

## HUMAN SECURITY OR STATE SECURITY? THE OVERRIDING THREAT IN TRAFFICKING IN PERSONS\*

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### *I. Introduction*

Trafficking in persons<sup>1</sup> is a violation of human rights that mainly affects women and children. For this reason, it should be recognized not only as a crime against the state but as a crime against the individual that poses a threat to human security. This paper will inquire into how national legal systems take into consideration the concept of human security in designing the appropriate legal response to trafficking in persons.<sup>2</sup> This paper will focus on the following issues: personal security and safety versus human security; the methods that can be employed by legislation to protect the rights

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<sup>1</sup> This concept is also commonly referred to as "human trafficking" or "trafficking in human beings." For an overview of various definitions of trafficking, see generally Daan Everts, *Human Trafficking: The Ruthless Trade in Human Misery*, 10 BROWN J. WORLD AFF. 149 (2003), Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN'S L.J. 31 (2002), and Alison N. Stewart, *Report From the Roundtable on the Meaning of "Trafficking Persons,"* 20 WOMEN'S RTS. L. REP. 11 (1998).

<sup>2</sup> This paper analyzes one level of government responses to trafficking in persons as a human security. See COMMISSION ON HUMAN SECURITY, HUMAN SECURITY NOW 7-11 (2003), <http://www.humansecurity-chs.org/finalreport/> (last visited Mar. 25, 2006), for a discussion on the suggestion that human insecurities comprise a five-level vertical structure consisting of insecurities at the individual, community, national, regional, and global levels.

of a trafficking victim; causes of human insecurity; trafficking in persons as a threat against the individual, not the state; recognition of all forms of trafficking; confronting all actors in the trafficking enterprise; and the involvement of NGOs and civil society in the fight against trafficking in persons. I will argue that understanding the real threat in cases of trafficking in persons affects the rules that a legal system must incorporate to combat the problem.

## *II. Personal Security and Safety vs. Human Security*

Addressing the security of the trafficked person as a part of a person's right to security is limited in scope. Security, in this sense, is confined to personal security as opposed to human security. That was the approach adopted by traditional international law. The concept of security of the individual was defined as personal in nature. For instance, the Universal Declaration of Human Rights ("UDHR") states that "[e]veryone has the right to . . . security of person."<sup>3</sup> Similarly, the International Covenant on Civil and Political Rights ("ICCPR") states that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."<sup>4</sup>

Similarly, when the right to individual security is addressed in national constitutions, the definition is generally limited to the right to liberty and security of a person and protection from bodily harm. Perhaps, the most extensive definition of this right is contained in the Constitution of the Republic of South Africa 1996, which is defined as:

[T]he right (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured

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<sup>3</sup> Universal Declaration of Human Rights, art. 3, GA. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

<sup>4</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

## 2006] HUMAN SECURITY OR STATE SECURITY? 251

in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.<sup>5</sup>

Limited definitions of the right to personal security are also provided under Article 18 of the Constitution of Armenia, Article 31 of the Constitution of Azerbaijan, Article II.3(d) of the Constitution of Bosnia and Herzegovina, Article 32 of the Constitution of Cambodia, Article 11(1) of the Constitution of Cyprus, Article 20(1) of the Constitution of Estonia, Article 14 of the Constitution of Ethiopia, Article 7(1) of the Constitution of Finland, Article 55(1) of the Constitution of Hungary, Article 94 of the Constitution of Latvia, Article 20(a) of the Constitution of Liberia, Article 32(a) of the Constitution of Malta, Article 9(1) of the Constitution of Paraguay, Article 41(1) of the Constitution of Poland, Article 27(1) of the Constitution of Portugal, Article 23(1) of the Constitution of Romania, Article 17(1) of the Constitution of Spain, Article 19(1) of the Constitution of Turkey, and Article 47(a) of the Constitution of Yemen.<sup>6</sup>

When the right to security was addressed in human rights discussions, it was mainly defined as personal security, which was interpreted as the right to liberty and safety from bodily harm. By contrast, the new concept of human security is broader than merely personal security, personal safety, or the right to security.<sup>7</sup> The concept was first introduced in the United Nations Development Program's 1994 HUMAN DEVELOPMENT REPORT: NEW DIMENSIONS OF HUMAN SECURITY ("Report"), with the intent "to bridge the concepts of the freedom from want and freedom from fear[, which] lay at the

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<sup>5</sup> S. AFR. CONST. 1996, ch. 2, § 12(1), [www.Polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1](http://www.Polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1) (last visited Mar 31, 2006).

<sup>6</sup> For texts, see International Constitutional Law, <http://www.oefre.unibe.ch/law/icl/index.html> (last visited Mar. 25, 2006). It should be noted that the trend towards including the right to personal security in domestic constitutions is relatively recent; most of the constitutions listed in this paragraph were adopted or fundamentally revised during the 1990s.

<sup>7</sup> See generally SABINA ALKIRE, CENTRE FOR RESEARCH ON INEQUALITY, HUMAN SECURITY AND ETHNICITY, A CONCEPTUAL FRAMEWORK FOR HUMAN SECURITY, WORKING PAPER 2 (2002), available at <http://www.crise.ox.ac.uk/pubs/workingpaper2.pdf>.

heart of the philosophy of the United Nations.”<sup>8</sup> The former freedom has been interpreted to mean freedom from violence, while the latter has been interpreted to mean freedom from poverty.<sup>9</sup> Presenting human security as the “safety from chronic threats as hunger, disease and repression” and the “protection from sudden and hurtful disruptions in the patterns of daily life”,<sup>10</sup> the Report also defined seven different dimensions of human security, which include economic, food, health, environmental, personal, community, and political security.<sup>11</sup> Alternatively, the Report of the International Commission on Intervention and State Sovereignty entitled *THE RESPONSIBILITY TO PROTECT* covers “the security of *people* against threats to life, health, livelihood, personal safety, and human dignity . . . .”<sup>12</sup> Thus, human security, in an extended definition of the concept, “encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfill his or her own potential.”<sup>13</sup> It seeks “to protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment.”<sup>14</sup> In essence, human security can encompass almost anything related to people’s lives, as it includes “freedom from death, poverty, pain, fear or whatever else makes people feel insecure.”<sup>15</sup>

### *III. How Can Legislation Protect the Rights of a Trafficked Victim?*

The right to safety of the trafficked person may be protected by defining trafficking in persons as a violent crime. In many cases, trafficking in persons involves *violent commodities*, where those who

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<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Id.*

<sup>10</sup> U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 23 (1994).

<sup>11</sup> *Id.* at 24-33 (describing each of these dimensions of human security).

<sup>12</sup> INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* 15 (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

<sup>13</sup> COMMISSION ON HUMAN SECURITY, *supra* note 2, at 4.

<sup>14</sup> ALKIRE, *supra* note 7, at 48.

<sup>15</sup> SADAKO OGATA, OVERVIEW FOR THE COMMISSION ON HUMAN SECURITY 1 (2001), available at <http://www.humansecurity-chs.org/activities/meetings/first/overview.pdf>.

demand or supply a particular commodity frequently practice violence in order to satisfy their demand or to protect their supply.<sup>16</sup> Typically, this occurs in the so-called *violent entrepreneur model of trafficking*, where the trafficker relies on violence in all stages of the trafficking operation.<sup>17</sup> Trafficking in persons, as well as many of its aspects such as forced prostitution, necessarily involves violence against women. Therefore, under the U.N. Declaration on the Elimination of Violence against Women, violence against women is defined to include trafficking in persons.<sup>18</sup> Consequently, a national legal system may protect the right to personal security and personal safety of the trafficked person by making violence, or the threat of violence, an *illegal means*, the existence of which makes trafficking in persons a crime.<sup>19</sup>

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<sup>16</sup> See generally Alex Y. Seita, *Conceptualizing Violence: Present and Future Developments in International Law: Panel I: Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: The Role of Market Forces in Transnational Violence*, 60 ALB. L. REV. 635 (1997) (analyzing how the market forces of supply and demand can lead to transnational violence).

