

Economic and Social Commission for Asia and the Pacific

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**Violence against and Trafficking in Women  
as Symptoms of Discrimination:  
The Potential of CEDAW as an Antidote**

December 2005

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## I. Introduction

Violence against women has been called the greatest human rights scandal of our times. Although the evidence of how widespread and how damaging it is widely available from numerous studies, strong measures to eliminate it are seriously lacking. As the World Health Organization (WHO) Multi-country Study on Women's Health and Domestic Violence against Women launched in November 2005, which presented the initial results on prevalence, health outcomes and women's responses, the number of reported cases is only the tip of the iceberg.<sup>1</sup> Such violence is perpetuated by mostly men as acts of domination, which establish and reinforce gender and age-based hierarchies. Violence constitutes an obstacle to the achievement of the objectives of equality, development and peace; it violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms.

Likewise, the phenomenon of trafficking in women and girls has continued growing throughout the world, largely uncontrolled. It has reached a point of being one of the most profitable sources of income in the informal economy and for transnational criminal groups, being the third largest source of illegal income after weapons and drug trafficking, while the US Government states human trafficking is tied with arms as the second largest criminal industry in the world today following drug dealing.<sup>2</sup>

Trafficking in humans and the exploitation and forced labour that follow, depend on physical, sexual and psychological violence. Although men, women children are trafficked for begging, domestic, fishing, factory, agricultural, mining and other forms of work, as well as sports such as camel jockeying, international or domestic trafficking for the purposes of the sex trade or sex tourism, at least initially often involves forced prostitution, rape and sexual abuse mainly of women and girls. Women and girls who are part of this trade are at an increased risk of further violence, as well as unwanted pregnancies and sexually transmitted infections (STIs), including human immunodeficiency virus (HIV).

Violence against women and trafficking in women have in recent years received increased attention in international and domestic law, the United Nations and its specialized agencies, in development policy debates, research, programs and projects and in advocacy work. The landmark United Nations Convention on Transnational Organized Crime and its supplementary protocols on trafficking in persons and migrant smuggling which was adopted by the United Nations General Assembly on 15 November 2000, and entered into force on 29 September 2003, was a reflection of the quickly growing recognition by governments of the trans-boundary and organized criminal dimension of the problem of trafficking in humans, reflected in a largely law and order approach used in anti-trafficking initiatives.

Within the United Nations decision-making bodies, violence against women as an issue has moved from being mainly dealt with by the Commission on the Status of Women where it was not given visibility as an issue affecting vast numbers of people, to being the focus of a study being undertaken by the Secretary-General<sup>3</sup> This builds on the recognition of rape and other forms of sexual violence by combatants in armed conflict as a war crime in the Rome Statute of the International Criminal Court and in Security Council Resolution 1325 (2000). Resolution 1325 calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.

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<sup>1</sup> The Study builds on earlier work carried out on domestic violence and violence and health in general.

<sup>2</sup> US Department of Health and Human Services: <http://www.acf.hhs.gov/trafficking/about/index.html>

<sup>3</sup> By its resolution A/RES/58/185 adopted in 2003, the General Assembly mandated the Secretary-General to prepare an in-depth study on violence against women. The study will be submitted to the General Assembly at its sixty-first session, in 2006.

The Secretary-General's Study aims first of all to: Highlight the persistence, and unacceptability, of all forms of violence against women in all parts of the world; Secondly to identify ways and means for better and more sustained and effective implementation of Government commitments and obligations to combat all forms of violence against women, and increase accountability; And finally to strengthen political commitment and joint efforts of all stakeholders to prevent and eliminate violence against women.

In the Millennium Declaration adopted by the United Nations General Assembly in 2000, Governments resolved to combat all forms of violence against women and to implement the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In his report *In larger freedom* (A/59/2005), the Secretary-General also highlighted the need to support direct interventions to protect women from violence.

Despite the information and numerous well-documented studies available on both trafficking and violence against women, little has changed for the people affected. This paper will review some of the key issues concerning trafficking of women and violence against women, discuss discrimination as a common thread, and explore the potential for the use of CEDAW as a tool to reduce trafficking in and violence against women. It will also review some of the tools, approaches or mechanisms that could be, and to some extent are being used already, to address these two key problems in the Asia-Pacific region.

These issues cannot be analyzed or addressed adequately in a vacuum and also without taking into account the complexity of the issue. A few key points must be born in mind regarding the context in which events take place and trends emerge:

- The most recent phase of globalization has a very significant role in social, economic, cultural and political trends in the world, and dimensions that result in individualization and commoditization of social relations.
- Related to globalization is the changing role of the State. Since the introduction of structural adjustment programmes by the World Bank and International Monetary Fund (IMF) in the 1980s, governments have cut spending on health care, education, social security and subsidies. As a result, the poor have become poorer and gaps have widened between rich and poor in a large number of countries. Basic deprivation escalates conflicts within households and communities.
- There is a link between poverty and the greater likelihood of being a victim of trafficking; however, it is not necessarily the case that the poorest people are trafficked. Citizenship, land rights and other issues also play a big role. Disempowerment, unequal access to power, information and economic opportunities, lack of choice as well as the erosion of social control mechanisms in formerly close-knit societies lead to exploitation by some and risk-taking by others cause people to opt to move away from where they had been living.
- Militarization of countries, and long-running conflicts in countries, some of which have lead to United Nations peace-keeping operations, bring an increased demand for sexual services by men involved in these conflicts or peace-keeping. Prostitution, the sex trade and incidents of rape generally increase with the presence of armed forces. Women as the symbolic representatives for collective honour are targeted through systematic acts of shaming and humiliation.
- Violence, trafficking and poverty are associated with HIV infections and vice versa.
- Women and girls must not be treated as a homogeneous group and only seen and treated as helpless victims. While they may be exploited and more represented among the poor, some people do make choices and take risks based on a calculation of how best to survive or to support a family.

- Violence and trafficking entail violations of human rights and a human rights approach must be used in addressing these problems.

## II. Human trafficking

The following section provides an overview of the issue of trafficking, examines regional characteristics and outlines initiatives taken to combat human trafficking. Many aspects and linkages are discussed, and the intersection of violence with trafficking is addressed. This is followed by a discussion on using CEDAW as a tool and approaches to addressing trafficking and violence.

### A. Overview

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 inequalities 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. While 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.

It is estimated that more than half the 15–30 million illegal migrants in the world have been assisted by smugglers or been forcibly relocated by traffickers. According to the Trafficking in Persons Report of 2004 published by the United States Department of State, “Each year, an estimated 600,000-800,000 men, women, and children are trafficked across international borders, while some international and non-governmental organizations place the number far higher, and the trade is growing. This figure is in addition to a far larger yet indeterminate number of people trafficked within countries”. Because trafficking in human beings is a clandestine, cross border issue, it is difficult to obtain reliable data. In recent years, trafficking has become a huge, organized, largely international operation, in some countries, managed by criminal networks and fueled by big demand and a steady supply of women (and men), who often face inequalities, resulting in a lack of employment opportunities, violence, abuse, discrimination and poverty, and see moving away or the promise of a job or marriage as a chance to have a better life. It is the negative side of globalization. People today more than ever are exposed to images and information about the world beyond their country, city or village. These consumerist images act to motivate and draw people, many of whom have few options where they are and are willing to believe promises of traffickers.

