

# Triply Exploited: Female Victims of Smuggling and Trafficking Networks Strategies for Pursuing Protection and Legal Status in Countries of Destination

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*Teresa, a 25 year old Colombian woman, lived with her child, parents and extended family in a small town near Cali, Colombia. Her family was poor and Teresa had no work. Many young women from the town were moving to Spain to work, and were sending money home to help support their families. Teresa wasn't exactly sure what they were doing but suspected that they were working as prostitutes. After seeing an ad in the local newspaper from an agency offering work in Spain to young women, Teresa decided to take a chance. She went to the «travel agency» which offered to arrange travel to Spain and a job as a dancer in Barcelona. Although Teresa was nervous, she decided to take the offer. She felt she had to do something to support her family. After arriving in Spain, she began to work as a dancer in a club in Barcelona. Conditions were horrible. She worked 12 hours a day, having sex with many different men daily. She lived in a house with other dancers—all immigrant women from different countries—and received little money. The majority of her «salary» was retained to pay for her trip to Spain. Teresa nor the other women were allowed to leave the home without the «controller.» Once, one young woman did slip out, to meet a friend. When she returned, the controller beat and raped her, leaving scars on her body. During the time that she worked in the club, Teresa was not able to send any money home. Depressed and afraid for her life, she decided to escape. Others had escaped before her, including some young women from her own hometown. After*

*escaping, she managed to contact a group which helped women who had been smuggled or trafficked to Spain. They told her if she wanted to cooperate with the police, she might be able to stay legally in Spain. But they could offer no guarantees. Teresa decided against cooperating with the police and decided to return home to be with her family instead. When she arrived home, she did speak with the local police and told them what had happened to her. They wrote up a report but told her that they could not investigate the matter because the «travel agency» had influential and powerful backers. Six months after arriving home, Teresa found out that a young woman who had worked in the same club and escaped and returned to their hometown, had been assassinated and Teresa and others believed that the smugglers had killed her - because she did not pay for her passage. A short time later, another young woman was shot in her home and the smugglers were again suspected. Teresa was afraid that she would be next. So, she borrowed money from family and friends and returned to Spain.*

## Introduction

The trafficking of women and children has long been of concern to the international community. Beginning in 1904, a series of treaties and agreements were approved requiring

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states to criminalize trafficking and sexual exploitation and to cooperate with each other in prosecuting smugglers and traffickers and rescuing and protecting the victims.<sup>2</sup> Despite recognition that slavery and involuntary servitude violate fundamental human rights, rights-based arguments to support protection of smuggled and/or trafficked women and children are only beginning to be addressed and considered in devising protection strategies in destination countries.<sup>3</sup> Governments have focused primarily on strengthening law enforcement initiatives and migration controls to combat trafficking and smuggling. Recently, there has been more discussion about how to better protect the human rights of trafficking and smuggling victims and how to develop better advocacy efforts on their behalf. Unfortunately, governmental benefits and services provided to victims often depend on their «innocence» in the smuggling or trafficking which resulted in passage to the destination country. Hopefully, with the development of a human rights based approach supporting protection of the victims—both in destination countries and upon repatriation to their home countries—the question of «innocence» will become less and less important in determining ways to remedy the violations that they have suffered.

«Teresa» is a real person who lives in Spain. Some of the facts in her case have been changed and, of course, her real name is not used in this fact pattern. Teresa, like many other immigrant women forced to work in degrading conditions, is triply exploited: first in her home country, as a poor, single mother; second, in her destination country, as an indentured prostitute; and, third, as an undocumented person in the

destination country who will be targeted by her smugglers for persecution upon her return home. Throughout this article, I will refer to the fact pattern to support arguments for greater immigration relief in countries of destination for persons who want to remain and for those who cannot return home because of fear of persecution by their smugglers or traffickers.

The purpose of this article is to offer suggestions for obtaining permanent legal status in destination countries for women who fear returning to their home country or who cannot return because of great economic need. Specifically, the article will discuss relief under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, provide suggestions for improved trafficking visas and, finally, suggest that labour based immigration include work visas for prostitutes.

## Asylum Relief for Trafficking and Smuggling Victims

### *Definition of Refugee*

Persons fleeing persecution in their home country may be entitled to refugee protection under the 1951 United Nations Convention relating to the Status of Refugees (1951 Convention)<sup>4</sup> and the 1967 United Nations Protocol relating to the Status of Refugees (1967 Protocol).<sup>5</sup> The great majority of countries who have ratified the 1951 Convention and 1967 Protocol have also established national laws and norms governing adjudication of requests for refugee or asylum status.<sup>6</sup> In addition to providing protection from return or non-refoulement, both the 1951

<sup>2</sup> See, The International Agreement for the Suppression of the White Slave Traffic (1904); International Convention for the Suppression of White Slave Traffic (1910); Convention for the Suppression of Traffic in Women and Children (1921); Slavery Convention (1926); International Convention for the Suppression of the Traffic in Women of Full Age (1933); Protocol to Amend the International Agreement for the Suppression of the White Slave Traffic, May 4, 1949, 92 U.N.T.S. 21; Protocol to Amend the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 98 U.N.T.S. 103; Protocol to Amend the International Convention for the Suppression of the Traffic in Women and Children, Nov. 12, 1947, 53 U.N.T.S. 40; Protocol to Amend the International Convention for the Suppression of the Traffic of Women of Full Age, Nov. 17, 1947, 53 U.N.T.S. 50; International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 273.