<sup>17</sup> See generally Louise Shelley, *Trafficking in Women: The Business Model Approach*, 10 BROWN J. WORLD AFF. 119 (2003) (presenting various business models of trafficking in women).

<sup>18</sup> Declaration on the Elimination of Violence against Women, art. 2(b), G.A. Res. 48/104, U.N. GAOR, 48th Sess., U.N. Doc. A/48/49 (Dec. 20, 1993) (“[v]iolence against women shall be understood to encompass, but not be limited to, the following: . . . (b) Physical, sexual and psychological violence occurring within the general community, including . . . trafficking in women and forced prostitution . . .”).

<sup>19</sup> “Illegal means” should be defined very broadly to include debt bondage, disclosure of confidential information to the victim’s family or to other persons, confiscation of travel documents, abuse of power, abuse of office, bribery, abuse of a position of vulnerability and other illegal or improper means. For example, Article 3(a) of the 2000 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime defines “illegal means” to include the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or giving or receiving of payments or benefits to achieve the consent of a person having control over another person. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature*, Dec. 12, 2000, art. 2(b), G.A. Res. 55/25, at 60, U.N. GAOR, 55th Sess., Supp. No. 49, Annex II, U.N. Doc. A/RES/55/383 (Nov. 15, 2000) (*entered into force* Sept. 29, 2003) [hereinaf-

The legislation may also protect the right to safety of the trafficked person by making violence and the threat of violence, as well as bodily harm or death, an aggravated circumstance that enhances the penalty for the crime of trafficking.<sup>20</sup> Further, fear of violence may be designated as a ground for enrolling a trafficked person in a witness protection program. Finally, the right to safety of the trafficked person may be protected by making the fear of reprisal from the trafficker a ground for granting the victim a residency status in the country of destination.

#### *IV. Causes of Human Insecurity*

Applying the extended concept of human security means that it is necessary to address not only the right of the trafficked person to personal safety, but the other aspects of human security as well, including economic security, political security, legal security, and community or cultural security. Thus, it is imperative that the causes

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ter U.N. Protocol]. Under section 103 of the United States Trafficking Victims Protection Act of 2000, "illegal means" include the use of force, fraud, or coercion, and "coercion" is further defined to include "(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process." Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.) [hereinafter VTVPA]. Division A of the VTVPA is further identified as the Trafficking Victims Protection Act of 2000 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000), which incorporates 18 U.S.C. §§ 1589-1594 (2000)) [hereinafter TVPA].

<sup>20</sup> The new anti-trafficking articles in the criminal codes of many countries contain such provisions. This is the case, for instance, under Article 217 of the Criminal Code of Austria, Article 181 of the Criminal Code of Belarus, Article 204 of the Criminal Code of the Czech Republic, Article 181 of the Criminal Code of Germany, Article 165 of the Criminal Code of Moldova, Article 201a of the Criminal Code of Montenegro, Article 250a of the Criminal Code of the Netherlands, Article 127-a of the Criminal Code of the Russian Federation, Article 111b of the Criminal Code of Serbia, and Article 167 of the Criminal Code of Tajikistan. See 2005 Human Rights Reports, The Protection Project, <http://www.protectionproject.org/pub.htm> (follow "Navigate" drop-down box to "Human Rights Reports") (last visited Apr. 7, 2006). Translations of all of the aforementioned criminal code provisions are on file with the author.

of insecurity of the trafficked person be explored. In the context of trafficking in persons, the primary causes of insecurity are economic, social, cultural, legal, and political insecurities.

Economic insecurity is addressed directly in the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (“U.N. Protocol”), which mentions poverty, underdevelopment, and lack of equal opportunities as being among the root causes of trafficking in persons.<sup>21</sup> Economic insecurities may also be extended to include unemployment and the lack of access to basic health care, education, and social welfare.

Social insecurity is concerned with the low status of women in society. This involves gender inequality and sex discrimination in education, employment, access to legal and medical services, and access to information. This also includes violence against women, sexual violence or abuse, and domestic violence.

Cultural insecurity is related to social insecurity in a number of ways. For example, in many societies there exist harmful cultural practices, such as arranged marriages, early marriages, temporary marriages, marriages by catalog or mail order, and other forms of sexual exploitation which contribute to the trafficking infrastructure.<sup>22</sup> Further, in many societies, cultural norms affect the manner in which women respond to trafficking. For instance, women from Muslim countries who are trafficked into prostitution would find it more difficult to reintegrate into their families and communities after being freed from exploitation.<sup>23</sup> Many trafficked women may also

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<sup>21</sup> See U.N. Protocol, *supra* note 19, art. 9.4.

<sup>22</sup> See Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 *FORDHAM INT’L L.J.* 721, 730-33 (2003) (discussing the Islamic institutions of early marriage and temporary marriage and their role in the trafficking infrastructure of some countries of the Middle East).

<sup>23</sup> See, e.g., NICOLE BALL, REPORT OF A CONFERENCE ORGANIZED BY THE PROGRAMME FOR STRATEGIC AND INTERNATIONAL STUDIES, GRADUATE INSTITUTE OF INTERNATIONAL STUDIES (2001), [http://www.humansecuritynetwork.org/docs/report\\_may2001\\_3-e.php](http://www.humansecuritynetwork.org/docs/report_may2001_3-e.php) (last visited Mar. 13, 2006).

have contracted HIV/AIDS or other sexually transmitted diseases, reporting of which is considered shameful in these traditional societies.

Legal insecurity is manifested in the lack of access to the criminal justice system, which occurs either because the trafficked person is a foreigner, lacks access to legal representation, or the system itself does not offer an appropriate remedy. In addition, the insecurity is fostered by the Double Witness Rule or the Corroborative Evidence Rule, which is still applied in the criminal procedure of many countries. The Double Witness Rule or the Corroborative Evidence Rule does not allow treating victims of trafficking as credible witnesses. It prohibits the admission of evidence of only one witness unless her testimony is corroborated by another witness or other material evidence implicating the accused. As a result of this insecurity, trafficked persons are not afforded the opportunity to be heard in court.

In addition to economic, social, cultural and legal insecurity, political insecurity may be a reason behind trafficking in persons. This is particularly the case in the former soviet republics, where transition from communism to democracy, civil unrest, loss of national identity, and political instability have all created a favorable environment for organized crime, including trafficking in persons.<sup>24</sup>

#### *V. Trafficking in Persons: From Prohibition to Prevention and Protection*

A human security approach to the problem of trafficking in persons requires addressing the aforementioned causes of insecurity and taking the appropriate steps to eliminate those causes. In this respect, prevention of the contributing factors to trafficking in persons, or of the causes of human insecurity that make women and children

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<sup>24</sup> It has been suggested that threats to human security of the former Soviet countries arise from four interrelated transitions: "1) identity and nation-state building, 2) economic liberalization, 3) social reform, and 4) political liberalization." See DR. KATHLEEN COLLINS, COMMISSION ON HUMAN SECURITY, HUMAN SECURITY IN CENTRAL ASIA: CHALLENGES POSED BY A DECADE OF TRANSITION (1991-2002) 2 (2002).



