

# ACCESS TO INTERNATIONAL CRIMINAL JUSTICE FOR VICTIMS OF VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL FAMILY LAW

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## INTRODUCTION

I am delighted to be here at this very special event celebrating 60 years of the Universal Declaration of Human Rights (UDHR). I would like to share with you some of the most important recent developments in the anti-trafficking movement and the violence against women movement as linked to developments in international family law since the passage of the UDHR. In doing so, I would like to focus on two main developments: (1) at the substantive level—the expansion of the concept of human trafficking itself, originally limited to prostitution, to include the institution of marriage; and (2) at the procedural level—allowing victims of trafficking access to the international justice system as victims of a form of violence against women.

In discussing the first issue, I will outline the relevant international law that links forced marriage to human trafficking. I will then provide a summary of various forced marriage practices around the world that violate international law and the domestic measures that have been adopted in some countries to combat them. Regarding the second issue, I will first discuss a few domestic laws from around that world that attempt to bring trafficking cases within the auspices of domestic violence statutes. I will then review in detail various cases of domestic violence (and other private incidents of violence against women) brought before the U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee). These cases illustrate how international law provides a remedy for women who are denied justice at the national level and how such cases are being adjudicated under international law. I will end with a discussion of the one trafficking case that the Committee has heard to show how CEDAW jurisprudence on this issue may develop in the future.

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## I. SUBSTANTIVE DEVELOPMENT: EXPANDING THE CONCEPT OF HUMAN TRAFFICKING

To address the concept of human trafficking, let me take you back to 1948. The UDHR states in Article 4 that “no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”<sup>1</sup> The legislative history of the UDHR indicates that the term slavery was meant to include traffic in women and forced labor, but the specific concept of trafficking did not appear in the text of the UDHR.<sup>2</sup>

Of course, trafficking in persons arguably violates many of the 30 articles of the UDHR.<sup>3</sup> Of particular relevance to this presentation, trafficking in persons may constitute interference with family relations in violation of international family law and thus also a violation of Article 16 of the UDHR, which states, “The family is the natural and fundamental group unit of society and is entitled to protection by society and state.”<sup>4</sup> Article 16 also states, “Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”<sup>5</sup> It further provides, “Marriage shall be entered into only with the free and full consent of the intending spouses,”<sup>6</sup> a requirement that human trafficking violates. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), one of the progeny of the UDHR, likewise states:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; [and]

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<sup>1</sup> Universal Declaration of Human Rights art. 4, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

<sup>2</sup> GUDMUNDUR ALFREDSSON & ASBJØRN EIDE, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 106 (1999).

<sup>3</sup> For example, trafficking for the purposes of forced labor, child labor, and domestic service constitutes a violation of Article 23(1) of the UDHR, *supra* note 1, which provides that “[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

<sup>4</sup> *Id.* art. 16(3).

<sup>5</sup> *Id.* art. 16(1).

<sup>6</sup> *Id.* art. 16(2).

(c) The same rights and responsibilities during marriage and at its dissolution.<sup>7</sup>

International family law thus establishes the principles of consent to marriage, a minimum age for marriage, and equality in the union of marriage. Consequently, trafficking for the purposes of forced marriage, arranged marriage, marriage by catalog or mail-order brides, temporary marriage, child marriage, and forced child-bearing violate international family law.<sup>8</sup>

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<sup>7</sup> Convention on the Elimination of All Forms of Discrimination against Women art. 16(1)(a)–(c), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. Similarly, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231 [hereinafter Convention on Consent to Marriage], protects individuals from potential forced marriages or trafficking by requiring that: “No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.” *Id.* art. 1(1). Furthermore, the aforementioned convention requires all parties to “take legislative action to specify a minimum age for marriage,” *id.* art. 2, which the U.N. has mandated “shall not be less than fifteen years of age.” Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 2018 (XX), at 36, princ. II, U.N. Doc. A/6014 (Nov. 1, 1965). The explanatory notes to the Council of Europe’s anti-trafficking convention are educational on this subject:

[E]quality between women and men means not only non-discrimination on grounds of gender but also positive measures to achieve equality between women and men. Equality must be promoted by supporting specific policies for women, who are more likely to be exposed to practices which qualify as torture or inhuman or degrading treatment (physical violence, rape, genital and sexual mutilation, trafficking for the purpose of sexual exploitation).

