

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

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## ABSTRACT

Organized crime rings exploit 700,000 to 4 million new victims of human trafficking each year, typically luring them across borders where they are more vulnerable to abuse. Trafficking in Southeastern Europe is a relatively new phenomenon, fueled by the dissolution of the former Soviet Union, as well as the presence of international peacekeepers who have sometimes exacerbated the problem. The two main anti-trafficking models emphasize the prosecution of the trafficker or the protection of the victim, but neither adequately addresses immigration options that could serve to protect the victim and provide better evidence with which to prosecute the traffickers for their crimes.

## PROLOGUE

Madeleina was a slight, delicate-looking sixteen-year-old girl from Moldova. She left Moldova in 1998, when her sister's husband convinced her and another girl to go with his friend who promised to find them hostess jobs in Italy. She was given a fake passport, and after about a week of traveling,

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found herself locked in a brothel in what she later discovered was the Republika Srpska, Bosnia and Herzegovina (Bosnia).<sup>1</sup> 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.

Madeleina 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 eleven 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 five months, forcing her to have sex with as many as twenty men a day. She thought that some of the customers at the brothel 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, goods, and women are sold. Two foreign 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 day or two, often with friends, and forced her to have sex with them. Over the course of these months, Madeleina had begun to teach herself some of the Serbian language.

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 with no warm clothes Madeleina went out 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 Co-operation in Europe (OSCE) intervened, and Madeleina was transported to a makeshift shelter in Sarajevo.<sup>2</sup> International and local nongovernmental organizations were then just establishing the shelter.

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1. Bosnia is currently divided into two entities and a district: the Republika Srpska, the Federation, and Brcko District.
  2. As related to the author during her work with the OSCE in Bosnia. For similar stories, see HUMAN RIGHTS WATCH, *HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT*

## I. INTRODUCTION

Trafficking in human beings is an extremely lucrative business, with profits estimated at \$7 billion per year<sup>3</sup> and a seemingly endless supply of persons to traffic, estimated at between 700,000 and four million new victims per year.<sup>4</sup> 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.<sup>5</sup> In fact, the United States Central Intelligence Agency estimates that traffickers earn \$250,000 for each trafficked woman.<sup>6</sup> 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.<sup>7</sup> Several countries are

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BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION (2002) [hereinafter HRW REPORT]; John McGhie, *Bosnia—Arizona Market: Women for Sale* (UK Channel 4 News television broadcast, 8 June 2000), available at [fpmail.friends-partners.org/pipermail/stop-traffic/2000-August/000113](mailto:fpmail.friends-partners.org/pipermail/stop-traffic/2000-August/000113); William J. Kole & Aida Cerkez-Robinson, *U.N. Police Accused of Involvement in Prostitution in Bosnia*, ASSOC. PRESS, 28 June 2001; Colum Lynch, *U.N. Halted Probe of Officers' Alleged Role in Sex Trafficking*, WASH. POST, 27 Dec. 2001, at A17, available at [www.washingtonpost.com/wp-dyn/articles/A28267-2001Dec26](http://www.washingtonpost.com/wp-dyn/articles/A28267-2001Dec26).

3. UNITED NATIONS CHILDREN'S FUND (UNICEF) ET AL., TRAFFICKING IN HUMAN BEINGS IN SOUTHEASTERN EUROPE xiii (2002) [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 ET AL., CRIME AND SERVITUDE: AN EXPOSÉ OF THE TRAFFIC IN WOMEN FOR PROSTITUTION FROM THE NEWLY INDEPENDENT STATES 14 (1997), available at [www.qweb.kvinnoforum.se/misc/crimeru.rtf](http://www.qweb.kvinnoforum.se/misc/crimeru.rtf) (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 before the Commission on Security and Cooperation in Europe*, 106th Cong., 1st Sess. 22 (1999) (testimony of Laura Lederer) [hereinafter, *The Lederer Report*] (stating that women trafficked into 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 \$20,000 to \$40,000); see also, Jennifer Lord, *EU Expansion Could Fuel Human Trafficking*, UNITED PRESS INT'L, 9 Nov. 2002, available at [caymannetnews.com/Archive/Archive%20Articles/November%202002/Issue%20286%20Wed/EU%20Expansion.html](http://caymannetnews.com/Archive/Archive%20Articles/November%202002/Issue%20286%20Wed/EU%20Expansion.html).
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, adopted 15 Nov. 2000, G.A. Res. A/55/25, Annex II, 55 U.N. GAOR Supp. (No. 49), at 60, U.N. Doc. A/45/49 (Vol. I) (2001) (*entered into force* 25 Dec. 2003) [hereinafter *Trafficking Protocol*]. Article 3 of The Protocol defines trafficking as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power

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.<sup>8</sup> 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.<sup>9</sup> Second, of those that have, many completely fail to implement those laws even after undertaking domestic and international obligations.<sup>10</sup> 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.<sup>11</sup>

A particular contemporary problem is trafficking for the sexual exploitation of women<sup>12</sup> in and from Central and Southeastern Europe.<sup>13</sup> Currently,

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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.

See UNITED NATIONS, OFFICE OF DRUGS AND CRIME *available at* [www.unodc.org/unodc/en/trafficking\\_human\\_beings](http://www.unodc.org/unodc/en/trafficking_human_beings). Solely for the purposes of narrowing discussion, this article will 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 notes pt. IV(A).
9. In South Eastern Europe, for instance, Croatia, 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, ABA: CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE SURVEY OF LEGISLATIVE FRAMEWORKS FOR COMBATING TRAFFICKING IN PERSONS (2003) [hereinafter ABA CEELI REPORT] *available at* [www.abanet.org/ceeli/publications/concept\\_papers/humantrafficking/home](http://www.abanet.org/ceeli/publications/concept_papers/humantrafficking/home). See *infra* note 109. In March 2003, the Office of the High Representative imposed a law criminalizing trafficking as a distinct offense, as the Bosnian authorities had failed to do. As yet, however, no traffickers have been charged under this new law.
10. See *infra* text pt. III(B)(1).
11. See *infra* text pt. IV(B)(1)(b).
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 1990s 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 transit and destination. See OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW 20 (2001) [hereinafter OSCE REFERENCE GUIDE]. South Eastern European countries offer the unique combination of

Central and Southeastern Europe are the primary sources from which women are drawn into global sex traffic through Europe,<sup>14</sup> 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.<sup>15</sup> In addition, some countries in the Balkans have the added presence of international peacekeepers and humanitarian workers, which in many respects exacerbates the problem.<sup>16</sup>

This paper will, in Part II, 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 IV 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 V 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 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.

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being countries deeply mired in trafficking, and simultaneously interested in entering the European Union (EU). 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. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia, and 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, available at [europa.eu.int/comm/enlargement/candidate](http://europa.eu.int/comm/enlargement/candidate).

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 7.
15. U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex I, U.N. GAOR 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. 1) (2000), entered into force 29 Sept. 2003 [hereinafter Organized Crime Convention]. Serbia, Montenegro, and Bosnia have ratified the Organized Crime 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 *infra* text pt. III(B)(2). International Administration is still in effect in Kosovo (through the U.N. Mission in Kosovo, pursuant to U.N. Resolution 1244 (S.C. Res 1244, U.N. SCOR, 4011th mtg., S/RES/1244 (1999)), and partially in Bosnia and Herzegovina.