## 2006] HUMAN SECURITY OR STATE SECURITY? 257

vulnerable to trafficking, becomes the key. Prevention and protection are implied by a broad definition of human security, as opposed to the prohibition approach which is the focus of a limited concept of personal safety.<sup>25</sup>

The limited prohibition approach to trafficking in persons was reflected in the traditional international law that existed prior to the U.N. Protocol. For instance, UDHR stated that “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”<sup>26</sup> The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery outlawed practices such as debt bondage, serfdom, bride price, and exploitation of child labor.<sup>27</sup> The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) prohibits “exploitation of prostitution of women” and “all forms of traffic in women.”<sup>28</sup> The U.N. Convention on the Rights of the Child mandates that state parties prohibit “the abduction of, the sale of or traffic in children for any purpose or

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<sup>25</sup> Numerous writings have suggested that prevention of human insecurities and protection of human security should be the preferred responses to these issues. See, e.g., KOFI A. ANNAN, UNITED NATIONS, “WE THE PEOPLES”: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 44-45 (2000) (“[t]here is near-universal agreement that *prevention* is preferable to cure, and that strategies of prevention must address the root causes of conflicts, not simply their violent symptoms”) (emphasis added); CANADA DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE, FREEDOM FROM FEAR: CANADA’S FOREIGN POLICY FOR HUMAN SECURITY 7 (2002), available at [http://www.humansecurity.gc.ca/pdf/freedom\\_from\\_fear-en.pdf](http://www.humansecurity.gc.ca/pdf/freedom_from_fear-en.pdf), (stating that “the responsibility to protect has three dimensions: to prevent, to react, and to rebuild“, the most important of them being *prevention*) (emphasis added); INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 12, at 6 (“there is growing recognition worldwide that the *protection* of human security, including human rights and human dignity, must be one of the fundamental objectives of modern international institutions”) (emphasis added).

<sup>26</sup> UDHR, *supra* note 3, art. 4.

<sup>27</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, Sept. 7, 1956, 226 U.N.T.S. 3.

<sup>28</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

in any form.”<sup>29</sup> Similarly, ILO Convention No. 182 on the Elimination of the Worst Forms of Child Labor prohibits “the use, procuring or offering of a child for prostitution . . . [.]”<sup>30</sup> Finally, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits “recruit[ment] and use in hostilities [of] persons under the age of 18 years.”<sup>31</sup>

However, it was the U.N. Protocol<sup>32</sup> that shifted the focus from prohibition to the prevention of the act of trafficking and the protection of victims. The U.N. Protocol became international law in December 2003, after it was ratified by forty countries.<sup>33</sup> It is necessary to urge more countries not only to ratify the U.N. Protocol, but to also change their law and policy to meet international obligations. This is especially important given that the U.N. Protocol had a significant impact in various countries in creating the international consensus as to what should be considered trafficking. In addition, the U.N. Protocol will create a reporting mechanism different from the sanctions that are now being imposed by the United States under the Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”).<sup>34</sup>

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<sup>29</sup> Convention on the Rights of the Child, art. 35, G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (Nov. 20, 1989). Sale of children, child prostitution and child pornography are also prohibited pursuant to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Pornography, art. 1, G.A. Res. 54/263, U.N. Doc. A/Res/54/263 (May 25, 2000).

<sup>30</sup> International Labor Organization Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, art. 3(b), 38 I.L.M. 1207.

<sup>31</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, art. 4, U.N. Doc. A/Res/54/263.

<sup>32</sup> U.N. Protocol, *supra* note 19.

<sup>33</sup> At present, 54 countries have ratified the U.N. Protocol. The information regarding the status of the U.N. Protocol is *available at* [http://www.unodc.org/unodc/en/crime\\_cicp\\_signatures\\_trafficking.html](http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html) (last visited Mar. 25, 2006).

<sup>34</sup> TVPA, *supra* note 19.

### *VI. Threat Against the Individual, Not the State*

While addressing the issue of trafficking in persons as a threat to human security requires focusing on prevention in addition to prohibition, such approach also requires recognizing trafficking in persons not only as a crime against the state, but also as a crime against the individual.<sup>35</sup> Such recognition would shift the concept of security from the *state security* to *human security*.<sup>36</sup> Several important questions arise in this respect. Should internal trafficking acquire the same importance as international trafficking? Should victims of trafficking be eligible to receive residency status on a humanitarian basis even if it places a burden on the state's immigration policy? Should they be penalized for commission of unlawful acts that are incident to their trafficking? Should they be eligible for witness protection programs if they agree to testify against their traffickers? The answers to these questions depend on the type of protected interest threatened by trafficking in persons.

#### *A. Internal Trafficking*

If trafficking in persons is considered mainly as a threat to the state, then addressing internal trafficking becomes less important. Although, in many cases internal trafficking poses a real threat to human security. For instance, it is estimated that 100,000 women and children are sexually exploited annually within the borders of Brazil, and 40,000 children are trafficked and sold every year for work in domestic service or in agriculture.<sup>37</sup> Also, it is commonly

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<sup>35</sup> It should be emphasized that trafficking in persons has to be classified as a crime that threatens two distinct protected interests: the human security of women, and children and the state security.

<sup>36</sup> It should be noted that until recently, the notion of security in international law has most commonly been presented in terms of nation states protecting their borders, people, institutions, and values from foreign military aggression. This notion of security assumed that achieving state security automatically assured the security of the citizens and disregarded the fact that states can be "both a major threat to human security and a major vehicle for guaranteeing human security." Ball, *supra* note 23. Therefore, a more appropriate approach is to look at human security as complementary to state security.

<sup>37</sup> Louise Corradini, *Children in Chains*, THE UNESCO COURIER, June 2001, at 38.

known that there are incidents of internal trafficking in such countries as Afghanistan, Haiti, India, the Philippines, Russia, and Thailand. Nevertheless, many countries still only consider trans-border trafficking to be an offense and refuse to recognize internal trafficking.<sup>38</sup> While crossing international borders should not be an element of the crime of trafficking, it may warrant a different response, such as transnational cooperation or an enhanced penalty.<sup>39</sup>

### *B. From Deportation to a Residency Status*

If trafficking in persons is considered as a crime against the state, then the state should have the right to deport the trafficked persons. This deportation policy is the policy that is followed in most countries today.<sup>40</sup> Immigration laws in most countries still treat the victim of trafficking as a prohibited immigrant and provide for her deportation, ignoring the distinction between smuggling of migrants and trafficking in persons.

By contrast, if trafficking in persons is considered a threat to the person, then reconsideration or a review of this deportation policy is warranted as a matter of principle. Indeed, about thirty countries have changed their immigration policy to grant a victim of trafficking some kind of residency status (temporary or permanent).<sup>41</sup>

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<sup>38</sup> The examples include Article 217 of the Criminal Code of Austria, Article 187 of the Criminal Code of Bosnia and Herzegovina, Article 177 of the Criminal Code of Croatia, Article 246 of the Criminal Code of the Czech Republic, Article 81-2 of the Criminal Code of Estonia, Article 246 of the Criminal Code of Slovakia, and Article 149 of the Criminal Code of Ukraine. *See supra* note 20 and accompanying text.

<sup>39</sup> Crossing national borders as an aggravated circumstance for trafficking in persons is provided, for instance, under Article 173 of the Criminal Code of Azerbaijan, Articles 128 and 133 of the Criminal Code of Kazakhstan, Article 124 of the Criminal Code of the Kyrgyz Republic, and Article 127-1 of the Criminal Code of Russian Federation. *See supra* note 20 and accompanying text.

<sup>40</sup> In fact, it has been estimated that as of 2001, 44 percent of developed countries and 39 percent of developing countries had restrictive immigration policies. *See COMMISSION ON HUMAN SECURITY, supra* note 2, at 42.