<sup>3</sup> See, «Human Rights Standards for the Treatment of Trafficked Persons» by the Global Alliance Against Traffic in Women, the

Foundation Against Trafficking in Women and the International Human Rights Law Group (January 1999). The standards—drawn from international human rights instruments and international legal norms—aim to protect and promote respect for the human rights of victims of trafficking, including those subjected to involuntary servitude, forced labour and/or slavery-like practices. These standards are available on the website of the IHRLG at <http://www.hrlawgroup.org>.

<sup>4</sup> 1951 United Nations Convention relating to the Status of Refugees, opened for signature, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150. (hereinafter 1951 Convention)

<sup>5</sup> 1967 United Nations Protocol relating to the Status of Refugees, opened for signature, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967). (hereinafter 1967 Protocol)

<sup>6</sup> A refugee is someone who satisfies the definition of refugee under the 1951 Convention and who is accepted for admission and residence in a third country. Asylum is a process through which persons fleeing

Convention and the Protocol provide for a series of rights which countries should provide to refugees, including education (Article 22), travel (Article 28), employment (Articles 17 and 18), housing (Article 21), and social security rights (Article 24).

Under the 1967 Protocol, a refugee is a person who:<sup>7</sup>

... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who not having a nationality and being outside the country of his [or her] former habitual residence..., is unable or, owing to such fear, is unwilling to return to it.<sup>8</sup>

Therefore, the elements which an applicant for refugee or asylum status must prove are:

- A well-founded fear of persecution;
- Because of one of the five grounds: race, religion, nationality, membership in a particular social group or political opinion;
- That she is outside her country of origin, and;
- That she is unable to or unwilling to avail herself of protection of that country.

Based on the circumstances of her case, Teresa may qualify for asylum under the 1951 Convention and the 1967 Protocol. Teresa can argue that she has a well-founded fear of persecution by the smugglers in Colombia — who arranged for her passage, who subsequently held her in slave like conditions in their club in Barcelona and who were responsible for shooting one escapee and killing another in her hometown in Colombia. She faces persecution as a member of a particular social group —a young woman smuggled and forced to work in slave like

conditions who escaped. She is outside her country of origin living in Spain, and is unable to obtain protection from her own country because the police have advised her that they cannot do anything.

### *Gender Based Claims*

Historically, the definition of refugee and asylum protection has been interpreted primarily through the experiences of men fleeing persecution. Therefore, many gender related claims have gone unrecognized. During the past decade, however, the analysis and consideration of gender in the context of refugee protection has advanced in the case law of many countries, in state practice and procedures towards female asylum seekers and in academic scholarship. Although gender is not specifically included in the refugee definition of the 1951 Convention, it is widely accepted that it can be considered in adjudicating asylum claims. The European Union has proposed to its Member States that they recognize gender as a basis for asylum.<sup>9</sup>

What do we mean by gender based claims? The term gender related persecution is used to address the variety of different asylum claims in which gender is a relevant factor in the determination of refugee status. Gender refers to the relationship between men and women based on socially or culturally constructed and defined identities, roles, status and responsibilities assigned to one sex or another. Gender related claims may be brought by men or women.<sup>10</sup> However, due to the particular types of persecution, they are generally brought by women. Gender related claims include acts of sexual violence, family or domestic violence, coerced family planning, female genital mutilation, forced marriages, punishment for

persecution seek protection *after* arriving in the third country. In order to obtain such protection, both the refugee and the asylum seeker must satisfy the elements of the refugee definition in the 1951 Convention.

<sup>7</sup> Refugees include those persons who are resettled as refugees to third countries and persons who apply for and are granted asylum status in third countries.

<sup>8</sup> 1967 United Nations Protocol relating to the Status of Refugees, opened for signature, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967), Article I(2), incorporating by reference Article 1(a)(2) of the 1951 Convention.

<sup>9</sup> Proposed Council Directive on minimum standards for the qualification and status of third party nationals and stateless persons as

refugees or as persons who otherwise need international protection, art. 7(d), art. 12(d), COM (2001) 510 final (12/09/2001).