## II. 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 from European countries 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.<sup>17</sup>

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.<sup>18</sup> 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 the men and women who purchased them.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup>

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

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17. See JENNA SHEARER DEMIR, *THE TRAFFICKING OF WOMEN FOR SEXUAL EXPLOITATION: A GENDER-BASED AND WELL-FOUNDED FEAR OF PERSECUTION?* 4–5 (2003), available at [www.unhcr.ch/cgi-bin/texis/vtx/home/openssl.pdf?tbl=RESEARCH&id=3e71f84c4&page=publ](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); Sergei Blagov, *Equal Opportunities Remain a Pipe Dream*, ASIA TIMES ONLINE, 10 Mar. 2000, available at [www.atimes.com/c-asia/BC10Ag01.html](http://www.atimes.com/c-asia/BC10Ag01.html) (stating that “[s]ome 70 percent of Russian unemployed with college degrees are women. In some regions, women make up almost 90 percent of the unemployed.”)

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

19. *Id.*

20. HRW REPORT, *supra* note 2, at 18.

21. *Id.* at 4, 11.

22. *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy*, U.N. ESCOR, Comm’n on Hum. Rts., 53rd Sess., U.N. Doc. E/CN.4/1997/47 (1997) § IV (expressing concern about government complicity in trafficking).

cash flow to support the riskier traffic in drugs and arms.<sup>23</sup> Human beings, being reusable commodities that can be sold and resold, are both more lucrative<sup>24</sup> and less risky to traffic than drugs and arms, in that traffickers of human beings are rarely prosecuted for this particular offense.<sup>25</sup>

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

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.

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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 [www.odci.gov/csi/monograph/women/trafficking.pdf](http://www.odci.gov/csi/monograph/women/trafficking.pdf) [hereinafter CSI REPORT]. See also IOM, APPLIED RESEARCH AND DATA COLLECTION ON A STUDY OF TRAFFICKING IN WOMEN AND CHILDREN FOR SEXUAL EXPLOITATION TO, THROUGH AND FROM THE BALKAN REGION 7 (2001) [hereinafter IOM REPORT].
  24. See CSI REPORT, *supra* note 23, at 19–20.
  25. See *infra* text pt. IV (C)(2)(a).
  26. U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 1, *supra* note 4, at 1. The numbers for South Eastern Europe in particular are difficult to specify. For example, one Swedish NGO estimates that “500,000 women . . . are trafficked 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 7 percent of the foreign migrant sex workers known to be victims of trafficking receive any long term assistance and support).
  28. HRW REPORT, *supra* note 2, at 38.
  29. GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN ET AL., HUMAN RIGHTS STANDARDS FOR THE TREATMENT OF TRAFFICKED PERSONS 13, 15 (1999), available at [www.hrlawgroup.org/resources/content/IHRLG Traffickin\\_tsStandards.pdf](http://www.hrlawgroup.org/resources/content/IHRLG Traffickin_tsStandards.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.* at 13.

### III. 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 for the Suppression of White Slave Traffic, addressing the fraudulent or abusive recruitment of women for prostitution in another country.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

Beginning in the late 1980s, the European Union and the United Nations 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?

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31. International Agreement for the Suppression of White Slave Traffic, 1 U.N.T.S. 83 (*signed* 18 May 1904) (*entered into force* 18 July 1905) (amended by the Protocol signed at Lake Success, New York, 4 May 1949). The Agreement was ratified by Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden, and Norway, Switzerland, and the United Kingdom 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, Concluded at Geneva 11 Oct. 1933, as amended by the Protocol signed at Lake Success, New York, on 12 Nov. 1947, *registered* 24 Apr. 1950, No. 772.

33. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* 21 Mar. 1950, 96 U.N.T.S. 271 (*entered into force* 25 July 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.* art. 1.

34. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980) (*entered into force* 3 Sept. 1981), 1249 U.N.T.S. 13, *reprinted in* 19 I.L.M. 33 (1980).

### 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.

Some governments pretend to care about trafficking when the real objective is controlling unwanted migration.<sup>35</sup> 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.<sup>36</sup> Authorities have remained cynical and hardened to the plight of victims who are easier to treat as prostitutes or illegal immigrants.<sup>37</sup>

In fact, some countries seem to view the existence of trafficked women within their sovereign borders as evidence of a breach of security or the failure of their domestic immigration mechanisms, and accordingly attempt to address trafficking through simple reconfiguration of their border control mechanisms.<sup>38</sup> Traffickers are often extremely savvy transnational organized criminals, while their victims are most often women and children already

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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, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE MISSION TO THE FRY: STUDY ON POLICING IN THE FEDERAL REPUBLIC OF YUGOSLAVIA 21 (2001), available at [www.osce.org/yugoslavia/documents/reports/files/report-policing-e.pdf](http://www.osce.org/yugoslavia/documents/reports/files/report-policing-e.pdf) [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 35 (US government officials cited as holding the opinion that trafficking victims are part of the conspiracy and therefore view them as accomplices).

38. “More often than not, anti-trafficking laws, be it domestic or international, tend to be conceived and are employed as border-control and immigration mechanisms,” Agnes Khoo, *Trafficking and Human Rights: Some Observations and Questions*, 12 ASIA PACIFIC FORUM ON LAW, WOMEN AND DEVELOPMENT 3 (Dec. 1999), available at [www.apwld.org/vol123-02.htm](http://www.apwld.org/vol123-02.htm).

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 this section will demonstrate, 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 European Union.

### 1. Prostitution

Prostitution and trafficking are not one and the same, yet some would treat them as such.<sup>39</sup> Prostitution involves persons willingly engaging in sex work. 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,”<sup>40</sup> trafficking involves clear deprivation of choice at some stage, either through fraud, deception, force, coercion, or threats.

Whether a trafficked 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

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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 CO-ORDINATOR OF THE STABILITY PACT FOR SOUTH EASTERN EUROPE TASK FORCE ON TRAFFICKING IN HUMAN BEINGS, ANTI-TRAFFICKING POLICY OUTLINE FOR 2003 [hereinafter SP TRAFFICKING TASK FORCE PRIORITIES], available at [www.stabilitypact.org/trafficking/info.html#four](http://www.stabilitypact.org/trafficking/info.html#four). For more discussion on the Stability Pact, see discussion *infra* pt. IV(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, 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).

forced labor of any kind.<sup>41</sup> 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, being kept against their will, having their travel documents taken from them, or being raped, beaten, and sold like chattel.<sup>42</sup>

Nevertheless, within the community of NGOs, 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 United Nations Mission in Bosnia and Herzegovina (UNMIBH) and partner organizations tasked with assisting the Bosnian government to eradicate trafficking refused to provide trafficking protection assistance to women who at any point willingly engaged in prostitution.<sup>43</sup>

The Organized Crime 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. Nevertheless, 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.<sup>44</sup> Thus, trafficking is politicized, a volatile topic easily used to affix other political agendas. Even while most 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.