<sup>41</sup> These include, for example, Australia, Austria, Bahrain, Belgium, Bosnia and Herzegovina, Bulgaria, the Canada, Czech Republic, Denmark, France, Germany, Hong Kong, Hungary, Israel, Italy, Macedonia, Moldova, the Netherlands, Norway, Pakistan, Portugal, Romania, Russian Federation, Spain, Sweden, Swit-

## 2006] HUMAN SECURITY OR STATE SECURITY? 261

However, in most of these countries the underlying basis for this status is the protection of state security and not the security of the trafficked person. Such an approach is manifested in the laws of many countries such as Belgium, where the residency status is dependent upon the legal proceedings and is temporary in nature.<sup>42</sup> Once the legal proceedings are concluded, the victims return to their countries of origin. The same is true in Germany, although permanent residency may be granted on very rare occasions where the victims' return to their countries of origin would present a risk to their lives.<sup>43</sup> In all of these cases, the focus is on trafficking as a threat to state security and the need to protect the state. However, if trafficking is considered as a crime against the individual and as a threat to human security, it is necessary to consider granting a victim of trafficking temporary or permanent immigration status on a *humanitarian basis*. Moreover, once the victim of trafficking has been identified, the benefits granted to them should not depend on their immigration status, but nevertheless, in many cases, foreign victims of trafficking fall outside the protection of the national legal system of the destination countries.

The humanitarian approach to the residency status of victims of trafficking is manifested in the U.N. Protocol stating that "each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking to remain in its territory, temporarily or permanently, in appropriate cases ... giv[ing] appropriate consideration to humanitarian and compassionate factors."<sup>44</sup> Such approach is taken by the Netherlands, which may grant a victim

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zerland, Turkey, the United Kingdom, and the United States. For the trafficking reports of these countries, see <http://www.protectionproject.org/allreports.htm> (last visited Mar. 31, 2006).

<sup>42</sup> Details on Belgium's requirements and procedure for granting the temporary residence status to victims of trafficking are available from the Daphne Programme's Committee against Modern Slavery, <http://victimsoftrafficking.esclavagemoderne.org/UK/index.html> (last visited Mar. 25, 2006).

<sup>43</sup> *Ausländergesetz* [AuslG, Aliens Act], Jan. 1, 2000, BGBl. I at 1620, §§ 54-56 (F.R.G.). Details on Austria's procedure for granting the temporary residence status to victims of trafficking are available from the Daphne Programme's Committee against Modern Slavery, <http://victimsoftrafficking.esclavagemoderne.org/UK/index.html> (last visited Mar. 25, 2006) [hereinafter *Alien's Act*].

<sup>44</sup> U.N. Protocol, *supra* note 19, art. 7.

a residency permit on humanitarian grounds. These humanitarian grounds may include the risk of reprisals against the victim or their families, the risk of persecution in the victim's country of origin for committing an offense related to prostitution, and the difficulty of social reintegration in the country of origin.<sup>45</sup> This approach is also reflected in the TVPA, as amended by the Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2003.<sup>46</sup> The TVPA uses the term *extreme hardship* upon removal from the United States as the *human insecurity* that constitutes the basis for granting a victim of trafficking a special T visa.<sup>47</sup> While the T visa is temporary in nature and lasts for three years, it may be adjusted to provide permanent residency status.<sup>48</sup>

One can interpret the *extreme hardship* standard of the TVPA as one that is based on the concept of *human insecurity*, whether this means medical, legal, personal, or social insecurity. Medical insecurity refers to the medical status of a victim of trafficking and implies that the required medical care is not available in the victim's country of origin. Legal insecurity means that if a victim is denied access to the U.S. legal system, they would be left without any effective legal remedy. Personal insecurity refers to the issue of the victim being subjected to reprisals from their trafficker or to criminal or other punishment because their countries of origin penalize the trafficked person. Finally, social insecurity means the likelihood of a victim's re-victimization, especially in the absence of any assistance to her in her country.<sup>49</sup>

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<sup>45</sup> See generally Aliens Act, *supra* note 43.

<sup>46</sup> Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18, and 22 U.S.C.A) [hereinafter TVPRA].

<sup>47</sup> TVPA, *supra* note 19, 22 U.S.C. § 7105(e)(1)(C), (f) (amending the Immigration and Nationality Act).

<sup>48</sup> TVPA, *supra* note 19, 22 U.S.C. § 7105(f).

<sup>49</sup> The eligibility criteria for T visa are specified in Immigration and Naturalization Service's Final Rule on New Classification for Victims of Severe Forms of Trafficking in Persons: Eligibility for "T" Nonimmigrant Status, Jan. 31, 2002, Section 9 (adding Part 214.11(i) to Title 8, Code of Federal Regulations). 8 C.F.R. § 214.11 (2002).

Ultimately, whether trafficking in persons is considered to be a threat to state security or to human security, this determination will affect the approach taken in immigration law to trafficking in persons, including the granting of immigration status to the victim.

### *C. The Principle of Non-Criminalization*

The distinction between state security and human security also affects criminal justice policies. Among these policies is the application of the principle of non-criminalization of the acts of trafficked victims that are incident to trafficking, such as illegal entry, falsification of travel documents, or prostitution. Unfortunately, existing domestic laws in most countries fall short of applying these principles. The use of the abovementioned traditional immigration law approach results in punishing the victims through deportation. Further, in countries where prostitution is illegal, victims may also be held criminally responsible for engaging in this unlawful act. For example, in August 2002, 10 Vietnamese girls ranging from ages 12 to 18 were arrested and convicted on immigration violations in Cambodia. The girls were sentenced to three months in prison and subsequently deported, even though they were trafficked into the country against their will and forced to engage in prostitution.<sup>50</sup>

The human security approach to the victims of trafficking implies that they should not be penalized for unlawful acts committed as a direct result of being trafficked. This is the rule exemplified in the U.N. Regulation on the Prohibition of Trafficking in Persons in Kosovo, stating that “[a] person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking.”<sup>51</sup> Likewise, this rule was introduced

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<sup>50</sup> Feminist Majority Foundation, *Victims of Sex Trafficking Imprisoned for Immigration Violations*, FEMINIST DAILY NEWS WIRE, Aug. 8, 2002, <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=6774> (last visited Mar. 25, 2006).

<sup>51</sup> United Nations Interim Administration Mission in Kosovo, Regulation No. 2001/4, on the Prohibition of Trafficking in Persons in Kosovo, U.N. Doc. UNMIK/REG/2001/4, § 8 (Jan. 12, 2001), available at <http://www.unmikonline.org/regulations/2001/reg04-01.html> (last visited Mar. 25, 2006).

into the U.S. criminal justice system in accordance with TVPA, which provides for 5 years of imprisonment for the trafficker who falsifies immigration documents and explicitly provides that this rule “does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons if that conduct is caused by, or incident to, trafficking.”<sup>52</sup>

Still interpreting trafficking in persons as a crime against a state, some countries make the application of the principle of non-criminalization contingent upon the victim’s willingness to cooperate with the state law enforcement officials in investigating and prosecuting the trafficking offense and testifying against the traffickers. This is the case under Article 165(4) of the Criminal Code of Moldova,<sup>53</sup> Article 124 of the Criminal Code of the Kyrgyz Republic,<sup>54</sup> and Article 8 of the Dominican Republic’s Law No. 137-03 Regarding Illegal Trafficking of Migrants and Trade in Persons.<sup>55</sup> These laws do not reflect the rule that the victim’s immunity from liability for trafficking-related offenses should not be contingent upon the victim serving as a witness on behalf of the state. While the vic-

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<sup>52</sup> TVPA, *supra* note 19, 22 U.S.C. § 7109(a)(2) (adding § 1592 to Chapter 77, Title 18, United States Code). Note that according to the draft TVPA as introduced in the House of Representatives, victims of trafficking could not be imprisoned, fined or otherwise penalized merely because they were trafficked. However, under the TVPA as passed by the Senate and signed into law by the President, victims are not to be detained in facilities inappropriate to their status as crime victims. It was concluded during the deliberations that the original provision that prohibited penalizing victims of trafficking by virtue of their status as crime victims or for conduct committed under duress incident to such status restated existing criminal law and, therefore, was unnecessary. See CHRIS SMITH, VICTIMS OF TRAFFICKING AND VICTIMS PROTECTION ACT, H.R. Doc. No. 106-939, at 93 (2000) (Conf. Rep.).

