

**HUMAN TRAFFICKING AND
THE COMMON EUROPEAN ASYLUM SYSTEM
VICTIM PROTECTION AND ASSISTANCE IN THE EUROPEAN UNION**

Master of Arts in Law and Diplomacy Thesis

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Victim Protection and Assistance in the European Union**

Submitted to Dr. Karen Jacobsen

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-INTRODUCTION-

In October 1999 at the European Council in Tampere, EU member Heads of State agreed that to address the common challenges of individuals seeking international protection in the EU and to safeguard Europe's "humanist tradition," a common asylum policy should be implemented and a common European asylum system should be established.¹ This common asylum system continues to develop in 2006, now in its second phase under the auspices of the Hague Programme. This paper examines human trafficking within the European Union and questions how to provide international protection to victims of human trafficking in the EU. The focus of this paper is on the situation of victims who face deportation from the European Union: non-EU citizens who are trafficked into the EU. The core of this thesis is the research question: what mechanisms can be developed within, or to complement, the common European asylum system to provide assistance and protection to victims of human trafficking who want assistance but face deportation from the EU? The argument is maintained that victims of human trafficking are in need of international protection and must not be deported nor forced to return to their country of origin. As is argued, such action constitutes a form of shifting responsibility and allowing human traffickers to operate even further underground while governments ignore their obligations to victims. The European Union is a major destination for human trafficking and while the EU has moved to prevent and punish trafficking, the assistance and protection of victims have largely been ignored.

To investigate how to provide assistance and protection to victims of human trafficking in the European Union, this paper examines human trafficking within the context of the common European asylum system. This thesis first examines the

possibility of affording victims of human trafficking in the EU the right to asylum under the common European asylum system. This paper then concludes that asylum is not an appropriate institutional response for victims of human trafficking, and posits that internal coherence to providing assistance and protection to victims of human trafficking within the European Union could be created through the establishment of a common European temporary residence permit system for victims of human trafficking, complementing the common European asylum system. Victims of human trafficking come from manifold, diverse groups and situations, and as the needs and wants of victims are never uniform, determining how best to protect and assist a victim has an important dependence on understanding the situation the victim faces. The situation that the focus group of this paper faces is deportation from the European Union, which inhibits their ability to receive desired and needed assistance and protection. European Union asylum policy will be utilized to question what kinds of procedures are possible to provide victims of human trafficking in the EU the right to remain in the destination country.

Chapter One presents the problem of human trafficking into and within the European Union. Different forms of trafficking are distinguished, as are the critical differences between human trafficking and human smuggling. Individuals who are particularly vulnerable to human trafficking are examined, and the group of individuals of concern to this thesis – victims of human trafficking who want assistance and protection but face deportation from the European Union – are explicitly considered. The research question serving as the premise for this thesis is elaborated, as Chapter One questions how to provide assistance and protection to these victims of human trafficking within the EU rather than deporting these individuals to neighboring countries or their

country of origin. Chapter Two considers the current practices and policies in place to provide assistance and protection to victims of human trafficking within the European Union. First, the “three Ps” – prevention, prosecution and protection – of combating human trafficking are reviewed. Protection is carefully elaborated, and it is argued that victim protection and assistance is a form of prevention and critical to truly combating human trafficking. Secondly, the development of counter-trafficking legislation and policies at the level of the EU are studied. Chapter Two introduces the mechanisms that exist which could provide assistance and protection to victims of human trafficking: specifically asylum and visas. Chapter Three focuses on working within the common asylum system. Providing victims of human trafficking who are identified in the EU with the right to claim asylum is considered as a means to ensure victim protection and assistance in the destination country. Chapter Four moves away from asylum and focuses on working in tandem with the common asylum system. This chapter questions the possibility and value of instilling a common temporary residence permit for victims of human trafficking in the EU. Importantly, this chapter focuses on unlinking the granting of a temporary residence permit from the willingness of a victim to cooperate with law enforcement. Chapter Four first examines EU legislation for the establishment of residence permits and residence permit options already utilized within the EU. This concluding chapter then turns to a brief consideration of the Netherlands B-9 Regulation, Article 18 in Italy and the United States T visa to glean successful and victim-centered practices from which lessons can be learned. This thesis concludes that a common temporary residence permit could be established at the common EU level to provide

victims with the option to remain in the destination country, ensuring assistance and protection.

-The Palermo Protocol-

In recent years, the international community has taken significant steps to institutionalize combating human trafficking. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime (henceforth the “Palermo Protocol”) provides an agreed-upon, international, legally binding definition of human trafficking that will be used throughout this paper. The Palermo Protocol, which came into force on December 25, 2003, placed combating human trafficking on the international agenda and represents an important step in coordinating international anti-trafficking efforts.

Arguably, the Palermo Protocol’s most important role may have been finally attempting to clarify what exactly human trafficking is. The Palermo Protocol provides the first definition of human trafficking in a legally binding international instrument.² Article 3 of the Palermo Protocol states:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power 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.³

Human trafficking is a complex, multifaceted and evolving crime that presents enormous challenges for state and non-state actors alike. In a globalizing world with continuously changing borders, traffickers are finding deeper and ever more clandestine ways to operate. Coordinated international responses are vital to combating human trafficking,

and clear definitions are important for successful cooperation.⁴ Providing a definition for human trafficking builds a structure for tackling the issue, and in this, the Palermo Protocol is a beginning.

In a lecture titled “Conceptualizing Forced Migration,” David Turton stated: “when talking about conceptual maps, every discourse must have some basic minimum level of internal coherence. Otherwise, it loses its ability to make the world meaningful and therefore knowable.”⁵ The human trafficking discourse suffers from a lack of internal coherence, rendering it problematic, if not impossible, to determine how to address the problems of human trafficking. Conceptualized by different actors as an organized crime issue, a migration issue, a globalization issue, a gender issue, a poverty issue, a security issue, a human rights issue, and even a public health issue, synchronizing efforts to combat human trafficking is just as difficult as determining who victims of human trafficking are, or could be. Coontz and Griebel argue that the focus of the Palermo Protocol is on criminalization, deportation and border control strategies, and the “total neglect of a fundamental actor – the trafficked person – in many ways reinforces the structural factors that give rise to human trafficking.”⁶ The Palermo Protocol is part of the UN Convention Against Transnational Organized Crime, developed under the UN Office on Drugs and Crime (UNODC), thus the focus of the Palermo Protocol is on law enforcement rather than on human rights. As Ndiaye notes, the Palermo Protocol “does not fully incorporate, nor obligate countries to provide, international human rights standards that would guarantee all victims access to justice and basic services such as temporary shelter, medical care, and food. The protocol also does not require governments to grant temporary visas or permanent residency to victims when traffickers

in their countries of origin pose a continued threat to their safety.”⁷ While the Palermo Protocol defines trafficking in persons and sets out to provide a comprehensive international approach to prevent trafficking, punish traffickers and protect the victims of human trafficking, it establishes only the minimum standards and fails to guarantee the assistance and protection of victims.

Who is a victim of human trafficking? Applying the Palermo Protocol’s definition of human trafficking, victims of human trafficking can be interpreted to be individuals who have been recruited, transported, transferred, harbored or received by means of the threat or use of force or other forms of coercion for the purpose of exploitation. Victims of human trafficking are individuals who have been exploited, individuals whose human rights have been violated. What separates human trafficking victims from other individuals who have suffered human rights violations is that human trafficking victims have been threatened, coerced or deceived into exploitation. Exploitation is defined as the act of making use of an individual meanly or unjustly for one’s own advantage.⁸ Exploitation indicates that someone else is profiting from the human rights violations an individual suffers.

While a trafficked person may experience forced movement during the trafficking, the forced movement or confinement is not by itself trafficking, absent other factors. It is the slavery-like labor exploitation or commercial sexual exploitation that determines whether trafficking has occurred. In some trafficking cases, little to no movement or transportation occurs. Smuggling and human trafficking are often confused, but are not the same thing. Smuggling is the illegal crossing of a national border, and is a criminal act for the both the smuggler and the person smuggled. Human trafficking is the crime of slavery-like labor or commercial sexual exploitation, and may not involve any transportation at all. It is a crime committed by the trafficker against a victim, and so only the trafficker has committed a criminal act.⁹

Human trafficking is often confused with human smuggling, and while the Protocols to Supplement the United Nations Convention Against Transnational Organized Crime

create a critical distinction between trafficking and smuggling, trafficking and smuggling are nonetheless intrinsically linked. Individuals who hire smugglers may (and often do) fall victim to human trafficking. Individuals who are displaced are vulnerable to human trafficking. Fernando del Mundo described an incident in Hungary in 1995 where eighteen asylum-seekers from Sri Lanka were killed in a smuggling-trafficking operation. Del Mundo's comments can be applied to a recent UNHCR article underlining "the urgency of the UN refugee agency's appeal for action to stop the human traffickers operating from Somalia."¹⁰ Del Mundo discusses "the risks that illegal aliens and asylum-seekers, particularly those from the Third World, are willing to take to flee their homelands." He argues that "Their desire to escape either poverty or persecution has fueled a lucrative, if pernicious, trafficking in human lives."¹¹ Human trafficking operates where individuals are vulnerable and the primary victims of human trafficking are undocumented migrants.¹² Turton discusses the conceptual and practical difficulties involved in separating forced migrants from "unforced migrants,"¹³ and it seems inevitable that where migrants are vulnerable, forced migrants are even more so. Individuals particularly vulnerable to human trafficking include refugees, IDPs, asylum seekers, and others in situations of forced migration.

Victims of human trafficking have suffered persecution from traffickers, and often from other state/non-state actors during the trafficking process. This paper asserts that victims of human trafficking, as individuals who have experienced events threatening to their lives and safety, and as individuals who have left their homes or places of habitual residence, have the right to assistance and protection in the country where they are identified. Victims of human trafficking must not be deported nor forced to return to

their country of origin. Assistance and protection can be offered through ensuring that the basic human rights and physical security of human trafficking victims are guaranteed. This guarantee must come from governments and can be manifested in providing human trafficking victims with the right to seek asylum or to find temporary safe refuge in another state – the state where they are identified – with the option to return home voluntarily.¹⁴ The common European asylum system is of great concern to victim assistance and protection as asylum currently stands as the central, if not only, means to provide international protection within the European Union.

¹ *The European Union Policy towards a Common European Asylum System* (accessed January 21, 2006); available at europa.eu.int/comm/justice_home/fsj/asylum/fsj_asylum_intro_en.htm.

² Sean D. Murphy, ed., "Contemporary Practice of the United States Relating to International Law: International Trafficking in Persons, Especially Women and Children," *The American Journal of International Law*, Vol. 95, No. 2 (April 2001): 408. See also Europol, *Legislation on Trafficking in Human Beings and Illegal Immigrant Smuggling* (The Hague: Europol Public Information, 2005): 7.

³ United Nations, *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime* (2000) G.A. Res. 55/25, United Nations Certified True Copies Treaty Collection: Chapter XVIII, Volume 2, File Ch_XVIII_12_a; available at untreaty.un.org/English/CTC/Volume_2.asp.

⁴ See Europol, *Legislation on Trafficking*, 8.

⁵ David Turton, "Conceptualising Forced Migration," *Refugee Study Centre*, Working Paper No. 12, October 2003 (University of Oxford: Queen Elizabeth House International Development Centre): 15.

⁶ Phyllis Coontz and Catherine Griebel, "Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law," *Women's Health Journal* No. 4 (2004): 52.

⁷ Ayana Ndiaye, "Where Few Dare Tread: Formulating a Protective Regime for Victims of Sexual Trafficking Through a Broadening of Domestic Asylum Laws," Student Note, *Case Western Reserve Journal of International Law* (2004): 2; available at law.case.edu/student_life/journals/jil/Notes/Ndiaye.pdf.

⁸ See *Merriam-Webster Online*; available at www.m-w.com.

⁹ Polaris Project, "What is Human Trafficking?" (accessed March 11, 2006); available at www.polarisproject.org/humantrafficking/trafficking_ht3/what_is_ht.htm.

¹⁰ UNHCR, "Boats with dead and desperate arrive in Yemen from Somalia," *UNHCR News Stories*, January 20, 2006; available at www.unhcr.ch.

¹¹ Fernando del Mundo, "Trafficking in human lives," *Refugees*, Magazine Issue 101 (1995); available at www.unhcr.ch.

¹² Patrick A. Taran, "Safeguarding migrants' rights and dignity in and beyond the smuggling dilemma," *International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights*, Eleventh IOM Seminar on Migration Discussion Paper No. 5 (October 1994): 1. See also International Labour Office, *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement* (Geneva: International Labour Organization, 2005): 42.

¹³ Turton, 2.

¹⁴ This language is taken from UNHCR, which states that the organization's "primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate

locally or to resettle in a third country.” See “UNHCR Basic Facts” available at www.unhcr.ch/cgi-bin/texis/vtx/basics.

CHAPTER ONE: HUMAN TRAFFICKING AND THE EUROPEAN UNION

The June 2005 United States Trafficking in Persons Report estimates that between 600,000 and 800,000 men, women and children are trafficked across international borders every year. The TIP Report notes that its focus on transnational trafficking fails to include the countless victims who are trafficked within their own national borders, indicating that millions of individuals fall victim to human trafficking every year. The International Labour Organization (ILO) estimates that at any given time there are 12.3 million people in the world enslaved in forced labor, bonded labor, child labor, sexual servitude and involuntary servitude.¹ The covert nature of human trafficking makes the issue problematic to research. As Irena Omelaniuk states, human trafficking “is generally under-reported, under-recorded, and under-legislated.”² The data available on human trafficking is tragically incomplete, fragmented and varying. Data can not be taken at face value as research methodologies can be dubious and unreliable. In September 2004, the UNESCO Trafficking Project compiled the worldwide trafficking estimates given by organizations, and found that estimates for the annual flow of trafficked persons worldwide varied from 500,000 to 4 million.³ The lack of clear statistical data only muddles an already complicated and confused problem.

The conceptual and definitional problems referred to earlier in this paper are linked to the availability – or rather lack – of statistical data on trafficking and human smuggling. How can we define what we are not sure how to measure and vice versa? Not only is it unclear what data might be collected but under whose auspices.⁴

The European Union is acutely suffering from the lack of reliable data, the disjointed character of available information, and from the different methods used to both collect and analyze data in member states. In response, the Experts Group on Trafficking in Human Beings has called for a mechanism for data collection at the national level with

comparable mandates, comparable competences and common guidelines for data collection. The Experts Group states that after establishing such a mechanism at the national level, a similar mechanism could be established on the European level.⁵

In 2004, Transcrime, the Joint Research Centre on Transnational Crime at the Università Cattolica del Sacro Cuore in Italy, published a study on legislation, data collection systems, and quantitative and qualitative aspects of human trafficking in fifteen EU member states. Transcrime also stated that “action should be taken to establish common systems of data collection aimed at gathering separately information on the various forms of trafficking in human beings” and that a single national agency should be established in each member state to serve as the focal point for the collection and harmonization of statistics on human trafficking. Additionally, Transcrime recommended that a central EU agency be established to collect data at the EU level.⁶

Transcrime warned:

The trafficking and subsequent exploitation of human beings throughout the European Union is likely to become a serious problem; this is because there is substantial difficulty related to the development of a comprehensive counterstrategy due to the scarcity, unreliability and non-comparability of existing data in the various countries.⁷

Discussions centered upon data collection and analyses continue amidst a developing recognition that human trafficking is a growing and serious problem. Even with the lack of hard data for human trafficking, state and non-state actors are turning international attention to the issue and recognizing that in recent years there has been a massive growth in the trafficking industry.

