Failing to extend immigration benefits to victims hinders both prosecution and victim protection. Trafficked persons are reluctant to seek help in countries of destination or transit, even in the rare instance when they are able to escape confinement or after a brothel has been raided, for fear of being arrested for engaging in prostitution or deported for violating immigration laws.

More importantly, the restrictive immigration laws themselves are contributing to the growth of trafficking, a fact of which traffickers take advantage. In its Reference Guide for Anti-Trafficking Legislative Review, the OSCE states that

“[P]ersons willing to migrate and work abroad in order to look for a better life, but who have no legal possibility to do so, tend to rely on persons who provide them with false documents, arrange the journey and find them employment. As restrictive immigration policies do not allow for enough legal immigration to fill the jobs that exist, migrants are forced to use illegal means to get to those available jobs. Once they arrive, migrants might find themselves forced to work and live under slavery-like conditions.”¹⁵⁵

As discussed earlier, some countries have already begun acknowledging the well-known routes of illegal migration into their countries and tried to regulate it in part by providing legal means to immigrate and work.¹⁵⁶

i. Repatriation is an insufficient solution

¹⁵⁴ See CSI Report, *supra* note 23 at 1.

¹⁵⁵ OSCE Reference Guide, *supra* note 13, at 37.

¹⁵⁶ See *id.* at 38; discussion *supra* p. 33. While the OSCE concludes that “such agreements. . . are likely to contribute to the prevention of trafficking in human beings,” it is difficult to see in either case that granting such a low number of migrant worker visas will reduce the flow of illegal migration or trafficked persons into the countries, save for reducing it by the number of visas granted. Furthermore, the OSCE Report acknowledges that most applicants from Albania to Italy were men with secondary education. While there exists such high unemployment in transitioning countries, those most heavily economically impacted -- the women -- are unlikely to benefit from the grant of such a small number of work visas. See OSCE Reference Guide, *supra* note 13, at 38 (citing Press Release, International Organization for Migration (IOM) (July 13, 2001), available at <http://www.iom.int>). The OSCE Reference Guide does recommend that such initiatives be revamped to allow equal participation of women. *Id.*

Repatriation to the country of origin, the most common “immigration solution” employed by most countries encountering trafficked persons, is often an even worse solution. Upon return, trafficked persons face real threats of retaliation from traffickers,¹⁵⁷ as well as a host of problems stemming from social and economic exclusion.¹⁵⁸

Internationally devised and run programs that promote repatriation only partially remedy these problems. While an IGO can assist with travel documents and provide some small “repatriation allowance,” assistance by an IGO can also be the basis for even worse stigmatization. Police in Serbia, for instance, state that trafficked women refuse to participate in the repatriation program run by the International Organization for Migration [IOM], not only because they do not wish to return home, but because they are afraid that returning home with IOM will stigmatize them as prostitutes. The Moldovan press had run articles about IOM activities, identifying them as a “prostitute support” agency.¹⁵⁹

A trafficked person who knows that repatriation is her only immigration option may not believe that law enforcement officials in her own country will be able to protect her, should she testify against her traffickers (some of whom were in her country of origin).¹⁶⁰ Countries that still address trafficking as an illegal immigration issue, with deportation and repatriation being the only remedy, fail to acknowledge that they not only further victimize the victim of a crime, but also sabotage their own attempts to quash trafficking. A victim who has been repatriated to her country of origin will not be present in the country of destination to testify against her trafficker. Furthermore, women who fear arrest and deportation are unlikely to come forward. And finally, of course, women who are repatriated may have a legitimate fear of being approached again by traffickers; either to pay more bribes or pressured to be trafficked again. As one victim from Moldova stated, “I am afraid that [my brother’s friend, the person who sold me] will come and demand money from me. The police are corrupt

¹⁵⁷ Jenna Shearer Demir, *supra* note 17, at p. ii, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/openssl.pdf?tbl=RESEARCH&id=3e71f84c4&page=publ> (stating that it is common for victims to face violence or threat of violence by organized crime groups in the country of origin upon repatriation). See also Human Rights Watch Briefing Paper, *supra* note 115, at 7 (HRW research in Bosnia and Herzegovina and Greece also indicated deportees or unaccompanied persons being “repatriated” are likely to face further human rights violations in the form of reprisals or reintegration into the trafficking network).