<sup>53</sup> Article 165(4) of the Criminal Code of Moldova. See *supra* note 20 and accompanying text.

<sup>54</sup> Article 124 of the Criminal Code of the Kyrgyz Republic. See *supra* note 20 and accompanying text.

<sup>55</sup> Dr. Mohamed Y. Mattar, *The Birth of a New Anti-Trafficking Legislation: The Dominican Republic’s Law Number 137-03 Regarding Illegal Trafficking of Migrants and Trade in Persons*, Speech given at the Conference on New Steps in Path Breaking Strategies in the Global Fight Against Sex Trafficking (Santo Domingo, Dominican Republic, Dec. 8-9, 2003) (transcript available at <http://www.protectionproject.org/pub.htm>, last visited Apr. 8, 2006).



tim's testimony should be encouraged, it should not be a requirement for granting immunity.

#### *D. Witness Protection*

If the country does require the victim of trafficking to testify against her traffickers, then the victim should be provided with witness protection as a prerequisite to coming forward and testifying. This requirement, perhaps, is the best illustration of trafficking as a threat against a mixed protected interest: the safety of the person needs to be protected while she is testifying for the state. Thus, for the purpose of allowing the application of the 1982 Victims and Witness Protection Act to trafficking in persons, the TVPA recognizes trafficking as an organized criminal activity and as a serious offense.<sup>56</sup> At the same time, in most of the European countries that have witness protection laws the criteria for application of such programs are so strict that victims of trafficking can rarely meet the standard. Moreover, countries such as Belgium, Denmark, Finland, France, Luxemburg, Sweden, and most of the countries in Eastern and Southeast Europe do not have any formal witness protection programs at all.<sup>57</sup>

#### *VII. Extended Definitions of Victims of Trafficking and Identification of Victims*

A human security approach to trafficking in persons requires that a trafficked person must be recognized as a victim<sup>58</sup> who is enti-

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<sup>56</sup> TVPA, *supra* note 19, 22 U.S.C. § 7109(a)(2) (adding § 1594(d) to Chapter 77, Title 18, United States Code). Section 1594 of the Victim and Witness Protection Act provides only for protection of a witness in criminal proceedings concerning only "an organized criminal activity or other serious offense." *Id.* 18 U.S.C. § 1594(d) (2000).

<sup>57</sup> See MARTI LEHTI, EUROPEAN INSTITUTE FOR CRIME PREVENTION AND CONTROL, TRAFFICKING IN WOMEN AND CHILDREN IN EUROPE, HEUNI PAPER NO. 18. 35 (2003) (criticizing the lack of formal witness protection programs for victims of trafficking in Europe), *available at* <http://www.heuni.fi/uploads/to30c6cjxyah11.pdf>.

<sup>58</sup> Although the term "victim of trafficking" is not defined in the U.N. Protocol, an appropriate definition can be found in the U.N. Declaration of Basic Princi-

tled to basic human rights under the law and not as a criminal who is subject to punishment under the law.<sup>59</sup> In addition, this approach requires an extended definition of who should be considered a trafficking victim. In particular, this definition should include not only the victim, but also derivative victims, i.e., members of the victim's family who should either be covered by the witness protection programs or be granted a residency status.<sup>60</sup> There are several reasons behind the need for application of the derivative victim doctrine to traffick-

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ples of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985), Sections A.1 and A.2 of which define the term "victim of crime" to mean,

[P]ersons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws . . . [including,] where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Section A.6(d) of the Declaration also calls for "taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation." U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Annex, G.A. Res. 40/34, U.N. Doc. A/Res/40/34/Annex (Nov. 29, 1985).

<sup>59</sup> Victims of trafficking should be entitled to such rights as the right to safety, the right to privacy, the right to information, the right to legal representation, the right to be heard in court, the right to compensation for damages, the right to medical assistance, the right to social assistance, the right to seek residence, the right to return to their country of origin, and the right to be treated with dignity, fairness, compassion and respect for their human rights. See Mohammad Y. Mattar, *The Protection Project, Establishing a Bill of Rights for Victims of Trafficking in Persons: How It Can Become a Possibility* (2002) (presenting the Bill of Rights for Victims of Trafficking), <http://www.protectionproject.org> (last visited Mar. 25, 2006).

<sup>60</sup> This is the case under the United States law. Thus, section 107(e)(1)(C) of the TVPA grants residency status to spouse and children of the victim over the age of 21, as well as to parents of the victim under the age of 21. TVPA, *supra* note 19, 22 U.S.C. § 7105(e)(1)(C). Section 3521 of the Victim and Witness Protection Act allows for application of witness protection programs to a victim's or witness's immediate family members if they may be endangered because of the participation of the witness in the judicial proceeding. 18 U.S.C. § 3521 (1997) (section entitled Witness Relocation and Protection).

## 2006] HUMAN SECURITY OR STATE SECURITY? 267

ing in persons. First, traffickers commonly use threats not only against the victim, but also against their family members. Second, the migration of trafficked persons, in many cases, is dictated by the need to support their families. And third, the stigma associated with trafficking attaches not only to the victim, but to the victim's entire family.

The definition of a victim of trafficking should also be extended to include the potential victims of trafficking as a group, i.e., the vulnerable population, or the population at risk, especially women and children under the age of 18. In many cases, victims of trafficking are among the most vulnerable social groups in the population even before they are trafficked and "their human security is already compromised . . . due to factors ranging from dire poverty, the status of women in society, and war and conflict."<sup>61</sup> Therefore, preventive responses addressing the causes of vulnerability of women and children are crucial. These responses should include economic and social reforms aimed at poverty alleviation, creation of educational and employment opportunities, and elimination of gender discrimination, as well as child protection measures such as birth registration.<sup>62</sup>

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<sup>61</sup> COLLEEN THOUÉZ, THE INTERNATIONAL MIGRATION POLICY PROGRAMME, MIGRATION AND HUMAN SECURITY 6 (2002), [http://www.impprog.ch/statements\\_papers/IMP\\_Migration%20and%20Human%20Security\\_CHS\\_Oct02.pdf](http://www.impprog.ch/statements_papers/IMP_Migration%20and%20Human%20Security_CHS_Oct02.pdf) (paper submitted by the International Migration Policy Programme for the Consultation on International Migration).

<sup>62</sup> The right to birth registration is guaranteed to every child under Article 7 of the Convention on the Rights of the Child. Convention on the Rights of the Child, *supra* note 29, art. 7. However, this guarantee is not enforced in many countries. Thus, according to UNICEF, some 50 million births are not registered annually in the world--or about 30 percent of the estimated number of births. See UNICEF, Child Protection: Birth Registration, [http://www.unicef.org/protection/index\\_birth-registration.html](http://www.unicef.org/protection/index_birth-registration.html) (last visited Mar. 25, 2006). For instance, according to some statistics, over 200,000 children do not officially exist in the countries of Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, and Nicaragua. See INTER-AMERICAN CHILDREN'S INSTITUTE, EXECUTIVE BRIEF, THE DIAGNOSIS OF BIRTH REGISTRIES IN EL SALVADOR, GUATEMALA, HAITI, HONDURAS, NICARAGUA, AND THE DOMINICAN REPUBLIC (2002), [http://www.iin.oea.org/resumen\\_ejecutivo\\_diagnostico\\_registro\\_nacimientos\\_ingles.htm](http://www.iin.oea.org/resumen_ejecutivo_diagnostico_registro_nacimientos_ingles.htm) (last visited Mar. 25, 2006).