While quantifying and qualifying the specific numbers and nature of human trafficking within the European Union is beyond the scope of this paper, historically Europe has been recognized as a prime destination for human trafficking. In January

2006, the European Parliament reported that “trafficking is the fastest-growing criminal activity in comparison to other forms of organised crime.”⁸ Keeping in mind that the overall number of victims trafficked in the EU is unknown and that most EU member governments are not able to produce concrete data on human trafficking cases, in 2001 the European Commission estimated that 120,000 women and children are trafficked into Western Europe every year.⁹ Save the Children’s Italian coordinator, Carlotta Sami, stated in 2005 that there “are thousands of victims of child trafficking in Europe.”¹⁰ La Strada, an active anti-trafficking NGO in Europe, reasons that known cases of human trafficking are only the “tip of the iceberg.”¹¹ Indeed, for every case of human trafficking that is identified in the European Union, the number of cases that are misidentified or, perhaps worse, completely unnoticed, are a frightening indication of the complexity of combating invisible enemies and protecting and assisting silenced and unknown victims. To further examine the nature and extent of the problem within the European Union, and to assemble information about the target group – individuals who are identified in the European Union and who thereby face deportation – EU member states are examined on a case by case basis in the table below.

The United States TIP Report Ranking for each country is provided. The United States ranks countries based on the government’s compliance with the minimum standards for the elimination of trafficking as laid out in the United States Trafficking Victims Protection Act of 2000 (TVPA). Countries are divided into three tiers based on the following:

- TIER 1: Countries whose governments fully comply with the Act’s minimum standards.
- TIER 2: Countries whose governments do not fully comply with the Act’s minimum standards but are making significant efforts to bring themselves into compliance with those standards.

TIER 2 SPECIAL WATCH LIST: Countries whose governments do not fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards, and:

- a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or
- b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or
- c) The determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.

TIER 3: Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.¹²

The country's role in the human trafficking network is also examined and countries are divided into destination, transit or source countries. Many, if not most, countries serve all purposes – destination, transit and source – at one point or another. As has been emphasized, victims of human trafficking come from extremely diverse and varying situations, and the human trafficking process is not uniform. Additionally, internal trafficking is of great consequence, though arguably understandings and studies of internal trafficking lag behind even those of human trafficking across international borders. As the group of interest to the research question serving as the premise for this thesis is non-EU citizens who are identified in the EU, countries are divided into destination, transit or source countries based on their principal roles in *transnational* trafficking. Information is included as to where victims are primarily trafficked from, and where, if the country also serves as a transit country, victims are trafficked to.

Finally, statistics and information regarding victims of human trafficking estimated or identified in recent years are provided. This is to give a sense of the varying and problematic character of data available in the EU. Again it must be emphasized that data should not be accepted without scrutiny. But at the same time, these selected statistics help to characterize the situations of victims who are identified in the European

Union. Information for the table was compiled primarily from: the 2005 United States Trafficking in Persons Report, the U.S. Department of State Country Reports on Human Rights Practices, EUROPOL organised crime reports and serious crime overviews, the La Strada report on human trafficking in Central Europe, the Dutch National Rapporteur reports, the Transcrime report, the Johns Hopkins University Protection Project and recent European news sources.¹³ (For country-specific human rights reports with a detailed focus on human trafficking, the Johns Hopkins University Protection Project is an excellent resource.) This table is not meant to be exhaustive, nor are the statistics provided meant to be interpreted as spelling out or adding up the problem of human trafficking in each country. Rather, statistics have been selected from reliable sources to give a general sense of the “tip of the iceberg”: the varying, and yet fundamentally linked, situations of victims who are identified in the EU.

-Select Overview of Human Trafficking in EU Member States-

EU Member Country:	TIP Report Ranking:	Destination, Transit or Source Country:	Victims primarily trafficked from:	Victims primarily transited to:	Selected information regarding victims estimated or identified:
Austria	Tier 1	Destination and Transit	Central and Eastern Europe and the former Soviet Union; other countries such as the Dominican Republic and China	Italy, France, Spain and Germany	In May 2004 the gendarmerie of Upper Austria reported that 150 young Belarusian women had been forced into prostitution after being lured to Upper Austria with false promises of jobs.
Belgium	Tier 1	Destination and Transit	Sub-Saharan Africa, Central Europe and Asia; the main countries of origin are Albania, Nigeria, Moldova, Russia, and Ukraine		In January 2004, a trafficking ring was dismantled that had smuggled 200 women from the Dominican Republic to Belgium by arranging marriages for them. Most of the women ended up in prostitution.
Cyprus	Tier 2	Destination	Eastern and Central Europe		Police identified 66 victims who were willing to testify against traffickers in 2004.

Czech Republic	Tier 1	Destination, Transit and Source	Ukraine, Russia, Belarus, Moldova, Lithuania, Romania, Bulgaria, Slovakia, China and Vietnam	Western Europe and the United States	In 2003, the Czech Republic police detected 10 cases of human trafficking (though police statistics do not detail the number of victims detected in each case.) In the first half of 2004, 7 cases of human trafficking were detected.
Denmark	Tier 1	Destination and Transit	Central and Eastern Europe, the Baltic States and the former Soviet Union (particularly Ukraine, Moldova and Russia)	Other European countries	At least 20 cases of children trafficked to Denmark for criminal exploitation (such as pick pocketing and shoplifting) were detected from spring to winter 2003. In July 2004, Danish authorities announced plans to deport three foreign-born minors who were being prostituted.
Estonia	Tier 2	Source and Transit	Russia and Latvia	Nordic and EU countries, primarily Finland	The International Organization for Migration (IOM) reports that about 2,000 citizens of Estonia, Latvia, and Lithuania fall victim to trafficking annually. Approximately half of those victims are from Lithuania; the rest are from Estonia and Latvia.
Finland	Tier 2	Destination and Transit	Russia; also from Estonia, Ukraine, Belarus, Latvia, Lithuania, Georgia and Asia	EU countries	In 2004, Finnish authorities identified Asian women trafficked to and through Finland by Chinese crime syndicates, facilitated by the advent of direct air routes with several major Asian cities.
France	Tier 1	Destination	Eastern Europe, Central Europe, Africa and Asia		The government estimates that there are 10,000-12,000 trafficking victims in France.
Germany	Tier 1	Destination and Transit	Central and Eastern Europe		In 2001, 987 victims were recorded by the Bundeskriminalamt (Federal Office for Criminal Investigation). In 2002, 811 victims of trafficking were identified and reported. In 2003, 1,235 victims were identified and reported.
Greece	Tier 2 – Watch List	Destination and Transit	Eastern Europe and the Balkans		Human Rights Watch has reported that approximately 20,000 victims of trafficking are exploited in Greece at any

					given time, and another 50,000 are estimated to pass through Greece annually en route to other destinations. 181 victims were identified by the government in 2004. In their 2004 report, Transcrime numbered 17,200 sexually exploited trafficking victims in Greece.
Hungary	Tier 2	Destination, Transit and Source	Russia, Romania, Ukraine, Moldova, Bulgaria and the Balkans	Europe and North America	According to a recent United Nations report, Hungary is among the top 10 transit countries in the world for trafficking in persons.
Ireland	-----	Destination and Transit	Eastern Europe, Africa and South America		According to a recent IOM report, as many as 40 children a year are being trafficked to Ireland for either economic or sexual exploitation.
Italy	Tier 1	Destination and Transit	Nigeria, Romania, Moldova, Ukraine, Albania; Russia, Bulgaria, China, South America		PARSEC, a social and research institute in Italy, estimated that there were 2,000-3,000 new victims in Italy in 2004.
Latvia	Tier 1	Source and Transit		Germany, Spain, the UK, Italy, Cyprus, Switzerland and the Nordic countries	Statistics released by European police services indicated that the number of Latvian women involved as victims of trafficking increased in 2003. Approximately 500 women (not all necessarily involved in trafficking) were deported back to the country from the EU in 2002. Trafficking within the country also occurs.
Lithuania	Tier 1	Source, Destination, and Transit	Ukraine, Russia and Belarus	large cities in Europe	In November 2002, authorities uncovered a trafficking ring between Eastern Europe and Northern Ireland. Over a 2-year period, at least 300 workers had been brought from Lithuania alone to work in farms and factories
Luxembourg	Tier 1	Destination	Eastern Europe		In 2004, police in Luxembourg smashed a trafficking and prostitution ring in a nightclub raid. The suspects were believed to have trafficked about 150 Belarusian, Russian,

					and Ukrainian women to Luxembourg and to have forced them into prostitution.
Malta	not listed ⁱ	Destination	Eastern Europe, Ukraine and Russia		5 victims were identified in 2004
Netherlands	Tier 1	Destination and Transit	Central and Eastern Europe; Nigeria and Brazil		In 2001, 284 victims were reported to Stichting Tegen Vrouwenhandel (the Dutch Foundation against Trafficking in Women).
Poland	Tier 1	Destination, Transit and Source	Ukraine, Bulgaria, Romania, Belarus and Moldova	Western Europe, Israel and Japan	In 2004, of the estimated 7,000 prostitutes in the country, approximately 30 percent were estimated to be of foreign origin. La Strada previously estimated that 60 percent of foreign women working as prostitutes in Poland were trafficking victims. In addition, La Strada reports that up to 10,000 Polish women were trafficked out of the country annually.
Portugal	Tier 1	Destination and Transit	Ukraine, Moldova, Russia, Romania and Brazil		In 2000, it was reported that as many as 75,000 women from Brazil had been smuggled into European countries by way of Portugal in a huge operation involving as many as 100 organized crime gangs.
Slovak Republic	Tier 2 – Watch List	Transit; to a lesser extent Source	Former Soviet Union (especially Moldova and Ukraine) and the Balkan region	Western and Central European Countries; Japan	In June 2004, Czech and Slovak police raided criminal pseudo-modeling agencies. Police believed that as many as 250 women had been deceived into signing up with a modeling agency. Instead of begin given work as models, however, they were forced into prostitution in the Czech Republic and possibly in other countries such as Austria, Germany, Italy, Egypt, or the United Arab Emirates.
Slovenia	Tier 2	Transit; to a lesser extent Destination and Source	Eastern and Southeastern Europe (Ukraine, Slovakia, Romania,		According to a Slovenian NGO, 1,500 to 2,500 trafficked women pass through Slovenia every year, usually

ⁱ Malta is not listed in the 2005 TIP report because “information available does not indicate a significant number of victims.”

			Moldova and Bulgaria)		from Eastern Europe and the Balkans en route to Western Europe. The same NGO estimates that 1,500 to 2,000 women and girls are trafficked to Slovenia annually, mostly from Ukraine and Moldova.
Spain	Tier 1	Destination and Transit	Romania, Russia, Brazil, Colombia, Nigeria, Ecuador, Guinea, Sierra Leone, Bulgaria and Ukraine	Portugal, France and Germany	1,717 victims of sexual exploitation were identified by police in 2004; 797 victims of forced labor trafficking were identified by police in 2004.
Sweden	Tier 1	Destination and Transit	Eastern and Southeastern Europe, the Baltics and Russia; Thailand	Denmark, Norway, Germany, UK and Spain	In 2004, Police reported that between 400 and 600 women were trafficked to the country every year, coming primarily from the Baltic region, Eastern Europe, or Russia. In 2004, Police reported eight cases of child trafficking, involving victims ages 16 and 17. Most of these children were trafficked from Estonia, with one from Moldova and one from Vietnam.
United Kingdom	Tier 1	Destination	Eastern Europe, East Asia and West Africa		In February 2006, two women trafficked to Edinburgh, England to work as sex slaves managed to escape and to alert police; police warned that many more women in Edinburgh may also be trafficking victims.

-Forms of Exploitation-

As the Palermo Protocol provides the first definition of human trafficking in an international instrument, this definition is necessarily broad in order to cover the varying forms of human trafficking. The Palermo Protocol is not all-encompassing, but provides a firm “minimum standards” foundation for the criminalization of trafficking in persons (TIP) and for the assistance and protection of victims. The Palermo Protocol (in Article 3) focuses on the exploitation of victims as the key element in defining TIP, and

mentions, as minimum forms of exploitation: sexual exploitation, forced labor or services, slavery, practices similar to slavery, servitude and the removal of organs. The Palermo Protocol sets out that the consent of a victim to the intended exploitation is irrelevant where the threat or use of force, forms of coercion, abduction, fraud, deception or the abuse of power are used. Additionally, the Palermo Protocol specifies that for children (individuals under eighteen years of age), the “recruit, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons” even if force, coercion, etc. are not used.

The EU definition for human trafficking is stated in the 2002 Framework Decision on Trafficking in Human Beings (henceforth the 2002 EU Framework Decision).¹⁴ In Article 1, the 2002 EU Framework Decision States:

Each Member State shall take the necessary measures to ensure that the following acts are punishable:

the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:

- (a) use is made of coercion, force or threat, including abduction, or
- (b) use is made of deceit or fraud, or
- (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
- (d) payments or benefits are given or received to achieve the consent of a person having control over another person

for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or

for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

The EU definition also focuses on exploitation as being fundamental to TIP. The EU definition does not, unlike the Palermo Protocol, recognize the removal of organs as a form of trafficking. Human trafficking for organ removal is wanting of further investigation, as the fluidity between the illegal organ trade and human trafficking is

uncertain and confusing. Illegal organ trade is not automatically human trafficking. There are, however, reported cases of human trafficking for organ removal in Europe which justify cause for concern. For example, a report presented in Rome in 2004 provided distressing details about the trafficking of Albanian minors for the removal of their organs which were then sold on the European transplant black market.¹⁵ In 2006, the European Parliament urged the Commission to propose legislation to combat trafficking in human organs and tissues.¹⁶

The EU definition specifically mentions pornography, which is supplemented by the Europol definition for TIP where “forms of exploitation also include the production, sale or distribution of child pornography material.”¹⁷ The Palermo Protocol definition and the 2002 EU Framework Decision definition do not discuss trafficking for the purpose of adoption, a form of TIP that also warrants further international examination and recognition. The Child Rights Information Network (CRIN) has published research on the role of adoption agencies in poor countries as facilitators of child trafficking,¹⁸ and indeed, adoption through trafficking as a form of exploitation should be considered. The Convention on the Rights of the Child states in Article 35 that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”¹⁹ While identified cases of trafficking for adoption are few, they do exist, and using the “tip of the iceberg” argument, indicate that trafficking for adoption could be a prevalent and growing phenomenon. In 2004, for example, police in France “uncovered a baby trafficking ring that had allegedly sold at least two Bulgarian children to French couples,” and in Italy, police arrested individuals who had recruited pregnant Bulgarian women for the

trafficking of their infants.²⁰ In an investigation of forms of trafficking in minors, Rebecca Surtees provides further examples of trafficking for adoption, and states: “Some children may be trafficked abroad through an illegal adoption process to new families by whom they are raised, while, in other cases, adoption may be used for the purpose of exploiting the child’s labour.”²¹

The most widely recognized and discussed form of human trafficking is for sexual exploitation. While sexual exploitation is considered to be the most common form of exploitation for victims of trafficking, the intense focus on sexual exploitation may leave victims of other forms of trafficking ignored or undetected. For clarification, TIP types of exploitation in the European Union can be segregated into the following (noting that forms of exploitation are often overlapping, and in many cases, victims suffer multiple forms): trafficking for sexual exploitation (including pornography); trafficking for forced labour; trafficking for forced begging and/or delinquency; trafficking for adoption; and trafficking for the removal of organs.

-Human Trafficking v. Human Smuggling-

Human trafficking is often confused with human smuggling, and the optional Protocols to the United Nations Convention Against Transnational Organized Crime provide definitions of each to provide for important distinctions to be made. The Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (henceforth the Smuggling Protocol) defines human smuggling in Article 3.

“Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.²²

Smuggling occurs when an individual uses another individual, group or organization to migrate illegally across a border. Smuggled individuals migrate voluntarily, and almost always pay a fee to reach their destination.²³ Smuggling, which is a form of illegal immigration, is a highly politicized issue. Martin and Miller write:

Smuggling is an estimated \$5 to \$10 billion annual business, based on estimates that at least one million migrants a year pay an average \$5,000 to \$10,000 each to be taken unlawfully across borders. Brunson McKinley, the director general of the International Organization for Migration, notes that smuggling people from one nation to another, the “dark side” of globalization, is a large and growing business.”²⁴

This “dark side” of globalization seems almost inevitable as states try ever harder to regulate migratory flows in a world where millions of people move across borders, seeking economic opportunity, seeking to escape persecution: asserting their right to leave and return.²⁵ This right to leave and return, upheld in Article 13 of the Universal Declaration of Human Rights (and confirmed by the International Covenant on Civil and Political Rights), is, in the world of the nation state, not absolute, and has never in history been unlimited. However, an individual’s ability to leave his or her country and enter another is arguably becoming more and more unbalanced in today’s globalizing world, where the right to cross a border seems to depend increasingly on whether or not an individual can afford to. Developed countries, seeking to limit the number of foreign nationals (“third country nationals” in the EU) searching for economic opportunities within their borders, have implemented increasingly restrictive immigration policies. As Barbara Melis notes, “all EU countries have become immigration countries,”²⁶ and the perception of migrants as a threat to the security of a state has emerged and is on the rise.

Smuggling, like trafficking, is illegal, but for different reasons. Smuggling violates the rights of a state. Trafficking violates human rights. Distinctions between trafficking and smuggling must be drawn, but carefully. Smuggled individuals are illegal

migrants, and while illegal migrants absolutely have human rights that must be respected, and may even (in some cases) have the right to asylum, they are lawfully labeled illegal migrants. The Smuggling Protocol criminalizes the smuggling of migrants, while at the same time recognizing that illegal migrants themselves do often need assistance and protection. The Smuggling Protocol outlines the return of smuggled migrants to their countries of origin. The return of an individual to his or her country of origin, or deportation, is a fundamental exercise of immigration control. Gibney and Hansen write, “Immigration control implies two capacities: to block the entry of individuals to a state, and to secure the return of those who have entered.”²⁷ The ability to control and maintain borders is essential to state sovereignty, and the deportation of illegal migrants is an exercised and basic state right. The problem for victims of human trafficking is that they are frequently misidentified as smuggled individuals and therefore mislabeled illegal migrants and deported as such. Victims of human trafficking have suffered exploitation, and this is where a critical line lies between trafficking and smuggling. Smuggling can become trafficking when this line is crossed. Coontz and Griebel elaborate:

Other schemes begin simply as a smuggling offer, but upon arrival unexplainable costs are added to the initial agreement. Identification documents are withheld as collateral, and victims are literally trapped, extending the relationship beyond its original terms and introducing the elements of debt bondage and servitude.²⁸

Despite the definitional distinctions made between smuggling and trafficking by the Palermo Protocol and the Smuggling Protocol, smuggling and trafficking will continue to be confused as long as they continue to be interrelated. The Experts Group on Trafficking in Human Beings argues that a human rights approach provides a means to deal with such confusion.

From a human rights perspective, the primary concern is to combat the exploitation of human beings under forced labour or slavery like conditions, no matter whether such

exploitation involves a victim of trafficking, a smuggled person, an illegal migrant or a lawful resident. In the application of the UN Trafficking Protocol, policies should therefore focus on the forced labour and slavery like outcomes of trafficking, rather than on the process through which people arrive in such conditions. Such an approach would solve much of the current confusion between smuggling and trafficking and between so called “innocent” and “guilty” victims.²⁹

Anne Gallagher emphasizes this point and argues that while it is easy to discuss trafficking, smuggling and irregular migration in a human rights vacuum, that the Smuggling Protocol and the Palermo Protocol provide “a strong indication that, for many governments, trafficking and smuggling are issues of crime and border control, not human rights.” Gallagher also argues that the human rights approach must be used, as smuggled migrants are often fleeing human rights violations, and trafficking and smuggling, both “abusive forms of migration” are inextricably connected.³⁰

-The Root Causes of Human Trafficking-

Applying the Palermo Protocol’s definition of human trafficking, victims of human trafficking are individuals who have been recruited, transported, transferred, harbored or received by means of the threat or use of force or other forms of coercion for the purpose of exploitation. Victims of human trafficking are individuals who have been exploited by an insidious enterprise that operates where individuals are vulnerable.

While victims of human trafficking come from extremely diverse and varying experiences and circumstances, common root causes of vulnerability can be identified.

The underlying root causes of trafficking in human beings include poverty, unemployment and lack of education and access to resources. Clearly, if on the one side, people are ready to take the risk of falling into the hands of traffickers in order to improve their living opportunities, on the other side, there is a worrying trend in industrial countries to use cheap and undeclared labour forces as well as exploiting women and children in prostitution and pornography. In particular women are in a position of vulnerability to become victims of trafficking due to the feminisation of poverty, gender discrimination, [and] lack of educational and professional opportunities in their countries of origin.³¹

The primary victims of human trafficking are undocumented migrants. These individuals leave their home countries for numerous reasons. Europol divides these reasons into “push” and “pull” factors. Push factors include, but are not limited to, religious and ethnic conflicts, natural disasters, discrimination, political instability, armed conflicts, war, population growth, lack of economic opportunity and poverty.³² In 2005, Irena Omelaniuk drew from the International Organization for Migration’s global database on assisted victims to examine risk factors for human trafficking. Of the 5,233 victims of human trafficking that IOM assisted between 2001 and 2005, Omelaniuk determined that household poverty level was an important risk factor, as was being a member of a minority group.ⁱⁱ The United States TIP Report also discusses the myriad causes of trafficking and divides the causes of human trafficking into supply and demand sides. The United States TIP Report warns that the loss of family and community support networks aids in making individuals vulnerable to trafficking.³³

Undocumented migrants are at risk of falling victim to human trafficking. As individuals seek opportunities in other places and encounter the restrictive migration policies of destination states, they may utilize illegal means to migrate. Europol emphasizes that migration itself is not illegal, but becomes illegal when individuals, either on their own or with the assistance of organized criminal groups, attempt to enter a country covertly (in violation of that country’s laws) or when individuals violate the conditions for legal stay in a country. Apap, Cullen and Medved maintain that illegal

ⁱⁱ From the IOM database, Omelaniuk found that more than 81% of the surveyed victims were female; more than 74% were 25 years of age or younger (the majority – 56.9% were between ages 18 and 25); more than 60% of the cases surveyed had considerable education, indicating that lack of education may not be as great of a factor as has been suggested; not all victims were unemployed prior to migration; and household poverty levels were an important risk factor with 33% of victims claiming to come from “poor” circumstances and 14% from “very poor” households, indicating that almost half of those surveyed were from impoverished households (Omelaniuk, 4-5).

border crossings are increasingly facilitated by organized criminal groups as an activity for financial gain. They make the compelling point that traffickers “use the immigration policies of states to obtain control over their victims by placing them in a vulnerable immigration status.”³⁴ Human trafficking operates where individuals are vulnerable, and undocumented migrants with a vulnerable immigration status are in danger of human trafficking.

Where migrants are vulnerable, forced migrants are particularly vulnerable. Using the definition of forced migrants as individuals who flee or are obliged to leave their homes or places of habitual residence because of events threatening to their lives or safety, forced migrants are individuals in need of international protection. John Morrison and Beth Crosland discuss in detail the relationship between TIP and forced migrants, and demonstrate that the vast majority of refugees who claim asylum in Europe have either been trafficked or smuggled into Europe. Morrison and Crosland claim that “it is misleading to describe the customers of traffickers and smugglers as ‘illegal migrants’ or ‘illegal aliens’, and that the term ‘refugee in need of international protection’ would in fact be more appropriate in many cases.”³⁵ Indeed, refugees are known to be targeted by traffickers. For example, in 1999, IOM staff reported that traffickers were operating in the refugee camps for Kosovars and that young refugee women had even been abducted by traffickers. IOM warned that this was an extreme example “of traffickers taking advantage of the desperate situation of forced migrants, in many cases actively adding to their misery.”³⁶ UNHCR has also described the difficulties faced by forced migrants during flight and exile, and has reported on the ever-growing risk of human trafficking for forced migrants.

While forced migrants may be trafficked to the EU and are especially vulnerable to human trafficking, it is nonetheless important to recognize that in most identified cases, victims of human trafficking are individuals who have voluntarily migrated, but who have fallen victim to exploitation due to the use of force, coercion, deceit or threat. In the 1990s, IOM research on emerging migration issues indicated that TIP from Central and Eastern European countries, as well as from the Commonwealth of Independent States (CIS), to Western Europe was characterized by the use of deceptive promises of employment abroad. IOM stated that TIP in Europe “has been driven by the difficult post-Soviet socio-economic transition to market economies, the conflicts in ex-Yugoslavia and a general lack of appropriate legislation and of relevant institutions responsible for law enforcement or assistance to victims.”³⁷ Generalizations can be made about the factors which render an individual vulnerable to human trafficking, and certain groups of individuals (such as undocumented and forced migrants) are particularly vulnerable to human trafficking. However, there is no uniform process by which one becomes a victim of human trafficking. The only constant is that human trafficking always violates human rights. To return to the argument made by the Experts Group on Trafficking in Human Beings, the focus should be on the human rights violations of trafficking, rather than on the process through which individuals arrive in a country. Or, as the General Assembly of the European Women Lawyers Association (EWLA) states in a Resolution on Trafficking in Human Beings: “the integration of a human rights perspective into anti-trafficking action, as stated by the High Commissioner for Human Rights, is the only way to retain a focus on the trafficked person and to avoid that trafficking is simply reduced to a problem of migration, public order or crime.”³⁸

Examining the causal factors for human trafficking is critical to determining who may become a victim and to preventing trafficking before it happens. Examinations must include consistent direct research with victims of human trafficking, involving the victim to understand causalities and experiences. Current discussions of human trafficking seem to reflect advocacy positions based in weak statistical data: pushing for solutions before comprehensively understanding the problem. Therefore it is most necessary that individuals and organizations not only continue to discuss and research who the different victims of TIP are and what situations and experiences make individuals vulnerable to trafficking, but also identify through primary data collection the causal factors of human trafficking and focus on the needs and wants of victims. Identifying potential victims of trafficking can prevent exploitation and violations of human rights. Yet the focus of this thesis is on how better to provide assistance and protection to victims of trafficking in the EU: individuals who have already been trafficked. How and why these individuals were trafficked to the EU does not affect the fact that they have suffered human rights violations through exploitation – an exploitation fostered by the destination state.

-Non-EU Victims Identified in the EU-

The target group of this thesis encompasses victims of trafficking who have been identified in the European Union, who want assistance and protection, but who face deportation to their countries of origin. This paper will use the Regional Clearing Point (RCP) definition for identified victims: persons who have been identified as victims of trafficking according to a country's formal or informal identification mechanism.³⁹ RCP also provides a definition for assistance and protection that will be used in this paper:

Assistance and Protection: Measures taken by non-governmental, governmental, international and other relevant organizations to provide for the physical, psychological, social and legal recovery of trafficked victims as described in, but not limited to, Article

6 of the [Palermo Protocol]. Assistance and protection measures may range from voluntary acceptance of a single service (such as transportation to the country of origin) to voluntary acceptance of multiple services, including housing, medical, psychosocial, legal, educational and vocational services.⁴⁰

Identified victims in the EU, either through coming forward or through being identified by law enforcement officials, encounter complicated and divergent laws and policies that currently regulate the deportation of victims from the EU. Identification can take place both within EU countries and at border crossings. There are many victims of trafficking in the EU who are misidentified/not identified and who are deported as illegal migrants; many of these individuals are only identified as victims of human trafficking upon return to their country of origin. While these victims also require assistance and protection, they are not the focus group of this thesis. This thesis will explore mechanisms to allow victims *identified in the EU* who face deportation to remain in the country where they are identified to receive assistance and protection. Victims identified in the EU who face deportation are non-EU citizens who have been trafficked into and within the EU.

-Deportation-

Deportation is a foremost obstacle to providing identified victims with assistance and protection. Apap et al. argue that “in most destination countries action is first taken against the trafficked person, not the traffickers themselves: persons caught residing or also working illegally in the country face immediate deportation.”⁴¹ Deportation criminalizes the victim and allows traffickers to operate even further underground as deportation prevents law enforcement from being able to investigate and prosecute traffickers. Furthermore, the threat of deportation is a tool used by traffickers to keep their victims in an “inescapable situation.”⁴² Traffickers take advantage of the victim’s vulnerable immigration status; the fear of deportation may keep victims silenced and

trapped. Surtees argues: “The deportation of trafficking victims is appalling and involves serious risks of re-trafficking and additional trauma. Further, it contravenes commitments made by EU countries about the protection and care of trafficking victims.”⁴³ Deportation not only excludes victims from access to assistance and protection, but also often subjects victims to penalties, making the victim the criminal and compounding the victim’s vulnerability.⁴⁴

Deportation from the EU is a common practice, and one that inhibits identified victims from receiving assistance and protection. The UN Special Rapporteur on Violence Against Women has reported that “in the overwhelming majority of countries of destination, deportation remains the primary mechanism for dealing with undocumented immigrants, including trafficked persons.”⁴⁵ For example, in 2004, an NGO in Albania reported that of the 291 victims it assisted, 221 victims had been deported from the EU to Albania. “Significantly, none of the victims deported from EU countries reported receiving any information prior to return regarding opportunities for assistance, protection and reintegration in Albania.”⁴⁶ The Women’s Commission for Refugee Women and Children notes that deportation is particularly common when police and immigration officials cooperate in raids on brothels, and cite the example of 46 victims of trafficking who were deported from the UK following a raid in 2004. “The lack of an explicit form of protection for trafficked persons under UK law, combined with the barriers to asylum and humanitarian protection...means that trafficked persons remain vulnerable to deportation. Moreover, there have been reports of trafficked persons returned to their home countries before they even had a chance to apply for asylum or humanitarian protection.”⁴⁷ Deportation is counteractive to assisting and protecting

victims, and therefore is counteractive to combating human trafficking. Elaine Pearson writes:

A trafficked woman once told me: “That I was rescued by the police, and returned home immediately, did not change the fact that I had a debt to pay to the traffickers. I owed them for the initial travel expense, and then they kept adding on more money for accommodation, food, clothes and medicine. Not only had I failed to earn what I had hoped to support my family, but my situation was even worse, because now I also had the debt.” Returning her home was effectively putting her straight back into the hands of the traffickers.⁴⁸

The deportation of identified victims of human trafficking constitutes a violation of international obligations and standards which secure the need to protect the rights of trafficked individuals. European Union member states are moving to secure this assistance and protection through varying mechanisms, which will be discussed in the following chapter. However, as will be maintained, the deportation of trafficking victims from EU member states is still commonplace. This thesis argues that affording assistance and protection to non-EU victims of trafficking identified in the EU means providing victims with the option to remain in the destination country.

¹ United States Department of State, *Trafficking in Persons Report* (June 2005): 6-7.

² Irena Omelaniuk, “Trafficking in Human Beings,” *United Nations Expert Group Meeting on International Migration and Development*, UN/POP/MIG/2005/15 (July 2005): 2.

See also Frank Laczko, “Human Trafficking: The Need for Better Data,” *Migration Information Source: Data Insight* (November 1, 2002); available at www.migrationinformation.org.

³ See www.unescobkk.org/culture/trafficking.

⁴ John Salt, “Trafficking and Human Smuggling: A European Perspective,” *International Migration*, Special Issue 2000/1 (2000): 37.

⁵ Experts Group on Trafficking in Human Beings, *Report of the Experts Group on Trafficking in Human Beings* (Brussels: European Commission, 2004): 77.

⁶ Andrea Di Nicola, ed., *MON-EU-TRAF II: A Study for Monitoring the International Trafficking of Human Beings for the Purpose of Sexual Exploitation in the EU Member States* (Italy: Transcrime Joint Research Centre on Transnational Crime, 2004): 10.

⁷ *Ibid.*, 27.

⁸ “Justice and Home Affairs: Human-Trafficking the Fastest Growing Crime, Parliament Says,” *European Report*, January 18, 2006, No. 3022.