<sup>10</sup> For example, many male homosexuals fleeing persecution in their countries of origin due to their sexual identity have applied for and been granted asylum protection in several countries, including the United States, Germany, Canada, Australia and the UK. For more on US asylum law and homosexuality, see, Jenni Millbank, Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation, 1 Seattle J. for Soc. Just. 725 (Spring/Summer 2003); Fatima Mohyuddin, United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered, 12 Hastings Women's L. J. 387 (Summer 2001).

failure to obey social norms, honour killings, discrimination against homosexuals and forced prostitution. Trafficking for the purposes of forced prostitution or sexual exploitation constitutes persecution for asylum related purposes. The United Nations High Commissioner for Refugees in its gender guidelines specifically includes forced prostitution and sexual exploitation as forms of persecution and states the following:

Some trafficked women and minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation 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.<sup>11</sup>

The European Council in conclusions regarding the prevention and combating of trafficking discusses asylum claims of trafficking victims. It notes that where a trafficked victim is entitled to seek asylum, the fact that the applicant is a trafficking victim should not interfere with his or her rights to seek asylum or other available forms of residence.<sup>12</sup> The European Parliament issued a resolution stating that it takes the view that persecution on grounds of sex and, specifically, in trafficking in human beings should justify the grant of refugee status.<sup>13</sup> The European Council conclusions and the European Parliament resolution are especially relevant given many EU Member States' reluctance to entertaining non-traditional asylum applications —such as gender based claims involving

non-state actors. Recognition of gender based asylum claims is a relatively new development in Europe. Officials responsible for asylum adjudications in many EU Member States are reluctant to recognize such claims— arguing that the definition of refugee in the 1951 Convention and the 1967 Protocol does not provide protection for such applicants. Additionally, as mentioned below, many adjudicators are reluctant to grant protection in cases involving non-State actors —such as violent spouses, family members or traffickers. Many consider that trafficking cases should be dealt with as a law enforcement problem rather than a protection issue.

Persons raising gender related claims, including survivors of torture and trauma, need a supportive and safe environment in which to tell their story. Many women survivors of such trauma are often reluctant to provide details regarding their claims, fearful of reliving the events and, more often, of being denied relief. Often they continue to fear persons in authority, or fear reprisals from their families and communities. In light of the special and sensitive issues surrounding adjudication of gender based claims, several countries have issued guidelines for its government adjudicators to use in preparing and deciding upon such applications.<sup>14</sup>

### *Well-Founded Fear of Persecution*

In order to satisfy the first requirement, Teresa will have to prove that her fear of persecution is well-founded. The persecution feared can be either past persecution —something which directly happened to her— or a fear of future persecution. Teresa can establish a well-founded fear of persecution based on what she saw and experienced working as a prostitute in the club and subsequent events in Colombia. Specifically, Teresa has a well-founded fear that if she is forced to return to Colombia, the smugglers who arranged her passage, who subsequently held her in slave like conditions in their facility in

<sup>11</sup> UNHCR 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, para. 18 (HCR/GIP/02/01) 7 May 2002.

<sup>12</sup> Council Conclusions of 8 May 2003 - Brussels Declaration on Preventing and Combating Trafficking in Human Beings, para. 13, Official Journal of the European Union (C 137/1) 12/6/2003.

<sup>13</sup> Parliament resolution on the communication from the Commission to the Council and Parliament, entitled «For further actions in the fight against trafficking in women» (09/08/2000) Bulletin EU 5-2000.

<sup>14</sup> Those countries include: Canada; Australia; the Netherlands; Norway; Sweden; United Kingdom, and; United States. For copies of these guidelines, visit the website of the Center for Gender and Refugee Studies at <http://www.uchastings.edu/cgrs>.

Spain and who shot one escapee and killed another in Colombia, will target her.

Teresa has a well-founded fear of persecution based on the murder of the one escapee and the shooting of the other escapee in her hometown. Arguments can be developed and evidence produced—through police reports and affidavits—of these events, which prove that the smugglers—who the local government cannot control—would find and harm her, perhaps even kill her, in Colombia. Her well-founded fear of persecution made her flee her country to seek protection in Spain. In order to satisfy this first prong of the refugee definition, Teresa must also prove that what the others suffered—i.e., the shooting and murder in Colombia—constitute persecution which Teresa could also suffer if forced to return to Colombia. Clearly, murder, life-threatening violence, physical abuse and torture—recognized as fundamental violations of human rights—constitute persecution.<sup>15</sup>

#### *Membership in a Particular Social Group*

Teresa must also establish that her well-founded fear of persecution—fear of physical violence or death if returned to Colombia—is based on one of the five recognized grounds. In this case, we would argue that Teresa is a member of a particular social group targeted for persecution. Specifically, as part of a group of young women, between the ages of 18 and 30, who as a result of suffering indentured servitude as a prostitute, escape and face physical violence or death at the hands of the smugglers or traffickers. Facts in her case prove that at least one other escapee was shot in Colombia, and the other murdered by the smugglers because they escaped and failed to pay their passage. Courts in several countries have granted asylum protection to women who have suffered human rights violations as a result of attempted smuggling or trafficking or who have actually been smuggled or trafficked.