Trafficking in humans is a very lucrative business, with better profits and fewer risks than trafficking in drugs or weapons. Sexual exploitation is especially profitable for traffickers. Once trafficked, women and girls who had been promised a different sort of job or marriage, are typically told they must work in debt bondage in order to pay off fabricated debts in complete violation of their human rights. If traffickers are caught or their victims “rescued”, unlike cases of drugs or weapons trafficking in which evidence is confiscated and used in the prosecution of the case, prosecutions are so difficult that another cycle of trafficking involving the same people can easily begin again. A trafficked human being can be resold, and a profit is earned for the capturer or exploiter each time services are rendered, while drugs or weapons only generate a profit once and are lost completely if caught and confiscated. The United Nations Office on Drugs and Crime (UNODC) describes the smuggling of migrants and the trafficking of human beings for prostitution and slave labour as two of the fastest growing global problems in recent years, and reports that recent studies show the increased involvement of organized crime groups.

Slavery and the slave trade have existed for thousands of years. Modern day trafficking often has features in common with the traditional slave trade such as the buying and selling of people, forced labour and the prevention of people from leaving the situation by keeping them locked up or instilling fear through intimidation, threats and violence. Despite a number of legal instruments dealing with slavery and prostitution, some of which precede the founding of the United Nations, slavery-like practices, and exploitation and prostitution of others as well as trafficking and smuggling of persons continues to occur in increasing numbers and is spreading to new countries.

Until the United Nations Convention on Transnational Organized Crime and its supplementary protocols on trafficking in persons and migrant smuggling were adopted in 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.

In 2003 the United Nations Convention against Transnational Organized Crime came into force. In addition, three Protocols which supplement the Convention were adopted. Two of them deal with trafficking and closely related issues: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which came into force in December 2003 and the Protocol against the Smuggling of Migrants by Land, Sea and Air which came into force in January 2004 (the Palermo Protocols).

The terms “trafficking”, “smuggling”, “irregular” or “illegal migration” are often confused and not well understood. The Protocols make a clear distinction between the smuggling and trafficking of persons. Article 3 paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, defined trafficking in persons as follows:

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

According to Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, “Smuggling of migrants” shall mean:

“The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

Since its adoption, these definitions have received widespread acceptance and have been incorporated into other treaties (including the 2005 European Convention on Trafficking) as well as into numerous national laws and regional policy documents.

The definition of trafficking<sup>4</sup> therefore contains three separate elements:

*1. An action, consisting of:*

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

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<sup>4</sup> Trafficking Protocol, Article 3(a).

## 2. *By means of:*

- Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability,<sup>5</sup> 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,<sup>6</sup> 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.<sup>7</sup>

## 1. **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 United Nations 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 data is not collected in a standardized way and much of the information is anecdotal. There is a lack of comparable, reliable, global statistics.
- 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* decisions are made and movements 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:

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> Trafficking Protocol, Article 3(c).



- 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 act of trafficking is limited in time although the situation in which the trafficked person finds himself may continue for a long time. The nature of trafficking end-purposes and the dynamic of the activity mean that a trafficked person, if he/she does not escape or is rescued, (and can avoid death or serious injury), will, over time, find him/herself in a more "acceptable," less exploitative situation from which she will at some point be technically free to leave.

## **2. Characteristics and trends of trafficking in the Asia-Pacific region**

Trafficking in women and children for purposes such as sexual exploitation, begging, domestic work is widespread in the Asia-Pacific region and has been extensively documented. Relatively richer ESCAP countries tend to be destination countries and poorer countries tend to be source countries. In some countries people are trafficked from rural areas to urban centres. The dynamics are unique by sub-region and by individual country, with differing trends and scale also from one part of the country to another and frequently changing over time. For example, in the sub-region of Central Asia, men are a high proportion of people trafficked. According to a report by the NGO Transcend, there is a growing tendency toward male prostitution in Central Asia due to high unemployment, and increasingly, young males are sent to the Middle East for prostitution.<sup>8</sup> Several countries are used for transit and a number of countries are a mix of source, destination and transit countries.

The principle countries of origin have been identified as including Afghanistan, Bangladesh, Cambodia, China, India, Indonesia, Myanmar, Nepal, Pakistan, the Philippines, Republic of Korea, Thailand and Vietnam. The principle countries of destination in the Asia-Pacific region are said to be Australia, China, Hong Kong, India, Malaysia, Pakistan, Singapore, Taiwan and Thailand as well as States of the Middle East. Governments of countries into where trafficked people (and usually also illegal migrants) end up are especially concerned about keeping control of their borders and identifying false documents and people who overstay a legitimate entry. "Sending" countries are increasingly concerned about the exploitation and mistreatment of their nationals and the need for more managed opportunities for migration from which individuals, as well as countries, can better benefit through remittances or future investment by returning migrants.

### **B. Obligations of the State to combat trafficking**

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<sup>8</sup> Zulfriya Tursunova : "Preventing Human Trafficking: The Case of Uzbekistan", 26th of December 2004 accessible at [http://www.transcend.org/t\\_database/articles.php?ida=531](http://www.transcend.org/t_database/articles.php?ida=531)

Legal instruments are one means of governments committing themselves to take specific measures to address the problem. By ratifying the United Nations Convention on Transnational Organized Crime, countries commit themselves to criminalize participation in an organized criminal group, money laundering and obstruction of justice. The Convention also includes extradition laws, administrative and regulatory controls, victim protection and crime-prevention measures. Despite anti-trafficking work of governments, the traffickers are seldom caught and prosecuted and rarely convicted. They are very often free to continue their work, while people who have been trafficked are arrested, detained, deported and punished. Trafficking must be partly tackled through targeting the criminal networks that reap massive profits from commercial sexual exploitation, but since prosecution is difficult, other strategies must also be used.

States parties to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) also have legally committed themselves to taking “all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.” Exact obligations of States parties and the scope of their obligations is discussed later in this paper.

Also, although it is not legally binding, the Beijing Platform for Action for the Advancement of Women along with the Beijing Declaration, which was adopted by governments attending the Fourth World Conference on Women (Beijing, 1995), constitute a declaration of commitment and an agenda for women's empowerment. The Outcome Document of the “Beijing plus five” review also recommended that governments of origin, transit and destination, regional and international organizations take measures to address the causes of trafficking, provide protection, rehabilitation and reintegration, raise awareness and develop anti-trafficking legislation. The Platform sets out in its Strategic Objective D.3 *Eliminate trafficking in women and assist victims of violence due to prostitution and trafficking* specific actions to be taken by the State and other actors, namely:

By Governments of countries of origin, transit and destination, regional and international organizations, as appropriate: (a) Consider the ratification and enforcement of international conventions on trafficking in persons and on slavery;(b) Take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialized sex, forced marriages and forced labour in order to eliminate trafficking in women, including by strengthening existing legislation with a view to providing better protection of the rights of women and girls and to punishing the perpetrators, through both criminal and civil measures; (c) Step up cooperation and concerted action by all relevant law enforcement authorities and institutions with a view to dismantling national, regional and international networks in trafficking; (d) Allocate resources to provide comprehensive programmes designed to heal and rehabilitate into society victims of trafficking including through job training, legal assistance and confidential health care and take measures to cooperate with non-governmental organizations to provide for the social, medical and psychological care of the victims of trafficking;(e) Develop educational and training programmes and policies and consider enacting legislation aimed at preventing sex tourism and trafficking, giving special emphasis to the protection of young women and children.