⁹ Laczko.

¹⁰ Karma Hickman, “Police Smash Baby-Smuggling Gang,” *Catanzaro*, June 21, 2005 (ANSA English Media Service).

¹¹ La Strada, *Trafficking in Human Beings in Central Europe* (Czech Republic: La Strada, 2005): 16; available at www.strada.cz/en/home/dokumenty/.

¹² United States Department of State, *TIP Report*, 28.

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- ¹³ Ibid., 1-258; U.S. Department of State, *Country Reports on Human Rights Practices* available at www.state.gov/g/drl/hr/c1470.htm; Europol, *Publications* available at www.europol.eu.int; La Strada, 1-98; Dutch National Rapporteur *Trafficking in Human Beings: First report of the Dutch National Rapporteur* (The Hague: Bureau NRM, 2002) and *Trafficking in human beings: Second report of the Dutch National Rapporteur* (The Hague: Bureau NRM, 2003); Transcrime, 1-356; and Johns Hopkins University, *The Protection Project* available at www.protectionproject.org.
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- ¹⁵ BBC Monitoring International Reports, "Report Details Trafficking in Human Organs Involving Albanian Children," *Korrieri, Tirana*, November 21, 2004, p.2.
- ¹⁶ *European Report*, No. 3022.
- ¹⁷ Europol, *Legislation on Trafficking*, 13.
- ¹⁸ See Mayeda Jamal, "Children at Risk: Child Trafficking through Adoption Agencies," (Diss., Stockholm School of Economics, 2005); available at www.crin.org.
- ¹⁹ United Nations, *Convention on the Rights of the Child* (1989) G.A. Res. 44/25; available at www.unhchr.ch.
- ²⁰ Rebecca Surtees, "Other Forms of Trafficking in Minors: Articulating Victim Profiles and Conceptualizing Interventions," (Vienna: International Organization for Migration and NEXUS Institute to Combat Human Trafficking, 2005): 14.
- ²¹ Ibid., 15.
- ²² United Nations, *The Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime* (2000) G.A. Res. 55/25, United Nations Certified True Copies Treaty Collection: Chapter XVIII, Volume 2, File Ch_XVIII_12_b; available at untreaty.un.org/English/CTC/Volume_2.asp.
- ²³ See "What is Human Trafficking" (accessed January 21, 2006); available at www.salvationarmyusa.org; Australian Federal Police "About People Smuggling" (accessed January 24, 2006); available at www.afp.gov.au/afp/page/Crime/PeopleSmuggling/aboutpsmug.htm.
- For a detailed discussion of human trafficking v. human smuggling, see John Morrison and Beth Crosland, "The trafficking and smuggling of refugees: the end game in European asylum policy?" *New Issues in Refugee Research*, Working Paper No. 39 (Geneva: UNHCR, 2001): 5-9.
- ²⁴ Philip Martin and Mark Miller, "Smuggling and Trafficking: A Conference Report," *International Migration Review*, Vol. 34, No. 3 (Autumn 2000): 969.
- ²⁵ Hurst Hannum writes: "We live in a time of unprecedented international movement, despite the inherent tensions between some governments' desires to control their citizens and the latter's assertion of rights. Emigrants no longer look only to neighboring states for better opportunities or greater freedom; migrant workers often are employed thousands of miles from their homes; tourism to even the most remote areas of the world has become almost commonplace; refugees and displaced persons outside their own countries are numbered in the millions." *The Right to Leave and Return in International Law and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1987): 3.
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- ²⁹ Experts Group on Trafficking in Human Beings, 8.
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- ³¹ Niels-Henrik Sjolinder, "Trafficking in Human Beings: The European Response," Conference Paper for the European Conference on Preventing and Combating Trafficking in Human Beings (Belgium: IOM, 2002): 1; available at www.belgium.iom.int/STOPConference/.
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- ³⁶ IOM, “Traffickers Make Money through Humanitarian Crises,” *Trafficking in Migrants*, No. 19 (July 1999): 1-2.
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- ³⁹ Rebecca Surtees, *Second Annual Report on Victims of Trafficking in South-Eastern Europe*, (Geneva: IOM, 2005): 21.
- ⁴⁰ *Ibid.*, 22.
- ⁴¹ Apap, Cullen and Medved, 29.
- ⁴² United Nations Office on Drugs and Crime, “Trafficking in Persons: the New Protocol” (accessed March 14, 2006); available at www.unodc.org/unodc/en/trafficking_protocol_background.html.
- ⁴³ Surtees, *Second Annual Report*, 76. Jenna Shearer Demir also discusses “numerous cases of trafficking survivors being labeled as illegal migrants and deported, only to be met at the border by their traffickers, and re-trafficked with additional debt burdens.” See “Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear? An examination of refugee status determination for trafficked prostituted women from CEE/CIS countries to Western Europe” (Master in International Cooperation and Development Research Paper, University of Pavia ESAS-CS, 2003): 22
- ⁴⁴ International Organization for Migration, “Trafficking in Migrants: IOM Policy and Responses” (accessed March 14, 2006); available at www.iom.int/en/who/main_policies_trafficking.shtml.
- ⁴⁵ Economic and Social Council, *Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Ms. Radhika*. See Elaine Pearson, “The need for effective witness protection in the prosecution of traffickers: a human rights framework for witness protection” Paper Presented at the First Pan-African Regional Conference on Trafficking in Persons (February 2001): 3.
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CHAPTER TWO: COMBATING HUMAN TRAFFICKING

Combating human trafficking is an escalating political priority for the European Union. In 1996, the EU began developing a “comprehensive and multidisciplinary” approach to combating TIP, and new initiatives and developments continue to be put forward by the EU.¹ Article 2 of the Palermo Protocol sets forth the purposes of the Palermo Protocol:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

Combating human trafficking is frequently discussed as a procedure of “three Ps”: prevention, prosecution and protection.² Preventative measures are measures to reduce the root causes that make individuals vulnerable to human trafficking. Articles 9-13 of the Palermo Protocol address preventative measures and the need for cooperation among states to have effective prevention. States Parties are to endeavor to undertake: research into human trafficking, information and mass media campaigns, and social and economic initiatives as preventative actions. States are also to strengthen measures to alleviate the factors, such as poverty, underdevelopment and lack of equal opportunity, that make individuals – especially women and children – vulnerable to human trafficking. The Palermo Protocol also emphasizes: measures to discourage demand that fosters human trafficking, the importance of information exchange among states, border controls to prevent and detect trafficking and the security and control of travel documents.³

Prosecution means criminalizing human trafficking and prosecuting traffickers. Article 5 of the Palermo Protocol states that “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set

forth in article 3 of this Protocol, when committed intentionally.” Coontz and Griebel argue that criminalization is the “centerpiece” of the Palermo Protocol.⁴ Indeed, the Palermo Protocol reflects the trend of combating human trafficking through criminalization, deportation and border control strategies, what Coontz and Griebel call a “supply-side approach that places primary responsibility on law enforcement and pays scant attention to the demand side of the problem.”⁵ The prosecution of traffickers is vital to combating human trafficking, but the focus on criminalization may leave the possibilities for victim assistance and protection overlooked. Sjolinder writes that thus far, “the European Union has been much more active in taking initiatives on the development of penal legislation and law enforcement and judicial cooperation than on the prevention of trafficking and the protection of victims.”⁶ Human trafficking is a lucrative form of organized crime, generating an estimated \$9.5 billion annually.⁷ Europol argues that TIP is an extremely profitable business due to the lack of criminalization and to loopholes in legislation.⁸ The lack of legislation is exacerbated by corruption. Trafficking victims have reported authorities ignoring their exploitation, being delivered back to traffickers by authorities, and even authorities participating in the trafficking itself.⁹ Combating trafficking necessitates the prosecution of those involved in or aiding trafficking, but prosecution must be linked with prevention and protection in order to fully envelop a successful and human rights-based approach.

Trafficking in persons is explicitly mentioned under Title VI of the 1999 Treaty on European Union (Amsterdam Treaty); Title VI comprises provisions on police and judicial cooperation in criminal matters. Human trafficking in Europe is addressed as a criminal matter. Apap et al. write that the European Union’s policy approach to

combating human trafficking has differed from that of the UN and the United States, as the EU has approached countering TIP from a control perspective oriented on creating heavier penalties for traffickers. (The authors acknowledge, however, that the European Parliament approach is less control-oriented, instead stressing the need for victim assistance and protection.)¹⁰ Helga Konrad of the Stability Pact Task Force on Trafficking in Human Beings makes the case:

What is needed is a shift in perspective. If we want to be effective in diminishing human trafficking, it must not be seen primarily or exclusively from the perspective of national security; fighting human trafficking must not be seen only as a fight against organised crime and illegal migration. It is first and foremost a violation of human rights.¹¹

Approaching human trafficking as a violation of human rights requires that the victims of human trafficking – those who have suffered human rights violations – receive assistance and protection. Articles 6-8 of the Palermo Protocol outline assistance and protection, and as Article 6 elaborates what is meant by assistance and protection, it is worth citing in full.

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons in appropriate cases:
 - a. Information on relevant court and administrative proceedings;
 - b. Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each 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, and, in particular, the provision of:
 - a. Appropriate housing;
 - b. Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
 - c. Medical, psychological and material assistance; and
 - d. Employment, educational and training opportunities.
4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.
6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

A human rights based approach to combating human trafficking must be a victim-centered approach. Protection means assistance and protection; as the United States TIP Report asserts, a victim-centered approach to trafficking requires the “three Rs”: rescue, rehabilitation and reintegration. This paper will assert that ensuring victim assistance and protection requires a fourth “R”: residence.

-The Development of EU Counter-Trafficking Law and Policy-

In a Council Decision of December 2000, the President of the Council was authorized to designate the persons who are empowered on behalf of the European Community to sign the United Nations Convention Against Transnational Organized Crime as well as the additional Protocols. The Council Decision states that whereas “The Member States having stated that they will sign the instruments as soon as they are open for signing in Palermo, the European Community should also be able to sign.”¹² In Palermo in December 2000, European Commissioner António Vitorino signed the UN Convention Against Transnational Organized Crime, as well as the Palermo Protocol and the Smuggling Protocol. In doing so, the European Community and its member states were committed to the definitions and purposes of the Palermo Protocol. The EU has adopted budding legislation to combat human trafficking since the 1990s, and these policies have reflected the evolving migration order in Europe.¹³ The studies of migration policy in the European Union are intricate and many.¹⁴ While a detailed study of migration policy in Europe is not the focus of this thesis, migration policy and the politics of migration are extremely important to counter-trafficking law and policy.

Apap, Cullen and Medved state that the “policy reaction to trafficking is linked with the overall response of Western countries to the new migration order.”¹⁵

The migration order in Europe has been constructed by the integration of the European Union. In 1985, the Federal Republic of Germany, France, Belgium, Luxembourg and the Netherlands signed an intergovernmental treaty called the Schengen Agreement.¹⁶ The aim of the Schengen Agreement was to achieve a closer union between the five nations through establishing the free movement of persons, goods and services. Internal border control measures were reduced between the nations. In 1990, the Schengen Convention was signed, adding member states and shifting “the emphasis away from freedom of movement towards the strengthening of controls and questions related to internal security.”¹⁷ The Schengen Convention officially abolished checks at internal borders and created a single external frontier for the Schengen area, dictated by a common set of rules. Article 6 of the Schengen Convention defines the harmonization of external border controls; these border control measures are further specified and supplemented by the “Common Manual on External Borders” and the Schengen Information System (SIS), a database established for the exchange of information on specific categories of individuals and on lost/stolen goods.¹⁸ The Schengen Convention entered into force in 1995, and by 2001, 13 EU member states had become members of the Schengen area. A protocol to the Amsterdam Treaty incorporated the Schengen Agreement and Schengen Convention into the European Union’s legal and institutional framework. In the early 1990s, the European Parliament, national parliaments and non-governmental organizations attacked the secrecy and lack of transparency of the Schengen Convention. As an intergovernmental treaty initially outside the framework of

the EU, the Schengen Convention was not subject to the European Court of Justice's jurisdiction.¹⁹ However, with the protocol to the Amsterdam Treaty, the Schengen area "now comes under the scrutiny of the European Parliament and of the Court of Justice of the European Communities, ensuring democratic parliamentary control and giving citizens accessible legal remedies when their rights are challenged...although the competence of the Court of Justice in this area is partially limited."²⁰ As the Schengen area is now part of the EU legal and institutional framework, new member states will have to fulfill the requirements of the Schengen *acquis* in order to become members of the Schengen area. The Schengen *acquis* will be returned to in the next chapter, as initiatives adopted by the Schengen group members included establishing common rules for asylum seekers, and the Schengen *acquis* play a pivotal role in the development of the common asylum system.

The Schengen Agreement initially suggested a policy of integration and openness, eliminating internal borders and establishing the free movement of persons. However, with the enormous political changes of 1989 and the end of the Cold War, the Schengen idea transformed "from a commercially-oriented scheme to end border controls to a system of immigration control and monitoring."²¹ In the early 1990s, Western European states anticipated a massive influx of migrants and asylum-seekers from the once closed-off East, and talk of a "migration crisis" dictated migration policy development.

Thus, in the early 1990s, the phenomenon of trafficking was not treated separately from the overall migration policy approach to intensify controls and repress illegal immigration. States began to fortify their defences by enacting new laws and implementing new strategies to control the effects of migration, particularly unlawful immigration. Within the prevailing restrictive immigration atmosphere, immigration was first perceived as a 'crisis' with its key dimension of 'migration pressure' in the early 1990s.²²

Since the 1990s, the EU has been operating in a political environment fed by increasingly negative popular opinion regarding immigration. The laws and policies to combat human trafficking have developed in this environment, and human trafficking has been addressed in the context of migration, especially illegal migration.

As mentioned above, human trafficking is explicitly included in Title VI of the Amsterdam Treaty. In 1997, a joint action was adopted by the Council concerning measures to combat trafficking in human beings and the sexual exploitation of children. This joint action triggered the further development of initiatives at both the national and EU levels. In December 2000, shortly before the Palermo Protocol opened for signature, the European Commission produced a proposal for what would become the 2002 EU Framework Decision. The 2002 EU Framework Decision was based on the provisions of Title VI of the Amsterdam Treaty. Title VI – Provisions on Police and Judicial Cooperation in Criminal Matters (PJCC) – is the so-called “Third Pillar” of the European Union. The 2002 EU Framework Decision is binding on member states, and required member states to modify their legislation to comply with its provisions by April 1, 2004. However, as Apap et al. point out, when discussing instruments enacted under the Third Pillar, “one must give some attention to the widely discussed weaknesses of that legal regime from the point of view of democratic scrutiny and legal control.”²³ Apap et al. discuss the lack of jurisdiction of the European Court of Justice over Third Pillar matters and argue that the “First Pillar” (European Community legal instruments) offers greater possibilities for protecting the individual and more options for effective implementation. In other words, after closely examining the 2002 Framework Decision, Apap et al. conclude that “repressive elements against would-be traffickers outweigh the protective

dimension of victims.”²⁴ While the European Parliament continues to strongly emphasize the need for assistance and protection to victims in harmony with punishment and prosecution of traffickers, the Parliament’s say in Third Pillar matters is limited.ⁱⁱⁱ

In January 2006, the European Parliament urged member states to sign and ratify the 2005 Council of Europe Convention on Action Against Trafficking in Human Beings. This Convention is a comprehensive treaty specifically focused on protecting victims of trafficking and safeguarding their human rights.²⁵ The Council of Europe Convention is a significant instrument that has the potential to incorporate thorough victim assistance and protection into the EU combat against human trafficking. However, as of January 2005, only twelve EU member states had signed the Convention and none had ratified it.²⁶ The Members of the European Parliament (MEPs) have urged all member states to develop policies to ensure victim assistance and protection, and the mechanisms to provide such assistance and protection within the EU will be presented in detail in the following chapters.