¹⁵⁸ OSCE Reference Guide, *supra* note 13, at 87-88 (“Many trafficking victims are heavily traumatized because they were subjected to physical, psychological and/or sexual violence and are in need of medical treatment and psychological counseling. Especially women who worked in the sex industry in particular fear stigmatization and rejection by their families and social environment. Furthermore, in order to enable trafficked persons to integrate or re-integrate into the labor market, education and vocational training programmes, as well as assistance with finding employment are essential”).

¹⁵⁹ Joint Trafficking Report, *supra* note 3, at 79.

¹⁶⁰ Vandenberg, *supra* note 2, at 26-34 (Victims are aware that police and local authorities are complicit in trafficking and will be reluctant to seek assistance).

there. They'll say that I was a prostitute and then the police won't help. He'll find out I'm home and demand more money.”¹⁶¹

Finally, I argue that state parties expelling trafficked victims are in contravention of ICCPR Article 7 if the victim is at risk of being subjected to torture or inhuman or degrading treatment in the country of origin.¹⁶² ICCPR protection should be triggered when a victim is subjected to social ostracism rising to the level of degrading treatment upon return to her country of origin.

ii. Temporary and permanent immigration solutions for victims

As a starting point, if temporary residence permits are not extended to victims, victims will not be available to testify against traffickers. The United States and several member states in the European Union have adopted legislation that extends the opportunity for victims of trafficking to gain temporary visas. However, each state makes the provision of such visas contingent upon victims “cooperating” with or providing witness statements for the prosecution of traffickers.

No countries in South Eastern Europe currently have legislation granting residency permits or other immigration protections to victims of trafficking. In Germany, trafficking victims have four weeks to consider whether to press charges against traffickers and are granted a stay of deportation only if they decide to do so and then only for the length of criminal proceedings.¹⁶³ The United States limits the total number of T-visas to 5,000 visas per year and offers residence permits only to victims of “severe forms of trafficking,” although it does allow those who are awarded T-visas to apply for permanent residency.¹⁶⁴ In the Netherlands, victims have three months to consider whether to press charges and are entitled to remain during the length of criminal proceedings if they do; if they do not, they are deported.¹⁶⁵ Belgium grants longer permits to victims, depending on how useful their testimony is in serving the prosecution. It grants 45 days to persons identified as “true” victims of trafficking to consider whether to press charges and allows them a renewable three month residence permit if they decide to cooperate with prosecution, which can then be extended by another six months and is renewable. If the information given by the victim was significant in bringing a case to court, the victim may be granted permanent residence.¹⁶⁶ These conditions are flawed in that they turn temporary and

¹⁶¹ *Id.* at 20 (quoting a trafficking victim in an interview with HRW in Sarajevo, April 19, 2001).

¹⁶² ICCPR, *supra* note 102, at art. 7. Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Moldova, Romania, Slovenia, Macedonia and “Yugoslavia” are all parties to the ICCPR.

¹⁶³ See OSCE Reference Guide, *supra* note 13, at 62 (during the stay, if they are accepted on a recommendation made by police, victims are able to work or participate in vocational programs, receive victim support, accommodation, counseling and medical treatment).

¹⁶⁴ TVPA, *supra* note 50, Sec. 107.

¹⁶⁵ *Supra* note 13 at 62-63 (during the stay, victims are offered financial, legal and psychological assistance).

¹⁶⁶ *Id.* at 63.

permanent residence opportunities into a sort of lottery in which the winner is the victim who happens to provide the best evidence for prosecution. These conditions would also seem to increase the risk of false testimony by victims against traffickers in order to secure a longer stay in country.

Italy has a novel approach, granting residence permits based upon: 1) the need of the victim, 2) whether her life is in danger or 3) whether she risks further exploitation, and further allows that if a victim is employed at the end of the residence permit, the permit will be extended to the duration of the labor contract.¹⁶⁷

