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TRAFFICKING AND THE HUMAN RIGHTS OF WOMEN:

**USING THE CEDAW CONVENTION AND COMMITTEE TO
STRENGTHEN NATIONAL AND INTERNATIONAL RESPONSES TO
TRAFFICKING IN WOMEN AND GIRLS**

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	Page
1. Introduction.....	3
2. Definitions and key concepts	
2.1 Defining trafficking.....	4
2.2 Conceptual understandings of trafficking.....	5
2.3 Patterns and trends in Asia.....	6
3. Understanding the gender and human rights dimensions of trafficking	
3.1 Gender, human rights and the emigration push.....	7
3.2 Gender, human rights and the immigration pull.....	8
3.3 Gender, human rights and institutional factors.....	8
4. Trafficking and the Women’s Convention	
4.1 The prohibition on trafficking in the Women’s Convention.....	10
4.2 The work of the CEDAW Committee on trafficking.....	11
4.3 The key issue: trafficking as a form of sex-based discrimination.....	13
4.3.1 Does trafficking violate the international prohibition on sex-based discrimination?.....	13
4.3.2 Is trafficking a form of violence against women and thus prohibited under the non-discrimination norm?.....	14
5. Clarifying the obligations and responsibilities of States Parties to CEDAW in relation to trafficking in women and girls	
5.1 Determining the ‘content’ of the Convention’s Article 6.....	16
5.2 A preliminary list of action-oriented obligations for CEDAW States Parties.....	17
6. Conclusion.....	21
Annex: Note on the CEDAW Convention’s Reporting, Communication and Enquiry Procedure.....	29

1. Introduction

The term human trafficking refers to the trade in human beings, within and between countries, for the purpose of their exploitation. Over the past few years, human trafficking has moved from the margins to the mainstream of international political discourse. Trafficking is now widely recognised as a major revenue earner for transnational organised criminal groups and a source of political, social and economic insecurity for States as well as for individuals. Few countries have escaped the effects of this increasingly sophisticated and invariably brutal phenomenon.

In terms of responses to trafficking, it is in the legal area that the most significant and rapid changes have occurred. Where just a decade ago the legal framework consisted of a single, long-forgotten treaty, trafficking is now the subject of a vast array of international legal rules and national laws and a plethora of “soft” standards ranging from policy directives to regional commitments. The breadth and depth of this legal shift is truly remarkable. It took just two short years for the international community to negotiate a global agreement on fighting trafficking and only a further three years for that treaty to gain enough ratifications for it to enter into force. In Africa, Asia and Europe, regional groupings of States have moved to support or even strengthen the internationally agreed standards. It would be unthinkable, in early 2005, for a government to argue that they don't have to do anything to fight trafficking. Even countries traditionally distrustful of the international legal and political process have had no trouble in joining – or in some cases even leading - this unprecedented international movement.

The human rights violations associated with trafficking have been well documented and are rarely disputed. Human rights are implicated in the causes and vulnerability factors that contribute to trafficking as well as in the responses of governments and others at both national and regional levels. Trafficking is also a highly gendered phenomenon and gender affects all aspects of the trafficking process. Females are trafficked in different ways to men and for different reasons. Discrimination and violence have been identified as key factors in increasing the vulnerability of women and girls to trafficking and in shaping the trafficking outcome.

In international legal terms, the “composite” nature of the trafficking phenomenon implicates a wide range of violations, obligations and rights. For example, even the human rights dimensions of a trafficking situation can be examined from any number of angles. These include the rights of non-citizens; the prohibitions on slavery, the slave trade, servitude, forced labour and debt bondage; the prohibition on forced marriage; the prohibition on racial discrimination; the prohibition on trafficking in and related exploitation of children; the rights of migrants and migrant workers; economic, social and cultural rights; and the right to remedies. Trafficking also intersects with other branches of international law including laws relating to transnational organised crime and corruption; international humanitarian law; and international criminal law.

While international human rights law has long recognised the concept of trafficking, the term is only explicitly included in two of the major modern human rights treaties. The Convention on the Rights of the Child prohibits trafficking and related exploitation of children. The CEDAW Convention, in its article 6, is more equivocal,

in obliging States Parties to take all appropriate legislative and other measures to “suppress all forms of traffic in women and exploitation of the prostitution of women”.¹

In relation to the trafficking of women and girls, the CEDAW Convention is clearly a major source of obligation for States parties. But what is the nature of that obligation? Is trafficking a form of sex-based discrimination and therefore a trigger for the much wider range of obligations contained in the treaty? Is trafficking a form of violence against women and, if so, what are the exact legal implications of this characterization? Perhaps most importantly, what is the content of the norm – what must States parties actually do when it comes to trafficking? While the CEDAW Committee has undertaken some important work in the area of trafficking, these fundamental questions have not yet been conclusively answered.

This background paper seeks to set the groundwork for an exploration of States obligations when it comes to trafficking – with particular reference to the trafficking in women and girls and to the obligations of States parties to the CEDAW Convention. The paper is divided into four substantive parts in addition to this introduction. Part Two examines the definition of trafficking and summarises the main points of the current conceptual understanding of trafficking. Part Three explores the gender and human rights dimensions of trafficking. The CEDAW Convention and the work of its Committee is the focus of Part Four. This part also considers two of the key doctrinal questions set out above: whether trafficking is a form of sex-based discrimination (and thereby implicitly prohibited under the Convention) and, additionally, whether trafficking is a form of violence against women. In the final part, a preliminary attempt is made to answer the question of what States parties to CEDAW are required to do, as a matter of law, when it comes to trafficking. The author identifies a series of specific obligations which, while not definitive, could provide the starting point for a more practical and nuanced discussion around the CEDAW Convention and its role in the fight against trafficking.

An annex to the background paper provides additional and detailed information on the CEDAW Committee’s reporting, communications and enquiries procedures.

2. Definitions, trends and key concepts

This section provides the foundation for subsequent discussion of legal issues by setting out the definition of trafficking; summarising the key points of an emerging conceptual clarity on trafficking; and identifying key patterns and trends in the Asia region.

2.1 Defining trafficking

Until December 2000, the term “trafficking” had never been precisely defined in international law despite its incorporation in a number of international legal agreements including some of the first human rights treaties. The on-going failure to develop an agreed definition of trafficking reflected major differences of opinion concerning the ultimate end result of trafficking, its constitutive acts and their relative significance.

The first-ever treaty-based definition of trafficking is contained in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Girls Supplementing the United Nations Convention on Transnational Organised Crime*.ⁱⁱ Since its adoption, the definition has received widespread acceptance. It has been incorporated into other treaties (including the 2005 European Convention on Trafficking) as well as into numerous national laws and regional policy documents.

The definitionⁱⁱⁱ contains three separate elements:

1. An action, consisting of:

- Recruitment, transportation, transfer, harbouring or receipt of persons;

2. By means of:

- Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability,^{iv} giving or receiving payments or benefits to achieve consent of a person having control over another;

3. For the purpose of

- Exploitation (including, at a minimum,^v 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).

All three elements must be present for the situation to constitute trafficking. The only exception is in relation to child victims of trafficking for whom the requirements relating to means are waived.^{vi} This means that trafficking will exist where the child was subject to some act such as recruitment or transportation - the purpose of which is the exploitation of that child. Because it is unnecessary to show that force, deception or any other means were used, the identification of child victims of trafficking *and* the identification of their traffickers is relatively easier.

2.2 Conceptual understanding of trafficking

The complexity of the trafficking phenomenon has presented considerable challenges to those working in this area. Over the past several years, efforts have gone into the development of conceptual clarity: a level of understanding sufficient to guide international and national policy responses and to evaluate, impartially, the impact and effectiveness of interventions. Recent international legal and policy developments including the adoption of the UN Trafficking Protocol, have been critical to the emergence of a new ‘conceptual clarity’ on trafficking.

The key points of our current understanding include the following:

- The term “trafficking” essentially denotes the process of moving or transporting people into exploitative work situations. As movement is an essential aspect of the definition, the outcome of that movement cannot, by itself, constitute trafficking.
- Trafficking is fundamentally connected to migration and to broader migration trends. Attempts to isolate trafficking as a phenomenon unconnected to migration including migrant smuggling are both counter-intuitive and unproductive.

- Women, children and men are trafficked. It is widely presumed that more females than males are trafficked but there is no strong evidence on this point one way or another.
- Trafficking takes place for a variety of end purposes including but not limited to domestic service, forced marriage and sweatshop labour. Forced sex work is the most visible end-result of trafficking (and the one which attracts the most attention) but there is no hard evidence available that it is the most common.
- Trafficking occurs *within* as well as *between* countries.

Conceptual clarity also requires a common understanding on *how* things happen, In terms of practices, a number of issues which were previously contentious have now been more or less settled. For example, it is generally agreed that:

- Traffickers use a variety of recruitment methods. Outright abduction is rare. Child trafficking generally involves payment to a parent or guardian in order to achieve cooperation and this is often accompanied by a measure of deception regarding the nature of the child's future employment or position.
- The stereotype of the "coerced innocent" is too simplistic to reflect the reality of the majority of known trafficking situations. Most traffickers use varying levels of fraud or deception, rather than outright force, to secure the initial cooperation of the trafficked person.
- By definition, a trafficked person ends up in a situation from which she cannot escape. Physical detention is not always necessary. Traffickers and their accomplices use a variety of methods to prevent escape including threats and use of force, intimidation, detention and withholding of personal documents.
- Trafficking is sustained and strengthened by public sector corruption, particularly of police and immigration officials who play a key role in facilitating illegal entry and providing protection to trafficking operations.
- Most but not all persons trafficked across an international border enter and/or remain in the destination country illegally. Illegal entry increases a trafficked person's reliance on traffickers and serves as an effective deterrent to seeking outside help.
- The trafficking situation is generally limited in time. The nature of trafficking end-purposes and the dynamic of the activity mean that a trafficked person, if she does not escape or is rescued, (and can avoid death or serious injury), will, over time, find herself in a more "acceptable," less exploitative situation from which she will at some point be technically free to leave.