-Mechanisms to Protect Victims from Deportation-

The individuals of concern to this thesis are identified victims of human trafficking who face deportation from the European Union. Not only does deportation prevent assistance and protection from being afforded to victims of trafficking, it also impedes prevention, discourages prosecution and subjects the victim to further trauma and the risk of re-trafficking. Providing victims with assistance and protection in the country where they are identified depends on allowing the victim to remain in that country for an extended period of time. Examining human trafficking within the context

ⁱⁱⁱ See Chapter Two, endnote 23.

of European asylum policy, victims of human trafficking could be protected from deportation by asylum or through varying residence permit/visa options.

Asylum is based in international refugee law. International refugee law commenced with the 1951 United Nations Convention Relating to the Status of Refugees (1951 Geneva Convention), and expanded with the 1967 Protocol.²⁷ The international forced migration legal order has since broadened to include individuals uprooted for reasons other than those originally outlined in the 1951 Geneva Convention. “Refugee protection is generally interpreted in the context of human rights law. As human rights standards have evolved over the years, the refugee definition has often been interpreted to cover violations of such rights.”²⁸ The 1951 Geneva Convention serves as the core of the international refugee regime. Refugees are offered assistance and protection through the assurance that they will not be returned to a country where they face persecution – a principle known as *non-refoulement*.²⁹ *Non-refoulement* is considered to be a norm of customary international law.³⁰

Under the 1951 Geneva Convention, protection through asylum should be provided to any person found to be a refugee. The right to asylum is enshrined in the Universal Declaration of Human Rights; Article 14 (1) states: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” However, it is important to note that under international law, “an individual has no *per se* right to asylum” – asylum is not an individual right.³¹ Rather, a state has the prevailing right to grant asylum when it chooses to do so under international law. Kate argues that as destination countries are bound by international obligation to the 1951 Geneva Convention, theoretically states “do not have the freedom to decide on criteria for the granting of

asylum.”³² However, the refugee recognition rates (percentage of persons granted refugee status within the provisions of the 1951 Geneva Convention) vary considerably across destination states, indicating that the granting of asylum is at the discretion of the state. Individuals can claim asylum, but asylum must be granted by the state.

In Europe, asylum can be claimed under the 1951 Geneva Convention and protection can be claimed under Article 3 of the European Convention on Human Rights (“which prohibits expulsion to face prohibited treatment”).³³ Article 18 of the Charter of Fundamental Rights of the European Union guarantees the right to asylum in the EU (in accordance with the 1951 Geneva Convention and 1967 Protocol) and Article 19 (2) provides that “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”³⁴ Asylum is based on the legal responsibility of states to protect their citizens. When a government no longer protects the basic rights of its citizens, the international community must step in to ensure that the rights of these individuals – forced migrants – are protected.

Forced migrants may also receive humanitarian protection.³⁵ Though there is no legal obligation for a state to provide humanitarian protection, UNHCR encourages states to provide such protection to individuals who are deemed worthy of protection for more general humanitarian reasons.³⁶ Forced migrants also receive assistance and protection through the process of resettlement. Some countries around the world annually offer to accept a designated number of refugees for resettlement (individuals selected in this process are referred to as “quota refugees” even though the refugee quota may include other forms of forced migrants.) Finally, forced migrants may also receive assistance and

protection through long-term residence status or visa options. Both asylum and a long-term residence status or visa option have the potential to protect a victim of human trafficking from deportation, and both mechanisms are examined and discussed in this thesis. Chapter Three will introduce the common asylum system and will examine the possibility of providing victims of human trafficking with the right to claim asylum.

¹ Sjolinder, 2.

² See, for example, United States Department of State, *TIP Report*, 5.

³ For a summary of the Palermo Protocol, see United Nations Office on Drugs and Crime, “The Protocol to Prevent, Suppress and Punish Trafficking in Persons” (accessed February 19, 2006); available at www.unodc.org/unodc/en/trafficking_protocol.html.

⁴ Coontz and Griebel, 51.

⁵ Ibid.

⁶ Sjolinder, 3.

⁷ U.S. Department of State, *TIP Report*, 13.

⁸ Europol, *Legislation on Trafficking*, 22.

⁹ Demir, 22. For more on corruption aiding trafficking see also Helga Konrad, “Trafficking in Human Beings – The Ugly Face of Europe,” Conference Paper for the European Conference on Preventing and Combating Trafficking in Human Beings (Belgium: IOM, 2002): 8-9.

¹⁰ Apap, Cullen and Medved, 12.

¹¹ Konrad, 10.

¹² European Union, *Council Decision of 8 December 2000 on the signing, on behalf of the European Community, of the United Nations Convention against transnational organized crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea* (2000) 2001/87/EC; available through EUR-Lex.

¹³ For a complete list of EU anti-trafficking legislation, see “EU legislation being adopted against trafficking in human beings and the sexual exploitation of children”; available at europa.eu.int/comm/justice_home/doc_centre/crime/trafficking/wai/doc_crime_human_trafficking_en.htm.

¹⁴ See, for example: Solon Ardittis, ed., *The Politics of East-West Migration* (Great Britain: The Macmillan Press, 1994); Gallya Lahav, *Immigration and Politics in the New Europe: Reinventing Borders* (United Kingdom: Cambridge University Press, 2004); Andrew Geddes, *The Politics of Migration and Immigration in Europe* (London: SAGE Publications, 2003); Sandra Lavenex, *The Europeanisation of Refugee Policies: Between human rights and internal security* (Vermont: Ashgate Publishing Company, 2001); and the International Centre for Migration Policy Development research available at www.icmpd.org.

¹⁵ Apap, Cullen and Medved, 6.

¹⁶ The text of the 1985 Schengen Agreement, the Schengen Convention, accession protocols and the decisions and declarations adopted by the Schengen bodies are all included in *The Schengen Acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999* (1999) Official Journal of the European Communities 22.9.2000; available through EUR-Lex.

¹⁷ Lavenex, 94.

¹⁸ EUROPA, “Abolition of internal borders and creation of a single EU external frontier” (accessed February 20, 2006); available at europa.eu.int/comm/justice_home/fsj/freetravel/fsj_freetravel_schengen_en.htm.

¹⁹ Lavenex, 107.

²⁰ EUROPA, “Abolition of internal borders and creation of a single EU external frontier.”

²¹ Apap, Cullen and Medved, 7.

²² Ibid.

²³ Ibid., 30-31. The authors continue: “The European Parliament is of course not empowered with rights of ‘co-decision’ in Third Pillar questions, thus limiting its role in respect of Framework Decisions to that of a

football manager shouting instructions from the sidelines to his players (the Council) who may or may not be inclined to listen. National parliamentary control is dependent upon the effectiveness of scrutiny procedures and upon the efficiency of communication and transmission of documents from governments, and can all too often operate either in isolation from Brussels-based decision-making or far too slowly to be able to influence the European dimension.”

²⁴ *Ibid.*, 31-32.

²⁵ Council of Europe, “Action Against Trafficking in Human Beings” (accessed February 20, 2006); available at www.coe.int/T/e/human_rights/trafficking/.

²⁶ “Justice and Home Affairs: Human-Trafficking the Fastest Growing Crime, Parliament Says,” *European Report*, January 18, 2006, No. 3022.

²⁷ “The Long Journey Home: an IRIN Web Special on the challenge of refugee return and reintegration,” *IRIN News.Org*, February 20, 2006; available at www.irinnews.org.

²⁸ Women’s Commission for Refugee Women and Children, 6.

²⁹ Article 33 (1) of the 1951 Geneva Convention states: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

³⁰ See Sir Elihu Lauterpacht and Daniel Bethlehem, “Refugee protection in international law: the scope and content of the principle of *non-refoulement*,” Opinion 2.1 (Geneva: UNHCR, 2003).

³¹ Ndiaye, 9.

³² Mary-Anne Kate, “The provision of protection to asylum-seekers in destination countries,” *New Issues in Refugee Research*, Working Paper No. 114 (Geneva: UNHCR, May 2005): 2.

³³ Nuala Mole and Catharina Harby, “Immigration, Asylum and Detention,” (The AIRE Centre: European Council on Refugees and Exiles, 2005): 2.

³⁴ European Union, *Charter of Fundamental Rights of the European Union* (2000/C 364/01 18.12.2000) available at www.europarl.eu.int/charter/pdf/text_en.pdf

³⁵ AsylumLaw.Org writes that “humanitarian protection against forcible return is sometimes accorded [in Europe] when:

- someone is threatened by the death penalty without being a refugee,
- someone is threatened by torture or inhumane treatment without being refugee,
- someone needs urgently a medical treatment which is not available at home,
- someone is in danger at home for another reason
- someone has strong family links to a person living in [an EU state] and one depends on the other,
- a minor wouldn’t be looked after when returned home,
- for other humanitarian reasons (cultural or weak family links).” See www.asylumlaw.org.

³⁶ Kate, 1-2.

CHAPTER THREE: THE COMMON ASYLUM SYSTEM

This thesis is considering options available to victims identified in the EU who want assistance and protection but face deportation. Preventing deportation necessitates negotiating with the immigration policies of a state, and for EU member states (MS), migration policies are increasingly determined by the European Union. Diane Johnson elaborates:

Corollary to the MS' limitation on developing and implementing its own immigration policy, is the right of the EU to function in the area. Article K.I of the Treaty on European Union provides for nine matters of common interest between the MS and the EU. One of these interests is "conditions of movement and residency by third-country nationals on the territory of the Member State." In its 1997 proposed Convention, the European Commission noted the need for a "mandatory legal instrument clearly establishing the conditions of admission and the rights of third country nationals admitted to the territory of Member States." It went on to note that "in the areas covered by Title VI the Commission has a right of initiative shared with the Member States." Finally, in its decision of July 9, 1987, the ECJ held that immigration policy, *vis-à-vis* non-member countries, comes in its entirety within the meaning of Article 118. It is, therefore, clear that immigration, as it pertains to [third country nationals], is primarily within the hands of the EU.¹

The European Union, as an "area of freedom, security and justice" has worked from the beginning to harmonize movement across its borders.² As discussed in Chapter Two, the incorporation of the Schengen *acquis* into the legal and institutional framework of the EU played a pivotal role in the development of the common asylum system. Sandra Lavenex divides EU intergovernmental cooperation in asylum matters into two "generations." Lavenex writes that the first phase of cooperation in asylum matters evolved "in the context of the re-affirmation of the Single Market Project in the mid-1980s and was directly linked to the issue of abolishing internal border controls."³ Lavenex determines that the most significant output of this first generation of cooperation in asylum matters was the Dublin Convention of 1990.

The 1990 Dublin Convention was an agreement between EU member states that determined which country within the EU would deal with an asylum seeker's application. The Dublin Convention, which entered into force in 1997, stipulated that the first country on EU territory that an asylum seeker entered should have responsibility for processing his or her application. The Dublin Convention was an attempt to balance the responsibilities for processing asylum claims, but failed, as determining an asylum seeker's point of entry into the EU was difficult and moving asylum seekers under the agreement was unworkable. Thus the Amsterdam Treaty provided for the rewriting of the Dublin Convention as a community regulation, and in February 2003, the Community law proposal for "determining the member state responsible for examining an asylum application" was adopted and dubbed "Dublin II" or the Dublin Regulation.⁴ Lavenex's "second generation" of intergovernmental cooperation in asylum matters is the institutionalization of issues of asylum. Lavenex names this the "communitarisation of asylum and immigration policies." The EU is now responsible for asylum and immigration matters, according to the revisions of the Amsterdam Treaty. The Amsterdam Treaty moved asylum and immigration from the third pillar to the first pillar of the EU.

Building from these institutional and legal roots, the common European asylum system was born at the European Council in Tampere in 1999. The common asylum system is being built in two phases: a first set of standards and measures were to be adopted by May 2004. The second phase is currently under the auspices of the Hague Programme, a program adopted by EU Heads of State in November 2004. The Hague Programme "takes up the challenge for taking forward the Common European Asylum

System and looks to the establishment of the common asylum procedure and uniform status for those granted asylum or subsidiary protection, based on a thorough and complete evaluation of the legal instruments adopted in the first phase. The Commission is invited to adopt second phase instruments of the Common European Asylum System with a view to adoption by 2010.”⁵ The EU has set itself the goal of establishing the common European asylum system by 2010.⁶ Thus far the common European asylum system has achieved four main legal instruments on asylum.⁷ The system is in a process of development, and it remains to be seen whether or not there will be a successful working common asylum system in the EU. Lavenex argues that the prospects for establishing such a system are considerably constrained by the “institutional legacies of past cooperation.”⁸ A frequent reaction when discussing the common European asylum system with European lawyers and professionals is: “what common European asylum system?” However, the engine for developing this system is in place and running. And for several important reasons, the common European asylum system offers opportunities for exploring options available to victims of human trafficking within the EU.

The common European asylum system is a means to harmonize the systems that protect and assist forced migrants across Europe, a means to “level the asylum playing field” as EUROPA notes – an opportunity to establish an even, clear and fair asylum system across the EU. Balancing the foundation for the assistance and protection of forced migrants is a valuable opportunity that a common asylum system offers.

However, there are extremely important concerns to take into consideration; human rights experts have warned that harmonizing asylum in Europe will merely establish a lowest common denominator and will endanger forced migrants by replacing the systems that

formerly protected them. Others argue that the common European asylum system will impede refugees from acquiring assistance and protection. The debate surrounding the development of this system is heated and extensive.⁹ Rather than supporting or opposing the common European asylum system, this paper recognizes that it is in a process of development and is of great concern to protecting victims of human trafficking from deportation. Therefore the common asylum system must be examined when studying how to offer assistance and protection to victims of human trafficking in the EU.

As this paper attempts to offer victims of human trafficking who are identified in the EU a means to circumvent deportation, the common European asylum system inevitably comes into play. Additionally, in relation to the common asylum system, the EU is considering measures for temporary protection “to provide displaced persons coming from third countries with immediate and temporary protection where there might be a risk that the standard asylum system will be unable to process this influx without severely damaging it.”¹⁰ As will be discussed in the next chapter, victims of human trafficking fall into this category. A standardized EU mechanism for the assistance and protection of human trafficking victims (possible through the common asylum system) would provide solidarity, increase the regularity of implementation, allow for burden sharing among member states and reduce disparities between member states for the assistance and protection of identified victims. The harmonization of EU asylum and immigration policy through the development of the common European asylum system presents a unique and important opportunity to adopt an appropriate mechanism to provide assistance and protection to victims of trafficking in the EU.

-Establishing EU Responsibility-

This paper asserts that victims of human trafficking who are identified in the European Union have the right to assistance and protection in the state where they are identified. EU member states must not deport victims of human trafficking. Assistance and protection (rescue, rehabilitation and reintegration) depend on the victim having the right to remain in the state where he or she is identified. The right to residence may not be the solution for all victims; victims have extremely diverse needs, wants and experiences. For victims identified in the EU who currently face deportation, voluntary repatriation could be offered alongside a mechanism to allow the victim to stay in the destination country to receive assistance and protection. Giving the individual this right to choose would aid in developing the victim's agency. Assistance and protection in the destination country will not serve as a blanket solution for all victims. This paper recognizes that victims, as individuals, have the right to determine their own future and to decide whether or not they want to remain in the destination country to receive assistance and protection. But to ensure this right to choose, victims must be provided with options. Options can not be offered if victims are deported from the EU.