Convention on Action against Trafficking in Human Beings and its Explanatory Report ¶ 211, May 16, 2005, C.E.T.S. 197. Similarly, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 40, prohibits:

[a]ny institution or practice whereby . . . [a] woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or . . . [t]he husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or . . . [a] woman on the death of her husband is liable to be inherited by another person.

*Id.* art. 1(c).

<sup>8</sup> International family law is divided into three main categories: marriage and divorce laws, child custody laws, and adoption laws. See generally MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY (2003); NIGEL LOWE & GILLIAN DOUGLAS, FAMILIES ACROSS FRONTIERS (1996); JOHN MURPHY, INTERNATIONAL DIMENSION IN FAMILY LAW (2005), BARBARA STARK, INTERNATIONAL FAMILY LAW: AN INTRODUCTION (2005). These laws describe two main relationships: the relationship between spouses and the parent-child relationship. The instruments of international family law governing these categories and relationships are based on recognized principles regarding family law, including the right of a family to state protection, integrity of the family, right to social protection, and the right to marriage. The UDHR emphasizes the necessity of state protection of the family: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” UDHR, *supra* note 1, art. 16(3). Nearly identical pieces of legislation are found in the following treaties: Organization of American States, American Convention on Human Rights art. 17(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123

Extensive data demonstrates the magnitude of the problem of forced and arranged marriages around the world. Women are trafficked from Central Asian countries with the promise of marrying wealthy foreigners.<sup>9</sup> Since the 1990s, 3,037 women have been recruited from Kazakhstan, 4,109 from Kyrgyzstan, and 1,139 from Uzbekistan by marriage agencies.<sup>10</sup> Through such agencies and by virtue of similar means, some 75,000 women have left Russia

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[hereinafter ACHR]; the International Covenant on Economic, Social, and Cultural Rights art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; the African Charter on Human and Peoples' Rights art. 18(1), June 27, 1981, 1520 U.N.T.S. 217 [hereinafter Banjul Charter]; and the International Covenant on Civil and Political Rights art. 23(1), Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]. International human rights treaties also emphasize the right of a family to privacy, freedom from interference, and freedom from attacks. The European Convention on Human Rights declares, "Everyone has the right to respect for his private and family life . . . . There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society." Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 [hereinafter ECHR]. The ACHR extends this right by adding, "Everyone has the right to the protection of the law against such interference or attacks." ACHR, *supra*, art. 11. Additional legal instruments focus on the right of the family to a certain standard of living and the protection of the mother-child relationship in particular. The UDHR explains, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services." UDHR, *supra* note 1, art. 25. It further states, "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." *Id.* art. 25(2). Multiple legal instruments accord the family with particular state and social protections. The ACHR states, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state." ACHR, *supra*, art. 17(1). The state is responsible for ensuring the physical safety of its population, for providing a certain standard of living, and for preventing illegal attacks and interferences. The ICESCR states:

The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family . . . . The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

ICESCR, *supra*, art. 11(1). Furthermore, the ECHR elucidates:

Everyone has the right to respect for his private and family life, his home, and his correspondence . . . . There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR, *supra*, art. 8.

<sup>9</sup> Council of Europe, Steering Comm. for Equal. Between Women & Men, Group of Specialists on the Impact of the Use of New Info. Techs. on Trafficking in Human Beings for the Purpose of Sexual Exploitation, *Final Report*, 42-51, EG-S-NT (2002) 9, *available at* [http://www.humanrights.coe.int/equality/Eng/WordDocs/PDF\\_EG-S-NT\(2002\)9%20E%20Final%20report%20Feb%202003.pdf](http://www.humanrights.coe.int/equality/Eng/WordDocs/PDF_EG-S-NT(2002)9%20E%20Final%20report%20Feb%202003.pdf).