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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 pt. V(A)(1).
  42. See HRW REPORT, *supra* note 2, at 15–20 (detailing common treatment and expectations of trafficked women).
  43. *Id.* at 13. This practice of excluding prostitutes from victim protection results from criteria set by donor agencies rather than international law; see e.g., *infra* note 44 and accompanying text.
  44. In its report 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 Development (USAID) states that it will only work with [e.g. fund] local NGOs “committed . . . to combat trafficking and prostitution,” [emphasis added], explaining that: “organizations advocating prostitution as an employment choice or which advocate or support the legalization of prostitution are not appropriate partners,” US AGENCY FOR INTERNATIONAL DEVELOPMENT, TRAFFICKING IN PERSONS: THE USAID STRATEGY FOR RESPONSE (Feb. 2003), available at [www.usaid.gov/wid/pubs/pd-abx-358-final.pdf](http://www.usaid.gov/wid/pubs/pd-abx-358-final.pdf).

## 2. *Smuggling*

Politicians have also attempted to link smuggling and trafficking in order to achieve tightened border controls. While most governments acknowledge that smuggling and trafficking are two distinct crimes, they nonetheless use 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, and perhaps preventing terrorism.

The United States Department of State, for instance, opened the Migrant Smuggling *and* Trafficking in Persons Coordination Center in December 2000, even while acknowledging, "at their core . . . these related problems are distinct."<sup>45</sup> The US government nevertheless justified combining the two issues by pointing out that "these related problems result in massive human tragedy and affect our national security, primarily with respect to crime, health and welfare, and border control."<sup>46</sup> 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.<sup>47</sup> 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."<sup>48</sup>

Smuggling involves delivering persons to the country they wish to enter, initiated by the potential migrant. Smuggling often takes place under horrible and possibly 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.<sup>49</sup>

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45. U.S. DEP'T OF STATE INTERNATIONAL INFORMATION PROGRAMS, FACT SHEET: MIGRANT SMUGGLING AND TRAFFICKING IN PERSONS (2000), *available at* [www.usembassy.it/file2000\\_12/alia/a0121523.htm](http://www.usembassy.it/file2000_12/alia/a0121523.htm).

46. *Id.*

47. See JACQUELINE OXMAN-MARTINEZ, HUMAN SMUGGLING AND TRAFFICKING: ACHIEVING THE GOALS OF THE UN PROTOCOLS? 1 (2003), *available at* [www.maxwell.syr.edu/campbell/XBorder/OxmanMartinez%20oped.pdf](http://www.maxwell.syr.edu/campbell/XBorder/OxmanMartinez%20oped.pdf).

48. *Id.* at 1.

49. In the last decade, Southeast Asia alone has produced nearly three times as many victims of trafficking than produced during the entire history of slavery from Africa. Melanie Nezer, *Trafficking in Women and Children: "A Contemporary Manifestation of Slavery,"* 21 REFUGEE REPORTS 1, 3 (2000) (400 years of slavery from Africa produced 11.5 million victims; victims of trafficking in the 1990s within and from Southeast Asia are estimated to be more than 30 million).

In order for anti-trafficking initiatives to be effective, 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 EU entrance requirements or to obtain financial assistance*

Not surprisingly, the European Union and the United States, among other institutions and governments, are conditioning financial assistance<sup>50</sup> and entry into the European Union on the country's willingness to develop legislation curtailing trafficking within and across its borders<sup>51</sup>. Countries set to enter the European Union in 2004<sup>52</sup> are eager to pass legislation recommended by the European Union and the Council of Europe (CoE), and join working groups that address stemming the flow of trafficking and smuggling.<sup>53</sup>

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 European Union 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.

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50. The United States Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (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 country's compliance with US directives. U.S. DEP'T OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 10 (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. In the case of the European Union, entry into the Union is conditioned upon compliance with general respect for human rights and compliance with human rights standards.
52. For list of applicant countries to the European, see *supra* note 13.
53. In the author's experience working with ministries of justice, interior, and human rights in Bosnia, Croatia, and Serbia and Montenegro, high level government authorities were typically keen to attend high level working groups addressing the drafting of trafficking legislation, but were much harder to pin down when it came to establishing work plans to train field level government authorities.

## 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.<sup>54</sup> This section points out reasons no current laws are very effective in the fight to eradicate trafficking.

By no means, however, have all countries adopted laws to specifically target trafficking.<sup>55</sup>

### 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 European Union or the United States to encourage countries to introduce legislation to prosecute traffickers, no incentive can create the political will to *implement* legislation if such will or ability does not exist or is not prioritized.<sup>56</sup>

In Bosnia, for example, UNMIBH reported that of sixty-three cases brought against traffickers in 2000, only three were successfully prosecuted.<sup>57</sup> Of those three, the defendants were *all* tried on charges related to

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54. See *infra* text pt. IV(A). For example, in Israel as recently as 1998, 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 1994 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*, N.Y. TIMES, 11 Jan. 1998, at A1.

55. Serbia, Montenegro, and Croatia, for example, have no distinct criminal offense for trafficking. See generally ABA CEELI REPORT, *supra* note 9, for updates on domestic trafficking legislation. Although Bosnia's law criminalizing trafficking was imposed in March 2003, it has yet to yield a prosecution. See *infra* note 109.

56. One way to encourage implementation of anti-trafficking laws is for the European Union and United States 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) [hereinafter 2003 TRAFFICKING IN PERSONS REPORT], available at [www.state.gov/documents/organization/21555.pdf](http://www.state.gov/documents/organization/21555.pdf).

57. HRW REPORT, *supra* note 2, at 36.

prostitution, not trafficking. According to the HRW REPORT, all of the thirty-six cases brought involved charges related to prostitution and not trafficking—not just the three successful ones.<sup>58</sup> 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.<sup>59</sup>

Coordination among responsible agencies to implement the law is often flawed in the best of circumstances, further obstructing implementation.<sup>60</sup> 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;<sup>61</sup> traffickers supply false passports to border police,<sup>62</sup> and the girls and traffickers are waived through.

For example, during the author's tenure in Belgrade, Serbia, and Montenegro, 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

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58. *Id.*

59. *Id.*

60. CSI REPORT, *supra* note 23, at 31. 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:

Apart 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. HRW REPORT, *supra* note 2, at 61.

62. See *id.* at 16.

those carrying them out in the field, and there was 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 address this issue. Trafficked women in Bosnia, for instance, report that approximately 30 percent of their clients are internationals.<sup>63</sup> 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.<sup>64</sup> 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,<sup>65</sup> these international organizations have still failed to enforce internal rules or laws against frequenting brothels.<sup>66</sup>

Ninety percent of foreign sex workers in the Balkans are estimated to be trafficked, although less than 35 percent are identified and deemed eligible to receive protection assistance, and less than 7 percent actually do receive long-term support.<sup>67</sup> It is therefore well known among those charged with

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63. *Id.* at 11. See also, 2003 TRAFFICKING IN PERSONS REPORT, *supra* note 56, at 35 (acknowledging that the international civilian and military personnel have contributed to trafficking in Bosnia).