In Spain, a court remanded the case of a Nigerian woman which had been initially denied as inadmissible for further consideration on the merits of the claim by the Office of Asylum and Refugees. The case involved a Nigerian woman, abandoned by her mother as a child, and sexually abused by her aunt and her aunt's friend. This woman was subsequently trafficked to Spain, where she was forced into prostitution, imprisoned and threatened by her traffickers. She was finally able to escape and filed for asylum. The lower authority—the Office of Asylum and Refugees—ruled the case inadmissible, finding that it did not satisfy the elements of the refugee definition as contained in the 1967 Protocol. However, the National Court reversed the administrative decision, finding that the woman in fact could be a member of a particular social group, Nigerian women forcibly trafficked into prostitution, and remanded the matter for adjudication on the merits of the asylum claim.<sup>16</sup>

There have been many cases of asylum filed in the UK by women who were either smuggled—and suffered indentured servitude—or who were trafficked into forced prostitution. Although in some of the cases, the women were «willing victims», meaning that they paid or intended to pay the smuggler for their illegal passage and work in the UK, they were not prepared for the slave-like conditions in which they lived and were forced to work. Many were kept from escaping these conditions by threats against them or their family - similar to what Teresa suffered. In 2001, the UK government granted Extended Leave to Remain (ELR) status to two women who were victims of trafficking. The first case involved that of a Serbian woman abducted in Kosovo where she was forced into prostitution. The second case involved a young woman claiming asylum based on persecution because of her membership in a particular social group, as a young Romanian woman at risk of being trafficked. In both cases, the asylum officers failed to find that the applicants proved eligibility for refugee status which would have granted them permanent legal status but did grant them ELR status, a temporary form of relief.<sup>17</sup>

<sup>15</sup> See, James Hathaway, *The Law of Refugee Status* 102-103 (1991). Hathaway, in discussing the development of persecution as an element of the refugee definition, notes: «From the beginning, there was no monolithic or absolute conceptual standard of wrongfulness, the implication being that a variety of measures in disregard of human dignity might constitute persecution.» Under Hathaway's paradigm, physical assault is a first category rights violation. Execution also is a first category rights violation, the risk of which constitutes persecution.

<sup>16</sup> For a PDF copy of the decision and English translation, see, *International Gender Asylum Decisions and Law* on the website of The Center for Gender and Refugee Studies, at <http://www.uchastings.edu/cgrs>.

<sup>17</sup> See, *Women's Asylum News*, Issue 13 (August 2001) available at <http://www.asylumaid.org.uk>. Several Chinese women who testified against their traffickers were granted ELR status or asylum as reported by Anti-Slavery International. *Human Traffic: Human Rights: Redefining Victim Protection* (Anti-Slavery International 2002).

At least six Chinese women held by organized criminal groups who testified against their traffickers have been granted asylum or ELR status. However, in several other cases the UK Immigration Tribunal has found that trafficked women are eligible for asylum. In one case, the Immigration Tribunal granted the asylum appeal of an Albanian woman who had been sold to a man for marriage who intended to trafficking her into forced prostitution in Italy. In granting asylum, the Tribunal recognized that the Albanian government could not protect her.<sup>18</sup> In *SSH D v. Dzhangun* (00TH00728), the Immigration Tribunal granted asylum to a Ukrainian woman finding she faced persecution based on her membership in a particular social group, that of Ukraine woman forced into prostitution against their will.<sup>19</sup>

There have been several cases based on similar theories—persecution on account of membership in a particular social group—granted asylum protection by immigration courts in the United States. An immigration court granted asylum to 21 year old Russian woman, who had been abducted by a local crime figure, gang raped by he and his friends and then forced to have sexual relations with he and other men in his home on a nightly basis. The local police refused to intercede and the woman was held as a sexual prisoner for a period of time. At one point, she tried to escape but was caught and beaten. Her captor gave her away to another crime figure, in Moscow, who was planning to traffic her to Israel or Turkey for forced prostitution. She was finally able to escape and fled to the United States. The immigration court granted her asylum based on her well-founded fear of persecution as a member of a particular social group, including young women forced into prostitution and threatened with trafficking.<sup>20</sup>

In another case, a U.S. immigration court granted asylum to an Albanian woman who suffered similar abuses. In this case, after the woman's husband had emigrated to the United States, the local chief of police began harassing her. He propositioned her on the street and threatened to send her to Italy for prostitution. She was afraid and stayed in her home all the time.