When countries offer only temporary residence permits to women who testify against their traffickers, they do little to help prevent trafficking and the further exploitation of women. At a minimum, states should implement short-term residency permits during which time humanitarian assistance is provided and victims can recover and decide whether they wish to cooperate with prosecutors. There is not a lot of incentive in this option, however. Women are unlikely to come forward in exchange for an offer of a temporary residence permit, conditioned upon willingness to testify, followed by deportation. More importantly, the alleged justification for offering any type of residency *conditioned* upon testifying can backfire at trial. On cross-examination, the witness can be impeached with the question “isn’t it true that you are testifying *in order to* secure an immigrant benefit?” When immigration solutions are offered to protect victims, rather than conditional to securing prosecution, the witness cannot be thus impeached. Finally, unless she is allowed to remain in the country of destination, a victim will also be deprived of availing herself of any civil legal remedy, which I recommend be adopted, in which she might seek restitution for lost wages or other claims against her trafficker.¹⁶⁸

a) At least temporary protection

¹⁶⁷ Nevertheless, Italy’s anti-trafficking program has been criticized for a racist application of victim protection, in which African victims, who are the majority of victims in Italy, are offered protection less often than other victims, or are perceived more often as “prostitutes,” rather than victims of a crime. See Marian Douglas, *International trafficking in Black women "La africana" and "la mulata" out in the world: African women and women of African descent* (Lola Press) (2001), available at http://www.lolapress.org/elec2/artenglish/doug_e.htm. For instance, Italy cites that 45,000 women are *trafficked* out of Nigeria annually, but then states that 80% of its 18,000 *prostitutes* are Nigerian, seemingly failing to observe the distinction when it comes to women from Africa. See INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), *MIGRATION INFORMATION PROGRAMME, TRAFFICKING IN WOMEN TO ITALY FOR SEXUAL EXPLOITATION* (1996), available at http://www.globalmarch.org/child-trafficking/virtual-library/italy_traff_eng.htm. Even so, IOM contends that any disparity between the way African and non-African victims are treated is a result of the more entrenched African organized crime rings in Italy, making it more difficult to find victims.

¹⁶⁸ In the U.S., for example, criminal courts may order convicted traffickers to pay restitution to the victim, including the value of the victim’s labor. Because prostitution is illegal and therefore has no “market rate,” restitution is equal to the value gained by the trafficker for the victim’s services. OSCE Reference Guide, *supra* note 13, at 87 (citing U.S.C. § 1593, as amended by the Trafficking Victim’s Protection Act § 112(a) and stating that in Germany, trafficked persons granted a stay of deportation are entitled to compensation under the Act on Compensation of Victims of Violent Crimes).

If we start from a human rights approach, acknowledging that victims of trafficking should be offered protection and we then accept that immigration solutions of some sort are necessary in order to prevent deportation or unwanted repatriation, then immigration solutions should not be conditioned upon ability or willingness to cooperate with prosecution.

At a minimum, temporary residence permits or visas should be offered to victims, regardless of their willingness to assist in prosecution, in order to enable them to access the kind of health care, psychosocial support and shelter assistance they will need upon escaping a trafficking situation. Women offered humanitarian grants of temporary protection might be less likely to immediately re-enter the trafficking flow, which must be considered of some value to countries intent on combating trafficking. Legal residence would also enable victims to access legal assistance, not only helping to ensure that their rights are protected, but also serving the states' interest in prosecuting the traffickers.

There is currently a movement underway to set a European standard "reflective period," in which victims can remain in the destination country while contemplating whether or not to become witnesses to a prosecution.¹⁶⁹ While this could improve the situation in countries that currently do not have even a temporary visa regime for victims, attempts such as these to "harmonize" laws among European nations risk serving only to divert energy away from implementation of existing laws.

b) Asylum is a better solution

Although the European Parliament did recommend to EU member states that they should extend asylum eligibility to victims of trafficking, no states have explicitly offered asylum in their trafficking legislation, though some do not exclude the possibility for victims to make the argument that they do qualify for asylum.¹⁷⁰ The most serious obstacle to extending asylum to victims of trafficking lies in a state's fundamental right to preserve its own gate keeping power, a countervailing principle which the EU also supports and protects.¹⁷¹ A state which promotes combating trafficking in order to reach another ultimate goal -- the fight against illegal migration and organized, transnational crime -- is not likely to expand the

¹⁶⁹ See, e.g., COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, Recommendation No. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation, (Adopted by the Committee of Ministers on 19 May 2000, at the 710th meeting of the Ministers' Deputies). Italy, Belgium, the Netherlands and Spain grant temporary residence permits to trafficking victims who are willing to cooperate with prosecution of traffickers.

¹⁷⁰ See discussion, *infra* at p. 44.

