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Preliminary Report on Women and Migration

At the 69th Conference of the International Law Association held in London in 2000, the Committee on Feminism and International Law proposed to begin work on Women and Migration, and the Committee's proposal was adopted in Resolution 6/2000. This Preliminary Report studies women and forced migration, in particular, refugee women and trafficking in women. In addition to defining the parameters of the topic, the Report presents a historical background, the methodology to be used, the relevant international and domestic legal developments and criticisms of these developments. The issue framed by the Report, with a view to developing recommendations, is whether existing laws and practices provide enough space to include the experience and claims of women in migration - in its diverse manifestations - or whether a more radical overhaul of the various legal instruments is required.

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1. INTRODUCTION

The post-Second World War and post-colonial world is faced with large-scale spatial and social displacement of people at an accelerating pace. It is estimated that in total around 50 million people are affected by forced migration¹, including those affected by disaster-induced and development-induced

¹ United Nations High Commissioner for Refugees (UNHCR), *The State of the World's Refugees 1997-1998 - A Humanitarian Agenda*, Oxford University Press (2000) 2.

migration, mass expulsion, ethnic cleansing and those internally displaced persons who do not receive any protection of an international organisation. The Office of the United Nations High Commissioner for Refugees is responsible for the welfare of some 22 million people, around 12 million of whom are refugees, others include internally displaced persons and returnees.² If this figure is added to voluntary migration of people across the world, then it is estimated that 100 to 140 million are residing outside their country of citizenship.³

While migration takes many different forms, the distinction between voluntary and involuntary or forced migration is a useful primary categorisation of those forms. The word migration describes the process of movement of persons, and includes the movement of refugees, displaced and uprooted people, as well as migrants who take the decision to migrate freely.⁴ The world of involuntary or forced migration is one inhabited by the refugee, who does not have the protection of her home government, and victims of certain forms of international slavery. Voluntary migration, on the other hand, conjures up images of an individual immigrant seeking better economic and social opportunities in another country. In this simplified scenario *the* immigrant is the personification of the economic migrant whereas *the* refugee is the political migrant.⁵ However, the boundary between involuntary and voluntary migration is increasingly fluid. For instance, a woman who is enticed to taking up a glossy job-offer in the 'entertainment industry' may end up as a sex migrant across the border and a victim of traffickers. Trafficking in women touches upon aspects of involuntary and voluntary migration and 'cuts across most forms of migration'. The means used in trafficking are coercive or deceptive, but the migration or movement *per se* may be voluntary. Trafficking in women necessarily involves non-consensual elements such as the use of force, deception, fraud, abduction or abuse of power, which vitiates any initial implied or expressed consent to migrate. The line between voluntary and forced migration is also thin when a voluntary economic migrant is actually 'forced' out of her home country because of highly gendered and political factors such as educational disadvantage, or inability to inherit land under customary law, or other factors.⁶

Migration is always part of a constellation of phenomena that are shaped by socio-economic, political and cultural processes and practices. These determine the way we approach the topic in this Report. First, the social dynamics of migration prevents taking a narrow legalistic perspective. The various structural fault lines underlying migration such as the legacy of colonialism, the vast disparities in wealth, unequal power relations and pervasive racism and sexism inform the search for legal solutions. Since the causes of migration are manifold, the economic, political, cultural and social dimensions of migration need to be part of any comprehensive approach. While it is often regarded as being beyond the scope of most legal instruments to address the multifarious underlying factors of migration, it is possible to include or refer to social and economic initiatives designed to alleviate the root causes of the problem. Moreover, advocating a broader social justice approach has the advantage of narrowing the gap between our ideals of justice and legal formulations⁷, an insight that was brought to the fore in particular by feminists, postcolonial scholars of the so-called developing world, and other critical scholars. Thus, solutions to migration-related gender problems cannot be solved in a one-dimensional way devoid of the socially situated context.

Second, the first step in the process is gaining recognition to 'name' the problem, hear women's voices, and take their perspectives and assessments seriously. Unfortunately, it has been common practice to place

² <http://www.unhcr.ch> 2001 figures: the UNHCR is responsible for 21, 8 million people of whom 12 million are refugees.

³ Tomas Hammar, Grete Brochmann, Kristof Tamas and Thomas Faist (eds), *International Migration, Mobility and Development Multi-disciplinary Perspectives*, Berg Oxford New York (1997) 1. WIDER Institute, United Nations University, Helsinki, 2002.

⁴ International Organization for Migration (IOM): *Effective Respect for Migrants Rights* 2.

⁵ *International Migration, Immobility and Development* Tomas Hammar *et al* (eds) 17.

⁶ Charles David Smith, 'Women Migrants of Kagera Region, Tanzania: The Need for Empowerment' in Doreen Indra (ed), *Engendering Forced Migration*, Berghahn Books New York, Oxford (1999). See also IOM: *Effective Respect for Migrants Rights* 3.

⁷ Sheila L Martin, 'Proving Gender Bias in the Legal System' in J Brochman and DE Chunn (eds), *Investigating Gender Bias: Law, Courts and the Legal Profession*, Toronto, Ont; Lewiston, N.Y.: Thompson Educational Publ. (1993) 23.

significant theoretical and ideological impediments on the process of asserting claims by disadvantaged groups. Women's issues are marginalised under the pretext of them being too political and not advancing rigorous legal arguments.⁸ The dominant paradigm is a conception of law that pretends to be based on neutral principles and on ideas of law as dispensing justice without favour or bias. This overlooks the fact that societal inequality *is* reflected in the legal system. It is one of the most pervasive myths in law to evoke images of a free-floating international legal system that is "neither conceptually nor procedurally gendered" and in substance only very little.⁹ Similar paradigmatic problems are created by the erroneous assumption that women's and gender issues are distinct or separate issues to be 'added on' to mainstream law or general rules. The ideological and theoretical obstacles are exacerbated by the difficulties encountered in trying 'to prove' how women's general disadvantage is particularized in the international legal system while using the traditional tools. The methodological limitations of traditional legal analysis may require the use of multi-disciplinary perspectives.

Third, while the topic women and migration might suggest a monolithic category of 'women', the approach followed here does not underscore that assumption. The Report does not advocate a so-called 'essentialist' stance and acknowledges that women's experiences are differentiated on the basis, *inter alia*, of race, culture, class, religion, and sexual orientation. The insight and knowledge brought into Western-oriented feminist theory by African, African-American, Asian women on differentiation is invaluable. As Doreen Indra remarks, it has changed the course of feminist theory and representational strategies.¹⁰ But the use of the category 'women' has powerful theoretical and political potential.¹¹ Postmodernist and other theorists point to the danger of evoking a world in which forced migrants become simply 'victims' in a floating world beyond or above politics "without the gravities of history and politics"¹² or are represented as single, essential, transhistorical and disempowered figures as *the* forced migrant or *the* woman refugee. How people respond to forced migration will be gendered, but it will vary geographically, culturally, individually and otherwise. The Report therefore will make use of the category 'women' relating to situated experiences within a specific context where possible.

Four, factors such as the end of the Cold war, the idea of collective security, the accelerated pace of globalisation, the expansion of international civil society and the advent of overriding human rights law, have had significant impact on the development of international law. This has given credence to the suggestion that international law is at a 'Grotian moment' as indicated by the former Secretary-General of the United Nations, Boutros Boutros-Ghali.¹³ Whereas the 19th century revered the idea of state sovereignty, and the 20th century saw growing contradictions between state sovereignty and the evolving norms of the international community, the 21st century is at the threshold of a new internationalism that challenges the idea of state sovereignty to an unprecedented extent. National boundaries are increasingly permeable, producing an inter-dependent world in which the meaning of state sovereignty and the principle of non-intervention in the domestic affairs of states are altered. The rapid changes in the political and economic global (dis)order affect the traditional conceptions of the international legal system. The contours of a paradigm shift, leading to a reconfiguration of international law, are gradually becoming visible. Despite the complexities of this new internationalism, a new international engagement and solidarity is taking shape, expanding the space and rights of individuals to directly intervene in international

⁸ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, A Feminist Analysis*, Melland Schill Studies in International Law, Juris Publishing, Manchester University Press (2000) 21.

⁹ AX Fellmeth 'Feminism and International Law: Theory, Methodology, and Substantive Reform' *Human Rights Quarterly* 22 (2000) 662.

¹⁰ Doreen Indra, 'Not a "Room of One's Own": Engendering Forced Migration Knowledge and Practice' in *Engendering Forced Migration*, above note 6 at 8.