The basis for requiring that a state provide a victim with the right to remain is the understanding that the exploitation of the victim has occurred on that state's territory. The state where the victim is identified has provided a market for the exploitation of the victim, as well as a network through which the victim has been trafficked. In other words, the destination country is responsible for the exploitation that has occurred *within its boundaries*. While the traffickers are directly responsible for the victim's exploitation and should be prosecuted as such, the destination country can not shift the burden of

victim assistance and protection to source or transit countries. The destination country must accept some accountability for the victim^{iv} as the victim has suffered human rights violations within the boundaries of the destination country. Deporting victims is a form of shifting responsibility and ignoring the violations of human rights that are occurring. The state must protect individuals from persecution, and as Sari Sirva notes, the critical issue “is whether the state can, in fact, protect the individual from such persecution, not who is the persecuting agent. The State has a certain obligation to offer effective protection against serious violations of human rights and to fulfil this obligation with due diligence.”¹¹ Human trafficking is a complicated network, with individuals responsible for the crimes committed against victims at countless points along the trafficking route. Different actors are responsible at different points, and at times it can be unclear who the perpetrator is. The victim is never the perpetrator. Where the victim is identified marks the point at which the victim needs aid in escaping, where the victim deserves assistance and protection. If victims are identified in the European Union, states are obligated to protect and assist the victims with full respect for their human rights. And assistance and protection mean allowing the victim to remain in the country to take full advantage of the assistance offered, to seek compensation for damage suffered according to the domestic legal system of the country where they are identified, and to have their physical safety protected by the state.¹²

-Affording Victims of Trafficking the Right to Asylum-

Providing victims of human trafficking with the right to claim asylum has been proposed as a means to ensure victim protection and assistance in the destination country.

^{iv} Source and transit countries must also be held accountable, but the focus of this thesis is on victims of human trafficking identified in the EU – victims identified in destination countries.

The claim that victims should be afforded the right to asylum has generally been made for specific groups of victims: usually women trafficked for sexual exploitation. Women trafficked for sexual exploitation may qualify for refugee status where persecution can be determined on the basis of their membership of a social group.¹³ UNHCR has made this argument and has formally identified sexual violence as a form of torture. In 2002, UNCHR issued guidelines that stated: “in individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threat of harm.”¹⁴ Auton et al. argue:

The United Nations adopted the Refugee Convention in response to a global need to ensure the basic rights of refugees. Presently, trafficked women, as victims of modern-day slavery, are suffering egregious human rights violations and are clearly in need of such protection within the international community. One way to accomplish that would be to recognise victims of trafficking as refugees.¹⁵

Jenna Shearer Demir writes:

This paper is not a call for asylum for all trafficked women, but instead a call for a common understanding that women trafficked for forced sexual services are victims of gender-based persecution. As survivors of trafficking, women and girls who have been prostituted by force form membership of a particular social group. With this classification, a trafficked woman should be entitled to entry into refugee-determination proceedings to assess whether, as an individual, she has a well-founded fear of persecution, and is in need of international protection. Although being a survivor of trafficking does not guarantee blanket refugee status, victims should be afforded the possibility to be heard for refugee status determination, having passed the threshold on one of the five convention grounds.¹⁶

The Women’s Commission for Refugee Women and Children, after examining the UK approach to human trafficking, concluded:

Asylum is critical to the protection of trafficked persons in two ways. First, they may have been trafficked because they were attempting to escape a situation of armed conflict or human rights abuses that would qualify them for refugee status, regardless of their trafficking experience. Second, the fact that they were trafficked could render them eligible for asylum if they have a well-founded fear of persecution; for example, they fear being re-trafficked if returned, and their home country is unable or unwilling to help them.¹⁷

Elaine Pearson recommends that “Trafficked persons should be informed of their right to asylum, and be granted asylum in appropriate cases.”¹⁸ Sarah Richards, Mel Steel and Debora Singer, who completed an analysis of asylum claims by female victims of trafficking in the UK concluded that “the asylum process is the key mechanism to provide protection” to victims.¹⁹ Morrison and Crosland recommend that case law be shared amongst legal practitioners to examine how the experience of being trafficked could itself give grounds for 1951 Geneva Convention or other humanitarian status, as victims of trafficking have suffered persecution from state and/or non-state actors during the trafficking process.²⁰ While some countries have granted asylum to victims of trafficking, asylum has only been provided to victims of trafficking on a case by case basis, and the cases of trafficking victims being awarded asylum due to their status as trafficking victims are few and far between. There are several key reasons why this paper disagrees that asylum is an appropriate way to ensure assistance and protection to victims identified in the EU who face deportation.

The issue of asylum has become extremely politicized and sensitive in Europe. The assumption is that asylum applications in Europe have been on the rise for decades. While there have been periods of marked increase in asylum seekers in Europe (for example, asylum applications increased twenty-fold from the 1970s to the 1990s, increased again in the early 1990s with the Balkan wars and in the late 1990s during the Kosovo crisis), during the past few years asylum claims lodged in the EU have in fact decreased.²¹ Nonetheless, the fear of an asylum crisis overrides what the statistics actually demonstrate. With news reports on “asylum shopping” and talk of “bogus” asylum applicants flooding the EU’s already backlogged asylum systems, asylum seekers

in Europe face stigmatization and hostility; asylum seekers are presumed to be abusing the system. This paper has addressed the development of the migration order in Europe, discussing how the fears of a “migration crisis” led to mounting legislation restricting immigration to Europe. The increasingly restrictive immigration policies in the EU have, some argue, resulted in individuals taking advantage of the few remaining existing measures to migrate to Europe, of which asylum stands as the most significant. As EU member states have encountered a large flow of unfounded (or “false”) asylum applications, they have reacted with defensive and even “draconian” policies to make the conditions for asylum seekers less attractive.²² Yet many asylum applications do continue to be lodged across the EU. Timothy Hatton writes:

...there has been little formal analysis of why the numbers have increased, and why they persist in spite of increasingly restrictive asylum policies. Some see conflict and oppression as the principal cause of mounting asylum claims while others see asylum seekers as ‘economic migrants’. In fact both of these forces matter.²³

It is extremely important to note, as UNHCR has, that “Europe does not, in fact, suffer from an asylum problem. It has an immigration problem – and refugees, unhappily, pay the price.”²⁴ From the perspective of states engaged in an already hostile political debate about escalating immigration, affording victims of human trafficking the right to claim asylum could open the door to further abuse of the system – to further false asylum applications. Working within the common asylum system to provide victims of human trafficking with the right to asylum would require fitting victims of human trafficking into a system already tainted by political debate and public misunderstanding.

Asylum systems in the EU are problematic and often overburdened. Statistics will be provided in the following chapter regarding the number of asylum applications lodged in each EU country from 2001-2005. Additionally, increasingly restrictive

asylum laws throughout Europe lessen the chances that a trafficking victim will have of being granted asylum in the EU. Richards, Steel and Singer completed an investigative report into asylum claims made by trafficking victims (women trafficked into the UK) from March 2003 to August 2005. Of the 32 women who claimed asylum during the period, only 1 was granted asylum prior to appeal.^v The authors concluded that their analysis “demonstrates that women trafficked into the UK have limited chances of achieving a positive outcome on their claim.”²⁵ Additionally, the complicated rules of asylum can convolute trafficking cases. Apap et al. cite a unique and noteworthy case in the UK in 1993.

...the case of Naillie [1993] EC 674, House of Lords. Mr. Naillie had helped some people (in fact family members) reach the UK with forged documents. They applied for asylum when they arrived. He was charged with the offence of assisting illegal entry. The court held that the offence could not apply to him because the individuals whom he assisted had sought asylum. This case highlighted the difficulty of determining responsibility of the trafficker and the victims in the light of human rights standards. If the victims apply for asylum to what extent do the courts in the Member States tolerate criminal charges against those who assisted their arrival?²⁶

The web of regulations surrounding asylum in the EU combined with the progressively more defensive policies making conditions for asylum seekers less attractive indicate that affording asylum to victims of human trafficking could further convolute an already complicated issue. This paper is seeking to ensure assistance and protection to victims of trafficking identified in the EU, and asking an individual to submit an application for asylum which will more than likely be unsuccessful seems an ineffective way to guarantee that the victim will be assisted and protected in the destination country.

^v Though the authors do note that upon appeal, 80% of the victims received refugee status or humanitarian protection. While these statistics at the appeal stage are positive, women from “white list” (Non-Suspensive Appeal or NSA) countries cannot have their appeal determined until they have been returned to their country of origin. Thus the authors argue that “the only way that women can make the appeal, which may ultimately keep them safe, is to return to their home countries where there are high risks of reprisal/violence/further exploitation/retrafficking.”

Furthermore, asylum systems in Europe are abused by traffickers themselves. As Ernest Taylor writes, “Indeed, the relationship between asylum seekers and traffickers is made closer by exploitation by traffickers of asylum loopholes as a means of circumventing normal immigration procedures. Some of the trafficked are told by their traffickers to apply for asylum on entry so that they can at least get some temporary foothold in the host country.”²⁷ Uherek et al. discovered this type of scenario during their research for UNHCR on asylum seekers and trafficking in the Czech Republic, noting cases where traffickers had forced their victims to apply for asylum. The authors argued that where traffickers were exploiting asylum systems they were doing so “surreptitiously.” Uherek et al. indicate that trafficking victims may become asylum seekers through this kind of abuse, and also that asylum seekers are vulnerable to traffickers.²⁸ Traffickers take advantage of the vulnerable immigration status of their victims, often confiscating or destroying their travel documents and using threats of arrest and deportation.

Individuals in situations of vulnerability are at risk of being trafficked. There are many cases throughout Europe of asylum seekers lodging applications and then disappearing, and with the growth of the human trafficking industry, the possibility that traffickers are operating amongst asylum seekers must be given attention. Traffickers are known to operate among refugees. John Morrison and Beth Crosland completed an extensive study of the nexus between refugees and human trafficking, concluding that the “vast majority of refugees who claim asylum in Europe are trafficked/smuggled and anti-trafficking/smuggling initiatives must be very mindful of this.”²⁹ Asylum is a vital instrument to protect and assist refugees, and the development of the common European

asylum system must be wary of diminishing or inhibiting the ability of refugees to claim asylum under the 1951 Geneva Convention. Refugees who are trafficked into the EU must be provided with the option to claim asylum. Article 31 of the 1951 Geneva Convention states that governments shall not impose penalties on account of the illegal entry or presence of refugees as long as refugees present themselves without delay to authorities. Refugees who are victims of human trafficking may be unable or unwilling to present themselves to authorities, but upon identification, should not be penalized for their illegal presence, as they are victims and must not be criminalized. Asylum may be an appropriate means to provide assistance and protection to victims who are also forced migrants. But making the argument that human trafficking itself qualifies an individual for refugee status under the 1951 Geneva Convention and thereby the right to asylum may not hold in every case. Indeed, the cases where this argument has been successfully made are the minority, and across the EU, asylum is not protecting victims of human trafficking identified in the EU from deportation.

Asylum in the EU is already faltering in its ability to assist and protect refugees. Burdening the common European asylum system with a new set of individuals who need assistance and protection by affording victims of trafficking the right to asylum could further stress an already taxed system. Moreover, asylum does not provide assistance and protection specific to the needs of human trafficking victims. Victims of human trafficking have suffered exploitation at the hands of traffickers and may need legal, medical, protective and social services depending on their individual situation and experience. Sending a victim of human trafficking into the web of the asylum system may allow the victim to fall through the cracks, without learning more about who the

traffickers were, where and how they were operating, and how the victim can be helped and compensated for the exploitation he or she has suffered. Being awarded asylum depends upon proving one's status as a refugee under the 1951 Geneva Convention, and this requirement rules out many victims of human trafficking. As such, asylum will not guarantee that victims of human trafficking identified in the EU will not be deported. To ensure asylum would be to incorporate or recognize victims of human trafficking under the refugee definition. This would require expanding the definition of a refugee in international law, a move that risks de-legitimizing a system that is needed to protect and assist refugees. Victims of human trafficking in the EU must be allowed to determine how to proceed after they are identified; they must not be deported if they wish to remain in the destination country to receive assistance and protection. Asylum does not seem to ensure that victims of human trafficking identified in the EU will receive assistance and protection. Asylum systems in Europe are not capable of expanding to include a new category of victims. The perception of the asylum system as abused and overloaded may prevent any ability to work within it. The answer does not seem to lie in restructuring a system already in place. Rather, making certain that victims of human trafficking identified in the EU receive assistance and protection in the EU seems to depend on constructing an entirely new system, specifically for victims of human trafficking, that operates in tandem with the common European asylum system.

¹ Diane Johnson, "Trafficking of Women into the European Union," *New England International and Comparative Law Annual*, No. 5 (2002); available at www.nesl.edu/intljournal/vol5/johnson.htm.

² EUROPA, "The European Union Policy towards a Common European Asylum System" (accessed March 14, 2006); available at europa.eu.int/comm/justice_home/fsj/asylum/fsj_asylum_intro_en.htm.

³ Lavenex, 104.

⁴ UNHCR, "Tool Box 2: The Instruments," *UNHCR Tool Boxes on EU Asylum Matters* (Geneva: UNHCR, September 2003): 255.

⁵ EUROPA, "The European Union Policy towards a Common European Asylum System."

⁶ European Council on Refugees and Exiles, “Towards Fair and Efficient Asylum Systems in Europe” (London: ECRE, September 2005): 2.

⁷ The Reception Conditions Directive (on minimum standards for the reception of asylum-seekers); the Asylum Procedures Directive (which is expected to be adopted early 2006: will ensure that all procedures at first instance are subject to the same minimum standards); the Qualification Directive (a clear set of criteria for qualifying either for refugee or subsidiary protection status and which rights are attached to each status); and the Dublin Regulation (rules about the member state responsible for assessing an application for asylum).

⁸ Lavenex, 75.

⁹ See, for example: Amnesty International, “The Asylum Crisis: A Human Rights Challenge for the EU” (Brussels: Amnesty International, September 2001); Channe Lindstrom, “European Union Policy on Asylum and Immigration. Addressing the Root Causes of Forced Migration: A Justice and Home Affairs Policy of Freedom, Security and Justice?” *Social Policy & Administration*, Vol. 39, No. 6 (December 2005): 587-605; European Council on Refugees and Exiles, “Broken Promises – Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection” (London: ECRE, 2004); Christina Boswell, “The ‘external dimension’ of EU immigration and asylum policy,” *International Affairs*, Vol. 79, No. 2 (2003): 619-638; Khalid Koser, “Asylum Policies, Trafficking and Vulnerability,” *International Migration*, Special Issue 2000/1 (2000): 91-111; and many articles available through www.unhcr.org including “EU directive may trigger downgrading of asylum standards” (December 2, 2005) and “How a man from Darfur cannot get his asylum claim heard in Europe today” (December 6, 2005).

¹⁰ EUROPA, “The European Union Policy towards a Common European Asylum System.”

¹¹ Sari Sirva, “Women in the International Asylum regime – equality guaranteed?” Paper Presented at European Women Lawyers’ Association Conference: Immigration and Asylum (Helsinki: EWLA, June 2003): 3.

¹² These obligations are all taken from Article 6 of the Palermo Protocol, obligations to which the EU member states are committed having signed the Palermo Protocol.

¹³ See Morrison and Crosland, 54.

¹⁴ UNHCR, *Guidelines on International Protection: Gender Related Persecution* (2002), see Amy K. Auton, Pascal Bouvy, Jane Bowers, Kathie D. Claret, Logan H. Hennessey, Brian M. McCall and Emmanuelle Trombe, “Comparative Report on the Application of Asylum Standards to Protect Women Trafficked for Sexual Exploitation” (Dechert LLP and Klasko, Rulon, Stock & Seltzer LLP): 4.

¹⁵ Auton et al., 24-25.

¹⁶ Demir, 43.

¹⁷ Women’s Commission for Refugee Women and Children, 19.

¹⁸ Elaine Pearson, “Human traffic, human rights: redefining victim protection” (London: Anti-Slavery International, 2002): 7.

¹⁹ Sarah Richards, Mel Steel and Debora Singer, “Hope Betrayed: An analysis of women victims of trafficking and their claims for asylum” (United Kingdom: The POPPY Project, February 2006): 24.

²⁰ Morrison and Crosland, 85.