<sup>10</sup> *Id.* at 44 tbl. 1.

to marry American men.<sup>11</sup> Marriage agencies also operate in Ukraine, where they have no licensing requirements, and Ukraine constitutes a major country of origin for human trafficking.<sup>12</sup> In a related practice, women have been trafficked from Tajikistan to Austria for marriage for the sole purpose of giving birth to a child, which is then taken away from the mother.<sup>13</sup>

The Philippines is another major origin country for mail-order brides, with women often leaving as a result of social pressure to marry young or the stigma attached to spinsterhood, and because marrying a foreigner is seen as an opportunity to break out of poverty and secure financial well-being for the bride and her family.<sup>14</sup> Hundreds of marriage agencies advertise Filipinas through pen pal columns, newspaper ads, and the Internet.<sup>15</sup> In many mail-order bride arrangements (for example, in Canada), Filipinas are forced to assume roles in domestic servitude or prostitution; they are denied contact with families back home<sup>16</sup> and are subject to physical, sexual, and emotional abuse.<sup>17</sup>

In Indonesia, the mail-order bride phenomenon takes place primarily from the West Kalimantan province, where Chinese-Indonesian women marry Taiwanese men.<sup>18</sup> While some of those women and girls end up in successful marriages, others may work as slaves in their husbands' homes.<sup>19</sup> In some cases, women have been forced to work in the sex industry or have been sold

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<sup>11</sup> Victoria Loginova, *Russian Women Long to Marry Westerners*, AGENCE FRANCE PRESSE, May 2, 2004, available at <http://www.arabnews.com/?page=9&section=0&article=44212&d=2&m=5&y=2004>.

<sup>12</sup> Alexandra Stadnyk, *Ukraine Takes Steps to Curb Trafficking*, KYIV POST (Ukr.), July 16, 2008, <http://www.kyivpost.com/nation/29255/>.

<sup>13</sup> INTERNATIONAL ORGANIZATION FOR MIGRATION, DECEIVED MIGRANTS FROM TAJIKISTAN: A STUDY OF TRAFFICKING IN WOMEN AND CHILDREN 45–46 (2001), available at [http://www.childtrafficking.com/Docs/iom\\_2001\\_\\_deceived\\_migrants.pdf](http://www.childtrafficking.com/Docs/iom_2001__deceived_migrants.pdf).

<sup>14</sup> Aida Santos et al., *The Philippines: Migration and Trafficking in Women*, in A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS: PATTERNS, PROFILES AND HEALTH CONSEQUENCES OF SEXUAL EXPLOITATION IN FIVE COUNTRIES 22, 27 (Janice G. Raymond et al. eds., 2002), available at <http://action.web.ca/home/catw/attach/CATW Comparative Study 2002.pdf>.

<sup>15</sup> *Id.* at 27.

<sup>16</sup> *Id.* at 35.

<sup>17</sup> PHILIPPINE WOMEN CTR. OF B.C., CANADA: THE NEW FRONTIER FOR FILIPINO MAIL-ORDER BRIDES (2000), available at <http://dsp-psd.pwgsc.gc.ca/Collection/SW21-62-2000E.pdf>.

<sup>18</sup> INT'L CATHOLIC MIGRATION COMM'N & AM. CTR. FOR INT'L LABOR SOLIDARITY, TRAFFICKING OF WOMEN AND CHILDREN IN INDONESIA 103 (Ruth Rosenberg ed., 2003), available at [http://www.icmc.net/pdf/traffreport\\_en.pdf](http://www.icmc.net/pdf/traffreport_en.pdf).