Yet, the real problem that most of the countries face today is finding the victims of trafficking, including the extended victims, the vulnerable victims, and the potential victims. Thus, according to U.S. government estimates, between 14,500 and 17,500 persons are trafficked annually into the United States and between 600,000 and 800,000 people are trafficked annually across international borders.<sup>63</sup> U.S. authorities are required, under the provisions of TVPA, to identify these victims of trafficking and provide them with information about the rights and protections available to them.<sup>64</sup> However, from the passage of TVPA in 2000 through the end of 2003, only 448 victims have been certified or issued refugee benefits eligibility letters from the Department of Health and Human Services.<sup>65</sup> This total includes 151 certifications and letters issued in the year 2003.<sup>66</sup> Moreover, although there are 5,000 T Visas available every year under the TVPA, a total of only 757 T Visa applications have been received since the passage of the Act until the end of 2003, of which 328 visas were issued, 38 denied, and the remaining applications pending. Of this total, 297 T Visas were issued in 2003.<sup>67</sup>

Another example of a poor record of identifying the victims of trafficking comes from a recent study estimating that while 90 percent of foreign sex workers in the Balkan countries are victims of trafficking, only 30 percent are recognized as such, and only 7 percent have been identified for receiving assistance and support.<sup>68</sup> Therefore, any response to the problem of trafficking in persons, from a human security perspective, should begin with identifying the victims of trafficking. Identification of victims of trafficking is crucial because it would allow granting them residency status and applying to them the principle of non-criminalization. In addition, the witness protection programs and services would be available to vic-

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<sup>63</sup> U.S. DEPARTMENT OF JUSTICE, REPORT TO CONGRESS FROM ATTORNEY GENERAL JOHN ASHCROFT ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2003 3 (2004), *available at* <http://www.usdoj.gov/ag/050104agreporttocongresstvprav10.pdf>.

<sup>64</sup> See TVPA, *supra* note 19, 22 U.S.C. § 7105(c).

<sup>65</sup> U.S. Department of Justice, *supra* note 65, at 9.

<sup>66</sup> *Id.* at 9.

<sup>67</sup> *Id.* at 15-16.

<sup>68</sup> See COMMISSION ON HUMAN SECURITY, *supra* note 2, at 43.

tims, thus enhancing the state's ability to prosecute cases of trafficking while also protecting the victim's privacy and safety. Sadly, while most victims are reluctant to come forward, most states fail to take the necessary measures to reach the victims.

A collective effort by twelve countries in Southeastern Europe and neighboring regions deserves mentioning in this respect.<sup>69</sup> In September 2003, these countries participated in a joint operation called MIRAGE, which was carried out by the Southeast European Cooperative Initiative Regional Center for Combating Transborder Crime ("SECI") with the assistance of the United States. The ten-day-long operation targeted over 20,000 border crossings, bars, and nightclubs in the region and identified a total of 463 victims of sex trafficking and 595 suspected traffickers. The operation resulted in launching 319 new criminal investigations, with 207 traffickers charged under the specific anti-trafficking provisions of national legislation.<sup>70</sup> As of February 2004, a total of 31 traffickers identified during the operation have been convicted.<sup>71</sup>

Trafficking in person is a transnational crime, which warrants cooperation between countries of origin and of destination. Regional efforts are imperative to combat the problem.

As an important part of the global efforts to combat trafficking, all regions of the world have developed certain initiatives and other forms of cooperation among countries on a regional level.

Countries in Latin America have adopted regional conventions, such as the Inter-American Convention on the International Traffic in Minors,<sup>72</sup> the Inter-American Convention on Extradition<sup>73</sup>

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<sup>69</sup> The countries taking part included Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Greece, Hungary, Moldova, Romania, Serbia and Montenegro, Slovenia, and Ukraine, <http://www.secicenter.org/html/countries/seci%20states.htm> (last visited Mar. 25, 2006).

<sup>70</sup> For more details regarding the outcomes of "Operation Mirage 2003," see generally SECI Center, <http://www.secicenter.org> (last visited Mar. 25, 2006).

<sup>71</sup> Press Release, SECI Center, *31 Traffickers in Human Beings Convicted as a Result of the Continuation of Operation MIRAGE* (Feb. 10, 2004), <http://www.secicenter.org> (last visited Mar. 25, 2006).

<sup>72</sup> Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, 79 O.A.S.T.S., 33 I.L.M. 721.

and the Inter-American Convention on Mutual Assistance in Criminal Matters.<sup>74</sup>

In January 2002, the South Asian Association for Regional Cooperation (“SAARC”) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the SAARC Convention on the Regional Arrangement for the Promotion of Child Welfare in South Asia were signed by Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka; member countries of the SAARC.<sup>75</sup>

In Europe, in July 2002 the European Union adopted the Council Framework Decision on Combating Trafficking in Human Beings.<sup>76</sup>

Similar initiatives arose in Africa, where the South African Development Community (“SADC”) plays a very important role in curbing irregular migration and trafficking in migrants.<sup>77</sup> In West Africa, the countries of Economic Community of West African States (“ECOWAS”) adopted the Initial Plan of Action against Trafficking in Persons in 2001.<sup>78</sup> Also, as the initiative of the Middle East and North African Countries, the Declaration of the Arab- African Forum against Sexual Exploitation of Children was held in Ra-

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<sup>73</sup> Inter-American Convention on Extradition, February 25, 1981, 20 I.L.M. 723.

<sup>74</sup> The Inter-American Convention on Mutual Assistance in Criminal Matters, O.A.S. Treaty Doc. 105-25 (May 23, 1992).

<sup>75</sup> See generally Declaration of the Eleventh SAARC Summit, Jan. 4-6, 2002, available at <http://www.saarc-sec.org/main.php?id=57&t=4> (last visited Mar. 25, 2006).

<sup>76</sup> See generally The Council of the European Union, Council Framework Decision on Combating Trafficking in Human Beings, 2002/629/JHA, July 19, 2002, available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_203/l\\_20320020801en00010004.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_203/l_20320020801en00010004.pdf).

<sup>77</sup> See generally Southern African Development Community Parliamentary Forum, <http://www.sadcpf.org/>, (last visited Mar. 25, 2006).

<sup>78</sup> See generally ECOWAS Initial Plan of Action against Trafficking in Persons (2002-2003), available at [http://www.unodc.org/pdf/crime/trafficking/Minimum\\_Plano\\_CEDEAO.pdf](http://www.unodc.org/pdf/crime/trafficking/Minimum_Plano_CEDEAO.pdf).

bat, Morocco in 2001<sup>79</sup> and the Tunis Declaration was adopted at the 2002 Ministerial Conference on Migration in the Western Mediterranean.<sup>80</sup>

### *VIII. Recognition of All Forms of Trafficking*

Understanding the extended concept of human security requires not only an extended definition of a victim of trafficking, but also an extended definition of the forms of trafficking. This definition should not be limited to trafficking for the purpose of prostitution or forced labor. That is why Article III of the U.N. Protocol is important, since it created an international consensus as to what constitutes trafficking in persons. According to the U.N. Protocol, “[e]xploitation shall include, at a minimum, the exploitation of prostitution of others, or other forms of sexual exploitation, forced labor services, slavery or practices to slavery, servitude or the removal of organs.”<sup>81</sup>

Thus, any adequate response to trafficking in persons as a threat to human security must recognize all forms of trafficking, including trafficking for the purpose of commercial sexual exploitation, such as prostitution, pornography, and sex tourism; trafficking for the purpose of non-commercial sex, such as marriages for the purpose of child-bearing, forced marriages, early marriages, temporary marriages, and mail-order brides (i.e., bride trafficking); trafficking for the purpose of forced labor, in particular domestic service, street begging, and camel jockeying; trafficking for the purpose of illicit inter-country adoption (i.e., baby trafficking); trafficking for military purposes; trafficking for the purpose of involvement in illegal activities, such as drug trafficking; and trafficking in human organs.