One night, the police chief and three of his friends abducted her from her home and took her to a building where they gang raped her. After being held for several hours, she returned home. Soon after, she began to receive threatening calls. She hired a lawyer, but the police chief went to the lawyer's home and threatened and tortured her. The lawyer fled the country and warned her client to do so. Shortly thereafter, the woman fled to the United States and applied for asylum. The immigration court, in granting asylum, found that she had a well-founded fear of persecution on account of her membership in the particular social group of women in Albania threatened with being trafficked to Italy to engage in forced prostitution.<sup>21</sup>

In a third case, a U.S. immigration judge granted asylum to a young Thai woman who had been given away by her parents to a man named «Pa.» The young woman was an indentured domestic servant during the ten years that she lived with «Pa» who during this period of time regularly beat and raped her. She was subsequently sent by him to Bangkok, where she worked in a beauty salon and was raped and sexually abused by the male customers, including members of the police. Finally, a woman—part of a Thai smuggling operation—approached her and arranged for her travel to the United States. Upon arrival, smugglers were to meet the young woman and force her to work to pay off her passage. The young Thai woman accepted the offer and traveled to the United States. Luckily, at the time the young woman was leaving Thailand, the woman in charge of her travel and subsequent «work» in the United States was arrested by the police and put in jail. After arrival in the United States, the young Thai woman discovered that the smugglers were looking for her in Bangkok, demanding payment of her passage. In fear for her life, she applied for asylum. In granting asylum, the immigration judge found that the applicant was a member of a social group, forced into indentured servitude and trafficked to the United States.<sup>22</sup>

It should be noted that the UNHCR recognizes that sex or gender may be included in considering whether a persons is a

<sup>18</sup> See, Women's Asylum News, Issue 34 (July 2003) available at <http://www.asylumaid.org.uk>

<sup>19</sup> See, Women's Asylum News, Issue 34 (July 2003) available at <http://www.asylumaid.org.uk>

<sup>20</sup> See, Case Summary 275, on the website of The Center for Gender and Refugee Studies at <http://www.uchastings.edu/cgrs>

<sup>21</sup> See, Case Summary 330, on the website of The Center for Gender and Refugee Studies at <http://www.uchastings.edu/cgrs>

<sup>22</sup> See, Case Summary 560, on the website of The Center for Gender and Refugee Studies at <http://www.uchastings.edu/cgrs>

member of a particular social group - one of the five grounds enumerated in Article 1A(2) of the 1951 Convention.<sup>23</sup> As previously mentioned, the European Union has proposed to its Member States that they recognize that particular social group include gender as a basis for asylum.<sup>24</sup>

#### *Non-State Actor and Government Failure to Protect*

The 1951 Convention and the 1967 Protocol do not define who the persecutor must be in order for a person to qualify for protection from that persecutor. For many years, the traditional persecutor in the majority of asylum and refugee cases has been the government or governmental agents of the country from which the asylum seeker is fleeing. However, as the worldwide geopolitical situation has changed over the years, today many persecutors are non-governmental agents, guerrilla groups, mafia and individuals against whom governments either are unwilling or unable to protect their citizenry from. Therefore, thousands and thousands of asylum seekers around the world have fled persecution from these non-state actors because their government has failed to protect them. In gender based claims, these non-state actors include abusive partners, oppressive family members and trafficking and smuggling organizations.

Most refugee receiving countries agree that in addition to governmental agents, persecutors may also include non-state entities or persons that the government is unwilling or unable to control. The non-state actor doctrine is well established in jurisprudence from many state parties to the 1951 Convention, including the United States,<sup>25</sup> Canada,<sup>26</sup> Australia,<sup>27</sup> and New Zealand.<sup>28</sup> Many European countries also recognize that asylum seekers who suffer persecution by non-state actors may qualify for refugee protection. However, some countries require that states must be complicit in the persecution either through encouraging it or tolerating it.<sup>29</sup> Others hold the position that if a government is willing—but unable—to protect, that such inability cannot support a claim for asylum.<sup>30</sup> The European Union has proposed that its Member States recognize that non-State actors may be persecutors for refugee status determination purposes.<sup>31</sup> The UNHCR, in noting that claims asserting refugee status based on membership of a particular social group often involve claimants who face risk of harm by non-State actors, emphasizes that there is no requirement that the persecutor be a State actor.<sup>32</sup>

Under refugee laws and norms, a state fails in its obligation towards its people when it does not provide meaningful protection from harm by non-state actors, even absent active culpability of the state or its agents.<sup>33</sup> Persecution may be found

<sup>23</sup> UNHCR Guidelines on International Protection: «Membership of a particular social group» within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para. 12 (HCR/GIP/02/02) 7 May 2002.

<sup>24</sup> Proposed Council Directive on minimum standards for the qualification and status of third party nationals and stateless persons as refugees or as persons who otherwise need international protection, art. 7(d), art. 12(d), COM (2001) 510 final (12/09/2001).