¹¹ As Hilary Charlesworth and Christine Chinkin have argued in *The Boundaries of International Law - A Feminist Analysis*, above note 8 at 55.

¹² Liisa H Malkki, 'Refugees and Exile 'From "Refugee Studies" to the National Order of Things' in *Annual Review Anthropology* 24 (1995) 518.

¹³ Boutros Boutros -Ghali, 'A Grotian Moment', *Fordham International Law Journal* 18 (1995) 1609. See Hilary Charlesworth and Christine Chinkin, above note 11 at 20. *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Rep.(Advisory Opinion, 8 July), (diss.opinion Judge Weeramantry) at 551.

organisations and policies and vice versa. The relevant context of human displacement creates a discourse of internationalism that transcends the 'national order of things'.¹⁴

It is the impact of all these factors that opens up space for legal analysis beyond traditional boundaries: methodologically, theoretically, ideologically, and contextually by making use of insights gained from feminist, legal-sociological and multi-disciplinary research.

FORCED MIGRATION

It is well recognised that the position of women is subordinate or unequal to that of men worldwide. Women's disadvantages are not only played out on various levels and in different forms *within* societies, but are also played out within the global community. Two-thirds of the world's poorest people are women and girls; two-thirds of the world's illiterates are women and girls. Women are more vulnerable and suffer disproportionately in conflicts, wars and situations of poverty, health and discrimination. Two million girls between 5 and 15 are forced into the commercial sex trade *each year*, and trafficking for sexual purposes is the most rapidly expanding segment of organised crime.¹⁵ Women are almost always worse off than men while seeking employment in voluntary or forced migration.¹⁶ Economically disadvantaged women are especially vulnerable to sexual abuse, violence, trafficking and exploitation. Whereas the increase in voluntary migration is to a large extent the result of globalization of world trade, communications and the ease of modern transportation¹⁷, involuntary migration is the result of armed conflict, poverty, human rights abuses, violence and intolerance.

2 REFUGEE WOMEN

2.1 HISTORICAL PERSPECTIVE

Refugee movements are "the products of failure - the failure to resolve conflict and its underlying causes: intolerance, antagonism and poverty"¹⁸. As such they cannot be treated as a humanitarian issue only,¹⁹ but need to be recognised and addressed as political phenomena. Mass migrations often generate tensions within states, in-between states and can threaten regional or international peace and security. There is growing consensus that the plight of refugees and other forced migrants needs to be addressed in diverse ways, and on different levels, such as political negotiations, peacekeeping operations, social and economic development. Displaced persons are no longer relegated to the concern of humanitarian and charity organisations alone. The United Nations High Commissioner for Refugees (UNCHR) has realised the limitations of the traditional solutions of focusing purely on countries of asylum, and developed a new and additional approach to the question of human displacement. This is a pro-active and preventive approach, concerned with conditions in actual and potential refugee producing states.²⁰

The modern era of large-scale refugee flows began after the First World War. The newly formed states in Central, Eastern, and Southern Europe were seeking to create homogeneous populations through forced migration after the dissolution of the old empires.²¹ After the Second World War about 30 million people

¹⁴ Liisa Malkki expanding on Foucault's notion of international citizenship at 517.

¹⁵ Statement by Dr Nafis Sadik, Special Advisor, Under Secretary-General United Nations at the Special Debate on Tolerance and Respect, Commission on Human Rights, 57th session, (26 March 2001) 1

¹⁶ *Ibid.* at 2.

¹⁷ Myron Weiner, *The Global Migration Crisis - Challenge to States and to Human Rights*, HarperCollinsCollegePublishers 25.

¹⁸ Boutros Boutros -Ghali, preface to *The State of the World's Refugees - In Search of Solutions*, UNHCR, Oxford University Press (1995) 7.

¹⁹ Patrick Matlou 'Upsetting the Cart, Forced Migration and Gender Issues' in Doreen Indra (ed) *Engendering Forced Migration*,

²⁰ UNHCR Sadako Ogata in *The State of the World's Refugees - In Search of Solutions* (1995), 8.

²¹ Myron Weiner, *The Global Migration Crisis - Challenges to States and to Human Rights*, above note 17 at 22.

were displaced. In the last year of the war and the immediate postwar years the displacement was originally conceived as a military problem and not yet as a humanitarian one. These refugees were a major *political* issue on the international agenda in the period 1946-1950. It is against this background that certain techniques for managing refugees became standardized and then globalized.²² In 1951 Western states and Yugoslavia adopted the Convention relating to the Status of Refugees. In the same year the Office of the High Commissioner of Refugees was established. The United Nations High Commissioner for Refugees was entrusted with the primary responsibility of providing international protection to refugees and supervising the application of treaties. The anti-Communist thrust of refugee law was visible for the next few decades, e.g. of all refugees admitted to the USA until the mid 1980's 90% came from communist countries.²³ Refugee law developed within the above context and within the emerging human rights framework. Not surprisingly, the Universal Declaration of Human Rights underscores the right of everyone to enjoy fundamental rights and freedoms without discrimination and declares "*everyone has the right to seek and to enjoy in other countries asylum from persecution*".

The Refugee Convention defines a refugee as any person who "*...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*". The 1967 Protocol Relating to the Status of Refugees removed certain restrictions relating to the pre-1951 situation in Europe and made the 1951 Convention a universal instrument of refugee law. Other international instruments include the 1967 United Nations Declaration on Territorial Asylum. It states that the granting of territorial asylum "*is a peaceful and humanitarian act, and that, as such it cannot be regarded as unfriendly by any other State*" and upholds the basic humanitarian principle of *non-refoulement*.

Regional additions were, *inter alia*, the adoption of the Caracas Convention on Territorial Asylum (1954), the Cartagena Declaration on Refugees (1984), addressing refugee problems in Latin-America, although not binding upon states, and the Organisation of African Unity's (1969) Convention Governing Specific Aspects of Refugee Problems in Africa. The Council of Europe has also adopted several instruments concerning refugees. The "most comprehensive and significant regional treaty"²⁴ dealing with refugees is the 1969 OAU Convention with its expanded definition of 'refugee'. Art 1(2) adds to the definition of the 1951 Refugee Convention that the "*term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality*". It complements rather than duplicates the 1951 Convention, and includes important provisions on the prohibition of subversive activities. The latter was one of the main reasons for the adoption of the OAU Convention, besides concern for the constantly increasing numbers of refugees in Africa. The focus shifted from the post-war European refugee to the post-colonial refugee in Africa, the Middle East and Asia, bringing about the emergence of refugees as 'a Third World problem'²⁵. At the same time, the focus shifted from the individual refugee and asylum seeker to the large-scale displacement of groups.

The world's largest refugee flow took place in South Asia, following the partition of India in 1947, when an estimated 14 million persons migrated between India and Pakistan.²⁶ In 1995, half of the refugee population was to be found in Africa, the share of refugees in Africa was down to 30 percent in 2000, but still more than half of the world's internally displaced persons resides in Africa.²⁷ The outbreak of civil war in Rwanda in 1990 led to one million of internally displaced persons. This was preceded by the existence of large numbers of Rwandese refugees in neighbouring states over extended periods, and the involvement

²² Liisa Malkki, see note 12 above at 497

²³ Thomas Spijkerboer, *Gender and Refugee Status*, Ashgate/ Dartmouth (2000), 197.

²⁴ Centre for Human Rights, United Nations Office, Geneva, (June 1993).

²⁵ Liisa Malkki, see note 12 at 503.

²⁶ Myron Weiner, see note 17 at 22.

²⁷ IOM *Migration Policy Framework for Sub-Saharan Africa*, 6.

of refugees in power struggles outside their country. During the genocide in 1994, the exodus from Rwanda was not simply a refugee movement but "a calculated evacuation"²⁸ of part of the population. In the space of only a few days 800.000 people crossed the border, part of a Rwandese refugee population totaling almost two million men, women and children. The experience in Rwanda and the former Yugoslavia has demonstrated that the figure of the politically and militarily active refugee remains a reality.²⁹ The use of refugees for military purposes fomenting conflict, aiding rebel movements evokes stark images of the refugee other than as simply a victim, thus making solutions increasingly complex.