<sup>19</sup> *Id.* at 20.

directly to brothels.<sup>20</sup> Many of the marriages involve underage girls and falsified documents; most are facilitated through agents in Indonesia.<sup>21</sup>

Young Vietnamese girls have been trafficked through enticement into marriage to Taiwan, where they are sold into brothels and forced into prostitution.<sup>22</sup> In India, girls may be sold for marriage.<sup>23</sup> Internal trafficking for the purpose of marriage is also prevalent in China, where infant girls are frequently kidnapped or bought from poor parents—particularly migrant workers—and sold to childless families in more prosperous regions or sold to be raised as brides for poor farming families.<sup>24</sup>

In Egypt, temporary and transactional marriages have been reported, with young Egyptian women increasingly being married to wealthy suitors from the Persian Gulf as poverty levels rise.<sup>25</sup> While such temporary marriages are often arranged with parental consent, the transactional marriages are conducted by marriage brokers who aid foreign men in the procurement of Egyptian wives; both temporary and transactional marriages could amount to sex trafficking.<sup>26</sup>

In West Africa, a tradition involving the sale of female slaves, known as *trokosi*, or “wives of the deity,” is a modern-day form of slavery.<sup>27</sup> According

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<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.* at 17, 21.

<sup>22</sup> *Saigonese Couple Detained over Prostitute Trafficking to Taiwan*, VIETNAM NEWS BRIEFS, Dec. 5, 2003, available at 2003 WLNR 9241827.

<sup>23</sup> Devesh K. Pandey, *Girl Rescued from ‘Forced’ Marriage*, HINDU (India), Aug. 6, 2004, available at 2004 WLNR 11896450.

<sup>24</sup> ILO, Preventing Human Trafficking in the GMS, Where We Work: China (Yunnan), <http://www.ilo.org/public/english/region/asro/bangkok/child/trafficking/wherewework-china.htm> (last visited June 18, 2009).

<sup>25</sup> Ahmed Maged, *Human Trafficking: The Case of Egypt*, DAILY NEWS EGYPT, Aug. 1, 2008, <http://www.thedailynewsegypt.com/article.aspx?ArticleID=15456>.

<sup>26</sup> Mohamed Mattar, Stopping Women Trafficking in the Muslim World, Remarks at the American Islamic Congress Capitol Hill Distinguished Speaker Series (Apr. 1, 2008), <http://www.protectionproject.org/news/statuslegislation071707.htm>. On July 11, 2007, the Egyptian Council of Ministers passed a decision establishing the National Coordinating Committee to Combat and Prevent Trafficking in Persons, which, among its other activities, will be responsible for further researching the various forms of trafficking in Egypt. Mohamed Y. Mattar, *Egypt Establishing a National Committee to Prevent Trafficking in Persons: A Significant Step to Combat a Serious Violation of Human Rights*, <http://www.protectionproject.org> (follow “Egypt Establishing a National Committee to Prevent Trafficking in Persons: A Significant Step to Combat a Serious Violation of Human Rights” hyperlink) (last visited June 18, 2009). This is particularly significant given the need to gain additional information about and identify as such those forms of trafficking taking place in Egypt, but which may currently be otherwise categorized and addressed by the government under different labels. *Id.*

<sup>27</sup> Joana Mantey, *Trokosi: Indentured Servitude of Women Lingers in Pockets of West Africa*, VOICE OF AM., Oct. 9, 2006, <http://www.voanews.com/english/archive/2006-10/2006-10-09-voa23.cfm>.

to this tradition, young virgins are brought to a shrine to compensate for a crime or transgression committed by their families, perhaps generations earlier; the girls live as sex slaves to the priest.<sup>28</sup> In Zambia, the payment of *lobola* (bride price) is a common marriage tradition.<sup>29</sup> This practice exposes women to violence and abuse at the hands of husbands and in-laws who feel “that the payment entitles them to treat the bride as a virtual slave.”<sup>30</sup>

Some legislative measures have been adopted by countries to combat these practices. For example, domestic laws of many countries have specific restrictions on marriage to prevent forced or fraudulent marriages. An anti-trafficking law in the Philippines makes it a crime

[t]o introduce or match for money, profit, or material, economic or other consideration, any person or . . . any Filipino woman to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling, or trading him/her to engage in prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage.<sup>31</sup>