<sup>25</sup> In Re O-Z- & I-Z- , 22 I&N Dec. 23 (BIA 1998) (anti-Semitic nationalist groups persecuted applicants); In re Villalta, 20 I&N Dec. 142 (BIA 1990) (death squad in El Salvador agent of persecution); In Re McMullen, 17 I&N Dec. 542 (BIA 1980) (Provisional Irish Republican Army agent of prosecution); Rosa v. INS, 449 F.2d 199 \*1<sup>st</sup> Cir. 1971) (persecutor does not apply only to state actors).

<sup>26</sup> See, Canada (Attorney General) v. Ward [1993] 2 S.C.R. 689 (refugee law requires protection of those whose home state cannot or do not afford protection to them from persecution).

<sup>27</sup> See, Mary E. Crock, Immigration and Refugee Law in Australia 148-49 (1998) (discusses recognition of non-state actor doctrine in context of asylum claims based on domestic violence).

<sup>28</sup> See, Refugee Appeal No. 2039/93 Re MN, at 17 (Refugee Status Appeals Authority, Feb. 12, 1996) (New Zealand) (accepting that

1951 Convention requires protection from persecution by non-state actors).

<sup>29</sup> For an overview of the position of several European countries regarding persecution by third parties, see, Ben Vermeulen et al., University of Nijmegen, Centre for Migration Law, Persecution by Third Parties (1998).

<sup>30</sup> ARK 6 June 1996, no. 28. (Switzerland) (Algeria's inability to protect against fundamental Islamists does not support claim for asylum).

<sup>31</sup> Proposed Council Directive on minimum standards for the qualification and status of third party nationals and stateless persons as refugees or as persons who otherwise need international protection, art. 9.1 COM (2001) 510 final (12/09/2001).

<sup>32</sup> UNHCR Guidelines on International Protection: «Membership of a particular social group» within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para. 20 (HCR/GIP/02/02) 7 May 2002; UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 65 (Geneva 1992).

<sup>33</sup> See, James Hathaway, The Law of Refugee Status 104 (1991) (commenting on the Convention drafter's concern to identify forms of harm reflective of a breach by a state of its obligations of protection).

in «behaviour tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State.»<sup>34</sup> The language of the 1951 Convention refugee definition itself emphasizes state responsibility for actions not directly attributable to them by including protection for persons who flee because the state is not only *unwilling* but also *unable* to provide protection.<sup>35</sup> The UNHCR's Handbook notes that private acts of violence «can be considered persecution if they are knowingly tolerated by the authorities, or the authorities refuse, or prove unable, to offer effective protection.»<sup>36</sup> Principles and basic instruments of human rights law also recognize state responsibility for human rights violations committed by non-state actors.<sup>37</sup> Virtually all human rights conventions and treaties contain language requiring states to control the activities of non-state actors so as to protect against human rights violations.<sup>38</sup>

In Teresa's case, we would argue that the Colombian government was unwilling to provide protection to her from the smugglers. Although the police were willing to take information from Teresa regarding the circumstances of her smuggling and the things she suffered, they were not willing to pursue any further investigation. Proof of a government's unwillingness or inability to protect can include information relating failure to prosecute non-state actors who violate human rights, the lack of laws designed to protect persons such as Teresa from the wrath of smugglers and traffickers and the ongoing impunity enjoyed by smugglers and traffickers evidenced by their continued business.

### Conclusion

Spain should grant asylum to Teresa based on the arguments made above. Teresa has a well-founded fear of persecution of the smugglers in Colombia should she be forced to return.

Although she traveled to Spain with the knowledge that she would be working as a prostitute, she did not anticipate that she would be working in slave like conditions from which she had to escape. Although she hoped to return to Colombia and live in peace, she discovered that others in her situation—who had escaped the clubs—were targeted. One woman was shot and wounded and another was murdered by the smugglers. The police have not investigated the cases and no one has been prosecuted. Her persecutors—the smugglers—would target her because of her membership in a particular social group, a young woman who escaped the smugglers. Fearing that she would be harmed, maybe even killed, Teresa fled Colombia and seeks asylum protection from the Spanish government.

The fact that Teresa initially moved to Spain «willingly», and entered the country illegally, should not affect her application for asylum. Under Article 31 of the 1951 Convention, states are prohibited from imposing penalties on refugees for their illegal entry or presence.

### Special Trafficking Visas

Many countries of destination for victims of traffickers have established special trafficking visas, often providing only temporary legal status, based on the cooperation of the victim in the investigation and prosecution of traffickers.<sup>39</sup> Most countries also provide a range of social, medical and housing services in conjunction with NGOs working with victims of smugglers and traffickers during the investigation and prosecution of traffickers. Austria provides temporary residence to victims of trafficking, with the possibility of obtaining long term residence. Under Canadian gender asylum guidelines, victims of trafficking are eligible to apply for asylum protection. However, many trafficking victims are also

<sup>34</sup> See, 1 Atle Grahl-Madsen, *The State of Refugees in International Law* 189 (1966).