2.3 Overview of trafficking patterns and trends in Asia

Trafficking fact patterns vary significantly from place to place and even from time to time. Current, primary-source information seems to confirm that trafficking affects all regions and most countries of the world one way or another. It is therefore not surprising that complex networks of flows have developed between countries and between continents. While favoured routes are constantly changing (in response to shifts in supply and demand as well as law enforcement pressures), one constant factor is the social and economic distinction between countries of origin and countries of destination. Trafficking, like all other forms of irregular and/or exploitative migration, generally involves movement from poorer countries or regions to *relatively* wealthier ones. Whilst other forms of migration tend not to be unidirectional, in the

case of trafficking, there are few identified exceptions to this trend. The major profit from this crime comes not from the movement but from the subsequent exploitation.

Trafficking within and from Asia has been extensively documented and continues to attract a great deal of attention from researchers. The principle countries of origin have been identified as including Afghanistan, Bangladesh, Cambodia, China, India, Indonesia, South Korea, Myanmar, Nepal, Pakistan, the Philippines, Thailand and Vietnam. The principle countries of destination in this part of the world are said to be Australia, China, Hong Kong, India, Malaysia, Pakistan, Singapore, Taiwan and Thailand as well as States of the Middle East. In many countries of Asia trafficking is also an internal phenomenon involving movement between rural areas and cities. This pattern is particularly evident in China and Indonesia. Some countries are simultaneously points of departure, transit and destination for trafficked person. Thailand, an important “regional hub,” is a case in point. Cambodian, Vietnamese, Laotian and Myanmar women and girls are regularly trafficked into Thailand to work in the sex industry and through Thailand on their way to destinations in Europe and the Middle East. Large numbers of Thai women and girls are in turn trafficked to Japan, Australia and Western Europe.

3. Understanding the gender and human rights dimensions of trafficking

The gender and rights dimensions of trafficking are profound. Gender affects all aspects of the trafficking process: from the factors that contribute to trafficking to the nature of the laws and policies developed to deal with the phenomenon. In the same way, human rights are implicated in the causes and vulnerability factors that contribute to trafficking as well as in the responses of governments and others at both national and regional levels.

3.1 Gender, Human Rights and the trafficking “push”

There are a range of factors which limit the life options of people at points of origin and their ability to claim the legal rights to which they are entitled. This contributes to a supply of potential trafficking victims: individuals who leave their communities in search of better opportunities or to escape their current situation. These are often referred to as ‘push factors’.

While most commonly identified push factors affect both men and women, they often do so differently and many disproportionately affect women both in terms of their magnitude and their consequences. For example, studies examining the motivations of trafficked persons overwhelmingly confirm that many women will accept dangerous migration arrangements in order to escape the consequences of entrenched gender discrimination including unemployment, violence, lack of security and lack of access to basic resources.^{vii} Migratory flows therefore become not just an enforced response to economic hardship but “also represent a recognition on the part of the gendered individual actors that migration provides the best opportunity of escaping a repressive environment”.^{viii}

An analysis of the human rights record of the major source countries appears to confirm a link between the position of women and their susceptibility to trafficking and related exploitation. According to the UN Special Rapporteur on Violence

Against Women, governments actually *create* situations in which trafficking flourishes by failing to protect women's civil, political, economic and social rights.^{ix}

Once a woman enters or is forced into the immigration process, gender continues to be determinative. Available information seems to indicate that the majority of smuggled migrants are men and the majority of trafficked persons are women. While no explanation has yet been offered for this anomaly, it is likely that women's relative inability to pay up-front for their transportation is one factor predisposing them to subsequent exploitative arrangements such as debt bondage. Women are also more vulnerable to certain forms of exploitation including sexual exploitation. Finally, it is the informal, unregulated and largely invisible labour and entertainment sectors – both predominantly female – that are the principle target markets for traffickers.

3.2 Gender, Human Rights and the trafficking “pull”

Trafficking services a market in which there are both buyers and sellers. The growth in trafficking reflects not just an increase in “push” factors but also the strong pull of unmet labour demands – particularly in the informal, unregulated sector. Until very recently, the demand side of trafficking had not been subject to close analysis. However, demand is clearly sufficient to sustain the enormous profits required by organised criminal groups and to encourage the emergence of a new breed of entrepreneurs whose job it is to match supply with demand.^x

Labour shortages in the informal sector of most industrialised economies have long been addressed through the (often illegal but just as often unofficially tolerated) import of foreign workers. It is the members of this group who have traditionally been channelled to the bottom of the labour-market hierarchy – undertaking the “dirty, dangerous and difficult”^{xi} jobs which are rejected by the domestic labour force. This practice is being faithfully copied by emerging and adolescent economies in all regions of the world, including those in Asia.

The global labour market reproduces traditional gendered divisions of labour which exist, to a greater or lesser extent, in all countries. The effect of these divisions is that women have less opportunity than men to engage in skilled work. They are therefore much more dependent than men for employment in the very sector where demand for the products of trafficking is strongest. That demand can be traced, at least in part, to cost differentials. Put simply, trafficked persons fill a market requirement for cheap or even free labour. If remunerated at all, such individuals are invariably paid at a much lower rate than local workers and they do not receive the kind of costly employment benefits which are now standard in most developed and some developing States. The profit potential is therefore much higher and the services involved can accordingly be provided at a much cheaper cost than would be the case for local, legal labour. In the case of trafficking into the sex industry, cost differentials are extremely important – often reinforced by a demand for the coerced, the young and the “exotic.”

3.3 Gender, human rights and the response to trafficking

Most countries in the Asia region have begun to develop detailed responses to trafficking. In at least some cases, this work has been going on for many years and that longer experience is reflected in the relative sophistication of the national

response. Other countries have only recently become aware of a trafficking problem but have taken advantage of work done elsewhere to push-start their own efforts. In some other countries, very little has been done, sometimes because the country in question is yet to officially acknowledge the existence of a significant trafficking problem.

Human rights and gender considerations provide an important lens through which to view and evaluate responses to trafficking. Anti-trafficking interventions by governments, NGOs and international organizations will often reflect certain gender biases which serve to limit their reach and compromise their positive effects. In the legal and law enforcement sectors for example, measures taken in the name of protecting victims and preventing trafficking can operate in a discriminatory manner or otherwise result in further, highly gendered violations of the rights of women and girls. Importantly, even while many anti-trafficking interventions address women exclusively, this does not mean that they are necessarily gender-sensitive. In particular, such interventions often view differences between men and women as natural and unchangeable, reinforce discriminatory stereotypes, and ultimately further disadvantage women and girls, men and boys.

Key human rights and gender issues around the response to trafficking include the following:

Weak and/ or inappropriate criminal justice responses: many countries have comparatively weak law enforcement mechanisms and measures to investigate, apprehend, prosecute and penalize trafficking. Even where mechanisms are in place, low levels of understanding by officials can lead to treatment of trafficking victims as criminals. Victims, most often women, are commonly charged with entering the country illegally, and are quickly deported. Weak law enforcement can be reinforced by negative community attitudes at points of destination for trafficking. Widespread discriminatory attitudes toward migrants and ethnic minorities, coupled with lower status of women and children generally, often provide little or no social sanction for trafficking activities. Trafficking into the sex trade is particularly susceptible to community acceptance of inadequate or inappropriate responses by the criminal justice system.

Discriminatory emigration and immigration policies: a number of countries of origin have responded to the dangers considered inherent in female emigration by placing restrictions on female migratory outflows on the basis of age and/or country of origin. In one Southeast Asian country for example, the overseas recruitment or deployment of women is prohibited except for certain countries of destination. In another country, a place where lawful emigration is already exceedingly difficult, young women may not leave the country without a certificate of permission from the national women's organisation. It is not difficult to accept the argument that when such discriminatory restrictions on movement are enacted without any corresponding effort to alleviate the compulsion to migrate, they serve only to encourage potential migrants to seek out the services of traffickers.

Violations of the rights of victims: individuals who have been trafficked are victims of crime and victims of human rights violations. However, many countries treat trafficked persons as criminals. Most frequently, once they are identified, victims of

trafficking are incarcerated and quickly deported. They are given no material, social, medical or psychological support. Occasionally however, and especially if they are female, victims are held in immigration or social welfare detention for long and indeterminate periods of time. While such detention is usually defended with reference to the need to “protect” victims, it remains extremely problematic in human rights terms. Another common violation relates to failure of States to recognise and protect the right of victims to access remedies. Only very rarely have victims of trafficking been given the information and means to enable them to claim criminal or civil remedies for the violations they have suffered.