Unfortunately, after ten years little progress has been made in these areas except for “c” in some countries or sub-regions. This reflects the largely law and order approach to the problem and in allocation of resources. In the case of “a”, since 1995 when commitment was made to undertake these actions, the United Nations Convention on Transnational Organized Crime came into force (in 2003). The issue of trafficking had come to be taken seriously by States and as of 15 December 2005, there

were 114 State Parties. As already noted, one important result of the Convention is clarity in what the definition of trafficking is. Previously, it had usually been treated in the context of prostitution and the distinction between trafficking and smuggling of persons and migration were not clear. Although there is still a great degree of overlap (i.e. trafficking seen as migration “gone wrong”), legally, the definition is clear. However, attention to the root causes “b”, rehabilitation “d”, and educational efforts “e”, many elements of which are covered by CEDAW and the Convention on the Rights of the Child, have not received much attention.

As it is difficult to eliminate, reduce or even properly monitor the trafficking/smuggling/illegal migration situation because of its complexity and types of people involved, it may seem to be an impossible task to fulfill obligations under various legal instruments. A trafficking operation often begins at the village level and involves people known to the potential victim or from the same ethnic group. The problem is very complex and has social, economic and often historic/political dimensions, which also need to be understood. It may be difficult for the State to prevent trafficking at that level; however, studies have shown that law enforcement officials often facilitate trafficking operations or fail to protect those being trafficked – sometimes even in cases where someone escapes from his or her captors and seeks help. This is clearly a violation of legal obligations under various treaties to which most countries are State parties.

## **1. Anti-trafficking agreements and initiatives in the Asia-Pacific region**

While violence against women and internal trafficking of people is largely a problem which must be addressed at the national level, trafficking is a problem which also must be addressed through international cooperation, including bilateral and multilateral memoranda of understanding and sub-regional agreements or conventions among other mechanisms. A number of regional action plans have been adopted, such as the Asian Regional Initiative Against Trafficking in Women and Children (ARIAT) and Bangkok Accord and Plan of Action to Combat Trafficking in Women (1998), which was adopted by five organizations at a regional conference on trafficking in women hosted by ESCAP. The Bangkok Accord called for urgent steps and regional action for addressing the issue, the need for sharing of best practices and common concerns and strengthening networks at the national, sub-regional and regional level for exchanging experiences, research and information and delineated actions to be taken in the area of prevention, protection, repatriation and reintegration.

Other instruments or agreements have been adopted such as the South Asia Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for the Purpose of Prostitution, adopted at the SAARC Summit in 1999 and signed on 5 January 2002, but not yet entered into force. Furthermore, initiatives such as the Bali Process and the Coordinated Mekong Ministerial Initiative on Trafficking (COMMIT) agreed upon in 2004 by the countries of the Greater Mekong Sub-region and its sub-regional action plan for cooperation in seven areas in collaboration with the United Nations as well as initiatives involving countries of a particular geographic area or organization now exist. In addition, there are national and bilateral Memorandums of Understanding (MOUs), and numerous initiatives involving NGOs and private-public sector initiatives such as training for girls in “high risk” areas in the hotel industry. In South Asia, effective programmes have been initiated on economic alternatives, media campaigns and awareness raising. However, despite good intentions, some of these agreements, instruments or initiatives are discriminatory towards women.<sup>9</sup>

Countries in the region are formulating new anti-trafficking laws; however, many are still almost exclusively focused on prostitution and sexual exploitation. A new law in the Philippines gives due

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<sup>9</sup> Others such as indigenous people or members of minority groups whose births were never registered and do not have citizenship also often encounter problems.

attention to forced labour and slavery-like practices. Some governments are also giving particular importance to employment and labour structures in their anti-trafficking strategies.<sup>10</sup>

The consultations have indicated that there is mutual interest in pursuing greater cooperation and collaboration among the various sub-regions for the purposes of combating human trafficking in the region. Cross border issues and legal processes relating to extradition of offenders remain the most problematic and sensitive issues among the countries in South Asia and ASEAN. It was acknowledged that more dialogue and regular consultations on such issues may foster better understanding of the problem.

Some of the immediate challenges to sub-regional and inter-regional cooperation that have been identified by the government representatives Strategic Planning meeting include: lack of adequate common or similar institutions, laws, policies and procedures at the national and sub-regional levels; lack of conceptual clarity on terminology; absence of mutual trust to address cross-border issues such as monitoring and law enforcement; lack of ratification of the Palermo Protocols of the United Nations Convention against Transnational Organized Crime; need for advocacy for ratification of the Protocols; absence of linkages to the various processes such as the SAARC Convention and the Bali Ministerial Meeting Processes and the lack of information sharing among the various regional and sub-regional processes so as to have added value impetus.

There are numerous informal bilateral initiatives and memoranda of understanding among the countries, which should be studied and documented. The sharing of such initiatives as the Coordinated Mekong Ministerial Initiative on Trafficking (COMMIT) and a sub-regional action plan for cooperation adopted in 2004 by the countries of the Greater Mekong Sub-region in collaboration with the United Nations and others, might be beneficial to other countries of the region.

There are many international organizations involved in anti-trafficking activities. Some are concerned mainly with criminal law and its enforcement; others primarily with border control, security issues and repatriation of trafficked persons. Yet others place the main emphasis on prevention, or also on rehabilitation of returned trafficked victims to their places of origin. Broadly speaking, distinctions are usually drawn between actors who place the main emphasis on border and security concerns, and those who place most emphasis on human rights and the protection of victims. It is also important to see trafficking as in large part a failure of labour markets, labour migration and social welfare systems and for governments to find ways to involve labour institutions and authorities more closely in the global action against trafficking, particularly in destination countries.

There is a great deal of misunderstanding of the difference between trafficking in humans, smuggling of humans and migration, yet there is also growing recognition of the linkage between migration policies and trafficking. While trafficking is mainly addressed through a law and order approach, legal systems and better implementation of human rights conventions need to be strengthened. However, all measures should be based on principles of human rights. Measures that restrict the movement of women in the name of protection, for example, whether preventing them from migrating or keeping them confined to "safe" houses, violate their rights. There is also a need for governments to develop strategies and laws for dealing with children who have been trafficked that are different from those for adult women who have been trafficked.