The changing nature and structure of armed conflicts, from traditional wars fought between states with professional soldiers to armed conflicts between warring factions and rebel movements, have increasingly made women victims. Significantly, United Nations Security Council Resolutions 1261, 1314 and 1325 on women and armed conflict, and children and armed conflict, require peacekeeping missions to include gender advisors. According to UNIFEM "women have to live with constant sexual abuse in camps designed to protect them" and aid workers often turn a blind eye to the violations in the refugee camp in order not to compromise their neutrality. Relief agencies have been criticised for being 'stuck in the game of humanitarian assistance' and not being able to translate that into development or human rights assistance.³⁰

At present Iran and Pakistan are hosting the world's single largest refugee population of more than 3,6 million, mostly from Afghanistan. Women's organisations, such as the Women's Commission for Refugee Women and Children, have recently called for an Afghan Women's Initiative, similar to the ones in Bosnia, Rwanda and Kosovar, to promote empowerment of women, including economic independence through skills training and micro-enterprise development.³¹ The Women's Initiatives are important programmes, administered by the UNHCR, for instance, the Rwanda Women's Initiative (RWI), targets women refugees and displaced persons, in particular widows, women heads of household, single mothers and victims of sexual violence, and is intended to create some form of self-sufficiency and access to vocational skills.³²

At the other side of the spectrum are examples of positive contribution made by refugees returning back home. In the Horn of Africa returnees have acted as catalysts for development bringing back skills and experience in several places in Eritrea, Somalia, Ethiopia. In the Ogaden region of Ethiopia "returnee women have been in the forefront of opening new business and play a leading role in the long-distance trade in goods from Somaliland and Djibouti"³³. During the last decade the UNHCR has recognised the inadequacy of the traditional responses. Fewer host countries are now prepared to contemplate long-term settlement and integration of large refugee populations, while third country resettlement is decreasing. There is also a growing recognition that the world's response to refugee movements in the 1970's and 1980's may have contributed to the scale of the problems in the 1990's.³⁴

None of the refugee treaties deal with gender as a separate category or ground. Article 1 of the 1951 Convention does not list sex or gender as reason for asylum, nor does Article 3 (dealing with the principle of non-discrimination) make reference to sex or gender. Although, at the drafting stage the Yugoslav delegate had suggested that 'sex' should be added to the grounds of non-discrimination: race or religion or sex. But the suggestion was rejected as 'equality of the sexes' was regarded a matter of national legislation. Besides the United Nations High Commissioner for Refugees doubted whether there would be any cases of persecution on account of sex anyway.³⁵ All the relevant international instruments dealing with refugee protection focus on men's activities or frame the rights mainly in the "image of men's public sphere rights"³⁶. It was only after criticism from non-governmental organisations and academics in the 1980's that the

²⁸ UNHCR, *The State of the World's Refugees - In Search of Solutions*, 32.

²⁹ *Ibid.* at 37.

³⁰ UNIFEM at <http://www.unhcr.ch>

³¹ Women's Commission for Refugee Women and Children.

³² UNHCR, *The State of the World's Refugees - A Humanitarian Agenda*, 161.

³³ *Ibid.* at 163

³⁴ UNHCR, *The State of the World's Refugees - In Search of Solutions*, 35

³⁵ Thomas Spijkerboer, Gender and Refugee Status, above note 23 at 1.

³⁶ Kadjiija Elmadmad, 'The Human Rights of Refugees with Special Reference to Muslim Refugee Women'

Nepal, Guatemala, Kenya and other camps), (iii) community-based, culturally appropriate, psycho-social support (Bosnia, Herzegovina, Rwanda, Kenya, Tanzania), (iv) projects such as Women Victims of Violence Project in Dadaab camp in Kenya, working towards a change of attitudes.

Despite criticism, States Parties to the 1951 Refugee Convention remain committed to the Convention, evidenced in the December 2001 Declaration. One hundred and twenty-six states of the 143 states that have ratified the Refugee Convention, reaffirmed their commitment to the Convention, and pledged to improve the treatment of refugees, to share the world's refugee burden more evenly, to strengthen international cooperation and to step up the battle against trafficking in persons. The Declaration stresses the fact that respect for the protection of refugees is a responsibility that is strengthened by international solidarity involving all members of the international community. The Declaration draws special attention to vulnerable groups and individuals with special needs, including women, children and the elderly.

Against this brief historical background the following aspects of refugee law and constructions of the refugee become clear. First, politicization is part of refugee law. In particular, *during* the Cold War refugee law emerged as contested terrain on which ideological battle lines were drawn.⁴² Second, the growing scale and complexity of involuntary migration indicates the difficult task of finding general legal and other solutions without a supportive political (both nationally and internationally) framework. In this regard, the address of the High Commissioner of Refugees, Ruud Lubbers, is significant, indicating changes in perception and seeking solutions to the *root causes* of migration flows, as well as stressing the importance of sharing the burden more equitably.⁴³ Third, the conceptualisation of refugee law as a humanitarian issue is under pressure. There have been calls for a paradigm shift in refugee law from humanitarian law to human rights law. A human rights law framework would require greater cooperation by states or more 'supra-national' powers to international organisations. Fourth, in the light of the continued reassessments and breakdown of conventional categories, rigid definitions and constructions of the refugee can no longer be maintained. More and more the UNHCR and other operational agencies have moved away from insisting on the refugee definition of the 1951 UN Refugee Convention and include internally displaced persons, uprooted populations and other involuntary migrants within their ambit.

Fifth, the various drafters of international instruments did not have the woman refugee in mind. The current image in law remains that of the male refugee and the emergence of women in refugee law is a recent phenomenon. It is for this and other reasons that some scholars regard the existing instruments inadequate⁴⁴ or, worse still, outmoded⁴⁵. But it is a sentiment not shared by the Governments of the States Parties: the recent re-affirmation of the 1951 Convention bears witness to that. However, there must also be recognition of the fact that attempts to put gender on the agenda have materialised in valuable action by international organisations such as the UNHCR during the last decade. The changes in approaching women's issues in refugee policy and practice have been substantial and the United Nations, for instance, has taken seriously its undertaking to mainstream gender. The UNHCR has stated that it is committed to expanding the involvement of women in the running of refugee camps and delivery services, and the restructuring of the asylum process so that it is more responsive to the needs of women.⁴⁶ Sixth, the geographical and cultural differentiation of refugees and thus of women refugees is apparent. This differentiation and the intersection of race, ethnicity, sex and culture are reflected in the national states' response in granting refugee status to women.

From here it is one step to the question: How has the present day woman refugee been constructed? What are the challenges facing women refugees generally while emphasising the specificity of the experiences of refugee women at the same time? What have been feminists' critiques of refugee law? Do we need a radical overhaul of the relevant conventions to provide space for the inclusion of a new regime in which the woman refugee becomes the point of reference? Should we conceptualise international protection in such

⁴² Guy S. Goodwin-Gill, editorial, *International Journal of Refugee Law*, 12 (2000), see also Dennis McNamara, *International Journal of Refugee Law* (1997) 5.

⁴³ Statement by Ruud Lubbers, UN High Commissioner for Refugees, to the Ministerial meeting of States Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (Geneva), (12 December 2001).

⁴⁴ Kadjja Elmadad, above note 36 at 266.

⁴⁵ Patrick Matlou, above note 19 at 130.

⁴⁶ Ruud Lubbers, statement at International Women's Day (8 March 2002).

ways as to include a ground of general gender persecution? Or should we excavate existing provisions, expand existing grounds relying on the flexibility of legal rules and concepts to create the necessary changes? In other words, to advocate for a human rights based approach to women in refugee law?

2.2 PERSECUTION GROUNDS

The 1951 Refugee Convention enumerates race, religion, nationality, and membership of a particular social group or political opinion as persecution grounds. In The Netherlands the question concerning which of the five grounds provides the basis for the fear of persecution is "virtually considered immaterial"⁴⁷, although the most important ground seems to be 'political opinion'. The most crucial element is whether the persecution is clearly discriminatory. In other jurisdictions such as Canada the precise ground of the feared persecution is of major importance, with a focus on inclusion of gender persecution within the category 'a particular social group'. Similarly, advocates of a human rights based approach to refugee women focus their attention on this category.

The United Nations High Commissioner for Refugees has described six principal forms of 'gender-based persecution'⁴⁸:

- (a) harsh and inhuman treatment for the transgression of social norms
- (b) persecution taking the form of sexual violence
- (c) claims of women resisting female genital mutilation
- (d) fear of persecution on birth control, if coercive and intrusive methods are used, including forced abortions and involuntary sterilization
- (e) punishment and mistreatment of people on the basis of homosexuality
- (f) domestic violence primarily in situations where the abuse attains a certain level of severity, and where the authorities are unable or unwilling to provide any protection (although it has formed the basis for successful asylum requests in only a small number of countries).