<sup>35</sup> 1951 Convention, art. I(A)(2).

<sup>36</sup> United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, para. 65 (Geneva 1992)

<sup>37</sup> See, generally, Stephanie Farrow, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 *Am. Society of Int'l L. Proc.* 209 (1998); Deborah Anker et al., *Women Whose Governments Are Unable*

or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees under United States Asylum Law, 11 *Geo. Immigr. L. J.* 709 (1997).

<sup>38</sup> Stephanie Farrow, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 *Am. Society of Int'l L. Proc.* 299, 301 (1998).

<sup>39</sup> For a review of procedures in Belgium, Germany, Italy, the Netherlands, Spain and the United Kingdom, see, Aika van der Kleij, *Provisions for Victims of Trafficking in Bonded Sexual Labour, i.e. Prostitution - in 6 European Countries* (2002) available at [http://www.humanitas.nl/project/Blinn\\_Final\\_Report.pdf](http://www.humanitas.nl/project/Blinn_Final_Report.pdf).



deported.<sup>40</sup> In Denmark, short term permits of fifteen days are granted to victims of trafficking to permit them to prepare for repatriation. Many victims are also deported from Denmark because they have no legal status. In France, the government grants temporary visas to women who apply for asylum or who pursue lawsuits against their employers. Also, temporary visas are granted for cooperation with the police in investigation of trafficking networks. If a trafficker is convicted as a result of such cooperation, a permanent visa is granted. In the UK, the government grants temporary visas for victims of trafficking under certain circumstances.<sup>41</sup> In the United States, temporary visas are available to victims of severe trafficking. In order to prove eligibility for this temporary visa, applicants must establish that they are victims of a severe form of trafficking in persons, that they have complied with reasonable requests for assistance in the investigation or prosecution of acts of such trafficking and that they would suffer extreme hardship involving unusual and severe harm upon removal.<sup>42</sup>

Many of the temporary visa schemes of several countries require a high level of participation in the investigation and prosecution of traffickers. Also, they are generally available only to victims of trafficking, and not to victims of smugglers who often suffer similar human rights violations. For example, in order to be eligible to receive the temporary visa for trafficking victims in Spain, victims must cooperate with police investigations and provide testimony before they can receive legal status. Also, the visas are available only to victims of trafficking. Therefore, Teresa—even if she agrees to cooperate with the police and provide information regarding labour and human rights violations committed by the club owners—is not eligible for this visa because she paid a smuggler. According to the police, such visas are only eligible for «innocent» victims.

The temporary visa regime in many states falls short of its intended dual goals of assisting law enforcement efforts and providing protection for the victims. First, because of the level of

cooperation required under many schemes, most victims may be afraid to cooperate. Given the precariousness of their legal situation in the destination country, the fact that family members at home often depend on their income and the possibility of serious reprisals should they cooperate, many women forgo such collaboration with the police. This is especially so since granting of the visa is often dependent upon variables beyond the victim's control—the determination regarding the «essential» nature of the information provided by the victim and the conviction of the trafficker. In many cases, the trafficking victim may not have the «essential» information necessary for the conviction of the trafficker. She may be privy only to general information which the police already have in its possession.

States should revisit the temporary visa schemes in effect in their countries to determine if they are in fact accomplishing the goals of improved law enforcement efforts and real protection for the victims of trafficking and smuggling. In reviewing their visa schemes, states should refer to the Human Rights Standards for the Treatment of Trafficked Persons<sup>43</sup> and the Model Law to Combat Trafficking in Persons developed by the United States Department of State.<sup>44</sup> Victims of trafficking who are witnesses or potential witnesses should be eligible for witness protection and relocation programs. Such programs should include: relocation; new identity documents establishing the identity; new resident, employment and work permits, and; protection of confidentiality of identity and location. Additionally, governments should provide victims of trafficking and their accompanying children with appropriate visas to permit them to remain in the destination country during the pendency of the investigation against the traffickers as long as the victim complies with reasonable requests for assistance in the investigation and prosecution of the trafficker(s). Victims of trafficking and their accompanying children should also be given the opportunity to receive permanent residence in the

<sup>40</sup> Immigration and Refugee Board, Guidelines for Women Refugee Claimants Fearing Gender Related Persecution (Nov. 1996) available on the website for The Center for Gender and Refugee Studies at <http://www.uchastings.edu/cgrs>

<sup>41</sup> For a description of protection offered to victims of smuggling and trafficking in countries around the world, see, Trafficking in Persons Report , U.S. Department of States (June 2003) available on the Department of State website at <http://www.state.gov>

<sup>42</sup> 8 C.F.R. § 214.11(b)(1), 214.11(b)(3)(i), 214.11(b)(4).