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<sup>79</sup> See generally Declaration of the Arab-African Forum against Sexual Exploitation of Children, Oct. 24-26, 2001, available at [http://www.ecpat.net/eng/a4a0203\\_online/ENG\\_A4A/appendices\\_5\\_declaration\\_arab\\_african.pdf](http://www.ecpat.net/eng/a4a0203_online/ENG_A4A/appendices_5_declaration_arab_african.pdf).

<sup>80</sup> See generally Tunis Declaration, Oct. 16-17, 2002, available at [http://www.iom.int/DOCUMENTS/officialtxt/en/declaration\\_e.pdf](http://www.iom.int/DOCUMENTS/officialtxt/en/declaration_e.pdf).

<sup>81</sup> U.N. Protocol, *supra* note 19, art. 3(a).

A number of countries provide in their anti-trafficking laws for such a broad definition of the act of trafficking. For example, the Criminal Code of Serbia criminalizes trafficking “for the purpose of obtaining some gain, exploitation of labor, criminal activities, prostitution or begging, for pornographic purposes, removal of organs, and for exploitation in armed conflicts.”<sup>82</sup> A similarly broad definition is adopted by the Criminal Code of Tajikistan, which also prohibits trafficking for the purpose of “further sale, involvement in sexual or criminal activity, use in armed conflicts, pornography, forced labor, slavery or likewise activity, debt related detention, or adoption of children with commercial aims.”<sup>83</sup>

On the other hand, many laws contain a very limited definition of trafficking. Some laws cover only trafficking for the purposes of prostitution and other forms of sexual exploitation. Examples of such laws are Article 246 of the Criminal Code of the Czech Republic,<sup>84</sup> Article 250(a) of the Penal Code of the Netherlands,<sup>85</sup> and Sections 61-63 of the United Kingdom’s Sexual Offences Act, which has just entered into force in May 2004.<sup>86</sup> Similarly, the TVPA is limited in criminalizing only “severe forms of trafficking in persons,” which include only sex trafficking, narrowly defined to include solely trafficking “for the purpose of a commercial sex act,” and labor trafficking defined as “involuntary servitude, peonage, debt bondage, or slavery.”<sup>87</sup>

### *IX. Confronting All Actors in the Trafficking Enterprise*

Any adequate and comprehensive approach to trafficking in persons, in addition to recognizing all forms of trafficking as crimi-

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<sup>82</sup> Article 111b of the Criminal Code of Serbia. *See supra* note 20 and accompanying text.

<sup>83</sup> Article 130 of Criminal Code of Tajikistan. *See supra* note 20 and accompanying text.

<sup>84</sup> Article 246 of Criminal Code of Czech Republic. *See supra* note 20 and accompanying text.

<sup>85</sup> Dutch Penal Code Article 250(a). *See supra* note 20 and accompanying text.

<sup>86</sup> *See* U.K. Sexual Offences Bill, available at <http://www.publications.parliament.uk/pa/ld200203/ldbills/026/2003026.pdf>.

<sup>87</sup> TVPA, *supra* note 19, 22 U.S.C. § 7102(8)-(9).



nal offenses, must involve going after all the actors that are involved in the trafficking enterprise. In this respect, several important distinctions are warranted.

The first is the distinction between the private persons and the public person. While the offense of trafficking may be committed by a private individual or a group, many cases involve a public official, an immigration officer, a law enforcement agent, a border patrol officer, or other officials who facilitate the act of trafficking or refrain from prosecuting such an act. In such case, public corruption, abuse of office, or abuse of power must be recognized as an illegal means that gives rise to the offense of trafficking and must warrant an enhanced penalty. Such aggravating circumstances in trafficking-related offenses are provided, for instance, under Article 173 of the Criminal Code of Azerbaijan,<sup>88</sup> Article 181 of the Criminal Code of Belarus,<sup>89</sup> Article 172 of the Criminal Code of Georgia,<sup>90</sup> Article 127-1 of the Criminal Code of Russia,<sup>91</sup> and Article 149 of the Criminal Code of Ukraine.<sup>92</sup>

The second is the distinction between the natural person and the legal person. First, it implies that an anti-trafficking law must provide for the liability of the legal, or the corporate, person that facilitates the act of trafficking committed by a natural person. This includes establishing the responsibility of the facilitators involved in the trafficking act, such as the strip club, the escort service, the massage parlor, the travel agency, the advertisement agency, the employment agency, the adoption agency, the matchmaking organization, as well as hotels, restaurants, bars, and taxi companies. The responsibility of the legal person is established, for instance, under Irish legislation, which provides that

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<sup>88</sup> Article 173 of the Criminal Code of Azerbaijan. *See supra* note 20 and accompanying text.

<sup>89</sup> Article 181 of the Criminal Code of Belarus. *See supra* note 20 and accompanying text.

<sup>90</sup> Article 172 of the Criminal Code of Georgia. *See supra* note 20 and accompanying text.

<sup>91</sup> Article 127-1 of the Criminal Code of Russia. *See supra* note 20 and accompanying text.

<sup>92</sup> Article 149 of the Criminal Code of Ukraine. *See supra* note 20 and accompanying text.

Where an offense under this Act is committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any person, being a director, manager, secretary or other similar officer of such body, or a person who was purporting to act in any such capacity . . . the body corporate shall be guilty of an offense and shall be liable to be proceeded against and punished as if [it] were guilty of the first-mentioned offense.<sup>93</sup>

Second, the distinction between the natural person and the legal person means that the law must address the responsibility of the customer who purchases the services, mainly commercial sexual services, from the trafficked person. In other words, the human security approach to combating trafficking in persons requires the countries to address the harmful demand that encourages the thriving trade in human beings. The link between the demand and trafficking in persons is made in the U.N. Protocol, according to which “[s]tate parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures . . . to discourage the demand that fosters exploitation of persons, especially women and children, that leads to trafficking.”<sup>94</sup> Thus, if the customer is a tourist, a sex tourism law must apply to him regardless of whether the act is a crime in the place where it is committed. Similarly, if the customer is a peacekeeper, the U.N. Code of Conduct must apply to him and the country that has jurisdiction to prosecute him must do so.

Most countries in the world that outlaw prostitution punish only the woman in the prostitution, while some legal systems, most notably those of the Islamic legal family, penalize both the customer and the woman in prostitution.<sup>95</sup> By contrast, the 1998 Swedish Law

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<sup>93</sup> Sexual Offenses (Jurisdiction) Act, 1996, § 5 (Ir.), available at [http://www.irishstatutebook.ie/1996\\_38.html](http://www.irishstatutebook.ie/1996_38.html) (last visited Mar. 31, 2006).

<sup>94</sup> U.N. Protocol, *supra* note 19, art. 9.5.

<sup>95</sup> See generally Linda Smith & Mohamad Y. Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN and Global Responses and Challenges*, 28 FLETCHER F. WORLD AFF. 169-171 (2004) (explaining that the countries that criminalize both the act of prostitution

on the Prohibition of Purchase of Sexual Services criminalizes only the purchase, and the attempted purchase, of casual sexual services, while selling sex is not considered a crime.<sup>96</sup> The punishment for the customer is a fine or imprisonment for up to 6 months. However, the number of prosecutions under the Swedish law has been low. The available statistics show that 10 convictions resulted out of 94 cases tried in 1999, 29 convictions out of 92 cases in 2000, and 38 convictions out of 86 cases in 2001.<sup>97</sup> Nevertheless, similar laws have been enacted in Norway<sup>98</sup> and Finland.<sup>99</sup> However, both laws only criminalize buying sexual services from a person under the age of 18.<sup>100</sup>

A slightly different approach is adopted by the Criminal Code of Macedonia, which provides for a penalty of imprisonment from 6 months to 5 years if the customer who is using or procuring the sexual services from a person in prostitution with the knowledge that

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and the act of purchasing sexual services include Saudi Arabia, Iran, Pakistan, Yemen, Mauritania, Jordan, Bahrain, Sudan, Tunisia, Malaysia, Brunei, and the United Arab Emirates); *see also*, Mattar, *supra* note 22 (providing a general overview of anti-prostitution laws in the Middle East).