4. Trafficking and the CEDAW Convention

It has been noted above that the legal implications of trafficking are much broader than the Women’s Convention. However, in keeping with the focus of this study, the following paragraphs focus particularly on the relevant provisions of that instrument. Several other legal agreements are also briefly considered in the context of examining whether trafficking is indeed a form of sex-based discrimination.

4.1 The prohibition on trafficking in the Women’s Convention

The first specific reference to trafficking in a modern (UN-era) treaty is contained in the 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*. This Convention aimed to prohibit and control the (undefined) practices of trafficking, procurement and exploitation, whether internal or cross-border and irrespective of the victim’s age or consent. It declared both trafficking (for sexual purposes only) and prostitution to be “incompatible with the dignity and worth of the human being” and a danger to “the welfare of the individual, the family and the community”.

The drafters of the CEDAW Convention took a different approach. Article 6 of the Convention simply obliges States Parties to take all appropriate legislative and other measures to “suppress all forms of traffic in women and exploitation of the prostitution of women”.^{xii} There is no other reference in the Convention to trafficking or the violations with which it is typically associated.

The vagueness of this core provision (“appropriate measures”) makes it difficult to ascertain the precise nature of the States Parties obligations and the relevant *travaux préparatoires* do not provide any guidance on this point. Clearly, the Convention goes beyond earlier instruments, including the 1949 Convention by requiring States parties to address not just the phenomena but also the root causes of trafficking and exploitation of prostitution.^{xiii} In the matter of scope it can be strongly argued that the reference to *all forms of traffic* expands the prohibition contained in the 1949 Convention to cover trafficking for other typical end-purposes such as forced labour or forced marriage as well as forced prostitution.^{xiv} This interpretation has been suggested by the CEDAW Committee itself.^{xv} The Committee’s clear tendency to follow the strict wording of the Convention and focus on exploitation of prostitution - rather than solely on prostitution, can also be read as a tacit rejection of the explicit abolitionist stance of the 1949 Convention.^{xvi}

It has been suggested that the prohibition on trafficking in the CEDAW Convention should be interpreted and analysed with reference to this instrument's overarching commitment to eliminating discrimination against women and promoting equality between women and men.^{xvii} In other words, identification of the responsibilities of States *vis a vis* the trafficking prohibition should involve consideration of the broad aims of the Convention as well as of its general provisions. Under this approach, "appropriate measures" to eliminate trafficking would necessarily include the requirements set out in Article 2 of the Convention with regard to furthering equality of men and women.^{xviii} Article 5, requiring States Parties to "modify the social and cultural patterns of conduct of men and women" in order to eliminate gender-based stereotypes would also be relevant^{xix}. The general obligation on States to eliminate discrimination by individuals or private bodies^{xx} would serve to extend the reach of required state action to include private persons, organisations and enterprises. This position depends, of course, on trafficking being characterised as a violation of the right to equality and as a manifestation of discrimination against women, discussed further below.

4.2 The work of the CEDAW Committee on trafficking

The Committee on the Elimination of Discrimination against Women ("the Committee" or "the CEDAW Committee") is an independent expert body created under Article 17 of the Women's Convention to consider the progress made in implementation of the Convention. The Committee's primary function is to consider reports submitted by States Parties, but over the years it has spent an increasing amount of time producing General Recommendations and providing input to specialized agencies and human rights mechanisms of the United Nations. Through its General Recommendations and the Concluding Observations, the Committee makes in response to States' reports, it has played a critical role in the normative development of the rights and obligations contained in the Convention.

With the recent entry into force of the Optional Protocol to the Convention, the Committee's work has expanded to include consideration of individual complaints and the capacity to conduct inquiries into gross or systematic violations of the Convention. These procedures strengthen the Convention's effect, by providing a means by which those who have suffered violations of their rights under the Protocol can seek redress from an international treaty body with expertise in gender-based discrimination.

The CEDAW Committee's most forceful and explicit statements on trafficking are found in its 1992 General Recommendation on Violence against Women which is discussed in detail below at Section 4.4. Briefly, the Committee stated, in this instrument, that all forms of trafficking are "incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity".^{xxi} It noted the particular vulnerabilities of women to trafficking and, in relation to specific obligations under the Convention itself, the Committee declared that: "States parties are required by Article 6 to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women."^{xxii}

Under Article 18 of the Convention, States Parties are required to submit regular reports on the measures they have adopted to give effect to the provisions of the

Convention and the ‘progress made’ as a result of these initiatives. The reporting procedure is “the central feature of the Convention’s system of international supervision” and is the primary function of CEDAW.^{xxiii} In practice, the CEDAW reporting procedure has helped promote implementation of the Convention at the national level by requiring governments to focus on their obligations under the Convention. The reporting mechanism has also created an important avenue for non-governmental organizations (NGOs) to spotlight problems in State compliance and to pressure governments to fulfil their obligations under the Convention.

In its consideration of States Parties report, the Committee has dealt with the trafficking issue on numerous occasions with a marked increase in attention paid to trafficking being evident over the last decade.^{xxiv} While an analysis of these observations reveals some inconsistencies in the Committee’s approach, several trends can be identified. First, there is a clear and growing interest on the part of the Committee in the trafficking phenomenon and a related willingness on the part of States parties to include trafficking in their reports. Second, the Committee’s major preoccupation is with the rights and welfare of trafficked persons and it has focussed attention predominantly on trafficking into sexual exploitation. Third, there is a clear preference for strengthened legislative responses to trafficking in countries of origin, destination and transit. The Committee has often called for or otherwise supported regional and bilateral agreements to address trafficking.^{xxv}

In summary, the comments by the Committee in their review of the States reports have been mostly programmatic in nature, recommending that certain anti-trafficking measures be undertaken, e.g.:

- Incorporation and implementation of legislative measures to prevent trafficking and prosecute traffickers
- Increased measures to improve the economic situation of women so as to eliminate their vulnerability to trafficking
- Formulation of comprehensive strategies to prosecute and punish offenders
- Increased international, regional, and bilateral cooperation with other countries of origin, transit, and destination for trafficked women and girls to monitor migration patterns and strengthen state controls
- Public awareness campaigns and training for law enforcement and border control officials
- Comprehensive rehabilitative and reintegration programs for trafficked women and girls providing alternative opportunities for economic viability.

There has been some discussion of discriminatory measures that feed trafficking in women – e.g., disparity in male/female sex ratio at birth, discriminatory laws and measures against sex workers and not the traffickers, pimps and clients, and women’s unequal access to food and healthcare. But there has been little, if any, linking of States’ obligations to redress these root causes and to develop anti-trafficking programs with reference to specific provisions of the Women’s Convention. These comments are situated within the context of States’ obligations under Article 6, yet it is interesting to note that CEDAW has yet to elaborate on its interpretation of the scope of the Article 6 prohibition on “traffic in women and exploitation of prostitution of women.”

It is possible that recent legal developments, including the emergence of an agreed international definition of trafficking discussed at section 2 above, will encourage further reflection on this aspect. In addition, the recently adopted Optional Protocol to the Convention,^{xxvi} establishing a complaints and inquiry procedure, may well prompt the Committee to consider the legal aspects of trafficking in more detail. The Communications and Inquiries procedures established under the Optional Protocol are described in detail in the Annex which also provides additional information on the functions and methodologies of the reporting procedure.

4.3 The key issue: trafficking as a form of sex-based discrimination

Major human rights instruments, both international and regional, prohibit discrimination on a number of grounds including race, sex, language, religion, property, birth or other status.^{xxvii} It has been argued that trafficking constitutes a violation of international law because it is contrary to the international prohibition on sex-based discrimination. A refinement of this second argument identifies trafficking as a form of violence against women and, *ipso facto* a violation of the norm prohibiting discrimination on the basis of sex. These various positions are analysed below with special reference to the work and functions of the CEDAW Committee.

4.3.1 Does trafficking violate the international prohibition on sex-based discrimination?

Equal treatment and non-discrimination on the basis of sex is a fundamental human right, firmly enshrined in the major international and regional instruments.^{xxviii} The Convention on the Elimination of all Forms of Discrimination against Women defines such discrimination as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.^{xxix} It is widely accepted that this prohibition requires States Parties to take action to prevent private as well as public acts of discrimination.^{xxx} The prohibition on sex-based discrimination is related to and reinforces the duty of equal application of the law.^{xxxi}

While it may be problematic to argue that trafficking itself violates the prohibition on sex-based discrimination, the link between such discrimination and vulnerability to trafficking will often not be difficult to establish. It is relevant to note in this context that the Committee on Human Rights has implied a connection between trafficking and sex-based discrimination in its General Comment on Equality of Rights Between Men and Women. Whilst not specifically identifying trafficking as an issue of legal equality, the Committee explicitly asks States parties to provide information to it on measures taken to eliminate forced prostitution as well as trafficking in women and children.^{xxxii}

Certain strands of the “prohibited form of discrimination” argument relate to the connection between trafficking and prostitution. Some activists and commentators argue that all prostitution, not just that implicated in trafficking, is inherently exploitative of women and therefore a form of sex-based discrimination.^{xxxiii} Others take the position that the different and universally negative treatment of all prostitutes,

including trafficked women working in the sex industry, constitutes gender-based, and therefore unlawful, discrimination.^{xxxiv} The legal implications of both positions have not yet been analysed in any great depth by their proponents or by the various international human rights bodies including the CEDAW Committee.