¹⁷¹ See discussion *supra* at pp. 19-20, about EU resolutions and protection of States rights. European Parliament 2000 Resolution (Sec. 23). Opening of the "floodgates" should not be of such concern in countries in which asylum is granted in two-step process, including eligibility as well as discretionary factors. The two-step process, in theory, preserves the gate-keeping power while allowing in as many victims as exist.

definition of asylum to include victims.¹⁷² However, some parties have already acknowledged that repatriation may endanger the victim, and that local integration in the country of destination may be both warranted and desirable.

In its April 2002 issue of “Refugee Women,” UNHCR stated for the first time that:

Some trafficked women may be able to claim refugee status under the 1951 Convention.... In individual cases, *being trafficked could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.* [Emphasis added]. It is crucial to the protection of individual women for States to ensure that trafficked women and girls who wish to seek asylum also have access to asylum procedures.¹⁷³

While mild on its face, the comment packs substantial force in that it could be argued that most countries from which trafficked women originate are currently unable or unwilling to provide protection against trafficking.¹⁷⁴ It may also either force the hand of the EU or send a message to member states, and perhaps more importantly, states hoping to enter the EU, that in order to effectively combat trafficking, they may need to extend asylum, visas or permanent residence options to victims retrieved within their borders. The flip side, of course, is that the EU may use this as an excuse to insist that countries further tighten asylum regulations and illegal migration, if trafficking victims are a newly eligible pool of asylum applicants.

As I see it, the grounds upon which asylum could arguably be extended to victims of trafficking, as members of a particular social group, are: 1) past persecution (by a group the government is unable or unwilling to control), 2) well-founded fear of being re-trafficked or suffering retaliation from traffickers (whom the government is unable or unwilling to control), and 3) well-founded fear of serious social or economic ostracization based upon status as trafficking victim.¹⁷⁵

¹⁷² To qualify for asylum, a person must establish that he or she has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion. . . .” Convention Relating to the Status of Refugees, Resolution 429 (V) of 14 December 1950, adopted 28 July, 1951; Entry into Force: 22 April 1954, in accordance with article 43, at Art. 1, para. 2. A victim of trafficking would most likely argue that she qualified as a member of a particular social group. See discussion, *infra*.

¹⁷³ John Morrison & Beth Crossland, *The trafficking and smuggling of refugees: the end game in European asylum policy?*, UNHCR Working Paper No. 39, 2001, p. 54, available at <http://www.unhcr.ch/refworld/refworld/refpub/refpub.htm>. UNHCR did, however, condition its promotion for extension of asylum to victims, stating that status as a victim of trafficking should not in and of itself allow access to refugee status determination. UNHCR, *Guidelines on International Protection: Gender-Related Persecution* (2002).

¹⁷⁴ See, e.g., a typical government reaction as recent as 1998, made by Gennadi Lepenko, then-chief of Kiev’s branch of Interpol, who stated, “[w]omen’s groups want to blow this all out of proportion. Perhaps this was a problem a few years ago. But it’s under control now.” Michael Specter, *Traffickers’ New Cargo: Naïve Slavic Women*, NEW YORK TIMES, January 11, 1998.

¹⁷⁵ Refugee Convention, *supra* note 172.

A few countries have already granted asylum to a very few victims of trafficking, as members of a particular social group.¹⁷⁶ Canada granted asylum to a Ukrainian woman trafficked into prostitution, finding that she was a member of a particular social group consisting of “impoverished young women from the former Soviet Union recruited for exploitation in the international sex trade,” that upon return to the Ukraine, there was a “reasonable possibility that she would be subjected to abuse amounting to persecution at the hands of organized criminals,” and that she would not be able to seek protection from local authorities, given the links between organized crime and the government, as well as the government’s inability to combat trafficking.¹⁷⁷

The United Kingdom granted asylum to a Ukrainian woman promised employment as a nurse in Hungary, who was instead raped, assaulted and forced to work as a prostitute upon her arrival in Hungary. Even though she first returned to the Ukraine before fleeing to the United Kingdom, the court found that she qualified for asylum because organized criminals were looking for her upon her escape and return to the Ukraine, because the Ukrainian authorities rarely prosecute men for exploiting women (citing to a US Department of State Report on the Ukraine), and because she belonged to a “particular social group that consists of women in Ukraine who are forced into prostitution against her [sic] will.”¹⁷⁸