64. See, e.g., HRW REPORT, *supra* note 2, at 4, 11. (“According to [IGOs and NGOs] trafficking first began to appear [in Bosnia] 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 46–60.

67. See JOINT REPORT ON TRAFFICKING, *supra* note 3, at xv.

teaching Bosnians how to better enforce their laws, e.g. peacekeepers, the International Police Task Force [IPTF]<sup>68</sup>, and international humanitarian workers, that by visiting a prostitute, one stands a good chance of visiting a trafficked woman.<sup>69</sup> 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.<sup>70</sup> 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 United Nations have recently developed "Codes of Conduct" which implicitly forbid their 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.<sup>71</sup> Nevertheless, several recent articles indicate that local police, international peacekeepers, and humanitarian aid workers continue to be major users of brothels in the Balkans in particular.<sup>72</sup> Developing and enforcing prohibitions against this practice are crucial, because the international police, peacekeepers, and humanitarian workers 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 international police and peacekeepers for protection.<sup>73</sup>

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68. In January 2003, the duties of the IPTF were assumed by the European Union, and are now referred to as "European Union Police Mission."

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

70. HRW REPORT, *supra* note 2, at 62–67.

71. The author, a member of the OSCE Mission to Bosnia, signed such a Code of Conduct.

72. See, e.g., McGhie, *supra* note 2; Kole, *supra* note 2; Lynch, *supra* note 2; Daniel McGrory, *Woman Sacked for reveling UN Links with Sex Trade*, THE TIMES ONLINE (LONDON), 7 Aug. 2002; Robert Capps, *Crime Without Punishment*, SALON.COM, 27 Jun. 2002, available at [www.salon.com/news/feature/2002/06/27/military](http://www.salon.com/news/feature/2002/06/27/military); Robert Capps, *Outside the Law*, SALON.COM, 26 June. 2002, available at [www.salon.com/news/feature/2002/06/26/bosnia/index\\_np](http://www.salon.com/news/feature/2002/06/26/bosnia/index_np); *US Scandal, Prostitution, Pimping and Trafficking*, BOSNIA DAILY, Daily e-newspaper, 25 Jul. 2001, No. 42, at 1 (on file with author).

73. 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, peacebuilding, 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 Principles and Guidelines on Human Rights and Human Trafficking*, U.N. High Commissioner for Human Rights, E/2002/68/Add.1, Guideline 10, ¶ 3 [hereinafter *Recommended Principles and Guidelines*]. See *infra* text pt. IV(C)(2).

#### IV. 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 United Nations High Commissioner for Human Rights (UNHCHR) and United Nations High Commissioner for Refugees (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 1980s, when horror stories were emerging and statistics were first being gathered to identify the problem.<sup>74</sup> These two dominant models have come about through a series of legislative drafts and counter-proposals made by various governments, international institutions (IOs), and consortiums of interested international organizations and NGOs.

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 1980s government authorities in virtually all countries tended to treat trafficked persons as criminals, rather than victims of both a crime and of human rights violations.<sup>75</sup> Governments were regularly jailing trafficked persons for violations of immigration status, unauthorized employment, or prostitution, and deporting them.<sup>76</sup> Some

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74. 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.” Specter, *supra* note 54.

75. OSCE REFERENCE GUIDE, *supra* note 13, at 8.

76. *Id.*

countries, such as Bosnia, Serbia, and Montenegro still arrest and deport, as a matter of practice,<sup>77</sup> even when it contravenes newly adopted laws or international obligations.

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 charges of prosecuting the victim for prostitution, document fraud, or immigration or labor violations.<sup>78</sup> The deplorable treatment of trafficked persons by police, prosecutors, and judges,<sup>79</sup> who are themselves sometimes complicit in the trafficking, serves only to discourage victims from agreeing to cooperate with prosecution. In one case in Bosnia, a woman had been accepted into an International Organization for Migration (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.<sup>80</sup>

## B. “Jail the Offender”

### 1. Model examples

This model emphasizes prosecution of the trafficker, and all examples of this model have certain elements in common, with different degrees of emphasis. They use 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.

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77. HRW REPORT, *supra* note 2, at 19.

78. *Id.*

79. In one case, two fifteen and sixteen year old girls found locked in a room during a raid on a Bosnian nightclub were asked by an investigative judge and the prosecutor whether they derived any pleasure from their sex work. This was only after the judge and prosecutor were pressured by the United Nations to take testimony from the girls at all. *Id.* at 36.

80. *Id.* at 39.

a. *Convention and Protocol Developed by United Nations Commission on Crime Prevention and Criminal Justice*

The current legal standard-bearers for anti-trafficking initiatives, the Organized Crime Convention<sup>81</sup> and the Trafficking Protocol,<sup>82</sup> are both wholehearted instruments that emphasize the prosecution of traffickers.<sup>83</sup> Developed by a law enforcement body, the United Nations Commission on Crime Prevention and Criminal Justice (UN Crime Commission), the Organized Crime Convention, and the Trafficking Protocol respond to the international battle against transnational crime.<sup>84</sup> While the Trafficking Protocol takes steps in the direction of victim protection, it does not go far enough.

The Organized Crime Convention and Trafficking 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. For instance, on the one hand, the Trafficking 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.”<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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81. Organized Crime Convention, *supra* note 15.

82. Trafficking Protocol, *supra* note 7.

83. For an analysis of both the Organized Crime Convention and the Trafficking 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 [www.hrlawgroup.org/initiatives/trafficking\\_persons/](http://www.hrlawgroup.org/initiatives/trafficking_persons/). 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.’” *Id.* at 3 (citing Trafficking Protocol arts. 6, 7; Organized Crime Convention, arts. 24, 25).

84. Forty-four countries have ratified the Protocol, which entered into force on 25 Dec. 2003.

85. Trafficking Protocol, *supra* note 7, art. 9, ¶ 4.

86. These include witness protection, the right to have her identity kept confidential, provision of shelter, and other protections. *Id.* art. 6.

87. *Id.* art. 7, ¶ 1.

*b. United States Trafficking Victims Protection Act*

The Trafficking Victims Protection Act [TVPA], another prosecution-oriented piece of anti-trafficking legislation, does include provisions for the care of victims.<sup>88</sup> It even allows 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; it “permits victims to remain in the US if it is determined that the victim is ‘a potential witness to such traffickings.’”<sup>89</sup> It also limits the number of T-visas granted to 5,000 (regardless of how many trafficked persons might qualify),<sup>90</sup> and limits T-visas to victims of “severe forms of trafficking.”<sup>91</sup> Finally, it relies heavily on economic sanctions to punish countries of origin or transit for failing to effectively prosecute traffickers.<sup>92</sup> 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.<sup>93</sup>

Despite its heavy emphasis on prosecution, in 2001 and 2002, the Department of Justice successfully prosecuted only thirty-six cases, although the Department of State projects that more than 50,000 persons are trafficked into the United States each year.<sup>94</sup> As of February 2003, two years after the TVPA went into effect, only twenty-three T-visas had been granted.<sup>95</sup>

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

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88. TVPA, *supra* note 50, § 107.