The last point has also received endorsement from the Special Rapporteur on Violence Against Women, Radikha Coomaraswamy, when recommending that national refugee and asylum laws be broadened "to include gender-based claims of persecution, including domestic violence".⁴⁹

2.2.1 PARTICULAR SOCIAL GROUP

In an effort to deal with gender-related persecution claims, some states are developing jurisprudence on 'membership of a particular social group' as ground for asylum. In 1985 the European Parliament called on states to grant refugee status 'to women who suffer cruel and inhuman treatment because they have violated the moral or ethical rules of their society'⁵⁰. According to the European Parliament women who have been treated in this manner constitute a 'particular social group'. The British House of Lords has in the cases of *Islam* and *Shah*⁵¹ advanced the situation of women as a social group potentially exposed to persecution. The case involved the appeals of two Pakistani women who were seeking asylum in the United Kingdom. Both women had been forced by their husbands to leave the home and were at risk of being falsely accused of adultery in Pakistan. The Court of Appeals held earlier that the two women could not be regarded as members of a 'particular social group' as 'the common uniting attribute setting the group apart from the rest of society' did not exist independently of the feared persecution.⁵² The House of Lords allowed the appeals. Lords Steyn, Hoffmann and Hope of Craighead held that the particular social group consisted of 'women

⁴⁷ Spijkerboer, above note 23 at 115.

⁴⁸ UNHCR, *A Humanitarian Agenda*, 197.

⁴⁹ Radikha Coomaraswamy, Report of the Special Rapporteur on Violence against Women 6 February 1996 E/CN.4/1996/53 - recommended strategies for states item (o) para. 142 at p34..

⁵⁰ UNHCR, *A Humanitarian Agenda*, 196

⁵¹ *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah* (1999) 2 W.L.R. 1015; (1999) INLR 144.

⁵² Waite L.J. in *R v Immigration Appeal Tribunal and Another, Ex parte Shah* (1998) 1 W.L.R 74.

in Pakistan'. The Law Lords unanimously concurred that the particular social group must exist independently of, and not be defined by, the persecution feared: to define the social group by reference to the 'fear of being persecuted would be to resort to circular reasoning'⁵³. However, the rule should not be extended so as 'to exclude discrimination as a means of defining the social group where people with common characteristics are being discriminated against'. Lord Steyn, delivering the leading judgment, warned against generalisations about the position of women in particular countries, but the distinctive feature of this case was that 'in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated and partly sanctioned by the state'.⁵⁴

The Executive Committee of the UNHCR has encouraged states to consider women fearing persecution on the basis of having transgressed their society's laws or customs regarding the role of women, to be considered a 'particular social group'.⁵⁵ In the United States gender alone is insufficient to constitute a social group.⁵⁶

The Supreme Court in Canada has developed jurisprudence on a 'particular social group' that includes women. The Canadian Immigration and Refugee Board has determined that single women living in a Moslem country without the protection of a male relative, unprotected Zimbabwean women or girls subject to wife abuse, and Zimbabwean women or girls forced to marry according to customary laws of kusvavura and lobola, belong to a social group.⁵⁷ However, some academics have been critical of the case law emanating from the Convention Refugee Determination Division (CRDD), the Immigration and Refugee Board (IRB) and the higher courts that have jurisdiction to review CRDD decisions. They have argued that the case law is not always consistent and principled and is to the detriment of women, many of whom face persecution for reasons of sex, gender, age and/or family status.⁵⁸

In 1993 the Canadian IRB issued *Guidelines on Women Refugee Claimants Fearing Gender-related Persecution*, which recognised that women who fear persecution on account of their gender could in certain circumstances be found to fall within the meaning of 'particular social group'.⁵⁹ La Forest J in *Ward*⁶⁰ stated that 'social group' could include individuals fearing persecution on 'such bases as gender, linguistic background and sexual orientation'. Although the *Ward* case did not deal with women refugees, it set out general guidelines for interpreting a 'particular social group'. The decision confirmed that claims based on gender could fall within the sub-category of 'a group defined by an innate or unchangeable characteristic': one of three sub-categories identified as falling within the ambit of 'social group'. Women subject to domestic violence, women forced into marriage without their consent, and women who have been subjected to exploitation and who, in consequence of the exploitation have been tried, convicted and sentenced to prison, *inter alia*, have been defined as deserving of the protection of the Refugee Convention.⁶¹ So far, there has not been an acceptance of the category 'women' constituting a particular social group, only various groups of women. Krista Daley and Ninette Kelley have suggested that a human rights based approach to the Refugee Convention grounds would provide a more principled and consistent framework. Any persecution directed at a woman on account of her gender, that is, if gender were a substantial factor in the persecution feared, would fall within a 'particular social group'.⁶²

⁵³ Full text of the judgment reprinted in *International Journal of Refugee Law*, vol 11 no 3, (1999) 496-527; Lord Hope of Craighead at 517, Lord Steyn at 504. See also Mavelyn Vidal, 'Membership of a Particular Social Group and the Effect of Islam and Shah', *International Journal of Refugee Law* (1999) 533.

⁵⁴ *Ibid*, *IJRL*, at 497.

⁵⁵ UNHCR, *Guidelines on Refugee Women* (EC/SCP/67).

⁵⁶ Report of the UNHCR Symposium on Gender-based Persecution, *International Journal of Refugee Law Special Issue* (1997) 16. The US decision-makers would allow 'women who do not wear the veil' or 'women who are opposed to FGM' *ibid*. at 18.

⁵⁷ Jane Connors, 'Legal Aspects of Women as a Particular Social Group', *International Journal on Refugee Law, Special Issue* (1997) 125.

⁵⁸ Krista Daley & Ninette Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' *International Journal of Refugee Law*, 12 no 2 (2000) 149.

⁵⁹ *Ibid*. at 154

⁶⁰ *Canada (Attorney General) v Ward* (1993) 2 S.C.R. 689

⁶¹ Daley and Kelley, above note 58 at 155.

⁶² *Ibid*. at 166.

Those who advocate a human rights approach to refugee women focus almost exclusively on a 'particular social group'. Apart from its many advantages, the human rights approach tends to lead to 'essentialist' reasoning, and relies on stereotyping and the image of the dysfunctional woman as victim. One of the greatest drawbacks of this approach is the construction of the cultural Other, locating gender discrimination and sexism in the so-called 'Third World', 'the South' or Islamic states. In the process women refugees are then presented as dis-empowered and tragic victims from strongly patriarchal and so-called 'non-enlightened' states in need to be rescued by Western states. One particular virulent form of stereotyping of women is found in the treatment of Muslim women refugees and asylum seekers. Susan Musarrat Akram, with reference to Edward Said, uses the term neo-Orientalism to describe this phenomenon.

The UNHCR has defined four broad categories of gender-related claims, which are relevant to the type of persecution claimed by persons fleeing Muslim countries: (a) the method of persecution is gender-related; (b) punishment for having transgressed social mores and laws which are restrictive of fundamental human rights; (c) the feared persecution is based on measures used in carrying out a law or policy; (d) the law, policy or practice in itself is persecutory.⁶³ Claims based on forced marriage, transgression of dress codes and social mores, the prohibition to study or to earn a living have been relegated to a generalised 'Islamic Law' or 'Muslim mores' as the source of persecution. Akram criticises the tendency of those who are advocating *gender-based* persecution - instead of bringing the claim under persecution on the ground of political opinion or religion - as reflective of an Orientalist mindset. The notion of women fleeing Muslim countries, because 'Islam persecutes women because they are women' is, besides being open to empirical rebuttal, stereotypical and diminishes the real claims of persecution of Muslim women⁶⁴. It denies women the right to speak in their own voice and undermines Muslim feminist movements.

The Case of Nada, a young Saudi woman applying for refugee status in Canada, is illustrative of this approach. The Canadian Immigration and Refugee Board rejected Nada's claim, who fled to Canada after having her life threatened for her feminist beliefs. The IRB regarded it not credible that an Arab Muslim woman would disagree with the authorities of a Muslim state, and her feminism was denied the status of 'political opinion'.⁶⁵ Spijkerboer, in his study of the construction of the asylum applicant in the Netherlands, equally comes to the conclusion that women are denied their own voices. Instead, in the asylum process the 'truth' gets constructed in an ideological, ethnic and gendered manner - albeit that the recognition rate of the - smaller - percentage of women applying for refugee status was found to be higher than that of men.⁶⁶ Whether the small comparative advantage of woman asylum application is specific to The Netherlands or is also found in other jurisdictions deserves more attention in the next report.