<sup>43</sup> «Human Rights Standards for the Treatment of Trafficked Persons,» by the Global Alliance Against Traffic in Women, the Foundation Against Trafficking in Women and the International Human Rights Law Group (January 1999). These standards are available on the website of the IHRLG at <http://www.hrlawgroup.org>

<sup>44</sup> Model Law to Combat Trafficking in Persons, U.S. State Department (March 12, 2003) available on the DOS website at <http://www.state.gov>

country under certain circumstances, especially where they would face extreme hardship or harm if returned to their home country.

The European Union Council of Justice and Home Affairs ministers reached an agreement on November 6, 2003 on a directive which would grant residence permits for a minimum of six months to third-country nationals victims of trafficking in human beings who find themselves in any of the EU member states. Before the directive can be formally adopted, two national parliaments still have to withdraw reservations. Under the directive, victims of trafficking who cooperate with authorities will receive assistance and be issued permits allowing them to reside and work legally in the EU member state during the proceedings.<sup>45</sup> In May 2003, the Council also issued conclusions regarding trafficking which included recommendations for assistance to victim witnesses. The suggested recommendations are similar to those included in the U.S. Department of State Model Law.<sup>46</sup>

### Employment Based Visas

A discussion addressing whether sex work is a legitimate occupation choice for some women or whether prostitution should be banned is beyond the scope of this paper. Further, this author is unclear on where she stands on the issue as there are clearly legitimate arguments on both sides. However, if we assume that sex work is a legitimate occupational choice and the country in which it is practiced does not consider it illegal, then the question becomes why countries with a shortage of workers in the sex industry do not issue employment based visas to fill those jobs.

In Spain, for example, although prostitution is not legal, it is not penalized by the authorities. It is, therefore, alegal. There is a

high demand for prostitutes, especially in the hundreds of Clubs in cities and rural areas throughout Spain. Some statistics suggest that over 70% of the prostitutes in Spain are foreign born. Most of those are undocumented and have been either trafficked to the country for forced prostitution or smuggled voluntarily with prior knowledge. Given that Spanish nationals are unwilling or unable to perform services in the sex industry—evidenced by the high number of foreign nationals working as prostitutes—it seems only logical that Spain and countries in similar positions consider making employment visas available to women interested in working in the sex industry.<sup>47</sup> Although this alternative would not necessarily solve the issue of trafficking into forced prostitution, it would certainly affect the smuggling business. If women could legally apply for employment visas to enter and work in Spain, using the services of the smuggler would be unnecessary. Women then would not be burdened with huge debt and could, after arrival, exercise their rights to demand fair labour conditions in their jobs.

### Conclusions

This paper does not pretend to address in detail all potential avenues of immigration related relief for victims of trafficking and smuggling. Instead, it is intended to promote a discussion on what cracks still exist in systems of protection and to stimulate brainstorming on more effective ways to provide support, assistance and long term status to trafficking and smuggling victims. The emphasis on victim assistance and protection in the US Model Law, the European Council directive and the several national laws mentioned is encouraging. However, such assistance and protection often depends on the nature or value of the information or testimony to be provided by the victims—many of whom may not necessarily have vital details about the smuggling and trafficking rings—and the

<sup>45</sup> See, 2538<sup>th</sup> Council meeting, Justice and Home Affairs, Brussels, 6 November 2003 (13747/03 (Presse 308). 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 competent authorities, Brussels, Feb. 11, 2002, COM(200) 71 final, 2002/0043 (CNS) available at [http://www.europa.eu.int/eur-lex/en/com/pdf/2002/en\\_502PC0071.pdf](http://www.europa.eu.int/eur-lex/en/com/pdf/2002/en_502PC0071.pdf).

<sup>46</sup> Council Conclusions of 8 May 2003 - Brussels Declaration on Preventing and Combating Trafficking in Human Beings, paras. 13, 14, 15, Official Journal of the European Union (C 137/1) 12/6/2003.

<sup>47</sup> The European Court of Justice has issued a decision holding that prostitution is an «economic activity» and, therefore, Polish and Czech nationals can work as self-employed sex workers in EU on the same basis as nationals. Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie, Case C-269/99 (Nov. 20, 2001).

interpretation of «cooperation» by the investigating authorities. These variables will likely result in a failure to protect many needy and deserving victims of human rights violations.

In cases where women can prove eligibility, asylum can and should be pursued as an avenue of relief for those who cannot comply with requirements for special trafficking visas. Asylum may be the only relief available to victims of smuggling, many of whom suffer serious violations of human rights subsequent to being smuggled.

Finally, in countries where prostitution is legal, governmental authorities should discuss the possibility of providing labor visas for foreign born women who wish to work as prostitutes. Such visas would greatly reduce the need for smugglers in this area. However, given the dangers that women are exposed to in the sex industry, creation of a labor visa scheme is not enough. Governments should also regularly monitor the labor and related conditions of foreign born women working in the prostitution trade to guarantee that all of their rights are respected.

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