### **C. Dimensions of trafficking and violence against women**

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<sup>10</sup> This was the case of Korea, whose rapid progress against trafficking has recently been recognized. It has carried out rigorous monitoring of all its employment services, both public and private, carrying out prosecutions in cases where these have been linked with trafficking networks. And, without prejudicing future debates as to whether or not prostitution should be considered a legitimate economic activity, the labour authorities have taken action to ensure that abused entertainment workers receive the minimum wage, rather than lose their subsistence livelihood at the profits of their exploiters.

## 1. Human Rights dimensions

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. In international legal terms, the “composite” nature of the trafficking phenomenon implicates a wide range of violations, obligations and rights. For example, 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 those relating to transnational organized crime and corruption; international humanitarian law; and international criminal law.

While international human rights law has long recognized 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”.<sup>11</sup>

In addition the International Guidelines on HIV/AIDS and Human Rights produced by UNAIDS and the Office of the High Commissioner for Human Rights provides guidance for governments and people working on the issue to ensure the protection of human rights.

## 2. Gender dimension of trafficking

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.

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.

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. Gender-based discrimination and son preference is widespread in the Asia-Pacific region. Therefore, girls are often seen as a burden on their families, to be married off as soon as possible. In countries with a tradition of dowry, marrying off daughters at a younger age means they have less dowry to pay. While dowry is a socially accepted practice, it also operates as an economic practice. When poor families cannot pay dowry, it is also very tempting to marry off a daughter to someone who does not demand a dowry. Women come into the situation of being at risk of being trafficked largely due to poverty. Families also may accept it because there are no better economic alternatives available to them.

Women and girls as well as men and boys are trafficked; however, due to the high demand for sexual services of women and girls, they are generally more often commercially sexually exploited. Some countries do not have laws or regulations in place for dealing with trafficked men, which also needs attention. Women have for various reasons have increasingly been forced to look for work in large urban centres or in other countries due to the drying up of other economic opportunities. Although people may

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<sup>11</sup> Convention on the Elimination of all Forms of Discrimination against Women, 28 INTERNATIONAL LEGAL MATERIALS, 1448 (1989), Article 6.

fear exploitative migration, different from but closely related to trafficking, it is also a last resort means of survival for many. Women are often targeted for exploitation as prostitutes since it is very lucrative for groups that control prostitution – which is usually illegal.

The demand for prostitutes has historically been fueled by conflicts and the presence of military or peace-keeping forces and in certain sectors of the economy such as transportation and fishing. Prostitution is a big part of the economy in several countries and the demand for prostitutes continues to increase, with younger women and girls increasingly being sought based on a belief that young girls would not be infected and sometimes that having sex with a young girl will cure AIDS: however, women and girls are significantly more at risk than men of contracting the virus. Once found to be HIV positive, women are often left to fend for themselves, usually without a family or community that will accept them back.

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.<sup>12</sup> 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”.<sup>13</sup>

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 United Nations (Human Rights Commission) 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.<sup>14</sup>

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 domestic labour, and entertainment sectors – both predominantly female – that are the principle target markets for traffickers.

### *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

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<sup>12</sup> 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).

<sup>13</sup> 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

<sup>14</sup> 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.

organized criminal groups and to encourage the emergence of a new breed of entrepreneurs whose job it is to match supply with demand.<sup>15</sup>

Labour shortages in the informal sector of most industrialized 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 relegated to the bottom of the labour-market hierarchy – undertaking the “dirty, dangerous and difficult”<sup>16</sup> jobs which are rejected by the domestic labour force. (In the gender and labor discourse this work has also been phrased “dirty, dangerous and demeaning”.) 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 fewer opportunities than men to engage in skilled work. They are therefore much more dependent than men on 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.”

#### *Gender, human rights and the response to trafficking*

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 trafficked people (most often women) as criminals, who 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 results in little or no willingness of those who can take action against trafficking activities to do so. Trafficking into the sex trade is particularly susceptible to community acceptance of inadequate or inappropriate responses by the criminal justice system.

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<sup>15</sup> PHIL WILLIAMS, “Trafficking in Women and Children: A Market Perspective,” *Transnational Organised Crime* 3, no. 4 (1997): 154 [Hereafter: WILLIAMS 1/1997].

<sup>16</sup> BIMAL GHOSH in *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (The Hague: Martinus Nijhoff Publishers, 1998), 3.

*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 organization. The Immigration policies of some countries restrict young women from particular countries from obtaining visas on the assumption that they may plan to engage in prostitution. 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. People who have been trafficked, who have been forced to do dangerous degrading and difficult work, are typically beaten, fed little and denied medical care, and if caught, are usually punished for engaging in prostitution or for being illegal migrants rather than victims of traffickers – who are left free to continue their work. 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.

### **3. Forced labour**

Forced labour was defined in the original Forced Labour Convention, No. 29 of 1930, as any work or service performed under the menace of any penalty, and for which the said person has not offered himself voluntarily. The definition was left unchanged by Convention, No. 105 of 1957, which called for its immediate abolition adopted for a range of purposes (including the treatment of political or ideological offenders). This definition can be applied to the forced labour dimensions of trafficking. Forced labour and debt bondage (which has been a very old practice in some countries), can be considered a “contemporary” form of slavery. The forced and exploitative labour dimension of human trafficking is equally important as sexual exploitation but usually receives less media attention.

In defining “trafficking in persons”, the drafters of the Protocol have made a basic distinction between trafficking for labour and forced labour exploitation on the one hand, and sexual exploitation and prostitution on the other. Article 3 of the Protocol lends itself to distinguishing between trafficking for prostitution or other forms of sexual exploitation on the one hand; and forced labour or slavery-like practices on the other. However, even the concept of exploitation in the case of prostitution can be difficult to determine, when different countries have different approaches to its legalization or criminalization. Much greater difficulties can arise with regard to such terms as exploitation, coercion and servitude. There are also questions about how exploitative an employment relationship needs to be before one can say that a person has been recruited and transported for the purposes of labour exploitation. Very often, cases of forced labour can be attributed to exploitation of members of one ethnic group of irregular migrants by members of their own ethnic group – reducing the chances that anyone will speak out.

Governments are struggling with these issues, for the purposes of reforming criminal law and other legislation, to harmonize them with the United Nations Convention and the Palermo Protocols. Policy



makers as well as legislators are looking at the broader dimensions of trafficking. The first generation of national anti-trafficking laws covered only sexual exploitation of women and children. The focus was broadened for example under the United States Victims of Trafficking Protection Act, adopted in 2000, which addresses the broader forced labour dimensions of human trafficking. It created new crimes and enhanced penalties for existing crimes including forced labour, trafficking with respect to peonage, slavery and involuntary servitude, and it criminalized attempts to engage in these activities. This has paved the way for intensified activity by the executive branch of government. It provides for assistance to foreign countries in order to, *inter alia*, draft laws to prohibit and punish acts of trafficking, and strengthen investigation and prosecution of traffickers.