3. TRAFFICKING IN WOMEN

3.1 INTRODUCTORY REMARKS

Trafficking in women is at once part of a global phenomenon of increased trafficking in persons across the world, and at the same time a distinct movement with women-specific characteristics of human rights violations. The use of coercion, sexual violence and particular types of forced labour servitude exacerbate the vulnerability of women. Similarly, the root causes of trafficking, the exploitation and violation of human rights of children may overlap those of trafficking in general, but interventions and remedies need to be specifically designed for the protection of the child. Trafficking in children falls outside the scope of the report except for those instances where it would be completely arbitrary to make a distinction between a woman and a girl-child.

⁶³ Susan Musarrat Akram, 'Orientalism Revisited in Asylum and Refugee Claims' *International Journal of Refugee Law*, 12 no 1 (2000) 17.

⁶⁴ *Ibid.* at 18, 19.

⁶⁵ Akram, see above note 58 at 25. Valerie Oosterveld, 'The Canadian Guidelines on Gender -Related Persecution: An Evaluation', *International Journal of Refugee Law* vol 8 no 4 (1996) 574-75 (Nada's case *Re P. (F.V.)* (24 Sept.1991), CRDD No. 1096, No.M91-04822(T)).

⁶⁶ Spijkerboer, above note 23 at 194.

More and more women are turning to traffickers to facilitate migration or are misled with promises of high income work, only to find themselves forced into factories, sweatshops, organized crime or sex work. Poverty, armed conflicts, persecution, violence or the search for better opportunities are root causes of migration. The feminization of poverty in many developing countries, lack of access to resources, gender discrimination in education, family status and employment as well as violence and certain religious and cultural practices contribute to the desperate economic and social situations of women in many places across the world. This has necessitated many to migrate in search of economic opportunities to escape abject poverty.

The Special Rapporteur on Violence Against Women, Radikha Coomaraswamy, sees the lack of rights of women as the "primary causative factor at the root of both women's migration and trafficking in women"⁶⁷ Women experience discrimination, lack rights, and are denied freedoms in the home, community and state structures. Illiteracy and lack of adequate skills among women in many societies make them turn to low paying, unskilled jobs in agriculture, domestic work and those in the 'entertainment' industry rendering them vulnerable to exploitation. They may be deceived not only by false information, but through lack of insight and awareness of the potential dangers they encounter when approaching agents or traffickers. For instance, middlemen lure many Nepalese girls to India under the pretext of employment in the carpet industry, while the young women end up in the sex industry.⁶⁸ It is a pattern repeated in many other states in the world. In the United States traffickers were successfully prosecuted (sentenced for up to 15 years and ordered to pay restitution to the women in the amount of 1 million dollars) for trafficking at least 23 women from Mexico into the US. The women were reportedly lured to the US with promises of employment as nannies and domestic workers, but were forced to work as sex workers and forcibly kept under threat and in slavery-like conditions.⁶⁹

Having little or no knowledge of the culture, language and legal system of the new country makes even the legal immigrant vulnerable. The situation is worse when the migrant is an illegal foreign national and smuggled or trafficked into the country under the auspices of criminal networks. In those situations the woman migrant is even more reluctant to report human rights violations and/or crimes committed against her for fear of deportation. Traffickers retain passports until the debt incurred is paid, and migrants are prevented from escaping by violence or threats of violence against themselves or their families.⁷⁰ In such situations the woman migrant may find her self subjected to sexual abuse, violence, maltreatment and other violations of her human rights.

The failure of governments to protect women's civil, political, economic and social rights create situations in which trafficking flourishes. The lack of rights and freedoms is exacerbated by political and economic factors such as gross inequality between rich and poor countries and disparities of wealth and access within societies. Coomaraswamy points out that these external factors increasingly are leading to "internal as well as international political instabilities and violent upheavals such as those that were witnessed in Albania in 1997 and Indonesia in 1998, during which women were targeted by particularized forms of violence, such as rape".⁷¹ The High Commissioner for Human Rights, Mary Robinson, early on decided to make trafficking a priority area through developing projects (such as in Nepal), through preventive and assistance work (throughout the territory of the former Yugoslavia), and other anti-trafficking activities.⁷² The inclusion of trafficking in women on the agenda of the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance equally testifies to greater awareness amongst states.

⁶⁷ Radikha Coomaraswamy, Report on Trafficking in Women, Women's Migration and Violence Against Women para. 54, at p19. E/CN.4/2000/68 Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women (29 February 2000).

⁶⁸ Dhurga Ghimire, 'Sexual Exploitation of Nepalese Girls', paper presented at the Regional Seminar in Bombay, India on 'Girls Rights - Taking Action Against Sexual Exploitation and Trafficking' (organised by the Center for Population and Development Activities, Washington, DC), 8-10 December 1997.

⁶⁹ Radikha Coomaraswamy, above note 67, at para. 49, p18.

⁷⁰ Trafficking in Migrants: *International Organization of Migration Policy and Responses*, 2 http://www.iom.int/em/who/main_policies_trafficking.shtml

⁷¹ Radhikha Coomaraswamy, above note 67 at para. 58, p20.

⁷² *Women's Rights are Human Rights* - Special Issue on Women's Rights (Spring 2000) 11, 12.

In several preparatory meetings for the World Conference, Mary Robinson alluded to the shocking scale of the problem of trafficking in human beings, urging improved regional and global cooperation to stem the tide of trafficking and the forced prostitution of women and children.⁷³

According to the International Organization for Migration (IOM) trafficking in human beings has become a global business, generating huge profits for traffickers and organized crime syndicates. The edifice of the trafficking and smuggling business ranges from small operators, providing a specific service such as owners of boats or trucks crossing the border, to large smuggling networks with connections worldwide, providing false documentation, accommodation, and even training on how to claim asylum.⁷⁴ It is for these reasons that the UN General Assembly's adoption of the Convention Against Transnational Organized Crime and the supplementary Protocols is a timely and welcome intervention.

3.2 THE UNITED NATIONS' REGIME ON TRAFFICKING IN WOMEN

The adoption of the Convention Against Transnational Organized Crime and the three Protocols is a milestone in the global efforts to combat transnational organised crime; (1) the Protocol Against Smuggling of Migrants by Land, Sea and Air, and (2) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and (3) the Protocol Against Illicit Manufacturing of and Trafficking in Firearms, Their Parts, Components and Ammunition. The main Convention and the first two protocols were opened for signature in December 2000, all states have signed the Convention and 80 states have signed the Trafficking Protocol. Each will enter into force once 40 states have ratified them, but states must ratify the Convention before ratifying one or more of its Protocols.⁷⁵ The Trafficking Protocol represents an attempt to a holistic approach with crime control aspects of trafficking being addressed along with traditional human rights.⁷⁶ The stated purposes (Article 2) of the Trafficking Protocol are: (a) to prevent and combat trafficking in persons, (b) to protect and assist the victims of such trafficking, with full respect of their human rights, (c) to promote cooperation among states parties in order to meet those objectives.

The Trafficking Protocol contains the *first* international definition of 'trafficking in persons':

"(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used."

Compared with the existing Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949), the scope of activities covered by the Trafficking Protocol is much wider. The new Protocol moves beyond prostitution and covers other trafficking situations including forced labour, debt bondage and forced marriage. The 1949 Convention confines trafficking to trafficking for purposes of prostitution, and prohibits the exploitation of the prostitution of another person, even with the consent of the person. Although the 1949 Convention does not prohibit prostitution *per se*, and targets and punishes third-party involvement, the reality is that women suffer the burden of criminalization. For example, the Indian Immoral Traffic in Persons Prevention Act (1986) targets, the maintenance of a

⁷³ Address of the United Nations High Commissioner for Human Rights, Mary Robinson. Tehran, 19 February 2001.