89. *Id.* § 107(c)(3).

90. *Id.* § 107(e)(2).

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

92. *Id.* § 110(d)(1)–(5).

93. The agency responsible for distributing aid pursuant to the TVPA, USAID, currently spends \$10 million annually in “programs specifically aimed at trafficking.” See THE HONORABLE ANDREW NATSIOS, U.S. AGENCY FOR INT’L DEV.: PATHBREAKING STRATEGIES IN THE GLOBAL FIGHT AGAINST TRAFFICKING 55 (2003), available at [www.state.gov/documents/organization/20942.pdf](http://www.state.gov/documents/organization/20942.pdf).

94. *Id.* at 47.

95. See DEP’T OF JUSTICE, FACT SHEET: ACCOMPLISHMENTS IN THE FIGHT TO PREVENT TRAFFICKING IN PERSONS (25 Feb. 2003), available at [www.usdoj.gov/opa/pr/2003/February103-crt-110](http://www.usdoj.gov/opa/pr/2003/February103-crt-110). 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 twenty-three 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.

legislation and initiatives are actually *implemented* and that US-funded programs are held accountable for producing results at a grassroots level.<sup>96</sup>

*c. European Union's Directives and Resolutions*

In late 2001, the European Union, following up its Resolutions on trafficking in human beings and trade in persons and the 2000 Organized Crime Convention and its Trafficking Protocol, discussed above, issued a "Proposal for an EU Council Framework Decision on Combating Trafficking in Human Beings."<sup>97</sup> 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 European Union 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 European Union 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.<sup>98</sup> States were not obliged to develop any programs or immigration measures to assist trafficked persons.

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96. The US 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. U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS: MODEL LAW TO COMBAT TRAFFICKING IN PERSONS § 300-12 (2003). Notably, the Model Law, unlike the TVPA, explicitly directs that victims shall have immunity from prosecution for any criminal offense related to trafficking. *Id.* § 208. Furthermore, on 23-26 Feb. 2003, the US Dept. 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. DEP'T OF STATE, PATHBREAKING STRATEGIES IN THE GLOBAL FIGHT AGAINST SEX TRAFFICKING: CONFERENCE RECOMMENDATIONS (2003), available at [www.state.gov/g/tip/rls/rpt/20834](http://www.state.gov/g/tip/rls/rpt/20834).

97. 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 Proposal for a Council Framework Decision on Combating Trafficking in Human Beings*, art. 1, 2002 O.J. (L 203) 1, 2.

98. *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*, Council of Europe, Commission of the European Communities, COM/2002/0071, 2002/0043 (CNS) (2002) at § 2.3, available at <http://>

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.<sup>99</sup> 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 eight years,” but not setting a minimum penalty.<sup>100</sup> 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 benefit of a person “established” in the territory of that member state.<sup>101</sup> Although anti-trafficking NGOs and IOs have been pushing EU institutions for six years to strengthen protection measures, most decisions regarding the prosecution of traffickers have been left to individual member states and no victim protection requirements have been established.

## 2. 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.<sup>102</sup>

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

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europa.eu.int/eur-lex/pri/en/lip/latest/doc/2002/com2002\_0071en01.doc. 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.*

99. Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, Council of Europe, 2002/629/JHA (L 203) art. 3(1), available at [www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_203/l\\_20320020801en00010004.pdf](http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_203/l_20320020801en00010004.pdf). Member states are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Candidate countries are: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey.

100. *Id.* art. 3(2).

101. *Id.* art. 6(1).

102. See *infra* text pt. IV(C)(2)(i).

victims of traffickers who do not agree to cooperate with prosecutors are not offered protection.<sup>103</sup> 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.

### 3. Drawbacks of “Jail the Offender” Models

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 gatekeeping 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.<sup>104</sup> 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 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 to 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.<sup>105</sup>

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103. Except in the rare instances in which asylum has been granted “on account of membership in a particular social group.” See *infra* text pt. V(A)(5)(c)(ii)(b).

104. It is arguable that the ICCPR 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, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, arts. 2, 7, 8, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).

105. See, e.g., MONK REPORT, *supra* note 36, at 6.

[The police force’s] [d]ealing with sexual crime and domestic violence is 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

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,<sup>106</sup> and the number of prosecutions, as compared to the reported numbers of trafficked persons, is infinitesimal.<sup>107</sup>

*a. 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 eleven traffickers to date, with the traffickers sentenced to between only one and three years, and the testimony of over 190 victim-witnesses was necessary to secure even these short sentences.<sup>108</sup> In Moldova, only fifteen cases were brought against traffickers as of 2002, and all were amnestied.<sup>109</sup> In 2002, forty-two cases were initiated in Moldova, eight of which were brought to court, while nineteen are still pending, two were suspended, and thirteen

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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.

106. In Serbia and Montenegro for example, trafficked women arrive from and pass through Russia, Romania, Ukraine, and 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 IOM 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.

107. See JOINT REPORT ON TRAFFICKING, *supra* note 3, at 146. "At this moment, prosecution is the weakest part of the whole anti-trafficking system in SEE. Even if, in some countries, there are many people arrested and charged with trafficking, very few are prosecuted and sentenced."

108. *Id.* at 67 ("repatriation of the victims prior to trial is one of the most significant impediments to successful prosecution").

109. *Id.* at 29. See UNICEF, TRAFFICKING IN HUMAN BEINGS IN SOUTHEASTERN EUROPE (2003), available at [http://www.osce.org/documents/odihr/2003/12/1645\\_en.pdf](http://www.osce.org/documents/odihr/2003/12/1645_en.pdf) [hereinafter 2003 JOINT REPORT]. "In the first four months of 2003, there were 41 trafficking cases investigated by police, 36 cases before the court and 8 persons convicted of trafficking." *Id.* at 14. It must be noted, however, that no prosecutions have yet been made under the 2003 Criminal Code imposed by OHR, which makes trafficking an offense. No convictions in Bosnia have yet been made for the specific offense of trafficking. *Id.*

dismissed.<sup>110</sup> Until 2003, in Serbia only one person had been charged,<sup>111</sup> but as of 2003, 104 persons had been charged with trafficking related offenses, although all cases are still pending.<sup>112</sup>

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.<sup>113</sup> 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 two to eight years.<sup>114</sup> By way of comparison, those convicted of certain drug trafficking offenses were ordered to serve life sentences.<sup>115</sup>

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.

#### *b. 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.<sup>116</sup> 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

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110. HRW REPORT, *supra* note 2, at 107.

111. JOINT REPORT ON TRAFFICKING, *supra* note 3, at 80.

112. HRW REPORT *supra* note 2, at 132.

113. OSCE REFERENCE GUIDE, *supra* note 13, at 49–50.

114. CSI REPORT, *supra* note 23, at 48.

115. *Id.* at 33 (stating that in 1999, 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).

116. *Report of the Special Rapporteur*, *supra* note 22, ¶¶ 213–15; 255 (commenting that obstacles to relying on victims to provide testimony against traffickers include fear of arrest, legal sanctions, and reprisals by trafficking rings).

to effectively prosecute the trafficker. Even 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.<sup>117</sup>

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.<sup>118</sup> 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.<sup>119</sup> 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 offenses, 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.