<sup>96</sup> *See* Act on Prohibiting the Purchase of Sexual Services, *available at* <http://www.sweden.gov.se/content/1/c6/02/56/31/e0d64374.pdf>.

<sup>97</sup> *See* Smith & Mattar, *supra* note 97, at 170.

<sup>98</sup> Penal Code of Norway, Section 203 (amended by the Act No. 76 of August 11, 2000). *See supra* note 20 and accompanying text.

<sup>99</sup> Penal Code of Finland, Section 20:8 (amended in 1998); secs. 20:6-7 (additionally criminalizing the purchase of sexual services from a person under the age of 16 as sexual exploitation of a child). *See supra* note 20 and accompanying text.

<sup>100</sup> At the same time, based on the Swedish experience, a special task force at the Finnish Ministry of Justice had recommended to prohibit the purchase of all sexual services. The draft law has been prepared and is expected to become effective sometime in 2005. *See Finland Prepares Complete Ban on Sex for Sale*, Agence France Press, Mar. 7, 2004. Similarly, the government of Norway decided to consider whether it should impose a general ban on the purchase of sexual services following the completion of a study of the effect of such ban on the extent of trafficking. Because such study should take into account the Swedish experience, it will be conducted only after the Swedish law had been in force for a sufficient period of time to allow some certain conclusions. *See NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE, NORWAY'S PLAN OF ACTION FOR COMBATING TRAFFICKING IN WOMEN AND CHILDREN 15 (2003-2005)*.

such person is a victim of trafficking.<sup>101</sup> The same model is followed by the Criminal Code of Croatia.<sup>102</sup>

#### *X. Involvement of NGOs and Civil Society*

While prosecution of cases of trafficking is the responsibility of the state, a proper response to trafficking in persons as a threat not only against the state but also against the person requires the involvement of non-state actors. The U.N. Protocol provides: “[e]ach State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”<sup>103</sup> The Protocol also provides that “policies, programmes and other measures established in accordance with [Article 9] shall, as appropriate include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”<sup>104</sup> These provisions established an international obligation on state parties to cooperate with non-governmental organizations (NGOs).

NGOs are organized as a global network and as such have become a significant player on the international scene. However, since appropriate action needs to be adjusted to the particular condition of a community, country or a region, their individual range of actions is usually focused on the regional and local levels. On the regional level, the main challenge for NGOs is to promote coordination to establish regional networks seeking to implement government programs and projects, adopt a comprehensive referral system, and work together to repatriate victims of trafficking. It needs to be emphasized, though, that the issues of trafficking is a social challenge that must be met also at the grassroots level. In this sense, NGOs can

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<sup>101</sup> Criminal Code of Macedonia, Article 418-A (added in January 2002). *See supra* note 20 and accompanying text.

<sup>102</sup> *See* Article 178 of the Criminal Code of the Republic of Croatia. *See supra* note 20 and accompanying text.

<sup>103</sup> U.N. Protocol, *supra* note 19, art. 6.3, art. 9.3 (regarding prevention of trafficking), art. 10.2 (regarding training of law enforcement and other government officials).

<sup>104</sup> U.N. Protocol, *supra* note 19, art. 9.3.

## 2006] HUMAN SECURITY OR STATE SECURITY? 277

bring to the forefront the strength of local knowledge, practical knowledge, and intimate community relationships.

For example, in Cambodia, domestic and foreign NGOs cooperate with the state in its support for prevention and protection programs. NGOs provide long-term shelter and other protective services for victims of trafficking. NGOs help strengthen community based networks to inform potential victims of trafficking by producing workshops, pamphlets and videos.<sup>105</sup> In Indonesia, NGOs assist the government in anti-trafficking and education initiatives.<sup>106</sup> In Laos, NGOs carry out projects raising awareness and skills development for populations at risk.<sup>107</sup> In The Dominican Republic, NGOs provide most of the assistance offered to victims of human trafficking. Also, NGOs offer training programs for government officials in order to improve their understanding of the law calling for victim assistance.<sup>108</sup> In Guatemala, NGOs help the government to identify the victims and place them in shelters.<sup>109</sup>

Unfortunately, many countries do not recognize the important role of the NGOs. Many governments do not allow the NGOs the freedom to perform their functions in assisting and protecting victims of trafficking. For example, it has been reported that in Togo, there have been complaints of poor coordination between the government and NGOs, sometimes disrupting the provision of needed services to repatriated child victims of trafficking.<sup>110</sup>

NGOs must be allowed to participate in providing the victims of trafficking with the necessary protection and empowering them to be independent and self-sufficient. In addition to protection and empowerment, NGOs play an important role in repatriation of victims of trafficking, their reintegration into the society, and preventing

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<sup>105</sup> U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 19 (2004), available at <http://www.state.gov/g/tip/rls/tiprpt/2004/> [hereinafter TIP REPORT 2004].

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See HUMAN RIGHTS WATCH, BORDERLINE SLAVERY: CHILD TRAFFICKING IN TOGO vol. 15 no. 8(A) (Apr. 2003).

their revictimization after the return to the country of origin. Civil society organizations can also prove important actors in strengthening the capacity of the criminal justice system to enhance the human security of trafficking victims. The role of the NGOs becomes more important with the failure of the government to “facilitate and accept, with due regard for the safety of [the trafficked] person, the return of that person without undue or unreasonable delay.”<sup>111</sup> For example, according to the Hotline for Migrant Workers, an Israeli NGO, women from Uzbekistan have to wait for an average of 39 days in Israeli prisons to receive the necessary travel papers in order to travel to their home country. The most dramatic example is that of one victim from Tajikistan who, due to the lack of Tajik diplomatic presence in the country, spent 290 days in a prison in Israel waiting for her documents.<sup>112</sup>

### *XI. Recommendations*

Based upon the discussion contained in this paper, the following recommendations for addressing trafficking in persons as a human security issue can be made.

- 1) Addressing not only the personal security and safety of the trafficked persons but all aspects of their human security;
- 2) Addressing the primary causes of human insecurity in the context of trafficking in persons, including economic, social, cultural, legal, and political insecurity;
- 3) Shifting the focus from the prohibition approach to trafficking in persons to a more expansive approach that requires prevention of trafficking in persons and protection of the victims of trafficking;
- 4) Shifting the focus from recognizing trafficking in persons as a threat against state security to trafficking as a threat to human security, which means recognizing internal trafficking as a form of trafficking, replacing the current deportation policy with the pol-

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<sup>111</sup> U.N. Protocol, *supra* note 19, art. 8.1.

<sup>112</sup> See Sigal Rozen, The Protection Project Seminar Series, *Trafficking in Israel: The Legal and Human Dimensions* (June 29, 2001), <http://www.protection-project.org> (last visited Mar. 19, 2006).

## 2006] HUMAN SECURITY OR STATE SECURITY? 279

icy of granting victims the residency status irrespective of a burden this may impose on a state's immigration policy, applying the principle of non-criminalization to the acts of victims of trafficking, and extending the application of witness protection programs to victims of trafficking testifying against the traffickers;

- 5) Recognizing a trafficked person as a victim of crime, including applying the derivative victim, the potential victim, and the vulnerable victim doctrine to trafficking, as well as taking appropriate measures to identify the victims;
- 6) Recognizing all forms of trafficking in persons as offenses under national criminal law;
- 7) Penalizing all actors in the trafficking enterprise, including the private persons, the public persons, the legal persons, and the natural persons;
- 8) Allowing the NGOs and civil society to function freely, while at the same time emphasizing the state responsibility in combating trafficking in persons.