⁷⁴ Trafficking in Migrants: IOM Policy and Responses, 2

⁷⁵ Art. 37(2)

⁷⁶ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' in *Human Rights Quarterly*, November (2000) 982.

brothel, living off the earnings of prostitution, procuring or detaining a woman for the sake of prostitution, soliciting or seducing for purposes of prostitution, the carrying on of prostitution in the vicinity of public places. But it is mostly invoked against the prostitutes themselves, and not the procurers and pimps.⁷⁷ The Trafficking Protocol, on the other hand, recognises that involuntary or forced participation in prostitution would constitute trafficking, but the majority of governments rejected the idea that voluntary, non-coercive participation in prostitution constitutes trafficking. One group of states argued that any distinction between forced and voluntary prostitution is morally unacceptable and that prostitution is inherently coercive. Starkly opposing positions were taken by those states rejecting the inclusion of non-coerced sex work into the definition of trafficking.⁷⁸ The Office of the United Nations High Commissioner for Human Rights, United Nations Children's Fund and the International Organization for Migration supported the latter position.

The *travaux préparatoires* will indicate that the UN Protocol addresses the 'exploitation of prostitution of others' (pimping) and 'other forms of sexual exploitation' only in the context of trafficking, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws. Because 'exploitation of prostitution of others' and 'other forms of sexual prostitution' are not defined in international law, national States would have to develop their own definitions for their criminal codes. Alternatively, they could use the international law definitions of 'forced labour', 'slavery or practices similar to slavery' or 'servitude' as these would cover all situations of force or coercion in prostitution, including forced participation in the sex industry.⁷⁹ For instance, the Rome Statute of the International Criminal Court (Art. 7.2 (c)) includes a definition of 'enslavement' including the exercise of 'ownership' powers in the course of trafficking, thereby linking trafficking to slavery-like practices.

The crime of trafficking of persons consists of the following three elements (with regard to trafficking of children only the first and third element needs to be present to constitute trafficking):

1. an action consisting of recruitment, transportation, transfer, harboring or receipt of persons
2. By means of threat or use of force or other forms of coercion, abduction, abuse of power, or position of vulnerability
3. For the purposes of exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, the removal of organs)

The Office of the UNHCHR, UNICEF and IOM would have preferred that the key provision of assistance for protection of victims and trafficking in person were not qualified by the term 'in appropriate cases'. They submitted that the qualification was unnecessary restrictive and not in accordance with international human rights law, which clearly provides that victims of human rights violations such as trafficking should be provided with access to adequate and appropriate remedies. According to their Note States Parties should be obliged to provide information to trafficking victims on the possibility of obtaining remedies, including compensation, and to render assistance to such victims.⁸⁰

The final text also does not provide sufficient protection for victims of trafficking as it did not accept the proposal to include safe and voluntary repatriation.⁸¹ The final article provides that states parties are to

⁷⁷ Sections 3,4,5,6,7,8 of the Immoral Traffic in Persons Act, 1986. Radikha Coomaraswamy, above note 67 at para. 24, p12.

⁷⁸ Ann Gallagher, above note 76 at 984, 985.

⁷⁹ See also Global Alliance Against Trafficking in Women (GAATW) <http://www.innet.co.org/gaatw/SolidarityAction/HRSLetter>, on 2.

⁸⁰ Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft Protocols concerning migrant smuggling and trafficking in persons to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, eight session, Vienna, 21 February-3 March 2000, A/AC.254/27 at page 3.

⁸¹ A/AC.254/16 and A/AC254/27

facilitate and accept the return of their trafficked nationals and permanent residents, but there is no obligation on the returning state except that 'the return shall preferably be voluntary'. But the *travaux preparatoires* will effectively render this concession meaningless by indicating that these words "are to be understood as not placing any obligation on the returning State Party"⁸². States Parties 'shall consider measures' or 'shall endeavour' to provide assistance 'in appropriate cases', making the protection much weaker than the UNHCHR, UNICEF and IOM and others, including several NGO's would have preferred. In fact, only the law enforcement provisions are phrased as mandatory obligations. The Protocol does not address the question of how victims of traffickers as opposed to migrant smugglers, are identified. Smuggled migrants in terms of the separate Migrant Smuggling Protocol are worse off than victims of traffickers with regard to repatriation, receive less protection and may be regarded less of a financial and administrative 'burden' by receiving States. The different responsibilities may, in turn, lead states to identify a person as a smuggled migrant rather than as a victim of traffickers. In addition, the Protocols do not deal with the problems arising out a situation where a person falls within the scope of both instruments.

The United Nations High Commissioner for Refugees, separately and together with the UNHCHR, UNICEF and IOM, made representations to the drafters of the Migrant Smuggling Protocol on the issue of *non-refoulement* and protection of the claim for asylum despite the illegality of entrance.⁸³ Although, the final text falls short of the recommended standard, at least there is reference (in both the Trafficking and Migrant Smuggling Protocol) to the principle of *non-refoulement* and the 1951 Refugee Convention and the 1967 Protocol.

Despite the discretionary - instead of mandatory - obligations on the protection of trafficked persons, the Trafficking Protocol is a worthy step in the right direction. The efforts and pressures by the UNHCHR, UNICEF, IOM and IGO/NGO's upon the drafting have been substantial: the broad definition of trafficking and the inclusion of references of - at least some - human rights perspectives into the final text of the protocols bear testimony to that. It is a pity, though, that the final text could not include more comprehensive human rights standards. In addition, the unwillingness to engage the root causes of trafficking is to be regretted. As the submission by the UNHCHR, UNICEF and IOM so distinctly stated, economic factors such as poverty, unemployment, indebtedness; social and cultural factors such as violence against women, gender discrimination; political and legal factors such as lack of appropriate legislation and corruption in the public sector; and international factors such as growing feminization of labour migration and increasingly restrictive immigration policies are at the basis of trafficking. It would not have been beyond the scope of the Protocol to make reference to steps, including legal steps and social and economic initiatives, that could be taken by States Parties to address the root causes of trafficking. The failure to do so displays a narrow conceptualisation of legal solutions to ubiquitous societal problems. The need to go beyond the Protocol, which has its focus on combating transnational organised criminal activities, remains axiomatic. Any subsequent legal instruments should place human rights⁸⁴, including the right to life, the right to dignity and security, the right to just and favourable conditions of work and others squarely at the centre of the fight against trafficking in women.

3.3 THE SAARC CONVENTION ON TRAFFICKING IN SOUTH ASIA⁸⁵

Trafficking in South Asia has taken on disturbing dimensions. Large segments of the population in South Asia are subsumed by poverty that has a sharper impact on women and children and increases their vulnerability. Nepal and Bangladesh constitute high supply zones for trafficking purposes with India being the recipient country. Women and children are trafficked into India from Nepal, Bhutan and Bangladesh. Women and children from India are in turn trafficked into Middle Eastern countries and further abroad.⁸⁶ The current era of globalization of the economy has facilitated the process of cross border movement and

⁸² Anne Gallagher, note 76 above at 993.

⁸³ *Ibid.* at 998.

⁸⁴ See the UNHCHR, Mary Robinson's address *Trafficking and the Global Sex Industry: The Need for A Human Rights Framework*, Geneva, 21 June 1999.

⁸⁵ By Ms Vijayashri Sripathi, see above.

⁸⁶ National Human Rights Commission (NHRC) Trafficking Kit at 4 & 11.

migration within the region. Illegal migrants and migration patterns facilitate the creation of fertile conditions for trafficking to flourish and be entrenched. An unfortunate offshoot of migration is that the poor and vulnerable among the migrants fall prey to a gamut of exploitative practices, one of which is prostitution and the sex trade. Poverty, illiteracy and lack of skills are all contributing factors. Corruption among the police, the unholy nexus that exists between the traffickers, political agents, and enforcement officials, inherently flawed anti-trafficking legislation that is skewed against the victims of the trade and their selective implementation whereby only the victim is penalized⁸⁷ are other reasons for the continuance of this practice. The low status of the girl child - an inherent aspect of societies in South Asia - has also facilitated fraudulent marriages after which she is trafficked for monetary consideration.⁸⁸ A high unemployment rate among the youth compels them to move to urban areas or foreign locales for better prospects. Every year 5,000 to 7,000 Nepalese girls are trafficked into red light districts of Indian cities⁸⁹. Certain traditions and cultures that approve the sale of girls for prostitution and sexual exploitation have also contributed to the increasing trafficking among women and children for the purpose of prostitution.⁹⁰ Where the victim is an illegal migrant she could be either deported or charged for violation of immigration laws. In Pakistan, trafficked victims are subjected to further trauma: they are charged under the Hudood Ordinance that prohibits extra-marital sexual intercourse.⁹¹ The additional fact that trafficking is a highly profitable venture, makes combating trafficking in women and children in South Asia an almost insuperable task.