4.3.2 Is trafficking a form of violence against women and thus prohibited under the non-discrimination norm?

International human rights law has not addressed the issue of violence against women in any direct way.^{xxxv} None of the major international human rights treaties, including the CEDAW Convention, make reference to gender-based violence and attempts to assert the existence of a prohibitive customary norm are fraught with difficulty.^{xxxvi} The attitude of the formal human rights establishment is, however, changing slowly and violence against women is now a fixture on the mainstream human rights agenda. From a normative perspective, two United Nations instruments are significant: the General Recommendation on Violence Against Women adopted by the CEDAW Committee and referred to above, and a Declaration on Violence Against Women adopted by the General Assembly in 1993.^{xxxvii} Also relevant, both in a regional context as well as in terms of its overall influence on the direction and content of the debate on violence against women, is the 1994 Inter-American Convention on Violence against Women.^{xxxviii}

The CEDAW Committee's General Recommendation circumvents the absence of any reference to violence against women in the Women's Convention by stipulating that the definition of discrimination contained in its Article 1 includes gender based violence, i.e., violence that is directed against a woman because she is a woman or that affects women disproportionately.^{xxxix} Gender-based violence is identified as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.'^{xl} According to the CEDAW Committee, gender-based violence includes "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."^{xli} The Committee's General Recommendation makes specific reference to trafficking identifying trafficking as a form of violence against women which is incompatible with the equal enjoyment of rights by women and with the respect for their rights and dignity, putting women at special risk of violence and abuse. In relation to Article 6 of the Convention, General Recommendation 19 also notes the following:

- States parties are required by Article 6 to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women.
- Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.
- Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because of their

status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.

- Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.^{xlii}

As General Recommendation No. 19 makes clear, gender-based violence “impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions.” Importantly, the General Recommendation points out that discrimination prohibited under the Convention is not restricted to action by or on behalf of governments^{xliii} and requires States to “take appropriate and effective measures to overcome all forms of gender-based violence, *whether by private or public act*”.^{xliv}

The Declaration on Violence Against Women covers all forms of gender-based violence within the family and the general community^{xlv} as well as violence “perpetrated or condoned by the State wherever it occurs”.^{xlvi} States are to “exercise due diligence to prevent, investigate and ... punish acts of violence against women whether these are perpetrated by *the State or private persons*”.^{xlvii} As a resolution of the General Assembly, the Declaration does not have automatic force of law. However, its potential capacity to contribute to the development of a customary international norm on the issue of violence against women including the question of state responsibility for acts of violence perpetrated by private individuals or entities should not be discounted.

The Inter-American Convention on Violence against Women is currently the only international legal agreement specifically addressing the issue of violence against women. Its purpose is to prevent, punish and eradicate all forms of violence against women which is defined as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women whether in the *public or private sphere*”.^{xlviii} The convention specifically recognises trafficking (undefined) as community-based violence against women (as opposed to domestic violence or violence perpetrated or condoned by the State or its agents),^{xlix} thereby acknowledging that the harm of trafficking generally originates in the private sphere. States Parties are required to refrain from engaging in any act or practice of violence against women; ensuring that their authorities or agents act in conformity with this obligation; exercise due diligence in preventing, investigating and imposing penalties for violence against women; and establishing fair and effective legal procedures for women who have been subjected to violence.¹ The Convention provides for a range of potentially effective enforcement mechanisms including reporting and a complaints procedure open to both individuals and groups.ⁱⁱ

It is also relevant to note that at the international political level, both the Vienna Declaration^{lii} and the Beijing Platform for Action^{liii} identified trafficking as a form of gender-based violence.

5. Clarifying the obligations and responsibilities of States Parties to CEDAW in relation to trafficking in women and girls

The CEDAW Convention is the single most important and most widely accepted international agreement in the fight for women's human rights. Despite the existence of a plethora of other instruments which directly or indirectly deal with trafficking, the CEDAW Convention is also very important in this context. As noted above, the Convention is one of only two human rights treaties which specifically mentions trafficking. Its mandate on the issue extends to both women and girls and therefore to the widely identified majority of trafficking victims. The CEDAW Committee, as the implementing mechanism for the Convention, is in a unique position to contribute to a strengthening of the international legal norm recognising trafficking and associated exploitation as a violation of international human rights law.

The determination by the CEDAW Committee that trafficking is a violation of the prohibition on sex-based discrimination – either in its own right or as a form of sex-based discrimination, is an essential first step forward. How can the Convention and its Committee be encouraged and supported to go further, to play a more active role in the fight against trafficking? The need is certainly great. While States have been extremely active on this issue over the past decade, the migration and transnational organised crime perspectives on trafficking continue to dominate international political discourse on the issue. There is a very real danger that the human rights perspective which secured for trafficking a place on the international agenda in the first place, will be significantly eroded or even lost. For all trafficked persons, but perhaps especially for women and children, retention of the human rights dimension is essential.

5.1 Determining the “content” of the Convention’s Article 6

Beyond the important characterisation of trafficking as a violation of the prohibition on sex-based discrimination, the above analysis made clear that the CEDAW Committee's work on trafficking has not been especially ground-breaking or influential. Certainly the Committee has begun to pay increasing attention to trafficking and it now regularly includes useful and relevant observations and recommendations in its consideration of States Parties reports. However, like all other UN human rights bodies, including its fellow treaty-bodies, the CEDAW Committee has generally been reluctant to attach trafficking to the violation of a specific right.

While Article 6 gives the Committee an entitlement to consider the issue of trafficking, it does not seem to be very helpful when it comes to actually deciding whether a State is respecting or violating rights and accepting or rejecting its international legal responsibilities. In other words, Article 6 appears to allow the Committee to recommend to States that they take certain (vague) measures such as enacting laws or strengthening administrative practices. It has not, at least up until now, given the Committee a starting point from which to determine whether or not a particular state is meeting its obligations under that article.

The main problem is one of *content*. What are the consequences of a determination that trafficking is a form of violence against women? What does the requirement, for States parties to take all appropriate legislative and other measures to “suppress all forms of traffic in women and exploitation of the prostitution of women”, actually mean? What must States do (or not do) in order to meet their obligations under Article 6 or indeed under the Convention as a whole?

The absence of content is not particularly surprising when one considers the vague nature of many of the norms which are associated with the human rights of women. The programmatic nature of the CEDAW Convention for example, while helpful in certain respects, does not lend itself to normative clarity. Lack of content may also be due, at least in part, to the relatively recent emergence of an agreed definition on trafficking.

Do legal and policy developments outside the CEDAW Convention provide any guidance on content? The Trafficking Protocol did not just create a definition. It also set out, in considerable detail, the steps to be taken by States Parties in preventing and dealing with trafficking. Since its adoption in 2000, the Protocol has been supplemented by a number and range of international and regional agreements and instruments which, with only a few exceptions, add considerably to our understanding of the human rights “wrong” of trafficking. These include a set of Principles and Guidelines on Human Rights and Human Trafficking, developed by the High Commissioner for Human Rights and presented to the UN Economic and Social Council in 2002,^{liv} and a comprehensive, human rights based European Convention against trafficking adopted in May 2005.^{lv} Sub-legal regional and bilateral agreements have also been concluded^{lvi} and many countries have developed special laws on trafficking. To this can be added the considerable array of international human rights instruments whose significance for trafficking is now, finally, beginning to be appreciated. These include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Race Discrimination Convention, the Convention against Torture; the Convention on the Rights of the Child; a range of ILO instruments; the Migrant Workers Convention and the Statute of the International Criminal Court.

In summary, while there is still room for debate and discussion regarding the relevant primary rules relating to trafficking, there can be no doubt as to the existence of such rules: of a core of obligations, enshrined in and protected by international law. The CEDAW Committee is in a position to draw on these recent legal developments in its own work, most particularly in fleshing out the “content” of the Convention’s obligations when it comes to trafficking.

5.2 A preliminary list of action-oriented obligations for States Parties

It is a dangerous and possibly thankless task to propose a preliminary list of obligations on States when it comes to human trafficking. However, for the reasons set out above, the timing is now, finally ripe. For the first time there is an internationally agreed definition on trafficking and at least some consensus on how trafficking happens, to whom and why. While the human rights dimensions of trafficking are sometimes forgotten in practice, they have at least earned a place in international, regional and national laws and policies.

The validity of any list of obligations in relation to trafficking is predicated on an assumption that trafficking is indeed a violation of human rights. This is where the previous work of the CEDAW Committee comes into play. The Committee has established that trafficking is indeed a form of sex-based discrimination and therefore a violation of one of the strongest of all international human rights laws. The further

identification of trafficking as a form of violence against women adds significant weight to its status as a clear violation of human rights.

What then, must CEDAW States parties do when it comes to trafficking? The first point of reference must, of course, be the Convention itself. The CEDAW Convention is a human rights instrument, designed specifically to protect the human rights and interests of women. Obligations to be derived from the Convention must be formulated and applied in this context. Such obligations could (indeed should) draw on external sources such as the other human rights treaties, the UN Principles and Guidelines and the UN Trafficking Protocol. Ultimately however, they must be seek to, in general terms, eliminate discrimination against women and, more specifically, “suppress all forms of traffic in women and exploitation of the prostitution of women” The following are proposed as “component” obligations of States parties in relation to CEDAW’s Article 6:

An obligation to criminalise trafficking

In the absence of an obligation to criminalise trafficking, any prohibition on trafficking which could be shown to exist in the CEDAW Convention or more broadly within the corpus of international law would be rendered meaningless. Criminalisation should therefore be seen to be an essential aspect of a States parties’ general obligation to give effect to the trafficking-related provisions of Article 6. The obligation to criminalise trafficking when committed intentionally is contained in Article 5 of the Palermo Protocol and is a central and mandatory provision of that instrument.^{lvii} All other international and regional agreements echo this requirement.^{lviii} In terms of what is to be criminalised, the definition contained in the Palermo Protocol, representing, as it does, the general legal consensus, is an essential aspect of this obligation for States parties and non-parties alike. CEDAW could contribute to the growing international consensus around the Protocol definition by explicitly adopting this definition in its own work.