Furthermore, it is a crime “[t]o offer or contract marriage, real or simulated, for the purpose of acquiring, buying, offering, selling, or trading them to engage in prostitution, pornography, sexual exploitation, forced labor or slavery, involuntary servitude or debt bondage.”<sup>32</sup> In Vietnam, Prime Minister’s Decree 69 implemented steps to protect women from marriage fraud through “heightened due diligence in issuing marriage certificates and steps to ensure that the marriage is voluntary.”<sup>33</sup> Likewise, the Republic of Korea’s National Assembly passed the Marriage Brokerage Act in 2007 to regulate both international and national marriage brokers, prescribing a penalty of up to three years’ imprisonment or fines for dishonest marriage brokers.<sup>34</sup> A few

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<sup>28</sup> *Id.*

<sup>29</sup> JOANNA BOURKE-MARTIGNONI, WORLD ORGANISATION AGAINST TORTURE, VIOLENCE AGAINST WOMEN IN ZAMBIA: REPORT PREPARED FOR THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 22 (2002), available at <http://www.omct.org/pdf/VAW/ZambiaEng2002.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations, and for Other Purposes, Rep. Act No. 9208, § 4(c), 99:31 O.G. 4916–25 (May 26, 2004) (Phil.).

<sup>32</sup> *Id.* § 4(b).

<sup>33</sup> OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 262 (2008), available at <http://www.state.gov/documents/organization/105501.pdf> [hereinafter TRAFFICKING IN PERSONS REPORT].

<sup>34</sup> *Id.* at 157. The Trafficking in Persons Report issued by the U.S. Department of State documents 17 countries where forced marriage is a significant problem, including Afghanistan, Burma, China, Cambodia,

countries have specific forced marriage provisions contained within their criminal codes, including Cameroon,<sup>35</sup> Norway,<sup>36</sup> and Germany.<sup>37</sup> Where a specific law has not been enacted, some states prosecute forced marriages under criminal provisions prohibiting marital rape.<sup>38</sup> In situations where there is no prohibition on marital rape, perpetrators of forced marriage often commit their crimes with impunity due to a lack of adequate legislation.<sup>39</sup> Other

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Egypt, India, Indonesia, Iran, Republic of Korea, Mongolia, Nepal, North Korea, Papua New Guinea, Taiwan, Tajikistan, Vietnam, and Zambia. *Id.* at 53, 80, 83, 92, 111, 139, 141, 144, 156, 184, 189, 199, 205, 239, 241, 260, 263. Additionally,

North Korean women and children seeking to leave their country voluntarily cross the border into China, but some of these individuals, after they enter [China] in a vulnerable, undocumented status, are then sold into prostitution, marriage, or forced labor. While it is difficult to determine if [China's] male-female birth ratio imbalance, with more males than females, is currently affecting trafficking of women for brides, some experts believe that it has already or may become a contributing factor.

*Id.* at 92.

<sup>35</sup> Penal Code art. 356 (Cameroon).

<sup>36</sup> The Norwegian Penal Code provides:

Any person who by force, deprivation of liberty, improper pressure or any other unlawful conduct or by threats of such conduct forces anyone to enter into a marriage shall be guilty of causing a forced marriage. The penalty for causing a forced marriage is imprisonment for a term not exceeding six years. Any person who aids and abets such an offence shall be liable to the same penalty.

The General Civil Penal Code art. 222(2) (2005) (Nor.).

<sup>37</sup> Section 240 of the German Criminal Code provides:

- (1) Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment of not more than three years or a fine.
- (2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome.
- (3) The attempt shall be punishable.
- (4) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if the offender

1. causes another person to engage in sexual activity or to enter into marriage. . .

Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl. I] 3322, as amended, § 240 (Ger.).

<sup>38</sup> Under Swedish law, certain offenses committed against a current or former wife (including coercing her into doing something against her will) are labeled “gross violation[s] of a woman’s integrity,” punishable by imprisonment for a period of six months to six years. Brottsbalken [BrB] [Criminal Code] 4:4–4a (Swed.).