The South Asian Association for Regional Cooperation (SAARC) was established when the Heads of State or Government of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka formally adopted its Charter on December 8, 1985.⁹² The SAARC Convention on Preventing and Combating Trafficking of Women and Children for Prostitution comes as an important follow-up at the regional level to the international efforts to combat trafficking. All the SAARC member states have signed - but not yet ratified - this Convention on January 6, 2002. It has therefore not yet come into force. Interestingly, all seven Member states of SAARC need to ratify it in order for it to enter into force.

The purpose of this convention is to promote cooperation amongst Member states to effectively deal with various aspects of a) prevention, b) interdiction and c) suppression of trafficking in women and children; d) repatriation and rehabilitation of victims of trafficking and e) preventing the use of women and children in international prostitution networks, particularly where the SAARC Member Countries are the countries of origin, transit and destination.⁹³ The SAARC Convention, in Article I(3) defines 'trafficking' as: "*Moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.*". 'Persons subjected to trafficking' are defined in Article I(5) as follows: "*Women and children victimised or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means*". The Convention defines 'Traffickers' in Article I(4) as: "*Persons, agencies or institutions engaged in any form of trafficking*". And 'Prostitution' has been defined in Article I(2) as: "*the sexual exploitation or abuse of persons for commercial purposes*".

This definition of trafficking contains three elements:

⁸⁷ See Report of the Committee on Prostitution, Child Prostitutes and Children of Prostitutes and Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children 9 (1998) (prepared under the auspices of the Department of Child Development, Ministry of Human Resource Development, Government of India), hereinafter "Committee Report" at 14.

⁸⁸ See eg., National Plan of Action for the SAARC Decade (1991-2000) of the Girl Child.

⁸⁹ NHRC Trafficking Kit, above note 86 at 8.

⁹⁰ Committee Report, above note 87.

⁹¹ Meena Saraswati Seshu, *Interventions W.R.T. Reducing HIV vulnerability of trafficked People* at 6 (on file with the author VS).

⁹² See <http://www.saarc-sec.org/visited> February 12, 2002.

⁹³ SAARC Convention on Preventing and Combating Trafficking in Women & Children for Prostitution, Art.II (available at <http://www.saarc-sec.org>).

1. An action consisting of movement, sale or purchase of women and children both within and outside the member state
2. By means of: deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means;
3. For the purpose of: prostitution.

Compared to the definition of trafficking under the UN Trafficking Protocol, the SAARC Convention's definition is narrower in that it requires prostitution alone to be the end-purpose of trafficking. This is perhaps in keeping with the underlying theme of the Convention's overall purpose and the international legal opposition to all prostitution. But in reality, trafficking is not only for prostitution but also for forced or bonded domestic work, fraudulent/forced marriages, drug peddling, begging, camel racing, organ-trade, illegal cross-country adoption and bonded child labor.⁹⁴ Seen in this light the SAARC Convention does not offer comprehensive protection to women and children from all forms of exploitation including the 'worst forms of child labor'.⁹⁵ The UN Trafficking Protocol is more powerful in this regard. However the phrase 'with or without the consent of the person subjected to trafficking' in the trafficking definition in the SAARC Convention ensures that traffickers cannot escape conviction by using the victim's so-called consent as a defense.

The practice of child marriage is a social evil peculiar to South Asian societies⁹⁶ that is reflected in the 'trafficking' definition. But under the Convention, child marriage becomes relevant only if it is a means for attaining the end goal of trafficking, namely prostitution. Although child marriages in India are outlawed,⁹⁷ there are many communities in India that practice child marriage as a social norm and not for commercial exploitation per se. Such marriages may be regarded as exploitation of children and in violation of their fundamental rights. Furthermore, the trafficking definition does not address the issue of migrant smuggling of children. By making prostitution the end goal, this Convention has with one stroke potentially deprived a large number of children who are otherwise exploited of its benefits. In this regard, it does not effectively tackle the entire problem of trafficking for non-sexual purposes. It also does not cover trafficking for interchangeable sexual and non-sexual purposes such as a domestic worker subsequently becoming a sex slave of the employer.

Article IX of the Convention addresses one of the most crucial issues in trafficking, namely, the care, treatment, rehabilitation and repatriation of the victims. Feeble implementation of these provisions will undermine the ultimate purpose of the Convention. In the absence of being rehabilitated or repatriated, the victims will be bound to be drawn into the vicious process of trafficking all over again. Interestingly the language of Article IX indicates that hard obligations have been imposed upon member states by the Convention; providing care and maintenance of victims is not made discretionary or dependent on the decision of national authorities⁹⁸. States Parties are obliged to provide care, maintenance, legal advice and health care facilities to such victims. For rehabilitating victims of trafficking, states parties are obliged under Article IX (3) to establish protective homes or shelters and provide job training, legal advice and

⁹⁴ NHRC Trafficking kit, above note 86 at 1.

⁹⁵ ILO Convention 182 identifies the worst forms of child labour as :

- (a) all forms of slavery or practices similar to slavery such as the sale and trafficking of children, debt, bondage and serfdom, and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering a child for prostitution for the production of pornography or for performances; (c) the use, procuring or offering a child for illicit activities, in particular for the production and trafficking in drugs as defined in relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

⁹⁶ See generally NHRC Annual Report 25 (1998-99)

⁹⁷ Child Marriage Restraint Act, 1929.

⁹⁸ Article IX (2) states:

Pending the completion of arrangements for the repatriation of victims of cross-border trafficking, the State Parties to the Convention *shall* make suitable provisions for their care and maintenance. The provision of legal advice and health care facilities shall also be made available to such victims. [Emphasis supplied]

health care facilities. Also in order to facilitate their psychological recovery they are to provide counseling to the victims. The Convention however has one serious flaw in this regard. It does not call upon the member states to recognize and meet the "special needs of child victims of trafficking" in providing for their care, maintenance and rehabilitation.⁹⁹

A welcome feature of the Convention is that it promotes governments' partnership with civil society in tackling the menace of trafficking. Accordingly, under Article IX of the Convention, States Parties have an option to recruit the assistance of non-governmental organizations in taking care of and maintaining victims. States Parties shall also encourage recognized non-governmental organizations in areas of prevention, intervention, rehabilitation and other protective measures including establishing shelters for providing care and maintenance for victims of trafficking. Another protective measure for trafficking victims is that states are required not to disclose the identity of trafficked victims in judicial proceedings for trying offences under the Convention. In other words member states are obliged to protect the privacy of the victims.

The legal status of the victim in the receiving state is crucial to tackling effectively her rescue and rehabilitation. At the least, trafficking victims must be given the right to remain in the receiving country, at least temporarily in order to being protected from being victimized again by traffickers. The view of the United Nations High Commissioner for Human Rights that: "safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons" is of utmost relevance to the plight of trafficked victims in South Asia. Unfortunately since the SAARC Convention imposes no such obligation on member states its potential to prevent re-trafficking is seriously weakened. Another serious flaw in the SAARC Convention is that it is silent on the protections that the receiving states are to provide to victims in this regard. Perhaps the drafters of the Convention avoided such a provision because of the objections of the States Parties that such a provision would further encourage illegal migration and actually benefit traffickers. The Convention leaves it to the States Parties to work out the modalities for repatriation of the victims to the country of origin. But the language of Article IX suggests that the responsibility of the host-state to take care and provide maintenance for the victims is not linked to the success or failure of its government in working out the modalities for repatriation. This article states that 'pending the completion of arrangements for the repatriation of the victims of cross-border trafficking, the state parties to the Convention shall make suitable provisions for their care and maintenance'. It can be also argued that where a returning State Party decides for humanitarian purposes to give some right to a victim to temporarily remain in its territory, such state party would be obliged to provide for such victim's care and maintenance during and until the repatriation process is completed.¹⁰⁰

A small but important breakthrough achieved is that parties to the SAARC Convention are obliged to criminalize trafficking in any form. The criminalization obligation facilitates a uniform approach to tackling this problem by requiring the States Parties to adopt national legislation that makes trafficking in any form a criminal offence.¹⁰¹ Such laws are also to provide for appropriate penalties for such offences. Furthermore, other related conduct is also to be made punishable. Any person who keeps, maintains or manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking and knowingly lets or rents a building or other place or any part thereof for the purpose of trafficking shall be liable for punishment.¹⁰² By this provision the Convention brings within its tentacles also those involved in implementing the end goal of trafficking: prostitution.