²¹ See Timothy J. Hatton, “Seeking Asylum in Europe,” Paper for the 38th Panel Meeting of *Economic Policy* (University of Essex, September 2003); and European Council on Refugees and Exiles, “Towards Fair and Efficient Asylum Systems in Europe” (London: ECRE, September 2005).

²² Hatton, 22. See also Liza Schuster, “A Sledgehammer to Crack a Nut: Deportation, Detention and Dispersal in Europe,” *Social Policy & Administration*, Vol. 39, No. 6 (December 2005): 606-621.

²³ Ibid.

²⁴ Christiane Berthiaume, “Asylum in Europe,” *Refugees*, Magazine Issue 101, 1995.

²⁵ Richards, Steel and Singer.

²⁶ Apap, Cullen and Medved, 21.

²⁷ Ernest Taylor, “Trafficking in women and girls,” Paper for Expert Group Meeting on *Trafficking in women and girls* EGM/TRAF/2002/EP.3 (November 2002): 6.

²⁸ Zdenek Uherek, Klara Skrivankova and Renata Weinerova, “Women Asylum Seekers and Trafficking: Research Report for UNHCR” (Czech Republic: Institute of Ethnology of the Academy of Sciences of the Czech Republic, 2001).

²⁹ Morrison and Crosland, 66.

CHAPTER FOUR: A COMMON TEMPORARY RESIDENT PERMIT SYSTEM

Constructing an entirely new system specifically for victims of human trafficking could be manifested in the development of a common temporary residence permit system. Residence permit or visa options are mechanisms already utilized within the international refugee regime to provide forced migrants with alternative humanitarian-based means to remain in a country. Temporary resident permits are already issued to victims of human trafficking throughout the EU, though generally on an ad hoc basis and according to diverse situations and policies. In 2002, the European Commission issued a proposal for a Council Directive on a short term residence permit to be issued to victims of trafficking who cooperate with authorities.¹ The EU adopted additional standards for the issuance of residence permits with the 2004 Council Directive.² Member states are to comply with the 2004 Council Directive by August 2006. While there are criticisms of this EU Council Directive which will be discussed in this chapter, the Directive serves as a starting point to build a common temporary residence permit system in concert with the common European asylum system. These two systems could operate together to create a balance whereby authorities assisting victims of human trafficking would have more options to choose from to best help a victim. A common temporary residence permit system operating in tandem with the common European asylum system could provide administrative burden sharing across the EU, and a means to clarify and strengthen both systems. Forced migrants who are trafficked could still turn to the asylum system to receive assistance and protection where appropriate. And for victims of human trafficking identified in the EU, a temporary residence permit at the level of the EU could

protect victims of human trafficking from deportation and provide a mechanism to guarantee assistance and protection to victims.

-Assistance and Protection in the European Union-

To illustrate the current systems for assistance and protection for victims of human trafficking in the EU, member states are again examined on a case by case basis in the table below. The numbers of asylum applications submitted from 2001-2005 are provided to demonstrate both the high volume of asylum applications lodged in the EU as well as the disparity in numbers between states. These asylum statistics also show that the number of overall asylum applications in recent years is decreasing in spite of current perceptions. Information regarding the current situation in member states concerning residence permits for victims of trafficking is also provided. Information for the table was compiled from UNHCR’s “Asylum Levels and Trends in Industrial Countries, 2005”, Europol’s *Legislation on Trafficking in Human Beings and Illegal Immigrant Smuggling*, the United States Trafficking in Persons Reports (from 2002-2005) and Anti-Slavery International’s “Comparative Matrix of Current Legislation on Trafficking of Migrants in EU Member States and Candidate Countries.”³

-Current Systems for Assistance and Protection in EU Member States-

EU Member Country:	Asylum Applications Submitted					Selected information regarding the current situation concerning residence permits for victims of trafficking:
	2001	2002	2003	2004	2005	
Austria	30,140	39,350	32,360	24,630	22,470	The Austrian government provides temporary resident status for trafficked victims who are prepared to testify in court as witnesses or who intend to raise civil law claims against perpetrators. Officials may also issue a delay in deportation proceedings pending completion of a court case.
Belgium	24,550	18,810	16,940	15,360	15,960	Although there is no specific law, the commission for the protection of witnesses can grant a victim and members of their family ordinary or special

						protection if threats have been made against them because of their testimony. If a victim files a complaint after a 45-day “reflection delay” (suspended expulsion order), a 3-month “declaration of arrival” may be issued. This may be followed by a 6-month Certificate of Registration in the Immigration Register, which depends on the prosecutor’s decision to initiate legal proceedings and is renewed until the end of the criminal proceedings. Permanent residence status may be granted, normally after trial.
Cyprus	1,770	950	4,410	9,860	7,770	The enactment of the protection of Witnesses Law No. 95(1) of 2001 provides a comprehensive scheme for the protection of victims/witnesses and those who assist in the fight against crime (including residence permits).
Czech Republic	18,090	8,480	11,400	5,460	4,020	In the Czech Republic, victims willing to testify against traffickers may be offered temporary residence permits, a work permit, access to social assistance and, in extreme cases, police protection. The problem of regulating the stay of victims in the Czech Republic was not satisfactorily resolved in 2002, as the question was still regulated by the granting of a visa in order to permit stay. In practice this visa is not guaranteed to all victims of trafficking, who are in many cases perceived as committing the crime of staying in the Czech Republic illegally and are expelled from the country.
Denmark	12,510	6,070	4,590	3,240	2,260	In the government’s action plan of 2002 on combating trafficking in women, the Danish Immigration Service decided that the time limit for an alien to leave Denmark can be extended to 15 days. The Danish Government is presently deliberating a possible prolongation of the time limit. Currently, Danish legislation does not provide the opportunity for “smuggled persons” to have a short-term residence permit. In practice, the time limit for leaving Denmark has been extended for those “smuggled persons” who assist in a prosecution.
Estonia	10	10	10	10	10	The new Witness Protection law came into force in July 2005. Although the law does not mention the residence permit as such, it can be understood that it is possible to have the permit issued.
Finland	1,650	3,440	3,220	3,860	3,560	There is not yet any witness protection program or provisions specific to victims of trafficking. Temporary leave to remain in the country for an individual cooperating with the criminal justice system may be possible. In relation to smuggling,

						almost all smuggled persons seek asylum and their applications are handled via the normal asylum procedure.
France	54,290	58,970	59,770	58,550	50,050	The government offers victims three to six months renewable temporary residency according to an assessment of needs and cooperation with police. Cooperating victims are guaranteed a residency extension; if cooperation leads to a conviction, a 10 year extension could be granted.
Germany	88,290	71,130	50,560	35,610	28,910	Germany improved its victim assistance efforts in 2004 by amending immigration and victims' rights legislation. Following a four week "reflection period," trafficking victims who testify against their traffickers may now obtain a temporary residence permit. The Victims' Rights Reform Law, enacted in September 2004, expanded the rights of crime victims in criminal proceedings, including trafficking victims. This legislation entitles victims to interpreters and allows third parties to be present during police questioning. The duration of the residence permit suspending deportation depends on several criteria, such as the need for the victim to be available as a witness in criminal proceedings, the importance of the evidence to be given and the actual risk.
Greece	5,500	5,660	8,180	4,470	9,050	A victim of trafficking in Greece can obtain a residence permit before the commencement of legal proceedings in order to decide whether or not to act as a witness. The residence permit granted is valid for as long as judicial and police authorities decide. It is impossible to predict the period of time that will be decided upon. During this time, administrative deportations are halted. During the legal proceedings, the victim will receive a residence permit which will be valid until the proceedings are finally concluded.
Hungary	9,550	6,410	2,400	1,600	1,610	The Aliens Act 39/2001 on an alien's entry into and residence in Hungary allows short term relief from deportation and provides the Alien Police with the opportunity to grant a residence permit on humanitarian grounds to foreigners who cooperate with criminal justice authorities to discover offenders of trafficking and smuggling.
Ireland	10,330	11,630	7,900	4,770	4,320	The Department of Justice, Equality and Law Reform is responsible for granting permission to remain in Ireland. Within the terms of Irish immigration law, it is possible for a victim to be granted temporary residency.
Italy	9,620	16,020	13,460	9,720	9,500	(See brief case studies below.)
Latvia	10	30	10	10	20	Article 106.3 of the Criminal Procedure Code

						determines the basis and reasons for special procedure protection. Special procedure protection can be granted if, due to the evidence given by victims, a real threat to their lives, property and legitimate interests has occurred or such threats have been expressed or there is valid reason to believe that such a threat might occur.
Lithuania	260	290	180	170	120	Currently there is no opportunity for a victim of trafficking to have a short-term residence permit.
Luxembourg	690	1,040	1,550	1,580	800	The Immigration Section of the Department of Justice would determine the granting of temporary residency on a case by case basis.
Malta	120	350	570	1,000	1,170	In Malta, Title IV of the Police Act regulates the protection of witnesses and victims. Article 75 states: “where a person is the victim of a crime who is to be produced as a witness in any criminal proceedings against any principle or accomplice in the crime and that person is concerned for his safety, the Commissioner of Police may, subject to the provisions of Article 76, set up a witness protection programme.” This program includes the granting of residence permits.
Netherlands	32,580	18,670	13,400	9,780	12,350	(See brief case studies below.)
Poland	4,530	5,170	6,910	8,080	5,440	The Act of 13 June 2003 regulates the protection to aliens within the territory of the Republic of Poland. Furthermore, Article 33 of the Aliens Act provides the opportunity for “smuggled persons” to have a short-term residence permit (issued for a maximum of three months if necessary to support the purpose of the prosecution.)
Portugal	230	250	90	110	110	In Article 137-B (Statutory Law n. 244/98) there is a provision for a foreign national that cooperates with the investigation of criminal activities, namely the investigation of organized crime, to be given a residence permit without having to obtain a visa.
Slovak Republic	8,150	9,700	10,360	11,390	3,490	In early 2003, the government initiated an inter-agency task force to discuss improving witness protection and victim assistance for all crime victims, including the granting of residence permits. This initiative was rejected because of the legislative problems. The government does not have mechanisms in place to protect victims who could be detained and deported.
Slovenia	1,510	700	1,100	1,280	1,600	Victims who would like to cooperate with judicial authorities and with law enforcement authorities may obtain permission for temporary residence for a period of one year, based on the findings and approval of the competent Prosecutor’s office. This permission may be extended for the duration

						of penal proceedings. Even before obtaining permission for temporary residence, a victim may obtain permission to stay for six months, for the period of recovery, without the condition that he/she will cooperate with the law enforcement authorities. Based on the agreement on cooperation (between an NGO – The Association KLJUC, the Ministry of the Interior, the Supreme Public Prosecutors Office and the Republic of Slovenia) permission to stay will be issued for a period of three months.
Spain	9,490	6,310	5,920	5,540	5,260	Victim protection is regulated in Article 59 of the Aliens Law. If a victim cooperates during the investigation and judicial prosecution process, he/she will be provided with a residence permit in Spain for one year (renewable).
Sweden	23,520	33,020	31,350	23,160	17,530	A new provision regarding the possibility to issue a time-limited residence permit was inserted into the Aliens Act in October 2004. A time-limited residence permit may also be issued to a victim if it is deemed necessary in order to conclude a preliminary investigation or the main proceedings in a criminal case.
United Kingdom	91,600	103,080	60,050	40,620	30,460	The UK deals with victims of trafficking on a case by case basis. There are no provisions to allow a victim to remain solely on the basis that they have been trafficked. Those who claim to be trafficked to the UK are normally returned to their country of origin or to the country of embarkation (if the person has a valid residence permit in that country) if their claim to remain in the UK fails. There is no automatic right to a short term residence permit if one assists in a prosecution.
Total Asylum Applications Submitted in the European Union:		2001	2002	2003	2004	2005
		438,990	425,540	346,690	279,860	237,840

-Developing a Temporary Residence Permit: Brief Case Studies-

Three specific examples of residence permit systems operating today should be examined to provide the groundwork for developing a common European temporary residence permit system. The Dutch government has a comprehensive program for combating human trafficking which includes the granting of a temporary residence permit to victims; this program is often cited as a strong example of providing

comprehensive support to victims of trafficking. Article 18 of the Anti-Trafficking in Persons law in Italy is another oft cited example of providing social assistance to victims. And finally, the United States T visa under the Trafficking Victims Protection Act of 2000 could offer a model for the development of a common European temporary residence permit (TRP).

Netherlands: B-9 Regulation

The B-9 Regulation in the Netherlands (section B-9 of the Immigration Law Circular) provides victims of human trafficking identified in the Netherlands with reception and support. The Dutch National Rapporteur provides a comprehensive description of the B-9 Regulation:

The B-9 regulation offers aliens who are (possibly) victims of THB [Trafficking in Human Beings], and aliens who are witnesses of THB, the option to temporarily stay legally in the Netherlands. In order to give the victim the time to decide *whether* she wants to report an offence, the victim is granted a reflection period of a maximum of three months. During these three months the deportation of the victim from the Netherlands is temporarily suspended. This reflection period does not apply for witness-informants. If the alien decides not to report an offence, she must leave the Netherlands immediately. If the victim or the witness decides to report the offence, this report is regarded as an application to grant a residence permit. The residence permit is issued for the duration of the investigation and criminal proceedings and expires when the investigation or the prosecution is completed or stopped. The B-9 regulation also provides certain facilities for victims and witnesses of THB (also for victims who are still in the reflection period phase): reception and shelter, medical assistance, legal assistance and special provisions for maintenance. In principle, when their temporary residence permit under the B-9 regulation expires, victims of THB can attempt to have this converted into a permanent residence permit. As grounds for this they may give humanitarian reasons.⁴

In the Netherlands, when officials (police) identify a potential victim of human trafficking, they are to inform the victim about the B-9 Regulation. Even if there exists “only the slightest indication” that an individual is a victim of trafficking, the police are to offer the victim a three-month reflection period during which the victim decides whether or not to officially report the crime.⁵ From 1996 to June 2002, of 607

applications for the B-9 residence permit, 462 B-9 permits were granted. Reasons for permits not being granted include withdrawn or expired applications, or victims who disappear after applying.⁶ It should also be noted that the B-9 applications are only a fraction of the total number of applications for temporary residence permits that the Dutch Immigration and Naturalisation Service (IND) receives and grants each year; other applications may also be lodged by victims of human trafficking. The B-9 regulation has its imperfections, but offers a strong example for providing victims with a sufficient reflection period, which will be discussed in this chapter.

Italy: Article 18

Italy passed a law on immigration in 1998 which created a legal framework to assist victims of human trafficking identified in Italy under Article 18. Aghatise writes:

The most significant consequence of Article 18 has been to help reintegrate women and girls into society by providing a comprehensive set of social services to victims of trafficking. From a legal viewpoint, Article 18 has also helped to increase the number of victims who denounce their exploiters. In the past, when a victim denounced her exploiters and obtained a residence permit, she was left on her own without any assistance and often found herself back at the starting point. After Article 18 was passed, a more comprehensive and structured program of assistance was made available to victims of trafficking, and they are assisted up to the point of obtaining independent living and social autonomy. There is close collaboration between the police and the network of NGOs offering services to victims.⁷

IOM considers Italy's Article 18 to be a model for other EU countries. Indeed, Article 18 offers a unique and important connection between assistance and protection. Article 18 protects victims of trafficking identified in Italy from deportation while at the same time offering assistance to victims through a comprehensive network of social services. With government funding, NGOs in Italy provide basic assistance, literacy courses, and help finding temporary employment or jobs. In 2004, 1,940 victims entered social protection

programs in Italy under Article 18.⁸ Italy's government also funds voluntary repatriation programs for victims identified in Italy, as well as six month reintegration assistance.⁹ The need to provide all-inclusive social assistance to victims of human trafficking has been mentioned and will be further elaborated in this chapter.