<sup>39</sup> C.E. Directorate Gen. of Human Rights, Equal. Div., *Forced Marriages in Council of Europe Member States: A Comparative Study of Legislation and Political Initiatives*, 43, C.E. Doc. CDEG (2005) 1 (prepared by Edwige Rude-Antoine), available at [http://www.coe.int/T/E/Human\\_Rights/Equality/PDF\\_CDEG\(2005\)1\\_E.pdf](http://www.coe.int/T/E/Human_Rights/Equality/PDF_CDEG(2005)1_E.pdf) [hereinafter *Forced Marriages Report*] (giving examples of countries, such as the Czech Republic, that do not criminalize marital rape).

criminal provisions used to prosecute these perpetrators include laws that penalize rape, indecent assault, false imprisonment, and duress.

In sum, illicit marriage practices constitute a significant problem in many countries. Combating the problem requires a more expansive definition of trafficking that recognizes not only trafficking for the purpose of a commercial sex act, but also trafficking for the purpose of forced marriage. Some countries, like the Philippines, are beginning to incorporate marriage into anti-trafficking laws.<sup>40</sup>

## II. PROCEDURAL DEVELOPMENT: ALLOWING VICTIMS OF TRAFFICKING ACCESS TO INTERNATIONAL JUSTICE AS VICTIMS OF A FORM OF VIOLENCE AGAINST WOMEN

Combating trafficking in women requires a more comprehensive approach. To this end, U.N. treaties increasingly allow trafficking victims access to international justice. In 1967, the U.N. Declaration on the Elimination of Discrimination against Women called upon states to take “appropriate measures, including legislation . . . to combat all forms of traffic in women and exploitation of prostitution of women.”<sup>41</sup> This language subsequently appeared in CEDAW, adopted by the United Nations in 1979.<sup>42</sup> The U.N. Declaration on the Elimination of Violence against Women of 1993 further broadened the concept of trafficking, defining it as a form of violence against women.<sup>43</sup>

Some domestic laws reflect this approach, allowing victims of trafficking the right to bring cases under violence against women statutes and receive compensation via mandatory restitution, civil action, or state funds. For example, the U.S. Victims of Trafficking and Violence Protection Act states that a court’s mandatory restitution order “shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses.”<sup>44</sup> Under Myanmar’s Anti Trafficking in Persons Law,

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<sup>40</sup> See *supra* note 31 and accompanying text.

<sup>41</sup> Declaration on the Elimination of Discrimination against Women, G.A. Res. 2263 (XXII), art. 8, U.N. GAOR, 22d Sess., U.N. Doc. A/RES/2263 (Nov. 7, 1967).

<sup>42</sup> CEDAW, *supra* note 7, art. 6.

<sup>43</sup> Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, art. 2(b), U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

<sup>44</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1593(b)(1), 114 Stat. 1464, 1488 (2006).

[t]he Central Body [for the Suppression of Trafficking in Persons] may for the purpose of utilizing for the suppression of trafficking in persons, repatriation and rehabilitation of trafficked victims:

- (a) establish a fund with money supported by the State and money donated from local and foreign sources.
- (b) accept and administer the property supported by the State and property donated from local and foreign sources.<sup>45</sup>

Azerbaijan's criminal law states that "courts shall resolve the matter of material and moral damages related to the victims of trafficking in persons . . . compensated from the assets of human traffickers, or trafficking victims' assistance funds, if the assets of human traffickers are not enough for compensation."<sup>46</sup> It is a positive development that domestic legal systems are allowing victims of trafficking access to such forms of justice; the expansion of this access reflects a similarly significant improvement in the international justice system.<sup>47</sup>

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<sup>45</sup> The Anti Trafficking in Persons Law, § 22, Law No. 5 (2005) (Myan.).

<sup>46</sup> Law on Trafficking in Persons art. 23 (2005) (Azer.).