Article IV lists out certain factual circumstances that make the commission of trafficking and other offences under the Convention 'particularly grave'. In prescribing penalties for offences under this Convention, States Parties are called upon to take into consideration these aggravating circumstances that

⁹⁹ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Note by the Office of the UN High Commissioner for Human Rights (OHCHR), the UN Children's Fund and the International Organization for Migration (IOM) on the draft protocols concerning migrant smuggling and trafficking in persons, U.N. Doc. A/AC.254/27.

¹⁰⁰ SAARC Convention, art. IX (2)

¹⁰¹ SAARC Convention art.III (1)

¹⁰² SAARC Convention, art.III(2)

make such offences 'grave in nature'. For instance one such 'aggravating circumstance': "*the fact that the offence is committed in a custodial institution or in an educational institution or social facility or in their immediate vicinity or in other places to which children and students visit for educational, sports, social and cultural activities*". The insertion of a 'mutual legal assistance' clause in the Convention seeks to facilitate communication and cooperation between States Parties for effective law enforcement.

The Convention lists a host of measures aimed at preventing trafficking - most of which are phrased in an obligatory style. In the area of law enforcement States Parties are also to regularly exchange information about agencies, institutions and individuals that are involved in trafficking. The Convention also envisages the establishment of a Regional Task Force by States Parties to facilitate implementation in the sphere of law enforcement. Since trafficking is emerging as a transnational crime, regional cooperation envisaged under these provisions is crucial to apprehension and prosecution of traffickers. Other preventive measures include sensitizing, and providing adequate training and assistance to the law enforcement agencies and judiciaries. However the Convention does not explicitly call upon States Parties to include a focus on methods to protect the rights of victims in such training.

The provision pertaining to preventive and development efforts on areas which are known to be source areas for trafficking is phrased in a programmatic, non-obligatory style. The states parties are 'to endeavour' to focus their efforts in this regard. States parties also have an option to consider taking necessary measures for supervising employment agencies that could be trafficking women and children under the guise of recruitment. Indeed there are many fake employment agencies that lure economically weak women and children into the vortex of trafficking by promising them higher wages or well-paid jobs as domestic workers in foreign countries. In the absence of access to the SAARC Convention's *travaux preparatoires*, it is not known why the framers of this Convention chose to use the word 'may' and thereby dilute the obligatory nature of this important provision. The establishment of bilateral mechanisms to effectively implement the provisions including mechanisms for cooperation to interdict trafficking in women and children is also phrased in a programmatic style. This is perhaps because implementation of such mechanisms would involve considerable expenditure on the part of States Parties.

The States Parties to the Convention are required to - in keeping with their respective approaches to the application of international law in their domestic legal systems - adopt necessary legislative and other necessary measures to ensure the Convention's implementation.

An important omission in this section is that the Convention makes no reference to the acknowledged root causes of trafficking like poverty, traditional and feudal culture, deprivation, low status of women and girls, and social conventions like dowry, polygamy, child marriage that create a platform for women's vulnerability. It only requires States Parties to use the media to promote awareness of the problem of trafficking and its underlying causes including the projection of negative images.

Porous borders marked by an absence of effective regulations have greatly contributed to trafficking. But under the Convention states parties do not have an obligation to strengthen border controls to detect and prevent trafficking. This is a serious lacuna in the preventive strategy under the Convention.

Provisions of the U.S. Victims of Trafficking and Violence Protection Act of 2000¹⁰³ are relevant in this regard and worth emulating in the South Asian context. States Parties should be obliged to provide economic alternatives including initiating microcredit lending programs, providing training in business development, skills training and job counseling, programs to keep children, especially girls, in elementary and secondary schools, and to educate girls on the dangers of trafficking¹⁰⁴. These economic alternative initiatives must be made an integral part of States Parties' prevention and deterrent strategies.

In conclusion, it can be said that the SAARC Convention marks an important step towards confronting the problem of trafficking that has bedeviled the SAARC nations for many years. It shows some degree of political willingness on the part of SAARC States to confront the issue of rights violations of women and

¹⁰³ Victims of Trafficking and Violence Protection Act, 2000 at 105-106.

¹⁰⁴ *Ibid.*

children that trafficking for prostitution entails. By placing a common criminalization obligation on States Parties it has facilitated a uniform approach to tackling trafficking. The Convention does not however break new ground or grant new rights. Its narrow definition of trafficking has left un-addressed many other serious forms of trafficking. By not laying down minimum standards for States Parties to adopt and follow with regard to the status and repatriation of victims in their countries, it has diluted the responsibility, which they owe to trafficked persons. The potential of this Convention to eliminating trafficking has not been tested and therefore its efficacy in this regard remains to be seen. The Convention does not have any review mechanism. This is a significant lacuna that is likely to undermine the political commitment of the States Parties that is bound to make its implementation less robust.

INDIAN INITIATIVES

The Government of India has had a national Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children since 1998. As per the Supreme Court directives¹⁰⁵, a Committee on Prostitution, Child prostitutes and Children of prostitutes has made an in-depth study into the problems of commercial sexual exploitation and trafficking in women and children to evolve suitable schemes appropriate with the Supreme Court directives. Various state governments have been implementing a number of projects for the rescue and rehabilitation of women and children victims through their own agencies and in collaboration with NGO's. India's National Human Rights Commission (NHRC) has been working in tandem with the Department of Women and Child Development (WCD), Government of India, the National Commission for Women (NCW) and UNICEF to evolve effective strategies and measures to combat trafficking in women and children. It has set up a Focal Point on Women's Rights including Trafficking in Women and Children.

However, much more remains to be done to totally eliminate trafficking in women and children on the subcontinent. At governmental level, the signing of the SAARC Convention is a welcome move and it is hoped that it will achieve speedy ratification by all the SAARC Member States and begin to be implemented seriously. Several interrelated and causative factors have given rise to and facilitated trafficking of women and children. Therefore tackling this trade requires holistic, inter-disciplinary, multi-pronged and coordinated long term and short term actions by not only the state but also by other actors, including civil society. Above all what is required is the political will to take the plight of victims of trafficking seriously. Thus there are no easy or quick or ready-made solutions to this problem. Seen in this light, the SAARC Convention is but a small step forward in the direction of eliminating trafficking of women and children in the South Asian region.

3.4 CONCLUDING REMARKS

When comparing the United Nations Trafficking Protocol with the South Asian equivalent, it is apparent that the different approaches to the end purposes of trafficking are pivotal to the workings of the two treaties. The choice made by the States Parties to the SAARC Convention of reducing trafficking to 'trafficking for the purpose of prostitution' has not been without its critics.¹⁰⁶ Although often linked in practice, trafficking and prostitution need to be distinguished. The input from human rights groups at the drafting stage of the UN Trafficking Protocol prevented the equation of trafficking with prostitution and left the question of the criminalization of prostitution to the individual States. In doing so, recognition was given to contemporary trafficking situations such as trafficking for the purposes of forced labour, forced marriage and slavery-like practices. Besides, inclusion of so-called 'voluntary' prostitution would have - arguably - infringed on the freedom of choice and sexual autonomy of women.

¹⁰⁵ AIR 1990 SC 1412, 1415-1416, *Vishal Jeet v. Union of India*; AIR 1997 SC 3021 *Gaurav Jain v. Union of India*.

¹⁰⁶ 'Trafficking in South Asia' - workshop held in Delhi (July 1998)), report prepared by NGO 'JAGORI' (on file with the author AL) commenting on an earlier draft of the SAARC Convention. See also the Office of the High Commissioner for Human Rights' Anti-Trafficking Programme that trafficking should not be restricted to sexual exploitation in *Women's Rights are Human Rights* - Special Issue on Women's Rights (Spring 2000) 13. See also Note of the OHCHR, UNICEF and IOM to the Ad-hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, above note 80. See Anne Gallagher, above note 76 at 985.

While the criminal activities of traffickers need to be effectively prosecuted, it remains important to keep a human rights focus on anti-trafficking interventions with the aim of protecting victims of trafficking. The desire to control illegal migration and transnational organised crime should not negate safeguarding international recognised human rights for trafficked women. Anti-trafficking initiatives run the risk of 'overprotection', opening the possibility of restricting freedom of movement and mobility of women by individual States. These issues warrant more debate at the forthcoming New Delhi Conference. Equally, other issues raised in this Preliminary Report need more input from Committee members in order to reach consensus on the formulation of recommendations in a subsequent Report.

The next Report intends to finalise work on women refugees and trafficking in women and related matters, and introduce voluntary migration of women. Preliminary Report on Women and Migration