#### 4. Migration

Trafficking also must be seen in the context of migration, although not be seen exclusively as a migration issue. The link between irregular migration and human trafficking is also a sensitive issue in some countries. There is often reluctance to see the exploitation of irregular migrants as an aspect of trafficking (and often, forced and/or child labour). There can be a fine line between the legal and above-board employment services; and the job placement, visa and tourist agencies that are linked with the trafficking networks. There has also been a difficult and often polemic debate over the past twenty years, as to the need to reduce state control over employment services, or to make labour markets less rigid and more flexible. In some countries measures have been taken to prevent or restrict women from migrating out in the name of “protecting” them from being trafficked. Such measures have proven to be counter-productive and punish women for the crimes of traffickers.

There is a realization now by many that serious headway cannot be made against such trafficking in persons, for as long as there is such strong demand for this irregular labour in destination countries, and in particular for as long as governments continue to allow the flourishing of an informal labour market in certain countries without clamping down on abusive practices. There are large numbers of people willing to migrate to a chance to earn a living and hopefully have a better quality of life. There are huge structural problems, in labour markets, migration policies, welfare systems, and monitoring and law enforcement mechanisms. If barriers are put up against legal migration in a context of demand for cheap migrant workers and for specialists and care providers others in the developed economies due to declining birth rates and longer life expectancy, a dangerous breeding ground for traffickers and smugglers may be created unless there are legal opportunities for migration. When one considers the fairly low risk (especially compared to drug trafficking, for example, which may involve a risk of capital punishment), and high potential profit, combined with the absence of multilateral migration policies and cooperation among countries it is not surprising how quickly it has grown and spread, and has appeal to international crime networks.

A lot of the anti-trafficking work done so far has focused on a specific sector or body of government such as public security or law enforcement. As was stated in *Human Security Now*,<sup>17</sup> “from a human security perspective, the movement of people must be looked at comprehensively, taking into account the political, civil, security, economic and social dimensions affecting peoples’ decision to move. It cannot be approached solely from the perspectives of the countries of origin, transit or destination. It must also be approached from the perspective of the different stages and motivations for displacement—for many people, migration is the only option. Today’s policies, norms and institutions are not doing this, leaving major gaps. Trafficking is not one event but a series of acts and circumstances involving a wide range of actors. Anti-trafficking measures must address the entire cycle of trafficking. Policy makers from different sectors must work together to formulate appropriate policies.

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<sup>17</sup> The report of the Human Security Commission completed in 2003

There is a need to also examine the linkage between standards and institutions for social and labour protection, and the incidence of trafficking. Labour institutions, such as employment and job placement services, labour inspection services and labour courts, are meant to protect workers.

## 5. Economic dimension

Successful work against human trafficking will require careful analysis of its economic aspects, of poverty –related factors among others, on the supply side, but perhaps most particularly of the “pull” or demand factors in the destination cities or countries. There may be demographic factors behind the rise in irregular migration and trafficking such as ageing populations in some countries and a high percentage of young people in others. The wealthier industrialized countries will continue to need a supply of workers willing to do a range of poorly paid and dangerous jobs, many of them seasonal in nature with no prospect of long-term job security that many nationals are unwilling to do. Tourism, domestic work, agriculture and construction for example, create pressures for seasonal and often informal labour markets.

In terms of economic factors which drive migration and trafficking, Sassen (2002) points out in her paper “Counter-geographies of globalization: the feminization of survival” (based on a multi-year project on “Governance and Accountability in the Global Economy”), that households and even whole communities are increasingly dependent on women for their survival, and that governments are dependent on women's earnings as well as types of enterprises whose ways of profit-making exist at the margins of the “licit” economy. She also stresses that there is a degree of institutionalization in these dynamics --they are not simply aggregates of individual actions. There is a need to address the problem of unprotected and informal labour, and to tackle those underground economic activities which undermine legitimate economies and enhance trafficking.

Sassen discusses the impact of structural adjustment programmes and the burden of debt. “Unemployment, both of women themselves but also more generally of the men in their households, has added to the pressure on women to find ways to ensure household survival. Subsistence food production, informal work, emigration and prostitution, have all become major survival options for women.”

It is also important to look at the phenomenal growth in poor women supporting themselves and their families from prostitution, whether by choice or force. The fact that there is demand (in developing as well as industrialized countries) and considering the very limited number of options for earning a living are available to many women, certainly the supply could be expected to grow. This is also the case in many of the Central Asia republics which have experienced deterioration in the quality of life and government spending on social services, leaving even well educated women few opportunities for gainful employment.

These points were echoed in 2004 when the World Commission on the Social Dimension of Globalization established by the ILO in 2002, launched its report entitled “A Fair Globalization: Creating Opportunities for All”, in which it said that while the potentials of globalization, in terms of growing connectivity and productive capacity, are immense, current systems of governance of globalization at national and international levels have not realized such potentials for most of the world's people-and in many instances have made matters worse. The Commission explained that “seen through the eyes of the vast majority of men and women around the world, globalization has not met their simple aspiration for decent jobs, livelihoods and a better future for their children”. In 2003, official figures for global unemployment reached a record high of over 185 million people. Unofficial figures would be much higher, especially if one includes the underemployed and the working poor. These trends, the Report argued,

were largely the result of deep-seated and persistent imbalances in the current workings of the global economy which are both "ethically unacceptable and politically unsustainable."<sup>18</sup>

The Report also makes a point about the role of discrimination, when it says "the practice on the ground often belies the commitments that have been made at the highest political level – revealing a picture of widespread discrimination and blatant violations of labour and trade union rights. It shows discrimination based on sex, age, disability and HIV/AIDS status to be virulent in the world of work today. Growing economic insecurity and inequality have exacerbated problems of xenophobia and racial and religious discrimination."<sup>19</sup>

Globalization, coupled with information technology, also makes possible the transmission of huge quantities of pornography over the Internet and through mobile phones. This has shown to have a particularly worrying impact on children and youth as described in a study undertaken by End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT International) entitled "Violence against Children in Cyberspace". Child exploiters also use cyberspace to network for child sex tourism and trafficking.

### **III. CEDAW as a tool for addressing violence and trafficking in women**

In terms of responses to trafficking, it is in the legal domain that the most significant and rapid changes have occurred. Where just a decade ago the legal framework consisted of a single, long-forgotten treaty, dating back to 1949, 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 United Nations Convention on Transnational Organized Crime and its supplementary protocols on trafficking in persons and migrant smuggling, which was adopted by the United Nations General Assembly on 15 November 2000 and entered into force on 29 September 2003, was a reflection of the quickly growing recognition by governments of the trans-boundary nature of the crime and role of criminal networks and the need to tackle the problem of trafficking in humans.

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.

By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

<sup>18</sup> ILO: "A Fair Globalization: Creating Opportunities for All" accessible at [www.ilo.org/public/english/wcsdg/docs/report.pdf](http://www.ilo.org/public/english/wcsdg/docs/report.pdf)

<sup>19</sup> ILO: "A Fair Globalization: Creating Opportunities for All" accessible at [www.ilo.org/public/english/wcsdg/docs/report.pdf](http://www.ilo.org/public/english/wcsdg/docs/report.pdf) .  
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The Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life -- including the right to vote and to stand for election -- as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. CEDAW is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women.

Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice and to submit reports, at least every four years, on measures they have taken to comply with their treaty. Such reports are a tool for civil society to hold governments accountable to its commitments. While civil society input to reports is encouraged by the CEDAW Committee, "shadow" reports are often prepared by NGOs, and the outcome of the review of the official report can be publicized by them to ensure follow-up. There are good examples of government and civil society working together such as in Russia, where a high-level working group from different government agencies and NGOs was assisting the *Duma* in drafting a new anti-trafficking law.<sup>20</sup>

## **A. Violence against women**

Violence against women is an issue with a number of dimensions. The Declaration on the Elimination of Violence against Women adopted by the United Nations General Assembly in 1993, recognized that violence against women is "a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men". In its Articles 2 and 3, it defined violence as against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. It stated that

"Violence against women" shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

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<sup>20</sup> Plant, Roger of the ILO speech "Preventing Forced Labour and Trafficking: The role of the legislature" delivered at the Expert Group Meeting on Prevention of International Trafficking and Promotion of Public Awareness Campaign, Seoul, Korea, 22-23 September 2003.

The issue of gender-based violence is not specifically addressed in the CEDAW, although it is clearly fundamental to its most basic provisions.<sup>21</sup> In general recommendation No. 19 adopted at its eleventh session in 1992, the Committee on the Elimination of Discrimination against Women (which monitors implementation of the Convention) took the important step of formally extending the general prohibition on gender-based discrimination to include gender-based violence, which it defined (para. 6) as

“ . . . violence that is directed at a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty . . . “

The Committee affirmed that violence against a woman constitutes a violation of her internationally recognized human rights—regardless of whether the perpetrator is a public official or a private person. State responsibility may therefore be invoked not only when a government official is involved in an act of gender-based violence, but also when the State fails to act with due diligence to prevent violations of rights committed by private persons or to investigate and punish such acts of violence, and to provide compensation.

In the same general recommendation (para. 24 (t)), the Committee called on States parties to take all measures necessary to prevent gender-based violence. Such measures would include not only legal sanctions, civil remedies and avenues for compensation, but also preventive measures such as public information and education programmes, as well as protective measures, including support services for victims of violence.

The work of the Committee in this area is being reinforced by other international developments. In 1993, the General Assembly, through its resolution 48/104, adopted the Declaration on the Elimination of Violence against Women (resolution 48/104). The Declaration specifies the steps which States and the international community should take to ensure the elimination of all forms of violence against women, whether occurring in public or in private life.

## **B. Trafficking and the CEDAW Convention**

The first specific reference to trafficking in a modern (United Nations-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

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<sup>21</sup> As Kristen Timothy and Marsha Freeman explain in their paper “The CEDAW Convention and the Beijing Platform for Action: Reinforcing the Promise of the Rights Framework”, “From a rights perspective, the Platform for Action moves beyond the CEDAW treaty in some areas and adds breadth to others. For example, it includes an entire section on violence against women, which is not mentioned in the CEDAW Convention because in the 1970’s when the Convention was drafted, the issue had not yet received international attention and very little hard data and evidence had yet been collected.

traffic in women and exploitation of the prostitution of women”.<sup>22</sup> 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.<sup>23</sup> In terms 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.<sup>24</sup> This interpretation has been suggested by the CEDAW Committee itself.<sup>25</sup> The Committee’s clear tendency to follow the strict wording of the Convention and focus on exploitation of prostitution - rather than solely on prostitution, could also be interpreted as a tacit rejection of the explicit abolitionist stance of the 1949 Convention.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> Article 5, requiring States Parties to “modify the

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<sup>22</sup> Convention on the Elimination of all Forms of Discrimination Against Women, Article 6.

<sup>23</sup> 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 (IRRAW) USA and the Commonwealth Secretariat, 2<sup>nd</sup> edition, 1996 at 19.

<sup>24</sup> 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.

<sup>25</sup> 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 (11<sup>th</sup> 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), 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 / developed 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.

<sup>26</sup> 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, pp. 288–289; and Sweden, 31/07/01, U.N. Doc. A/56/38, Part I I, p. 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, p.101; and Netherlands, 31/07/01, U.N. Doc. A/56/38, Part I I, pp. 209–210).

<sup>27</sup> TOEPFFER, 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.

<sup>28</sup> 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

social and cultural patterns of conduct of men and women” in order to eliminate gender-based stereotypes would also be relevant<sup>29</sup>. The general obligation on States to eliminate discrimination by individuals or private bodies<sup>30</sup> 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.

### C. 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. Briefly, the Committee stated, in this General Recommendation, that all forms of trafficking are “incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity”.<sup>31</sup> 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.”<sup>32</sup>

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.<sup>33</sup> In practice, the CEDAW reporting

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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.

<sup>29</sup> Convention on the Elimination of Discrimination against Women, Article 5.

<sup>30</sup> Convention on the Elimination of Discrimination against Women, Article 2(e).

<sup>31</sup> General Recommendation 19: Violence against Women, para. 14.

<sup>32</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against Women (11<sup>th</sup> Session, 1992), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at t 216, U.N. Doc. HRI/GEN /1/Re v.5 ( 2001), para. 13.

<sup>33</sup> Andrew Byrnes, *The Convention on the Elimination of All Forms of Discrimination against Women*, in W. BENEDEK, E. KISAAYE AND G. OBERLEITNER, *HUMAN RIGHTS OF WOMEN INTERNATIONAL INSTRUMENTS AND AFRICAN EXPERIENCES* 131 (Zed Books, 2002).

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 fulfill 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.<sup>34</sup> 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 focused 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.<sup>35</sup>

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, such as:

- Incorporation and implementation of legislative measures to prevent trafficking and prosecute traffickers
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<sup>34</sup> 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, p. 228, 239; **Azerbaijan**, 14/05/98, U.N. Doc. A/53/38, p. 74; **Bangladesh**, 12/08/97, U.N. Doc. A/52/38/Rev.1, Part II, p. 459; **Belarus**, 31/01/2000, U.N. Doc. A/55/38, p. 349, pp. 371–372; **Bulgaria**, 14/05/98, U.N. Doc. A/53/38, p. 243, 256; **China**, 03/02/99, U.N. Doc. A/54/38, p. 290–291; **China—Hong Kong Special Administrative Region**, 03/02/99, U.N. Doc. A/54/38, p. 299(c), 326; **Cyprus**, 09/05/96, U.N. Doc. A/51/38, p. 53, 61; **Denmark**, 12/08/97, A/52/38/Rev.1, p. 269; **Dominican Republic**, 14/15/98, U.N. Doc. A/53/38, p. 333, 346; **Finland**, 02/02/01, U.N. Doc. A/56/38, pp. 303–304; **Georgia**, 01/07/99, U.N. Doc. A/54/38, pp. 101–102; **Germany**, 02/02/00, U.N. Doc. A/55/38, pp. 321–322; **Greece**, 01/02/99, U.N. Doc. A/54/38, pp. 197–198; **India**, 01/02/00, U.N. Doc. A/55/38, p. 62, 76–77; **Indonesia**, 14/05/98, U.N. Doc. A/53/38, p. 296, 300, 310; **Kazakhstan**, 02/02/01, U.N. Doc. A/56/38, pp. 97–98; **Kyrgyzstan**, 27/01/99, U.N. Doc. A/54/38, pp. 129–130; **Lithuania**, 16/06/00, U.N. Doc. A/55/38, pp. 152–153; **Mauritius**, 03/05/95, U.N. Doc. A/50/38, p. 209; **Mexico**, 14/05/98, U.N. Doc. A/53/38, p. 395; **Mongolia**, 02/02/01, U.N. Doc. A/56/38, pp. 265–266; **Myanmar**, 28/01/00, U.N. Doc. A/55/38, pp. 119–120, 121; **Nepal**, 01/07/99, U.N. Doc. A/54/38, pp. 149–150; **Netherlands**, 31/07/01, U.N. Doc. A/56/38, Part II, p. 198, 211–212; **Nicaragua**, 31/07/01, U.N. Doc. A/56/38, Part II, pp. 314–315; **Norway**, 31/05/95, U.N. Doc. A/50/38, p. 494; **Philippines**, 12/08/97, U.N. Doc. A/52/38/Rev.1, p. 292, 299; **Republic of Moldova**, 27/06/00, U.N. Doc. A/55/38, pp. 103–104; **Romania**, 23/06/00, U.N. Doc. A/55/38, pp. 300, 308–309; **Singapore**, 31/07/01, U.N. Doc. A/56/38, Part II, pp. 90–91; **Slovakia**, 30/06/98, U.N. Doc. A/53/38, pp. 81–82; **Sweden**, 31/07/01, U.N. Doc. A/56/38, Part II, pp. 354–355; **Thailand**, 02/02/99, U.N. Doc. A/54/38, pp. 236–238; **United Republic of Tanzania**, 06/07/98, A/53/38, p. 240; **Uzbekistan**, 31/07/01, U.N. Doc. A/56/38, Part II, pp. 178–179; **Vietnam**, 31/07/01, U.N. Doc. A/56/38, Part II, p. 260–261.

<sup>35</sup> 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, p. 228; **Bangladesh**, 12/08/97, U.N. Doc. A/52/38/Rev.1, Part II, p. 459; **Belarus**, 31/01/00, U.N. Doc. A/55/38, p. 372; **Bulgaria**, 14/05/98, U.N. Doc. A/53/38, p. 243; **Cyprus**, 09/05/96, U.N. Doc. A/51/38, p. 61; **Dominican Republic**, 14/05/98, U.N. Doc. A/53/38, p. 346; **Finland**, 02/02/01, U.N. Doc. A/56/38, p. 304; **Germany**, 02/02/00, U.N. Doc. A/55/38, p. 322; **India**, 01/02/00, U.N. Doc. A/55/38, p. 77; **Kazakhstan**, 02/02/01, U.N. Doc. A/56/38, p. 98; **Kyrgyzstan**, 27/01/99, U.N. Doc. A/54/38, p. 130; **Lithuania**, 16/06/00, U.N. Doc. A/55/38, p. 153; **Nepal**, 01/07/99, U.N. Doc. A/54/38, p. 150; **Republic of Moldova**, 27/06/00, U.N. Doc. A/55/38, p. 104; **Romania**, 23/06/00, U.N. Doc. A/55/38, p. 309; **Slovakia**, 30/06/98, U.N. Doc. A/53/38/Rev.1, p. 82; **Sweden**, 31/07/01, U.N. Doc. A/56/38, Part II, p. 355; **Thailand**, 02/02/99, U.N. Doc. A/54/38, p. 238; **Vietnam**, 31/07/01, U.N. Doc. A/56/38, Part II, p. 261.



- 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 – such as 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 CEDAW. 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, will encourage further reflection on this aspect. In addition, the recently adopted Optional Protocol to the Convention,<sup>36</sup> establishing a complaints and inquiry procedure, may well prompt the Committee to consider the legal aspects of trafficking in more detail and for trafficked women to hold States accountable for taking necessary measures to address State complicity in trafficking and discrimination which encourages trafficking.

#### **D. 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.<sup>37</sup> 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 analyzed below with special reference to the work and functions of the CEDAW Committee.

*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.<sup>38</sup> While several conventions address various forms of discrimination, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which was adopted by the United Nations General Assembly in 1979 and entered into force in 1981, stands as the main legal framework for addressing discrimination against women. CEDAW 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

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<sup>36</sup> Adopted by the General Assembly in October 1999 (A/RES/54/4), *opened for signature* December 19, 1999.

<sup>37</sup> See, for example, ICCPR, Articles 29(1), 3, 4(1), 26, 36.

<sup>38</sup> 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.

fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>39</sup> It is widely accepted that this prohibition requires States Parties to take action to prevent private as well as public acts of discrimination.<sup>40</sup> The responsibility of States parties under the Convention extends to eliminating gender-based discrimination by any person, organization or enterprise. The prohibition on sex-based discrimination is related to and reinforces the duty of equal application of the law.<sup>41</sup>

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. While 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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup> 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.

In many respects trafficking and discrimination are linked and as is clear in the case of trafficking and exploitation of men and children as well as women, being poor, marginalized, not having citizenship where one lives, and having minority or indigenous persons status create vulnerability and are risk factors for both discrimination and exploitation and often trafficking.

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<sup>39</sup> Convention on the Elimination of all forms of Discrimination against Women, Article 1.

<sup>40</sup> See, for example, Theodor Meron, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS, (1986) at 60.

<sup>41</sup> 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 ...”.

<sup>42</sup> 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, p. 2, U.N . Doc .HRI/GEN /1/Re v.5 (2001).

<sup>43</sup> 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>.

<sup>44</sup> 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](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.

*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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> It is 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*”.<sup>49</sup> The convention specifically recognizes trafficking (undefined) as community-based violence against women (as opposed to domestic violence or violence perpetrated or condoned by the State or its agents),<sup>50</sup> 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.<sup>51</sup> The Convention provides for a range of potentially effective enforcement mechanisms including reporting and a complaints procedure open to both individuals and groups.<sup>52</sup>

It is also relevant to note that at the international political level, both the Vienna Declaration<sup>53</sup> and the Beijing Platform for Action<sup>54</sup> identified trafficking as a form of gender-based violence.

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

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<sup>45</sup> This omission, and the reasons behind it, has 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.

<sup>46</sup> 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.

<sup>47</sup> Declaration on Violence against Women, UN Doc. A/RES/48/104 (1993), adopted 20 December, 1993.

<sup>48</sup> 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.

<sup>49</sup> Inter-American Convention on Violence against Women, Article 1, emphasis added.

<sup>50</sup> Inter-American Convention on Violence against Women, Article 2.