United States: T Visa

The United States Congress passed the Victims of Trafficking and Violence Protection Act (TVPA) in 2000. The TVPA, along with the Immigration and Nationality Act, provides assistance and protection to victims of human trafficking identified and recognized as victims in the United States. To be recognized as a victim of human trafficking and to receive assistance from the United States government, an individual must receive certification from the Department of Health and Human Services' Office of Refugee Resettlement (child victims do not need to be certified, but are issued a letter of eligibility for benefits). "The TVPA signified a shift in the immigration law policy, which previously treated victims of human trafficking as illegal aliens subject to deportation."¹⁰ Adult victims of human trafficking are eligible to receive "certain benefits and services to the same extent as refugees" if they are willing to assist with the investigation and prosecution of traffickers and have completed an application for a T visa or have received "continued presence" status from the US Department of Homeland Security (DHS).¹¹ Victims may be granted "continued presence" or temporary residence if federal law enforcement authorities determine they are "potential witnesses to trafficking." Child victims of trafficking (under age 18) are immediately eligible for benefits and do not need to receive "continued presence" or apply for a T visa.

Victims may also apply for a T visa which provides temporary residence in the United States.¹² The United States Department of Justice elaborates:

The T visa is specifically designed for certain human trafficking victims who cooperate with law enforcement against those responsible for their enslavement. The statute allows victims to remain in the United States if it is determined that such victims could suffer “extreme hardship involving unusual and severe harm” if returned to their home countries. After three years in T status, victims of human trafficking may apply for permanent residency. In addition, subject to some limitations, the regulation allows victims to apply for non-immigrant status for their spouses and children. Victims under the age of 21 may apply for non-immigrant status for their parents as well.¹³

The United States is able to grant up to 5,000 non-immigrant visas (T visas) per year to certain victims of severe forms of trafficking who are in the United States. The TVPA also created the U visa. The U visa will be available to non-US citizens who “have suffered substantial physical or mental abuse resulting from a wide range of criminal activity and who have been helpful, are being helpful or are likely to be helpful with the investigation or prosecution of the crime.”¹⁴ The U visa provides temporary residency in the United States and employment authorization. However, the U visa will not be available until the DHS issues regulations to govern the U visa; until that time DHS is providing a form of interim relief called “U nonimmigrant status interim relief” or “U visa interim relief.” Victims of human trafficking who request this interim relief may receive deferred action, which allows temporary legal status and employment authorization.¹⁵ Victims who are granted a U visa will also be eligible to apply for lawful permanent residence after three years. While the United States is one of the few countries that offers the possibility of permanent residency to victims of trafficking, as well as an extended temporary residency (three years), the number of victims who have actually applied for or received T visas demonstrate the troubles inherent in United States

victim assistance and protection. In 2004, the US Department of Homeland Security's Vermont Service Center received 520 applications for T visas: 136 T visas were approved, 292 applications were denied, and 92 applications continue to be considered.¹⁶ Information about the T and U visa is difficult to access, applications are expensive, and victims lack options upon identification. Further analysis of the United States T visa and U visa is needed; both systems are new (the U visa is not yet in place) and it remains to be seen how the T and U visas will ensure assistance and protection to victims. There exists great skepticism about the T visa, though a thorough monitoring and evaluation of the T visa is yet to take place. However, what can be drawn from this brief examination of the United States T visa is the possibility for longer temporary residence and employment authorization – the values of which will be argued momentarily – and the possibility to apply for permanent stay.

¹ European Union, *Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities* (COM (2002) 71 final) Commission of the European Communities 2002/0043.

² European Union, *Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities* (2004) Official Journal of the European Union L 261/19.

³ UNHCR, "Asylum Levels and Trends in Industrialized Countries, 2005: Overview of Asylum Applications Lodged in Europe and Non-European Industrialized Countries in 2005" (Geneva: UNHCR, March 2006); Europol, *Legislation on Trafficking*; United States Department of State, *Trafficking in Persons Report* (2002); United States Department of State, *Trafficking in Persons Report* (2004); United States Department of State, *Trafficking in Persons Report* (2005); available at www.state.gov; and Anti-Slavery International, "Comparative Matrix of Current Legislation on Trafficking of Migrants in EU Member States and Candidate Countries," *Background materials for the Study Tour* (accessed March 17, 2006); available at www.antislavery.org/homepage/traffic%20news/Comparative%20Matrix%20in%20English%20and%20SerboCroatian.pdf.

⁴ Dutch National Rapporteur, *Trafficking in Human Beings: Second report of the Dutch National Rapporteur*, 9-10.

⁵ International Labour Office, 41. See also Monika Smit, "Trafficking in women: Dutch country report," Contribution at the NEWR Workshop on Trafficking in Women (Amsterdam: NEWR, April 2003).

⁶ Dutch National Rapporteur, *Trafficking in Human Beings: Second report of the Dutch National Rapporteur*, 11.

⁷ Esohe Aghatise, "Trafficking for Prostitution in Italy: Possible Effects of Government Proposals for Legalization of Brothels," *Violence Against Women*, Vol. 10, No. 10 (October 2004): 1140.

⁸ United States Department of State, *Trafficking in Persons Report* (2005).

⁹ Ibid.

¹⁰ The Campaign to Rescue & Restore Victims of Human Trafficking, “Victim Assistance” (accessed March 17, 2006); available at www.acf.hhs.gov/trafficking/about/victim_assist.html.

¹¹ United States Department of Justice, Civil Rights Division, “Trafficking in Persons: A Guide for Non-Governmental Organizations” (accessed March 17, 2006); available at www.usdoj.gov/crt/crim/wetf/trafficbrochure.html.

¹² See Heather J. Clawson, Kevonne M. Small, Ellen S. Go and Bradley W. Myles, “Needs Assessment for Service Providers and Trafficking Victims” (Virginia: Caliber Associates, 2001).

¹³ United States Department of Justice, “Department of Justice Issues T Visa to Protect Women, Children and all Victims of Human Trafficking” (January 24, 2002); available at www.usdoj.gov.

¹⁴ Immigrant Legal Resource Center, “U Visas: Immigration Relief for Victims of Certain Crimes” (accessed March 17, 2006); available at www.ilrc.org.

¹⁵ Ibid.

¹⁶ United States Department of State, *Trafficking in Persons Report* (2005); available at www.state.gov.

CONCLUSION: SECURING VICTIM ASSISTANCE AND PROTECTION

This thesis posits that a common European temporary residence permit system could be developed to prevent victims of human trafficking identified in the EU from being deported and to secure assistance and protection for victims in the EU. The benefits of such a system include: decreasing disproportionate and inconsistent handling of victims across the EU, increased information and burden sharing amongst EU member states, lessening the pressure on asylum systems in Europe and combating human trafficking through the assistance of victims. Working from the 2004 EU Council Directive on a residence permit for victims of human trafficking (member states are to comply with this directive by August 2006), a common TRP system could be developed in the EU. The 2005 Council of Europe Convention on Action Against Trafficking provides a valuable and comprehensive outline for a resident permit system. The Council of Europe Convention also provides a strong argument for a resident permit system.

Immediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic. For the victims this means having to start again from scratch – a failure, that in most cases, they will keep quiet about, with the result that nothing will be done to prevent other victims from falling into the same trap. A further factor is fear of reprisals by the traffickers, either against the victims themselves or against family or friends in the country of origin. For the law enforcement authorities, if the victims continue to live clandestinely in the country or are removed immediately they cannot give information for effectively combating the traffic. The greater victims' confidence that their rights and interests are protected, the better the information they will give. Availability of residence permits is a measure calculated to encourage them to cooperate.¹

Developing a residence permit system at the level of the EU to protect the rights and interests of victims depends on a number of elements that can be discussed after the preceding brief examination of the Netherlands B-9 Regulation, Italy's Article 18 and the US T visa.

The Netherlands B-9 Regulation demonstrates how to have an effective reflection period for victims. A reflection period is a time for recovery and reflection during which victims of human trafficking are not to be deported, but are to be provided with medical, psychological and legal counseling in the country where they are identified. Victims are not required to cooperate with law enforcement or to be active in criminal proceedings during this time. This reflection period allows victims to recover from the atrocities they have suffered and to regain agency in determining their future. Article 6 of the 2004 EU Council Directive states: “Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities. The duration and starting point of the period...shall be determined according to national law.” Anti-Slavery International recommends that reflection periods be (like the Netherlands B-39 Regulation allows) a period of three months.² For member states that currently provide shorter reflection periods, victims may not have sufficient time to recover, to be liberated from the threats and influences of traffickers, and to come to an informed and independent decision on how to proceed. A common European residence permit system should allow identified victims of trafficking, as well as individuals who are potentially victims of trafficking but who have not yet been formally identified to – as in the Netherlands – immediately begin a reflection period and to have access to assistance and protection in the country where they are identified.

Article 18 in Italy has been used as a model for other EU member states. Article 18 demonstrates a successful operational model for assisting and protecting victims of

human trafficking in the destination country. Article 7 of the 2004 Council Directive outlines the treatment of victims “granted before the issue of the residence permit,” and includes such services as: ensuring the victim’s subsistence; providing access to emergency medical treatment; providing translating and interpreting services; providing free legal aid; and ensuring protection under national law. The Palermo Protocol indicates that assistance measures for victims should include: appropriate housing; counseling and information in a language victims can understand (especially regarding legal rights); medical, psychological and material assistance; education, training and employment opportunities; legal assistance; and services that take into account the special needs of children.³ Italy’s Article 18 takes these services into account and provides an extensive network of services to victims identified in Italy. A common European residence permit system would depend upon state and non-state actors alike cooperating in assisting and protecting identified victims. The roles of NGOs throughout the EU, while not specifically addressed in this paper, are invaluable in assisting and protecting victims. The EU should call upon the assistance and advice of NGOs in developing a common residence permit to determine best practices for providing assistance measures and incorporating social services into the common residence permit system.

The United States T visa demonstrates a residence permit option that provides a longer stay in the destination country (three years), the option to apply for permanent residence, and authorization for employment. Article 8 of the 2004 Council Directive sets the minimum period for the residence permit in the EU at six months. Article 11 of the 2004 Council Directive addresses access to the labour market and places the decision

to allow authorization for employment at the level of the state. This approach seems to subordinate the interests of the victim to the interests of the state. Limiting a victim's temporary residence to six months prevents the victim from reestablishing a livelihood. Preventing authorization for employment renders the victim dependent upon social assistance and perhaps back into the same dire economic circumstances that led to trafficking in the first place. A six month residence permit seems inevitably linked, as all of the residence permit options discussed so far have been, to the victim's willingness to cooperate in criminal proceedings, as six months is not enough time for a victim to build any sort of foundation for his or her life. As Anti-Slavery International argues:

The risk to the trafficked person does not end with criminal proceedings. On the contrary, co-operation in a prosecution is likely to increase the risks to the individual and their family. Thus, the permit, which offers no guarantee that the victim will be allowed to stay in the country of destination after they are no longer of use to the prosecution, is unlikely to provide the security which most victims will require before putting themselves and their family at risk. Permanent residency for those assisting a prosecution will both ensure the protection of the victim and encourage co-operation in prosecutions.⁴

While permanent residency is not the only means to ensure the protection of the victim, a permanent residence option could strengthen a temporary residence permit system. The United States T visa can be utilized to examine how longer temporary stays are possible, and the possibility for applying for permanent residence after a certain time period.

The 2004 Council Directive links the granting of a residence permit in the EU to victims "who cooperate with the competent authorities." All of the residence permit options discussed in this thesis have linked the issuance of a residence permit to the victim's willingness to cooperate with authorities. While the point of view of the state is obvious and understandable – combating trafficking depends also on prosecution, and for prosecution witnesses (victims) are needed – linking a victim's assistance and protection

to his or her willingness to cooperate in criminal proceedings constitutes further exploitation of the victim. As Johnson writes, “While the policy of encouraging victims to bring charges and testify should be encouraged, the practice of providing residency permits to only those women who testify at successful prosecutions must be stopped. This practice re-enforces the idea that the only victim in cases of trafficking is the state. By doing this, the [victim] is again being manipulated, this time for the benefit of the state.”⁵ Wijers and van Doorninck argue that participation in criminal proceedings carries substantial risks for the victims involved. The authors list secondary victimization along with exposing the victim to retaliation from traffickers, harassment by authorities and stigmatization in the victim’s home community. Wijers and van Doorninck continue:

even the temporary protection offered by a short term residence permit is made totally dependent on the usefulness of the victim for the purpose of investigation and prosecution, without any attention to the protection needs common to trafficking victims. If the victim is not able or willing to co-operate with the state authorities or if she is not – or no longer – deemed “useful” as evidence in the criminal proceedings, she (again) is subject to arrest, detention and deportation, without any protection against the possible consequences. This clearly fails to recognise the obligations states have under international human rights law to provide victims of serious human rights violations with appropriate remedies, including state protection, access to justice, reparation, restitution, compensation and rehabilitation.⁶

The Women’s Commission for Refugee Women and Children also notes that making cooperation with authorities a precondition to receiving assistance and protection “may undermine the effectiveness of law enforcement efforts to combat trafficking.” The Women’s Commission cites caseworkers who cautioned that some victims may not present themselves to authorities at all as they feel their needs are not considered and they fear deportation.⁷ IOM observes this problem as well, arguing that “Even though a trafficker may be convicted, the only certain outcome for the migrant is that he/she eventually will be deported and the initial investment to travel abroad will be lost, along

with the opportunities for an income.”⁸ One must also consider the number of victims of trafficking who are unwilling to enter the system of assistance and protection *at all* due to restrictions placed upon their ability to receive true assistance and protection. If the system of assistance and protection cannot protect a victim of human trafficking from deportation, victims may remain in exploitative, atrocious situations, deepening the already obscured problems of human trafficking. A common European temporary residence permit system must not link the granting of residency to a victim’s willingness to cooperate. Victims have already suffered exploitation and human rights violations and the state must not subject victims to further risks and mistreatment. Rather the state must do everything in its power to assist and protect a victim and to encourage the victim, through rehabilitation and reintegration, to voluntarily assist the state in the fight against human trafficking.

This paper has examined human trafficking within the European Union and has questioned how to provide international protection to identified victims of human trafficking who face deportation from the EU. Deportation not only excludes victims from access to assistance and protection, but also often subjects victims to penalties, criminalizing the victim and compounding the victim’s vulnerability. Deportation from the EU is a common practice that inhibits identified victims from receiving assistance and protection and the deportation of victims must be stopped. This paper has examined human trafficking within the context of the common European asylum system and studied mechanisms which could be developed to allow victims who want assistance but face deportation to remain in the destination country to receive assistance and protection. The discussion showed that affording victims of human trafficking the right to asylum is

not an appropriate mechanism to secure assistance and protection for victims who face deportation from the EU. A mechanism that could be developed to complement the common European asylum system is a common European temporary residence permit system for victims of human trafficking. This paper has not offered a blanket solution to ensure assistance and protection to victims in the EU. Rather, this discussion has attempted to engage current literature and research in new ways to encourage fresh thinking about how to prevent victims of human trafficking from being deported from the European Union and how to build a comprehensive system to protect and assist such victims. As human trafficking spreads and evolves in the European Union, coordinated international responses will be vital to combating human trafficking. Developing a common European temporary residence permit system would be a coordinated response that could serve as the harmonized basis for the expansion of systems that will assist and protect the many and varying victims of human trafficking in the EU.

¹ Council of Europe, *Convention on Action Against Trafficking in Human Beings*, Explanatory Report Article 14 (181).

² Anti-Slavery International, "Briefing on a proposal for: European Union Council Directive (COM (2002) 71 final)" (accessed March 17, 2006): 2.

³ Ibid.

⁴ Ibid.

⁵ Johnson, 13.

⁶ Marjan Wijers and Marieke van Doorninck, "Only rights can stop wrongs: A critical assessment of anti-trafficking strategies," Paper presented at EU/IOM STOP European Conference on Preventing and Combating Trafficking in Human Beings (Belgium: EU/IOM, 2002): 7-8.

⁷ Women's Commission for Refugee Women and Children, 28.

⁸ IOM, "Trafficking in Migrants."

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