An obligation to quickly and accurately identify victims of trafficking

The obligation to actively identify victims of trafficking is the foundation upon which all other obligations with respect to victims rests. It is also essential when it comes to investigation and prosecution of traffickers because of the necessarily heavy reliance on victim cooperation and testimony.^{lix} The obligation of identification is not contained within the Trafficking Protocol but is reflected in both the European Convention^{lx} and the UN Principles and Guidelines.^{lxi} The chapeau to Guideline 2 explains very clearly why identification of victims is so important and why it is an obligation: “A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place.”

An obligation to investigate and prosecute trafficking cases with due diligence

The UN Principles and Guidelines declare unequivocally that: “States have a responsibility under international law to act with due diligence to ... investigate and prosecute traffickers”.^{lxii} This is a reiteration of a basic principle of international law relating to state responsibility for violations of an individual’s human rights.^{lxiii} How

does one measure whether a State is taking seriously its obligation to investigate and prosecute? The worst case will naturally be the easiest to decide. A State which doesn't even bother to have a law against trafficking, which fails to investigate any cases of trafficking; which fails to protect any victims or to prosecute any perpetrators when there is reliable evidence available of the existence of a trafficking problem will clearly not pass the due diligence test. In less egregious cases, it is necessary to evaluate whether the steps taken evidence a seriousness on the part of the State investigate and prosecute trafficking. The CEDAW Committee could look at a range of factors including the complaint/arrest/prosecution/conviction ratios and whether or not the State has established a specialist law enforcement response.

An obligation to provide victims with support and protection

The gold standard for victim treatment is set out in the UN Principles and Guidelines. Principle 8 requires States to: “ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care [which] shall not be made conditional on the capacity or willingness of trafficked persons to cooperate in legal proceedings”. The UN Protocol acknowledges the importance of victim support and assistance but in most cases shies away from imposing specific, detailed obligations, preferring to encourage rather than require States help victims of trafficking. However, taking the various international, regional and national instruments together, and drawing strength from a perceptible trend towards detailed articulation of victims rights and concomitant state duties,^{lxiv} it is possible to identify a growing consensus around the following core obligations when it comes to protecting and supporting victims of trafficking: (1) protection from further harm; (2) provision of emergency shelter, primary health care and counselling; (3) assistance with legal proceedings; (4) safe and, where possible, voluntary return; and (5) access to remedies.

An obligation to provide special protection for child victims including girls

Children are naturally included in generally applicable rules and standards set out above. However, it is now widely accepted that the particular physical, psychological and psychosocial harm suffered by trafficked children including girls and their increased vulnerability to exploitation requires that they be dealt with separately from adult trafficked persons in terms of laws, policies and programmes. This approach is validated by international human rights law which explicitly recognises the special position of children and thereby accord to them special rights.

What then, are States parties to CEDAW required to do as a matter of law when it comes to girl victims of trafficking? The core rule is derived from the obligations contained in the Convention on the Rights of the Child: in dealing with child victims of trafficking, the best interests of the child (including the specific right to physical and psychological recovery and social integration) are to be at all times paramount.^{lxv} This position, affirmed by the UN Principles and Guidelines, means that States cannot privilege other considerations, such as those related to immigration control or public order, over the best interests of the child victim of trafficking.^{lxvi} In addition, because of the applicability of the Convention on the Rights of the Child to all children under the jurisdiction or control of a State, child victims of trafficking are entitled to the same protection as nationals of the receiving State in all matters including those

related to protection of their privacy and physical and moral integrity. The CEDAW Committee could usefully integrate these issues into its consideration of trafficking situations involving girls.

An obligation to prevent trafficking

It is not difficult to attach to CEDAW States parties an international legal obligation of prevention in relation to trafficking once trafficking is identified as a violation of the prohibition on sex-based discrimination. States have an international legal obligation to prevent human rights violations through the application of measures which are to be evaluated with reference to the standard of due diligence (which can be usefully translated, for present purposes, into the terms “reasonable and appropriate”). The obligation of prevention when it comes to trafficking can also adduced from its inclusion in all the principal international instruments on trafficking including the Palermo Protocol, the European Convention and the UN Principles and Guidelines.^{lxvii}

A determination of whether or not a State has met the “reasonable and appropriate” standard of prevention will depend on its individual circumstances and its place in the trafficking chain. A poor country of origin may meet the necessary standard by enacting legislation; taking steps to deal with public sector complicity; ensuring that laws, policies and practices currently in force do not make particular groups (e.g. women and girls, female members of ethnic minorities) more vulnerable to trafficking; cooperating with development assistance agencies in community awareness and related initiatives; and developing effective cooperation with authorities and victim support agencies in the country of destination. For a developed country of destination such as Australia or the United States, the bar would be set much higher. In such cases, reasonable and appropriate prevention measures would include an effective, gender-sensitive victim-centred criminal justice response; criminalisation of reckless or knowing use of the services of trafficked persons - as well as education programmes aimed at the end users of such services; appropriate, gender and victim centred training of public officials; legislation and regulation / supervision of industries associated with trafficking such as brothels; and effective cooperation with authorities and victim support agencies in the country of origin. In relation to any State, failure to take known preventive measures when this is both possible and practical should be considered sufficient grounds for establishing a violation of the obligation of prevention.

An obligation of international cooperation

International cooperation is essential for the successful repatriation and reintegration of victims of trafficking who have been transported across international borders. In addition, the successful investigation and prosecution of trafficking cases will, in most cases, require cooperation between national criminal justice authorities in countries of origin and destination. The lack of a tradition of social welfare and criminal justice cooperation between countries, even those sharing a common border, is a key obstacle to the development of meaningful, effective responses to trafficking. Cultural, linguistic and political differences often work to prevent the development of a habit of cooperation. Even in situations where contacts at the highest levels of government are both frequent and substantive, operational links between governmental agencies (e.g.

between social welfare agencies or between national police forces or other parts of the national criminal justice process) tend to be much less developed. Traditional cooperation mechanisms such as mutual legal assistance arrangements, where they do exist, are generally unsuited to the type and quality of collaboration required for successful investigation of trafficking cases. All key legal agreements and policy documents on trafficking recognise the critical importance of international cooperation.^{lxviii} The failure of a CEDAW State party to engage in meaningful cooperation with other States on the issue of trafficking could be seen as a failure of a legal obligation which is part of a broader obligation to prevent and work against trafficking of women and girls.

6. Conclusion

Recent international legal developments, both within and outside human rights, has confirmed that States do indeed have international legal obligations with regard to trafficking. They have also confirmed that a failure to discharge these obligations will invoke the international legal responsibility of the offending State. It is necessary however, to be more precise: exactly what legal obligations can be deduced from the array of relevant instruments including Article 6 of the CEDAW Convention? Most importantly, under what circumstances can a State party to CEDAW be held responsible, as a matter of international law, for failing to fulfil its obligations?

As noted earlier in this paper, trafficking does not exist within a neat legal framework. The task of identifying the primary legal obligations of States in this area is therefore a difficult and not always wholly conclusive one. It is however, absolutely critical. States must understand what international law requires of them if the international legal system is to have any hope of influencing and attaching consequences to their actions. The more precise and action-oriented the identified norms are the better. It is of course important to determine the extent to which the prohibition violence against women intersects with modern-day trafficking. Of much more immediate concern however, is the question of whether States can lawfully return trafficked persons in situations where they cannot guarantee their safety, or whether States are legally obliged to support victims and criminalize trafficking. These are matters of more than academic interest. They are important today because they affect, directly and immediately, the lives and rights of a huge if undetermined number of the world's women and girls.

The CEDAW Committee has a critical role to play in fleshing out the norms which must give life, substance and the essential human rights dimension to the international legal prohibition on trafficking.

ⁱ Convention on the Elimination of all Forms of Discrimination Against Women, 28 INTERNATIONAL LEGAL MATERIALS, 1448 (1989), Article 6.

ⁱⁱ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, *adopted* 15 November 2000, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, 60, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* 25 December 2003, [Hereafter: Trafficking Protocol].

ⁱⁱⁱ Trafficking Protocol, Article 3(a).

^{iv} The travaux préparatoires to the Protocol will indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved. Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto, U.N. Doc. A/55/383/Add.1, 63 [Hereafter: Interpretative Notes]. Interpretative Notes, 63.

^v The words “at a minimum” were included in lieu of a listing of specific forms of prostitution and in order to ensure that unnamed or new forms of exploitation were not excluded by implication. Seventh Draft of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, U.N. Doc. A/AC.254/4/Add.3/Rev.7 (2000), note 14.

^{vi} Trafficking Protocol, Article 3(c).

^{vii} See generally, Commission for Human Rights, *Report of the Special Rapporteur, Ms. Radhika Coomaraswamy on Violence against women, its causes and consequences*, U.N. Doc. E/CN.4/2000/68 (2000).