<sup>51</sup> Inter-American Convention on Violence against Women, Article 7.

<sup>52</sup> Inter-American Convention on Violence against Women, Article 10, Article 12.

<sup>53</sup> 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.

<sup>54</sup> Fourth World Conference on Women, Beijing, 4-15 September 1995, Platform for Action, Chapter IV, Strategic Objective D.3., 131(a),

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.<sup>55</sup> 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.”<sup>56</sup> 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.”<sup>57</sup> 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.<sup>58</sup>

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<sup>59</sup> and requires States to “take appropriate and effective measures to overcome all forms of gender-based violence, *whether by private or public act*”.<sup>60</sup>

The Declaration on Violence Against Women covers all forms of gender-based violence within the family and the general community<sup>61</sup> as well as violence “perpetrated or condoned by the State wherever it occurs”.<sup>62</sup> 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*”.<sup>63</sup> As a resolution of the

<sup>55</sup> General Recommendation 19, para. 6.

<sup>56</sup> General Recommendation 19, para. 1.

<sup>57</sup> General Recommendation 19, para. 6.

<sup>58</sup> *Ibid.*

<sup>59</sup> General Recommendation 19, para. 9.

<sup>60</sup> General Recommendation 19, para. 24. (Emphasis added).

<sup>61</sup> Declaration on Violence Against Women, Articles 1 and 2.

<sup>62</sup> *Ibid.*, Article 2.

<sup>63</sup> *Ibid.*, Article 4 (c). (Emphasis added).

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.

### **E. 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 organized 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, retaining the human rights perspective is essential.

#### **1. Determining the “content” of the Convention’s Article 6**

Beyond the important characterization 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 United Nations 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,<sup>64</sup> and a comprehensive, human rights based European Convention against trafficking adopted in May 2005.<sup>65</sup> Sub-legal regional and bilateral agreements have also been concluded<sup>66</sup> 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 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.

## **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.

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<sup>64</sup> 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].

<sup>65</sup> Council of Europe *Convention on Action against Trafficking in Human Beings*, [Hereafter: European Convention].

<sup>66</sup> 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.

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 on Human Rights and Human Trafficking 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 criminalize 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. Criminalization 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 criminalize trafficking when committed intentionally is contained in Article 5 of the Palermo Protocol and is a central and mandatory provision of that instrument.<sup>67</sup> All other international and regional agreements echo this requirement.<sup>68</sup> In terms of what is to be criminalized, 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.<sup>69</sup> The obligation of identification is not contained within the Trafficking Protocol but is reflected in both the European Convention<sup>70</sup> and the United Nations Principles and Guidelines.<sup>71</sup> 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.”

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<sup>67</sup> *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 Organized Crime*, United Nations Office for Drugs and Crime, Vienna, 2004. at 17

<sup>68</sup> For example, The European Convention, Article 18 and the United Nations Principles and Guidelines and Principles 12 – 17 and Guideline 4.

<sup>69</sup> 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.

<sup>70</sup> 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.).

<sup>71</sup> UN Principles and Guidelines, Guideline 2; see also Guideline 11.5.

### ***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”.<sup>72</sup> This is a reiteration of a basic principle of international law relating to state responsibility for violations of an individual’s human rights.<sup>73</sup> 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 on Human Rights and Human Trafficking. 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,<sup>74</sup> 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 counseling; (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***

<sup>72</sup> UN Principles and Guidelines, Principle 2.

<sup>73</sup> 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.

<sup>74</sup> 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”.



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 recognizes 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.<sup>75</sup> This position, affirmed by the United Nations 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.<sup>76</sup> 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 United Nations Principles and Guidelines.<sup>77</sup>

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

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<sup>75</sup> 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).

<sup>76</sup> 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.

<sup>77</sup> 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).

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-centered criminal justice response; criminalization 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 centered 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 recognize the critical importance of international cooperation.<sup>78</sup> 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.

## **IV. Conclusions and Recommendations**

This paper has departed from a conceptual discussion of trafficking in general and its characteristics in the ESCAP Region. Following this discussion, the obligations of the state in combating trafficking were outlined. Also the principal rights-based and developmental dimensions of trafficking as a composite phenomenon and the connections to violence were outlined. Finally, CEDAW as a tool for addressing violence and trafficking in an integrated manner, was addressed.

A legal instrument such as the United Nations Convention on Transnational, Organized Crime is important in that it provides a clear definition and actions which States parties must take. Its weakness is that it provides singularly a law and order approach. The strength of CEDAW is that it has the potential to address the broad range of deeper root causes for the pervasiveness of violence against women and trafficking in women; however, it does not clearly define trafficking and links it to prostitution only. The two instruments can complement each other. It is crucial, however, to base policies, plans and actions on the United Nations Principles and Guidelines on Trafficking to ensure that people's rights are protected.

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<sup>78</sup> 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).

There is a need for a multi-sectoral, integrated approach, combining prevention through personal and community empowerment and awareness-raising, labour market analysis in both origin and destination areas, reviewing migration policy, greater supervision of recruiting systems across the trafficking cycle, and regular monitoring of conditions in the destination areas. The anti-trafficking law of the Philippines adopted in 2002 is of particular relevance in this regard, with its comprehensive approach to all aspects of labour and sexual exploitation.<sup>79</sup>

More attention is needed on prevention and demand as a major part of prevention efforts. Men and boys must be included in efforts to reduce son preference and violence against women. If demand for sex work is reduced, supply will also decline. The commoditization of women encouraged through the greater ease of access to pornography through information and communication technologies deserves a lot more attention. Related to this are gender stereotypes in media which devalue femininity and glorify dominance and power and attribute those qualities to men.

Trafficking must be seen in large part as a policy failure and a market failure and placed in the context of the recent phase of globalization, a diminished role of the state, trade agreements, and migration. If those issues are not adequately addressed, one cannot expect to see much change in demand for trafficked labour and people who can easily be trafficked. The main labour market actors such as employment services and job placement agencies, labour inspectorates, labour courts and employers' or workers' organizations, can have a very significant role to play in sustainable action against trafficking. Also, small scale livelihood projects that are meant to help women are often unsustainable and do not provide real alternatives to movement under risky circumstances.

Human rights protection and promotion can address problems of discrimination and violence, including that associated with the workplace. While not specifically linked to trafficking, workplace exploitation and violence are closely linked and are often accepted on the grounds that profit and foreign direct investment are most important and labour standards can be overlooked.

Poverty reduction efforts which promote participation in decision-making and "ownership" (of women and men, youth, marginalized groups etc.), political participation and social justice are crucial. This is linked to the need to also address citizen rights and women's land and other property rights. Lack of secure tenure, legal ownership and real influence in natural resource management and in political decision making, discourages people from protecting their environment and encourages mass movement of people.

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<sup>79</sup> Plant, Roger of the ILO speech "Preventing Forced Labour and Trafficking: The role of the legislature" delivered at the Expert Group Meeting on Prevention of International Trafficking and Promotion of Public Awareness Campaign, Seoul, Korea, 22-23 September 2003.