<sup>47</sup> The Statute of the International Criminal Court (ICC), which was established on July 1, 2002, includes in the definition of a crime against humanity enslavement, sexual slavery, enforced prostitution, and "any other form of sexual violence of comparable gravity." Rome Statute of the International Criminal Court art. 7(c), (g), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Enslavement is defined as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." *Id.* art. 7(2)(c). Crimes against humanity under the ICC Statute may be prosecuted "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of that act." *Id.* art. 7(1). Consequently, trafficking in persons may qualify as a crime against humanity if it is highly organized or committed against a substantial number of victims. Examples of such cases include the enslavement of "comfort women" by the Japanese government during World War II, who were subjected to forced prostitution and other forms of sexual slavery. Rumi Sakamoto, *The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: A Legal and Feminist Approach to the 'Comfort Women' Issue*, 3 N.Z. J. ASIAN STUD. 49, 51 (2001). The Japanese government's use of comfort women as sex slaves has not been tried before an international court; however, the sexual enslavement of women in the former Yugoslavia was tried as a war crime in Bosnia by the International Criminal Tribunal for the Former Yugoslavia, the first time such crimes had been tried as war crimes. *Id.* That tribunal found three former Serb soldiers guilty of raping Muslim women and girls and convicted two of them of sexual enslavement for keeping Muslim women and girls in captivity for up to eight months, forcing them to work as domestic servants, compelling them to dance naked, leasing and selling them to other soldiers, raping and torturing them, and threatening to kill them if they did not comply. *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, ¶¶ 593–822 (Feb. 22, 2001). The three soldiers were sentenced to 12 to 28 years imprisonment. *Id.* ¶¶ 885, 887, 890. The court concluded that these acts of terror constituted a systematic attack on a civilian population and were thus crimes against humanity. *Id.* ¶¶ 578, 584. Such crimes normally carry a penalty of up to 30 years imprisonment with no statute of limitation. Rome Statute, *supra*, art. 77(1)(a). However, the court may impose a term of life imprisonment in cases of "extreme gravity of the crime." *Id.* art. 77(1)(b).

The Optional Protocol to CEDAW (Optional Protocol)<sup>48</sup> expands remedies for women at the international level in circumstances where they are denied access to justice at the national level, without creating any new substantive rights.<sup>49</sup> Article 2 of the Optional Protocol allows for the submission of communications to tribunals on behalf of an individual or a group of individuals, even when the author “can justify acting on their behalf without [their] consent.”<sup>50</sup> This mechanism allows others to file a complaint on behalf of a victim who may not be able to do so individually, expanding the victim’s right to access the justice system.

Article 2 also states that communications may be made when there is an alleged violation of “any of the rights set forth in the Convention,” whether the right to nationality<sup>51</sup> or employment benefits,<sup>52</sup> or an allegation of trafficking.

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<sup>48</sup> G.A. Res. 54/4, Annex, U.N. Doc. A/RES/54/49 (Oct. 6, 1999) [hereinafter Optional Protocol]. As of publication, the Optional Protocol has 97 ratifications. U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-8-b&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8-b&chapter=4&lang=en) (last visited June 18, 2009).

<sup>49</sup> Similar mechanisms for individual complaints have been created under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, the International Convention on the Elimination of All Forms of Racial Discrimination art. 14, Dec. 21, 1965, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195, and the Optional Protocol to the International Covenant on Civil and Political Rights art. 2, Mar. 23, 1976, 999 U.N.T.S. 302.

<sup>50</sup> Optional Protocol, *supra* note 48, art. 2.

<sup>51</sup> *Id.* In one communication, a British citizen who left the United Kingdom for Colombia had a baby son by a Colombian father in 1954. *Salgado v. U.K.*, Communication No. 11/2006, U.N. Comm. on the Elimination of Discrimination against Women [CEDAW Comm.], U.N. Doc. CEDAW/C/37/D/11/2006, ¶ 2.1 (2007). British law allowed nationality only through paternity, foreclosing her application for her son to obtain British nationality, even after amendments to the Nationality Act in 1981 and 2002. *Id.* ¶¶ 2.2–2.3. Those amendments allowed equal rights to women and men claiming nationality for their children while under the age of 18 and rights to persons born between 1961 and 1983, and so the complainant claimed violations of CEDAW under Articles 9(2), 1, and 2(f) for sex discrimination. *Id.* The Committee, applying Article 4(2)(e) of the Optional Protocol, declared the communication inadmissible because “the disputed facts occurred prior to the entry into force of the Optional Protocol for the state party and did not continue after that date.” *Id.* ¶ 8.7. Additionally, the Committee applied Article 4(1) of the Optional Protocol and rejected the communication because its author failed to exhaust domestic remedies by registering her son as a citizen between 1954 and 1974, which would have allowed the denial of her application to be appealed in the High Court. *Id.* ¶ 4.14