^{viii} A. PHIZACKLEA, “Sex, Marriage and Maids,” (paper presented conference on “Non-Military Aspects of Security in Southern Europe: Migration, Employment and Labour Market,” Greece, September 1997), in , GABRIELLA LAZARIDIS, “Trafficking and Prostitution: The Growing Exploitation of Migrant Women in Greece,” *European Journal of Women’s Studies* 8 (2001): 67

^{ix} Commission for Human Rights, *Report of the Special Rapporteur Ms. Radhika Coomaraswamy, on Violence against women, its causes and consequences*, U.N. Doc. E/CN.4/2000/68, (2000), p. 54.

^x PHIL WILLIAMS, “Trafficking in Women and Children: A Market Perspective,” *Transnational Organised Crime* 3, no. 4 (1997): 154 [Hereafter: WILLIAMS 1/1997].

^{xi} BIMAL GHOSH in *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (The Hague: Martinus Nijhoff Publishers, 1998), 3.

^{xii} Convention on the Elimination of all Forms of Discrimination Against Women, Article 6.

^{xiii} Jane Connors, Andrew Byrnes and Chaloka Beyani, ASSESSING THE STATUS OF WOMEN: A GUIDE TO REPORTING UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, International Women’s Rights Action Watch (IRWAW) USA and the Commonwealth Secretariat, 2nd edition, 1996 at 19.

^{xiv} KATHARINA KNAUS, ANGELIKA KARTUSCH AND GABRIELE REITER, *Combat of Trafficking in Women for the Purpose of Forced Prostitution* (Vienna: Institute for Human Rights, 2000), 17.

^{xv} The CEDAW Committee's General Recommendation No. 19 on Violence Against Women (Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against Women (11th Session, 1992), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 216, U.N. Doc. HRI/GEN/1/Rev.5 (2001), lends authority to this broader interpretation by its admission that "[i]n addition to established forms of trafficking", there are new forms of trafficking such as the "recruitment of domestic labour from developing countries to work in developed countries and organised marriages between women from developing countries and foreign nationals" (para 14). It is submitted that the Committee's characterisation of these additional end purposes as "new forms of trafficking" is incorrect. In addition, the developed / developing country dichotomy which is a key feature of the Convention's characterisation of domestic labour arrangements and organised marriages as trafficking is simplistic and also, in many situations, incorrect.

^{xvi} While the Committee has generally avoided strict abolitionist positions in its consideration of States Parties reports, its various pronouncements on the issue of prostitution have been inconsistent. For example, while the Committee has occasionally asked states parties to decriminalize or review laws that criminalize prostitution (see, for example, China, 03/02/99, U.N. Doc. A/54/38, ¶¶ 288–289; and Sweden, 31/07/01, U.N. Doc. A/56/38, Part I I, ¶ 354.), it has also expressed concern that legally sanctioned prostitution may have unintended consequences, such as exposing sex workers to violence and health risks (see, for example, Georgia, 01/07/99, U.N. Doc. A/54/38, ¶ 101; and Netherlands, 31/07/01, U.N. Doc. A/56/38, Part I I, ¶¶ 209–210).

^{xvii} TOEPFER, SUSAN, BRIAN STUART WELLS. *The Worldwide Market for Sex: Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*. *Michigan Journal of Gender and Law* 18,1 (1994) at 100; KATRIN CORRIGAN, "Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An analysis of Existing Regulatory Schemes to Stop the Flow of Traffic," *Fordham International Law Journal* 25 (2001), 151 at 170-171.

^{xviii} Corrigan, *supra* at 171. Article 2 requires States parties to further equality between men and women by undertaking: "(a) [t]o embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; (b) [t]o adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) [t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d)[t]o refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e)[t]o take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; (f)[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g)[t]o repeal all national penal provisions which constitute discrimination against women". Convention on the Elimination of Discrimination against Women, Article 2.

^{xix} Convention on the Elimination of Discrimination against Women, Article 5.

^{xx} Convention on the Elimination of Discrimination against Women, Article 2(e).

^{xxi} General Recommendation 19: Violence against Women, para. 14.

^{xxii} Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against Women (11th Session, 1992), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 216, U.N. Doc. HRI/GEN/1/Re v.5 (2001), para. 13.

^{xxiii} Andrew Byrnes, *The Convention on the Elimination of All Forms of Discrimination against Women*, in W. BENEDEK, E. KISAAKYE AND G. OBERLEITNER, *HUMAN RIGHTS OF WOMEN INTERNATIONAL INSTRUMENTS AND AFRICAN EXPERIENCES* 131 (Zed Books, 2002).

^{xxiv} *See, for example*, the following citations which represent an update of the list contained in BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS, (Centre for Reproductive and Sexual Rights, 2001): **Austria**, 15/06/00, U.N. Doc. A/55/38, ¶¶ 228, 239; **Azerbaijan**, 14/05/98, U.N. Doc. A/53/38, ¶ 74; **Bangladesh**, 12/08/97, U.N. Doc. A/52/38/Rev.1, Part II, ¶ 459; **Belarus**, 31/01/2000, U.N. Doc. A/55/38, ¶ 349, 371–372; **Bulgaria**, 14/05/98, U.N. Doc. A/53/38, ¶¶ 243, 256; **China**, 03/02/99, U.N. Doc. A/54/38, ¶¶ 290–291; **China—Hong Kong Special Administrative Region**, 03/02/99, U.N. Doc. A/54/38, ¶¶ 299(c), 326; **Cyprus**, 09/05/96, U.N. Doc. A/51/38, ¶¶ 53, 61; **Denmark**, 12/08/97, A/52/38/Rev.1, ¶ 269; **Dominican Republic**, 14/15/98, U.N. Doc. A/53/38, ¶¶ 333, 346; **Finland**, 02/02/01, U.N. Doc. A/56/38, ¶¶ 303–304; **Georgia**, 01/07/99, U.N. Doc. A/54/38, ¶¶ 101–102; **Germany**, 02/02/00, U.N. Doc. A/55/38, ¶¶ 321–322; **Greece**, 01/02/99, U.N. Doc. A/54/38, ¶¶ 197–198; **India**, 01/02/00, U.N. Doc. A/55/38, ¶¶ 62, 76–77; **Indonesia**, 14/05/98, U.N. Doc. A/53/38, ¶¶ 296, 300, 310; **Kazakhstan**, 02/02/01, U.N. Doc. A/56/38, ¶¶ 97–98; **Kyrgyzstan**, 27/01/99, U.N. Doc. A/54/38, ¶¶ 129–130; **Lithuania**, 16/06/00, U.N. Doc. A/55/38, ¶¶ 152–153; **Mauritius**, 03/05/95, U.N. Doc. A/50/38, ¶ 209; **Mexico**, 14/05/98, U.N. Doc. A/53/38, ¶ 395; **Mongolia**, 02/02/01, U.N. Doc. A/56/38, ¶¶ 265–266; **Myanmar**, 28/01/00, U.N. Doc. A/55/38, ¶¶ 119–120, 121; **Nepal**, 01/07/99, U.N. Doc. A/54/38, ¶¶ 149–150; **Netherlands**, 31/07/01, U.N. Doc. A/56/38, Part I I, ¶¶ 198, 211–212; **Nicaragua**, 31/07/01, U.N. Doc. A/56/38, Part II, ¶¶ 314–315; **Norway**, 31/05/95, U.N. Doc. A/50/38, ¶ 494; **Philippines**, 12/08/97, U.N. Doc. A/52/38/Rev.1, ¶¶ 292, 299; **Republic of Moldova**, 27/06/00, U.N. Doc. A/55/38, ¶¶ 103–104; **Romania**, 23/06/00, U.N. Doc. A/55/38, ¶¶ 300, 308–309; **Singapore**, 31/07/01, U.N. Doc. A/56/38, Part I I, ¶¶ 90–91; **Slovakia**, 30/06/98, U.N. Doc. A/53/38, ¶¶ 81–82; **Sweden**, 31/07/01, U.N. Doc. A/56/38, Part II, ¶¶ 354–355; **Thailand**, 02/02/99, U.N. Doc. A/54/38, ¶¶ 236–238; **United Republic of Tanzania**, 06/07/98, A/53/38, ¶ 240; **Uzbekistan**, 31/07/01, U.N. Doc. A/56/38, Part II, ¶¶ 178–179; **Vietnam**, 31/07/01, U.N. Doc. A/56/38, Part II, ¶¶ 260–261.

^{xxv} *See, for example*, the following citations which represent an update of the list contained in BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS, (Centre for Reproductive and Sexual Rights, 2001): **Austria**, 15/06/00, U.N. Doc. A/55/38, ¶ 228; **Bangladesh**, 12/08/97, U.N. Doc. A/52/38/Re v.1, Part II, ¶ 459; **Belarus**, 31/01/00, U.N. Doc. A/55/38, ¶ 372; **Bulgaria**, 14/05/98, U.N. Doc. A/53/38, ¶ 243; **Cyprus**, 09/05/96, U.N. Doc. A/51/38, ¶ 61; **Dominican Republic**, 14/05/98, U.N. Doc. A/53/38, ¶ 346; **Finland**, 02/02/01, U.N. Doc. A/56/38, ¶ 304; **Germany**, 02/02/00, U.N. Doc. A/55/38, ¶ 322; **India**, 01/02/00, U.N. Doc. A/55/38, ¶ 77; **Kazakhstan**, 02/02/01, U.N. Doc. A/56/38, ¶ 98; **Kyrgyzstan**, 27/01/99, U.N. Doc. A/54/38, ¶ 130; **Lithuania**, 16/06/00, U.N. Doc. A/55/38, ¶ 153; **Nepal**, 01/07/99, U.N. Doc. A/54/38, ¶ 150; **Republic of Moldova**, 27/06/00, U.N. Doc. A/55/38, ¶ 104; **Romania**, 23/06/00, U.N. Doc. A/55/38, ¶ 309; **Slovakia**, 30/06/98, U.N. Doc. A/53/38/Rev.1, ¶ 82; **Sweden**, 31/07/01, U.N. Doc. A/56/38, Part II, ¶ 355; **Thailand**, 02/02/99, U.N. Doc.