In the United States, a Chinese woman forced into prostitution in China was granted asylum. The court found that she belonged to a “particular social group of women in China who oppose coerced involvement in government sanctioned prostitution.”¹⁷⁹ The court looked to the US Department of State’s Country Reports, and learning that local officials are often complicit in organized, coerced prostitution, found that the applicant was “unable to avail herself of the protection of the authorities.”¹⁸⁰

The US government has granted asylum to trafficking victims, and gives high praise under the TVPA criteria to countries that “provide victims with legal alternatives to their removal to countries *where they would face retribution or hardship* [emphasis added].”¹⁸¹ Nevertheless, when it comes to determining how to provide those legal alternatives to victims found in the United States, the TVPA suspends deportation only for victims willing to cooperate with prosecution, not

¹⁷⁶ Denmark, Germany, Ireland, Norway, Sweden, the UK and Australia have recognized gender-based persecution claims, a category into which most assume trafficking cases would fall.

¹⁷⁷ CRDD, V 95-02904, Neuenfeldt, November 26, 1997.

¹⁷⁸ Immigration and Appeal Tribunal, CC-50627-99 (00TH00728), 17 May 2000.

¹⁷⁹ Board of Immigration Appeals [BIA], A74 206 787, 30 March 2001. *See also* Tala Hartsough, Asylum for Trafficked Women: Escape Strategies Beyond the T Visa, 13 HASTINGS WOMEN’S LJ. 77, 115 (year) (Makes the important observation that the applicant in this case was not trafficked *into* the United States, but rather was trafficked in China and used this as a ground to applying for asylum).

¹⁸⁰ OSCE Reference Guide, *supra* note 13, at 67 (citing the Board of Immigration Appeals and the U.S. State Department’s Country Reports on Human Rights Practices, *available at* <http://www.state.gov/g/drl/rls/hrrpt/>).

¹⁸¹ TVPA at Sec. 108 (b)(2).

to those who would face retribution or hardship upon repatriation.¹⁸² Women who willingly entered the trafficking flow, but found themselves trapped in slave-like conditions in the United States, therefore, would receive no special protection.

UNHCR's willingness to recommend expanding the definition of a "membership in a particular social group" to include victims of trafficking, combined with the fact that several countries have, in fact, granted asylum to victims of trafficking on a case-by case basis, makes a compelling argument for allowing victims to apply for asylum in the country of destination or in a third country.

c) Third-country hosting

The concept of third-country hosting of victims has just begun to surface in Europe. The idea is that a victim of trafficking may not be able to be repatriated to her home country, for fear of retaliation from traffickers, persecution or stigmatization, but may also be unwilling or unable to seek asylum or temporary refuge in the country where she is found, most likely the country of transit or destination, for similar reasons. Third country hosting may, in fact, be an even better approach, if a more challenging option to execute, than asylum, in that victims of trafficking have different needs than refugees, even refugees who suffered severe forms of torture. A further argument in favor of third country hosting is that many countries of destination have not developed protection or even reception mechanisms for victims of trafficking (or refugees) and trafficking victims would be better off in a third country.

Some asylum cases are, in essence, already promoting the concept of third-country hosting. As described earlier, the extension of asylum by the United Kingdom to a Ukrainian national who was trafficked to Hungary comes close to the concept of a third country offering asylum to a victim of trafficking. In this case, however, the victim had to make her own way to the third country, entering illegally or under alternative justification, and then seek asylum. A bona fide third country host should assist the victim with travel documents, travel to the third country, and assistance upon arrival.

In its Recommended Principles and Guidelines, UNHCHR's guideline addressing "Ensuring an adequate law enforcement response," does urge states to consider "identification of options for continued stay, *resettlement* or repatriation," with resettlement being to a third country. In its guideline covering "protection and support for trafficked persons," UNHCHR also asks states to "explor[e] the option of . . . third country resettlement in specific circumstances (e.g. to prevent reprisals) or in cases where re-trafficking is considered likely."¹⁸³

Countries which already operate a quota system, offering permanent residence to a certain number of trafficking victims or migrants per year would

¹⁸² TVPA, Sec. 106 (c)(3).

¹⁸³ UNHCHR Recommendations and Guidelines, *supra* note 72, Guideline 6, para. 7.

not be overly burdening themselves by designating that a certain portion of that quota be filled by trafficking victims.