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117. 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 [www.hrw.org/campaigns/migrants/docs/recidence-permit.pdf](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 HRW BRIEFING PAPER].

118. 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").

119. 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.

Intergovernmental organizations (IGOs), NGOs, 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.

### *1. Model Examples*

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, 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.

#### *a. 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 (Human Rights Standards) in 1999.<sup>120</sup> The Human Rights Standards require 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.<sup>121</sup> Specifically, the Human Rights Standards require 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.

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120. GLOBAL ALLIANCE AGAINST TRAFFICKING IN WOMEN (GAATW), HUMAN RIGHTS STANDARDS FOR THE TREATMENT OF TRAFFICKED PERSONS (Jan. 1999), available at [www.thai.net/gaatw/GAATW\\_BODY\\_HRS\\_ENGLISH](http://www.thai.net/gaatw/GAATW_BODY_HRS_ENGLISH).

121. *Id.* art. II, ¶¶ 3–7.

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,<sup>122</sup> and that states repatriate victims who are willing and able to return to their countries of origin.<sup>123</sup>

*b. 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*<sup>124</sup> (UNHCHR Recommended Principles), released May 2002, came in response to the European Union's "Council Directive on the short-term residence permit issued to victims . . . who cooperate with the competent authorities."<sup>125</sup> Like the Human Rights Standards, the UNHCHR Recommended Principles attempt to place victim protection squarely at the foundation of all anti-trafficking measures. The first paragraph states 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."<sup>126</sup>

The UNHCHR formally asks that states not detain victims for illegal entry or unlawful activity,<sup>127</sup> that protection and care not be conditioned upon willingness to cooperate in legal proceedings against the traffickers,<sup>128</sup> 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."<sup>129</sup> However, while insisting that non-immigration assistance (shelter, medical treatment, legal services, etc.) not be conditioned upon willingness to

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

123. *Id.*

124. 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 (2002).

125. See *Commission Proposal for a Council Directive*, *supra* note 98.

126. *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, *supra* note 124, ¶ 1.

127. *Id.* ¶ 7.

128. 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.* ¶ 8.

129. *Id.* ¶ 11.

testify,<sup>130</sup> the UNHCHR Recommended Principles still allow states to condition *immigration* protection, in this case residency permits, on willingness to testify.<sup>131</sup>

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”<sup>132</sup> and to “explor[e] the option of . . . third country resettlement.”<sup>133</sup> Most likely the UNHCHR Recommended Principles were watered down in order to make them politically palatable.

*c. Stability Pact of South Eastern Europe*<sup>134</sup>

The Stability Pact for South Eastern Europe (Stability Pact) was adopted in 1999 after the war in Bosnia, at the European Union’s initiative, as an attempt to replace reactive crisis intervention with long-term conflict prevention strategies. More than forty 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, Bosnia on 30 July 1999, the Stability 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, eleven 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.<sup>135</sup> As part

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130. *Id.* ¶ 8.

131. *Id.* ¶ 9; Guideline 4, ¶ 7.

132. *Id.* Guideline 5, ¶ 8.

133. *Id.* Guideline 6, ¶ 7.

134. The so-called “Stability Pact countries” include the South Eastern European countries of Albania, Bosnia, 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. Information concerning the Stability Pact is *available at* [www.stabilitypact.org/trafficking/031210-sofia](http://www.stabilitypact.org/trafficking/031210-sofia). Pursuant to the Stability Pact South Eastern European Anti-Trafficking Ministerial Declaration of 13 Dec. 2000, these countries play a particularly important role, as all are countries of origin, transit or destination for trafficking and sometimes all three.

135. The Palermo Declaration was signed by Albania, Bulgaria, Croatia, the Federal Republic of Yugoslavia, the former Yugoslav Republic of Macedonia, Moldova, Romania,

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 Stability Pact Task Force on Trafficking in Human Beings (SP Trafficking Task Force) 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.<sup>136</sup> The first three points the author would endorse; the last is too narrow and potentially harmful to victims for several reasons that will be discussed below.

The SP Trafficking Task Force determined that in order to be successful, it must not only coordinate anti-trafficking activities, but also advocate for governments in the region to make anti-trafficking issues a priority. As such, the SP Trafficking Task Force identified individuals 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 IOM, as a member of the SP Trafficking Task Force, has undertaken responsibility to coordinate the physical movement of trafficked 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, 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.

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Slovenia, Turkey, Montenegro, and Kosovo. *Anti-Trafficking Declaration of SEE*, Task Force on Trafficking in Human Beings, Stability Pact for South Eastern Europe, Palermo, Italy (13 Dec. 200) available at [www.stabilitypact.org/trafficking/001213-palermo-declaration.doc](http://www.stabilitypact.org/trafficking/001213-palermo-declaration.doc).

136. SP TRAFFICKING TASK FORCE PRIORITIES, *supra* note 39. 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.*

## 2. Advantages to the "Protect the Victim" Model

### a. 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 allows them 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.

### b. Discourages repeat trafficking

A victim-oriented approach "enables former victims to regain control over their lives in a safe manner."<sup>137</sup> 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.<sup>138</sup>

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.<sup>139</sup> Anti-trafficking measures that include alternative job assistance and educate societies about trafficking, demonstrating that

137. JORDAN, *supra* note 83, at 4.

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

139. Fanny Polania Molina, *Japan, the Mecca for Trafficking in Columbian Women*, [www.DECEMBER18.NET](http://www.DECEMBER18.NET), 2, available at [www.december18.net/paper30ColumbiaJapan.pdf](http://www.december18.net/paper30ColumbiaJapan.pdf) (stating "women who recruit . . . in most cases were women who were trafficked and engaged in prostitution"); IOWA STATE UNIVERSITY WOMEN'S STUDIES 201 HOMEPAGE, *PROSTITUTION AND THE TRAFFICKING OF WOMEN*, available at [www.public.iastate.edu/~womenstu/ws201student/prostitution/homepage.html](http://www.public.iastate.edu/~womenstu/ws201student/prostitution/homepage.html) (stating that "some of these women end up working for the people who enslaved them in the sex trade by recruiting more women to join them. They do this by telling the same lies that convinced them in the first place.").

those who fall prey to traffickers are victims, have a chance of preventing the sort of marginalization that contributes to trafficking and re-trafficking.

*c. 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.

*3. 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 article, 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 article, none of the victim-oriented models thus far boldly endorse 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.

## **V. 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 do 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 mind set. 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 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 once 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 mind set 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. Many government officials and even NGO staff whose duty it is to provide protection to trafficking victims believe that they should or are required by law to preclude from protection women who have ever willingly engaged in sex work, even if they were also enslaved or forced into labor.<sup>140</sup> The author’s 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

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140. Based on the author’s experience while working in Bosnia.

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;<sup>141</sup> 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 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.<sup>142</sup> 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

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

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

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 CoE'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.<sup>143</sup>

*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.<sup>144</sup> Poverty conditions in these countries tend to impact women in particular, as their economic status vis-à-vis men is usually even lower in these countries. While the eradication of gender-based poverty is 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 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, provide information about legitimate options for migration, and extensive work with the governments and local NGOs to create alternatives to departure.