A/54/38, ¶ 238; Vietnam, 31/07/01, U.N. Doc. A/56/38, Part II, ¶ 261.

^{xxvi} Adopted by the General Assembly in October 1999 (A/RES/54/4), *opened for signature* December 19, 1999.

^{xxvii} See, for example, ICCPR, Articles 29(1), 3, 4(1), 26, 36.

^{xxviii} Charter of the United Nations, 26 June 1945, preamble, Article 1(3); ICCPR, Article 2, 3, 26; ICESCR, Articles 3,7; African Charter on Human and People's Rights, Articles 2 and 18(3); American Convention on Human Rights, Article 1; European Convention on Human Rights, Article 14.

^{xxix} Convention on the Elimination of all forms of Discrimination against Women, Article 1.

^{xxx} See, for example, Theodor Meron, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS, (1986) at 60.

^{xxxi} Article 26 of the International Covenant on Civil and Political Rights, for example, provides that: “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and shall guarantee to all persons equal and effective protection against discrimination on any ground such as ... sex ...”.

^{xxxii} Human Rights Committee, *General Comment 28: Equality of Rights Between Men and Women* (Art. 3) (68th Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 168, ¶ 2, U.N. Doc .HRI/GEN /1/Re v.5 (2001) .

^{xxxiii} See generally, Coalition Against Trafficking in Women - Asia-Pacific, *Sex: From intimacy to “sexual labour” or Is it a human right prostitute?*, (year not given, <http://action.web.ca/home/catw/readingroom.shtml?x=16287>); Mackinnon, Catherine, “Prostitution and Civil Rights,” in *Michigan Journal of Gender and Law*, 1993, Volume 1: 13 – 31, <http://www.prostitutionresearch.com/mackinnon1.html> and <http://www.prostitutionresearch.com/mackinnon2s.html>.

^{xxxiv} BANACH, LINDA, *Unjust and Counter-Productive: the Failure of Governments to Protect Sex Workers from Discrimination*, (Scarlet Alliance and the Australian Federation of AIDS Organisations, 1999), http://www.afao.org.au/library_docs/policy/unjust.pdf; BINDMAN, JO, *Redefining Prostitution as Sex Work on the International Agenda*, (Anti-Slavery International: 1997, <http://www.walnet.org/csis/papers/redefining.html>, Accessed 02/04/05); CENTER FOR WOMEN'S GLOBAL LEADERSHIP, *Report of the Women's Human Rights Caucus at the Fourth World Conference on Women, Beijing*, (Douglass College, 1995); UNITED NATIONS ECONOMIC AND SOCIAL COMMITTEE, *Human rights questions. Position of the Netherlands government*, (E/1990/33), 3 April 1990.

^{xxxv} This omission, and the reasons behind it, have been the subject of extensive analysis. For a useful overview, see: Preliminary Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, UN Doc. E/CN.4/1995/42.

^{xxxvi} On the doctrinal obstacles to asserting that violence against women breaches customary international law, see Hilary Charlesworth and Christine Chinkin, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000) at 71-77.

^{xxxvii} Declaration on Violence Against Women, UN Doc. A/RES/48/104 (1993, adopted 20 December, 1993).

^{xxxviii} Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *adopted by the twenty-fourth regular session of the General Assembly of the Organization of American States, 9 June, 1994*, 33 I.L.M. 1534 (1994), *entered into force* March 5, 1995.

^{xxxix} General Recommendation 19, para. 6.

^{xl} General Recommendation 19, para. 1.

^{xli} General Recommendation 19, para. 6.

^{xlii} *Ibid.*

^{xliii} General Recommendation 19, para. 9.

^{xliv} General Recommendation 19, para. 24. (Emphasis added).

^{xlv} Declaration on Violence Against Women, Articles 1 and 2.

^{xlvi} *Ibid.*, Article 2.

^{xlvii} *Ibid.*, Article 4 (c). (Emphasis added).

^{xlviii} Inter-American Convention on Violence against Women, Article 1, emphasis added.

^{xlix} Inter-American Convention on Violence against Women, Article 2.

^l Inter-American Convention on Violence against Women, Article 7.

^{li} Inter-American Convention on Violence against Women, Article 10, Article 12.

^{lii} Report of the World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc. A/CONF.157.24, Programme of Action, Part 1, para. 18.

^{liii} Fourth World Conference on Women, Beijing, 4-15 September 1995, Platform for Action, Chapter IV, Strategic Objective D.3., 131(a),

^{liv} Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/2002/68/Add.1. [Hereafter: UN Principles and Guidelines].

^{lv} Council of Europe *Convention on Action against Trafficking in Human Beings*, [Hereafter: European Convention].

^{lvi} For example, the SAARC *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, adopted by the South Asian Association for Regional Cooperation in January, 2002; and the *Memorandum Of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, adopted on 29 October 2004 by ministerial representatives of from Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam.

^{lvii} *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime*, United Nations Office for Drugs and Crime, Vienna, 2004. at 17

^{lviii} E.g. The European Convention, Article 18 and the UN Principles and Guidelines at Principles 12 – 17 and Guideline 4.

^{lix} Further on this, see ANNE GALLAGHER. “Strengthening national responses to the crime of trafficking: Obstacles, responsibilities and opportunities,” in *Development Bulletin*, No. 66, December 2004.

^{lx} Article 10 of the European Convention requires States parties to make available persons who are trained and qualified in preventing and combating trafficking and to ensure that there is collaboration between different agencies “*with a view to enabling an identification of victims*”. (Art. 10.1. emphasis added). The Convention also places certain obligations on States parties if there are reasonable grounds to believe that a person has been a victim of trafficking (Art 10.2.). If there are reasons to believe that the victim is a child then there is to be a presumption that the victim is indeed a child (Art. 10.3.).

^{lxi} UN Principles and Guidelines, Guideline 2; see also Guideline 11.5.

^{lxii} UN Principles and Guidelines, Principle 2.

^{lxiii} The due diligence standard as it relates to investigation and prosecution is well established in cases of human rights violations. The duty to investigate and prosecute is applicable when there is an allegation of violation by state officials *and* when the alleged perpetrator is a non-State actor. These principles were established by the Inter-American Court of Human Rights (*Velasquez Rodriguez Case* (Honduras), 4 Inter-Am Ct. H.R. (Ser. C) at 173 (1988)) and have since been confirmed by numerous international and regional courts and tribunals.

^{lxiv} The Statute of the International Criminal Court, for example, requires the court to “protect the safety, physical and psychological well-being, dignity and privacy of victims” as well as to permit the participation of victims at all stages of the proceedings as determined to be appropriate. The Statute also includes provisions on reparation, including restitution, compensation and rehabilitation. (The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*) signed 17th day of July 1998, entered into force 1 July 2002.). Note also: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms - Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62, January 2000: “[v]ictims should be treated by the State and, where applicable, by intergovernmental and non-governmental organisations and private enterprises with compassion and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety and privacy as well as that of their families. The State should ensure that its domestic laws, as much as possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation”.

^{lxv} The Convention on the Rights of the Child requires States parties to: “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”. Children are also to be protected from all forms of economic exploitation, sexual exploitation and sexual abuse. States parties are therefore also required to take all appropriate national, bilateral and multilateral measures to prevent the

inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials; and the illicit transfer and non-return of children abroad. The Convention further requires States parties to “take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of ... any form of ... exploitation ... in an environment which fosters the health, self-respect and dignity of the child” (Convention on the Rights of the Child, Articles 32-39).

^{lxvi} Principle 10 states, in relation to child victims, that: “[t]heir best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs”. UN Principles and Guidelines.

^{lxvii} Prevention is one of the main purposes of both the Trafficking Protocol (at Article 2.1.) and the European Convention, at Article 1.1.). The Protocol also contains detailed mandatory provisions on prevention (Articles 9, 11, 12) as does the European Convention (Articles 29, 32). Prevention of trafficking is a strong underlying theme of the UN Principles and Guidelines (Principles 2, 4-6, Guideline 7).

^{lxviii} Trafficking Protocol, Articles 2,9,10,13, the United Nations Convention Against Transnational Organised Crime,(*adopted* 15 November 2000, U.N. GAOR, 55th Sess., Annex 1, Agenda Item 105, at 25, U.N. Doc. A/55/383 (2000), *entered into force* 29 September 2003), (Articles 16 and 18; European Convention, (Articles 18,33, 34; UN Principles and Guidelines, (Guideline 11).