A. Response to Arguments Against Extending Immigration Benefits

The most likely argument against granting immigration benefits to victims of trafficking is that it will open up the floodgates, encouraging women to seek out opportunities to be trafficked, hoping to ultimately be granted permanent residency in a Western country. I will suggest several reasons why this argument does not have substantial merit:

- ❑ A woman who is trafficked for sex work will be forced to have sex with strangers, will be deprived of her liberty, will retain little or no profit from her work, and is likely to be threatened, raped repeatedly, isolated from friends and family, sold from person to person like chattel, and beaten on a regular basis. It is highly unlikely that many women would willingly put themselves into the flow of trafficking if they have knowledge of the potential consequences.
- ❑ Traffickers already lure women into trafficking with promises of jobs abroad. Perhaps the trafficker tells the victim that the nanny position she will have in Italy will be legal, but he is lying. Most likely the victim knows that she will be engaging in some form of illegal migration or illegal employment, but she is unaware that she will be trafficked into sex work. Since most victims already have the intention of migrating illegally, the outcome of being trafficked does not increase the total number of persons migrating illegally.
- ❑ Only a fraction of women have been granted visas or residency based on trafficking.¹⁸⁴ Because the who are women granted visas or residency still have to come forward and establish that they are eligible for such a benefit, the numbers are not likely to increase drastically.
- ❑ Even if they do increase drastically, countries could simply designate that a certain percentage of visas or residency grants that are already reserved for immigrants could be reserved for a subgroup of trafficking victims.
- ❑ Even if this would reduce the number of visas or immigration benefits that, for instance, family members of immigrants would be eligible to obtain, it would not be by much.
- ❑ Furthermore, countries could enlarge the total number of preferential visas in order to accept victims trafficking without harming other candidates.
- ❑ Finally, countries could simply adopt a libertarian viewpoint and endorse open immigration, deeming trafficking victims in particular to be “invitees.”¹⁸⁵

¹⁸⁴ E.g. 23 over the course of two years of and estimated 50,000 per year in the United States. See ***.

¹⁸⁵ While the libertarian model would open borders, but cut off welfare benefits, necessitating that immigrants be permitted to work upon arrival. For more on libertarian perspectives on immigration see Kent van Cleave, “Settling the Libertarian Immigration Debate,” *The Libertarian Enterprise*, No. 162, February 25, 2002, available at: <http://www.webleyweb.com/tle/libe162-20020225-03.html>, and Michael

Conclusion

As they stand, I believe that the victim protection model discussed above currently offers more than the prosecution-oriented model, which has numerous drawbacks. However, even the victim-protection model, of which several examples were highlighted, does not currently offer solid immigration solutions for victims, as a victim protection measure. I have argued that the correct approach would be to take the best elements from the prosecution model and the best from the victim-protection model and add the missing components, such as durable immigration solutions for victims, an emphasis on implementation of the laws, a look at the users of trafficked women, and improved international cooperation in prosecution of traffickers.

At a minimum, trafficked persons should not be arrested for illegal migration or labor violations. Merely preventing the arrest of victims, however, does not go far enough. These are not merely “victims,” they are also persons whose human rights have been violated and who are entitled to call upon the state for support and protection. Countries should adopt laws that emphasize protection, recognizing that the rights of trafficked persons to seek durable immigration solutions should improve the prospects of bringing solid cases against traffickers. Extending legal rights and protection to victims empowers them, rendering them less vulnerable to further economic and social exploitation, and perhaps ultimately limiting both their willingness to re-enter sex work and their desirability as sex workers. Empowered women are less desirable in the sex trafficking industry, in which women are valued for their silence, their timidity, their vulnerability, their inability to communicate, and their unwillingness to oppose or fight with their traffickers.

Most importantly, countries should then actively *implement* these laws, concentrating on training each and every person likely to come into contact with victims of trafficking.

Epilogue

Madeleina was returned to Moldova by an international organization. Her testimony was not used to prosecute her traffickers or the brothel owners. The international organization that repatriated her is unaware of her present circumstances.

Tanner, “Libertarian Solutions: The Benefits of Open Immigration,” Libertarian Party News Archive, June 1998, available at: <http://www.lp.org/lpn/9806-immigration.html>