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143. *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*, Council of Europe, Comm. of Ministers, Rec. No. R (2000) 11, 710th meeting, § IV (Prevention), subsection IV, ¶ 25, available at [cm.coe.int/ta/rec/2000/2000r11.htm](http://cm.coe.int/ta/rec/2000/2000r11.htm).

144. HRW REPORT, *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.").

*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 have begun instituting programs to allow 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.<sup>145</sup> Although only limited visas are offered, if persons understand that they may legally be able 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.<sup>146</sup> Police are known to tip off club owners before raids of those nightclubs suspected of harboring trafficked women in order to give owners time to hide women or supply false working papers.<sup>147</sup> 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.<sup>148</sup> 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

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145. See OSCE REFERENCE GUIDE, *supra* note 13, at 37. 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.*

146. HRW REPORT, *supra* note 2, at 18–19; OSCE REFERENCE GUIDE, *supra* note 13, at 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].”).

147. *Id.* at 18–19, 28, 31.

148. *Id.* at 18–19, 26–33.

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,<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup>

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 openly addresses corruption in the combat against trafficking, acknowledging that the use of trafficked women by international workers is an appalling symptom of the scant attention given to trafficking.

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149. ABA CEELI Report, *supra* note 9, at 39–42. In March 2003, a new Criminal Code came into effect in Bosnia, criminalizing trafficking. See also, 2003 TRAFFICKING IN PERSONS REPORT, *supra* note 56, at 35.

150. HRW REPORT, *supra* note 2, at 35.

151. *Id.*

152. *Id.* at 46. “Jurisdictional gaps, lack of political will, and indifference toward the crime of trafficking ensure that the small number of SFOR and military contractors and IPTF monitors who participate in trafficking-related offenses do so with nearly complete impunity.” See also the entire report, and specifically 41–68, dealing with the fact that no international employees are tried or sanctioned by their governments or employers.

*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; and 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. The author does 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. Nor is criminalizing prostitution the means to eradicate 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 South Eastern 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; NGOs 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.<sup>153</sup> As much emphasis should be placed on making the laws work as on adopting them.

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153. See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, adopted 29 Nov. 1985, U.N. GAOR, 40th Sess., Annex, art. 16, U.N. Doc. A/Res/40/34/Annex (1985) (recommending enhanced education and awareness of the applicable laws and procedures as a tool for positive change).

Countries such as the United States and international organizations such as the European Union, which have expressed an interest in funding programs to quash trafficking, should shift their efforts from funding high-level ministerial meetings and working groups regarding adoption of recommendations. Instead, they should devote at least 50 percent of their anti-trafficking budgets to 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.

### *5. 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 offenses that did not occur within its borders.<sup>154</sup> Currently, the Organized Crime 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.<sup>155</sup> The European Union has also recommended extraterritorial jurisdiction to secure prosecution.<sup>156</sup> 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,<sup>157</sup> 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

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

155. Organized Crime Convention, *supra* note 7, 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 52.

156. See *Council Proposal for a Council Framework Decision on Combating Trafficking in Human Beings*, *supra* note 97 at 3, ¶ 10.

157. See *supra* text accompanying notes 41–53.

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.<sup>158</sup>

Nevertheless, the author would not endorse such a deterrent law at this time. Some countries have legalized prostitution and an obvious question would be: who has 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. The author 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.<sup>159</sup>

*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

Persons 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.<sup>160</sup>

As discussed earlier, some countries have already begun acknowledging the well-known routes of illegal migration into their countries and have tried to

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158. *Id.*

159. See CSI REPORT, *supra* note 23, at 1.

160. OSCE REFERENCE GUIDE, *supra* note 13, at 36–37.

regulate migration in part by providing legal means to immigrate and work.<sup>161</sup>

*i. Repatriation is an insufficient solution*

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,<sup>162</sup> as well as a host of problems stemming from social and economic exclusion.<sup>163</sup>

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 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.<sup>164</sup>

A trafficked person who knows that repatriation is her only immigration option may not believe that law enforcement officials in her own country

161. See *id.* at 38; OSCE REFERENCE GUIDE, *supra* note 13, at 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. *Id.* at 37 (citing IOM press release of 13 July 2001, available at [www.iom.int](http://www.iom.int)). Furthermore, the OSCE Report acknowledges that most applicants from Albania to Italy were men with secondary education. *Id.* 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. The OSCE REFERENCE GUIDE does recommend that such initiatives be revamped to allow equal participation of women. *Id.* at 37–38.

162. DEMIR, *supra* note 17, at ii (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 HRW BRIEFING PAPER, *supra* note 117, 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).

163. 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.

164. JOINT REPORT ON TRAFFICKING, *supra* note 3, at 79.

will be able to protect her should she testify against her traffickers (some of whom were in her country of origin).<sup>165</sup> 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 and pressured either to pay more bribes or 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 there. They'll say that I was a prostitute and then the police won't help. He'll find out that I am home and demand more money."<sup>166</sup>

Finally, the author argues that state parties expelling trafficked victims are in contravention of International Covenant on Civil and Political Rights (ICCPR) Article 7 if the victim is at risk of being subjected to torture or inhuman or degrading treatment in the country of origin.<sup>167</sup> 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

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165. HRW REPORT, *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.)

166. *Id.* at 20.

167. International Covenant on Civil and Political Rights, *supra* note 104, art. 7. Albania, Bosnia, Bulgaria, Croatia, Macedonia, Moldova, Romania, Serbia and Montenegro, and Slovenia are all parties to the ICCPR.

they decide to do so and then only for the length of criminal proceedings.<sup>168</sup> 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.<sup>169</sup> 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.<sup>170</sup> Belgium grants longer permits to victims, depending on how useful their testimony is in serving the prosecution. It grants forty-five days to persons identified as “true” victims of trafficking to consider whether to press charges and allows them a 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.<sup>171</sup> These flawed conditions turn temporary and permanent residence opportunities into a sort of lottery in which the winner is the victim who happens to provide the best evidence for prosecution. They 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.<sup>172</sup> Additionally, if a victim is employed at the end of the residence permit, the permit will be extended to the duration of the labor contract.

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168. See OSCE REFERENCE GUIDE, *supra* note 13, at 64 (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).

169. TVPA, *supra* note 50, § 107.

170. OSCE REFERENCE GUIDE, *supra* note 13 at 64 (during the stay, victims are offered financial, legal, and psychological assistance).

171. *Id.* at 64–65.