Annex

Note on the CEDAW Convention's Reporting, Communication and Inquiry Procedures

1. The Reporting Procedure

Under Article 18 of the Convention, States Parties are required to submit regular reports on the measures they have adopted to give effect to the provisions of the Convention and the 'progress made' as a result of these initiatives. The reporting procedure is "the central feature of the Convention's system of international supervision" and is the primary function of CEDAW.^{lxviii} In practice, the CEDAW reporting procedure has helped promote implementation of the Convention at the national level by requiring governments to focus on their obligations under the Convention. The reporting mechanism has also created an important avenue for non-governmental organizations (NGOs) to spotlight problems in State compliance and to pressure governments to fulfil their obligations under the Convention.

Under Article 18 of the Convention, States Parties are required to submit regular reports on the measures they have adopted to give effect to the provisions of the Convention and the 'progress made' as a result of these initiatives. Because the Convention covers both direct and indirect discrimination, States are to describe both the *de jure* and the *de facto* situation of women in their countries. States are to submit their initial reports within one year after entry into force of the Convention for the State concerned and, thereafter, every four years or at the Committee's request. The initial report is intended to provide a comprehensive description of the situation of women in the country and to provide a baseline against which progress described in future reports can be measured.

Following submission of an initial State report to the CEDAW Secretariat, the Committee schedules the report for consideration and designates one of its members to be the main country rapporteur. The Committee then holds a hearing during which a representative of the State introduces the report, and the country rapporteur and other CEDAW members provide general comments and ask questions regarding the report. After the hearing, the country rapporteur drafts "Concluding Observations" on the report. These describe the positive and negative aspects of State efforts to implement the Convention, and identify principle areas of concern and concrete suggestions and recommendations for responding to the problems identified by the Committee. The Concluding Observations are then considered and adopted by CEDAW, communicated to the State Party, and then made public.

States' follow-up reports are considered by a working group of the Committee. In preparation for consideration of such reports, the working group compiles written questions from the country rapporteur, NGO's and specialized agencies. These questions are then transmitted to the State Party in advance of the hearing at which the State's follow-up report will be discussed. As with the hearings on States' initial reports to CEDAW, CEDAW and the State representative discuss these questions at the meeting, and the Committee adopts Concluding Observations.

The meetings with the State representative are not intended to be a judicial or quasi-judicial process, but rather an opportunity for the Committee and the State to engage in “constructive dialogue” over the progress and obstacles to effective realization of women’s rights under the Convention. This procedure of actual dialogue, according to the Committee, “has proven valuable because it allows for an exchange of views and a clearer analysis of anti-discrimination policies in the various countries.”^{lxviii}

2. The Optional Protocol: the Communications and Inquiries Procedures

The Optional Protocol to the CEDAW Convention entered into force on December 22, 2000. The Optional Protocol establishes two procedures by which victims of violations by a State Party to the Protocol can seek redress: (1) a *communications* procedure (under Articles 1 through 7), under which individual women or groups of women (or their representatives) can submit claims of violations of rights protected under the Convention to the Committee; (2) an *inquiry* procedure (under Articles 8 through 10) under which, based on reliable information, Committee can initiate inquiries into situations of *grave or systematic* violations of women’s rights. States party to the Protocol are bound by the communications procedure, but have the option, upon ratification or accession, to declare that they do not accept the inquiry procedure.

The existence of these procedures to address violations of the Women’s Convention carries great potential to strengthen understanding of these rights as binding human rights, as well as their substantive content through interpretation of these rights. Individual complaint procedures such as these “have a special characteristic of concretizing the contents of otherwise ambiguous or incomplete norms.”^{lxviii}

As of September 1, 2005, the only Asian signatories to the Optional Protocol – and thus subject to the communications and inquiry procedure – are Thailand, Sri Lanka, and the Philippines.

2.1 Communications Procedure

In addition to providing individuals the possibility of redress for violations of their rights under the Convention, the communications procedure affords the Committee a means of promoting greater compliance with Convention norms by targeting States that fail to comply with their obligations.

Communications may be submitted by individuals or groups of individuals (or their representatives) claiming to have been victim(s) of a violation of any of the rights set forth in the Convention by a State Party. In order to be admitted for consideration by the Committee, a number of admissibility criteria (Arts. 2-4) must first be met. These require that:

- The communication concerns a State that is party to the Protocol;
- The communication is made in writing, and is not anonymous, and
- That all available domestic remedies have been exhausted unless application of such remedies is unreasonably prolonged or unlikely to bring relief.

Communications will be considered inadmissible, however, where:

- The same matter has already been examined by the Committee or been the subject of another international procedure;
- Is incompatible with the provisions of the Convention
- Is manifestly ill-founded or not sufficiently substantiated,
- Abuses the right to submit a communication,
- Is based on a set of facts that occurred prior to the Protocol's entry into force (December 22, 2000), unless the facts continued after that date.

Communications that appear to meet the admissibility requirements are registered with the Secretariat and brought to the attention of the Committee for its consideration. The communications are dealt with in confidential, closed meetings, and the author/victim can request that the relevant names and identifying details be kept from the public. Confidentiality helps ensure the author/victim's (or their family members') safety and protects her/them from ridicule or harassment. The communications procedures require, however, that the identities of the victim and the author (if different from victim) be revealed to the State Party to ensure that it has the necessary information to investigate and defend its actions.

After the communication is brought to the attention of the relevant State Party, the State Party has two to six months to provide a written response regarding the admissibility and/or merits of the communication. If, in the time after the communication is lodged but before a merits decision is reached, the victim(s) of the alleged violations face imminent harm with irreversible impact, the Committee may transmit to the State Party a request for interim measures to avoid the harm. States Parties are obliged to take all necessary steps to comply with interim measures.

Upon making a determination on the merits of the communication, the Committee issues its decision in the form of a "view" (supported by a simple majority), outlining the facts of the case, summarizing the proceedings, and explaining the Committee's decision as to whether a violation occurred. If the Committee decides a violation has occurred, it may make recommendations to the State Party regarding, e.g., possible remedies, including the payment of damages, release from incarceration, reconsideration of offending laws, adoption of other measures to prevent future violations of the Convention.^{lxviii}

Thus far, the Committee has issued decisions on two communications, (regarding Hungary and Germany), one of which was dismissed on admissibility grounds, and neither of which addressed the issue of trafficking in women.

2.2 The Inquiry Procedure

While the communications procedure empowers the Committee to provide specific redress to individuals and groups of individuals, the inquiry procedure provides a welcome vehicle to address large-scale abuse of women's rights under the Convention. Unlike the communications procedure, the inquiry procedure permits the submission of anonymous information regarding grave and systematic violations. In so doing, the inquiry procedure provides an avenue for women who decline to pursue

the communications procedure out of fear of reprisal, for instance, an opportunity to have their grievances addressed.

Although any individual or organization can submit information to the Committee regarding grave or systematic violations of the Convention, the Committee has full discretion to decide whether to initiate an inquiry into the matter. Like the communications procedure, all meetings and documents related to an inquiry are kept confidential. Confidentiality is critical to ensuring the participation of NGOs in the inquiry process, a number of which function in the context of strained relationships with their host governments. Indeed, given the potential risk of retaliation, the Optional Protocol obliges States Parties to prevent the ill-treatment and intimidation of individuals who provide information to the Committee.

Once the Committee has received information alleging grave or systematic violations of the Convention, it must determine whether the information is reliable. To verify the information, the Committee may seek additional information from the State Party concerned and non-governmental organizations or individuals with expertise in the relevant area, and other specialized UN agencies. There is as yet little guidance as to the measure by which reliability or credibility of the information is determined. But, as commentators have noted, factors might include the information's specificity, consistency (both internally and as compared against other accounts), extent of supporting evidence, impartiality, and established record of credibility in fact-finding and reporting.^{lxviii}

After determining whether the information is reliable, the Committee must then decide whether the alleged facts amount to a *grave* or *systematic* violation of the Convention. Where the Committee finds that it has reliable evidence of grave and systematic violations, it may invite the State Party to submit observations regarding the information concerned. Before conducting an inquiry, the Committee is required to request the cooperation of the State Party, though it remains unclear whether the Committee deems it agreement necessary for it to proceed.^{lxviii} The actual conduct of the inquiry may include site visits and the assistance of those with particular expertise in the issue to assist in the investigation. The Committee may also conduct hearings during the site visits in order to ensure more comprehensive fact-finding. After conducting the inquiry, the Committee transmits its findings to the State Party concerned, together with comments and recommendations, to which the State Party has six months to submit its own observations.

How could the enquiry procedure be used in relation to trafficking? As Professor Rebecca Cook has argued, the term "grave," which usually refers to the severity of a situation, in the women's rights context would likely encompass violations of women's right to life, physical integrity, and security of person.^{lxviii} Violations resulting in psychological harm in certain circumstances such as trafficking or sexual violence during armed conflict, might also constitute a grave violation of the Convention.^{lxviii} Regarding the meaning of "systematic," it has been argued that, under human rights jurisprudence, the term is generally used to refer to "the scale or prevalence of violations" or the "existence of a scheme or policy directing the violations."^{lxviii} It would not be too difficult, for instance, to conceive of circumstances where trafficking in women is sufficiently systematic to warrant an

inquiry – e.g., in certain post-conflict peace-keeping contexts, such as the well-documented incidence in Bosnia-Herzegovina.

To date, CEDAW has completed one inquiry under the Optional Protocol. That case, assessing allegations of femicide in Ciudad Juarez, Mexico, does not address trafficking in women.^{lxviii}