172. 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 [www.lolapress.org/elec2/artenglish/doug\\_e](http://www.lolapress.org/elec2/artenglish/doug_e). For instance, Italy cites that 45,000 women are trafficked out of Nigeria annually, but then states that 80 percent of its 18,000 prostitutes are Nigerian, seemingly failing to observe the distinction when it comes to women from Africa. See IOM MIGRATION INFORMATION PROGRAMME, *TRAFFICKING IN WOMEN TO ITALY FOR SEXUAL EXPLOITATION* (1996), available at [www.globalmarch.org/child-trafficking/virtual-library/italy\\_traff\\_eng](http://www.globalmarch.org/child-trafficking/virtual-library/italy_traff_eng). Even so, the 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. *Id.*

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. This option does not provide much incentive, 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 to secure 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 the author recommends be adopted, in which she might seek restitution for lost wages or other claims against her trafficker.<sup>173</sup>

*a. Temporary protection at a minimum*

Starting from a human rights approach, acknowledging that victims of trafficking should be offered protection and accepting that immigration solutions of some sort are necessary in order to prevent deportation or unwanted repatriation, it is clear that 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, psycho social 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, a valuable outcome for 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’ interests in prosecuting the traffickers.

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173. In the United States, 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 89–90 (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).

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.<sup>174</sup> 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.<sup>175</sup> The most serious obstacle to extending asylum to victims of trafficking lies in a state’s fundamental right to preserve its own gatekeeping power.<sup>176</sup> A state that 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 definition of asylum to include victims.<sup>177</sup> 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.* 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.<sup>178</sup> [Emphasis added]

174. See, e.g., *Recommendation No. R (2000) 11*, *supra* note 143. Italy, Belgium, the Netherlands, and Spain grant temporary residence permits to trafficking victims who are willing to cooperate with prosecution of traffickers.

175. See OSCE REFERENCE GUIDE, *supra* note 13, at 62–64.

176. For discussion of states that have accepted the possibility of allowing trafficking victims to claim asylum, see *Id.*, at 66–69.

177. 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, adopted 28 July 1951, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150, art. 1 ¶ 4 (entered into force 22 Apr. 1954), reprinted in 3 WESTON III.G.4. [Hereinafter Refugee Convention]. A victim of trafficking would most likely argue that she qualified as a member of a particular social group.

178. John Morrison & Beth Crossland, *The trafficking and smuggling of refugees: the end game in European asylum policy?*, WORKING PAPER NO. 39 (UNHCR), Apr. 2001, at 54

While mild on its face, the comment packs substantial force in that the argument could be made that most countries from which trafficked women originate are currently unable or unwilling to provide protection against trafficking.<sup>179</sup> It may also either force the hand of the European Union or send a message to member states, and perhaps more importantly, states hoping to enter the European Union, 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 European Union 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 this author sees 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.<sup>180</sup>

A few countries have already granted asylum to a very few victims of trafficking, as members of a particular social group.<sup>181</sup> 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.<sup>182</sup>

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(2001), available at [www.unhcr.ch/cgi-bin/texisvtxhome+iwwBmeFiT89wwwwwwwwwwwwwhFqo20IOE2glTFqoGn5nwGqrAFqo20IOE2glcFqfnDmatwMnaoDa01GdpnwDaw5Oc1MapdcoqODzmxwwwwwwwww/.opendoc.pdf](http://www.unhcr.ch/cgi-bin/texisvtxhome+iwwBmeFiT89wwwwwwwwwwwwwhFqo20IOE2glTFqoGn5nwGqrAFqo20IOE2glcFqfnDmatwMnaoDa01GdpnwDaw5Oc1MapdcoqODzmxwwwwwwwww/.opendoc.pdf). 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. *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, U.N. Doc. HCR/GIP/02/01 (2002).

179. 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.” Specter, *supra* note 55.

180. Refugee Convention, *supra* note 177.

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

182. OSCE REFERENCE GUIDE, *supra* note 13, at 67.

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),<sup>183</sup> and because she belonged to a “particular social group that consists of women in Ukraine who are forced into prostitution against her [sic] will.”<sup>184</sup>

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.”<sup>185</sup> The court looked to the US Department of State’s Country Reports, which indicate that local officials are often complicit in organized, coerced prostitution, and determined that the applicant was “unable to avail herself of the protection of the authorities.”<sup>186</sup>

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*.”<sup>187</sup> 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 to those who would face retribution or hardship upon repatriation.<sup>188</sup> 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 “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

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

184. *Id.*

185. OSCE REFERENCE GUIDE, *supra* note 13, at 67. See also Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN’S L.J. 77, 115 (2002). (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 apply for asylum.)

186. OSCE REFERENCE GUIDE, *supra* note 13, at 67 [emphasis added].

187. TVPA, *supra* note 50, § 108 (b)(2).

188. *Id.* § 106 (c)(3).

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. While a victim of trafficking may not be repatriated to her home country, for fear of retaliation from traffickers, persecution, or stigmatization, she 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 a better approach, if a more challenging option to execute, than asylum, in that victims of trafficking have different needs than refugees, even refugees who have 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.<sup>189</sup> 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)."<sup>190</sup>

Countries that already operate under a quota system, offering permanent residence to a certain number of trafficking victims or migrants per year, would not overly burden themselves by designating that a certain portion of that quota be filled by trafficking victims.

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189. UNHCHR Recommendations and Guidelines, *supra* note 73, Guideline 5, ¶ 8 (emphasis added).

190. *Id.* at Guideline 6, ¶ 7.

## B. 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. This argument does not have substantial merit for several reasons, as suggested in this section:

a) 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.

b) 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.

c) Only a fraction of women have been granted visas or residency permits based on trafficking.<sup>191</sup> Those who are must still come forward and establish their eligibility for such a benefit, the numbers are not likely to increase drastically.

d) Even if they do increase drastically, countries could simply designate that a certain percentage of visas or residency grants already reserved for immigrants could be reserved for a subgroup of trafficking victims.

e) 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.

f) Furthermore, countries could enlarge the total number of preferential visas in order to accept victims of trafficking without harming other candidates.

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191. *E.g.* twenty-three over the course of two years, and estimated 50,000 per year in the United States. See DEP'T OF JUSTICE, FACT SHEET, *supra* note 95. 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 twenty-three 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.

g) Finally, countries could simply adopt a libertarian viewpoint and endorse open immigration, deeming trafficking victims in particular to be “invitees.”<sup>192</sup>

## VI. CONCLUSION

As it stands, 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 are highlighted, does not currently offer solid immigration solutions for victims as a victim protection measure. 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. Governments must take the eradication of

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192. While the libertarian model would open borders, it would cut off welfare benefits, so that countries would need to permit immigrants to work upon arrival. For more on libertarian perspectives on immigration see Kent Van Cleave, *Settling the Libertarian Immigration Debate*, THE LIBERTARIAN ENTERPRISE, ONLINE EDITION, No. 162, 25 Feb. 2002, available at [www.webleyweb.com/tle/libe162-20020225-03](http://www.webleyweb.com/tle/libe162-20020225-03); Michael Tanner, *Libertarian Solutions: The benefits of open immigration*, LIBERTARIAN PARTY NEWS ARCHIVE, June 1998, available at [www.lp.org/lpn/9806-immigration](http://www.lp.org/lpn/9806-immigration).

trafficking seriously, by adopting and implementing domestic legislation and honoring their international obligations. Traffickers should be harshly punished, but a premium should be put on the protection of the victims of trafficking, to avoid what is currently the common practice of government complicity in the re-victimization of woman who have already had their human rights so sorely violated.

## **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.