<sup>52</sup> In another communication, a resident of The Netherlands claimed that because she was working in her husband’s enterprise—in addition to another part-time job—at the time she gave birth, she was denied maternity benefits under the Self-Employed Persons Act because she received equal compensation for loss of income under the Sickness Benefits Act. *Nguyen v. The Netherlands*, Communication No. 3/2004, CEDAW Comm., U.N. Doc. CEDAW/C/36/D/3/2004, ¶ 2.3 (2006). The woman’s benefits from her work with her spouse did not exceed those from her salaried employment, but she was denied a remedy at every level of appeal. *Id.* ¶¶ 2.4–2.7. She claimed that Article 11(2)(b) of CEDAW entitles women to maternity leave with full compensation for loss of income from their work. *Id.* ¶ 3.1. However, the Committee noted that it “does

To date, only one complaint submitted by a trafficking victim in accordance with the Optional Protocol has been documented;<sup>53</sup> however, most communications that have been submitted involve domestic violence. For instance, in a complaint against the Austrian government on behalf of a deceased Austrian national of Turkish origin, it was alleged that the deceased had been a victim of offenses by a state party to CEDAW in violation of Articles 1, 2, 3, and 5.<sup>54</sup> The victim reported to the police that her husband choked her, threatened to kill her, and caused her bodily harm.<sup>55</sup> When the attacks continued, the police issued three expulsion and “prohibition to return” orders against him, but the husband ignored them and even disobeyed a court order.<sup>56</sup> Due to insufficient evidence, the public prosecutor ultimately stopped the prosecution for battery and criminal threats.<sup>57</sup> Shortly thereafter, the victim was shot by her husband in their apartment in front of their two daughters after a call to the police went unanswered.<sup>58</sup> The husband surrendered to the police two and a half hours after he committed the crime and is currently serving a life sentence.<sup>59</sup>

In reviewing the complaint, the CEDAW Committee referred to its Recommendation 19 on violence against women, in which it stated that “discrimination under the Convention is not restricted to action by or on behalf of Government” and that “[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>60</sup> The CEDAW

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not use the term ‘full’ pay, nor does it use ‘full compensation for loss of income’ resulting from pregnancy and childbirth. . . . [and it] leaves to States parties a certain margin of discretion to devise a system of maternity leave benefits to fulfil Convention requirements.” *Id.* ¶ 10.2. Because Dutch law provides for a compensated maternity leave for women who are salaried and self-employed, her request was again denied. *Id.* The Committee concluded that “[e]ntitlements under both schemes may be claimed simultaneously and awarded as long as the two together do not exceed a specified maximum amount.” *Id.* If the disputed facts occurred prior to the entry into force of the Optional Protocol for the state party, the communication would not have been admissible under Article 4(2)(c) unless the situation continued after that date. *Id.* ¶ 9.4.

<sup>53</sup> See *infra* notes 122–49 and accompanying text.

<sup>54</sup> *Goekce v. Austria*, Communication No. 5/2005, CEDAW Comm., U.N. Doc. CEDAW/C/39/D/5/2005, ¶ 1 (2007).

<sup>55</sup> *Id.* ¶ 2.1.

<sup>56</sup> *Id.* ¶¶ 2.2, 2.4, 2.6–2.8.

<sup>57</sup> *Id.* ¶ 2.10.

<sup>58</sup> *Id.* ¶ 2.11.

<sup>59</sup> *Id.* ¶ 2.12.

<sup>60</sup> *Id.* ¶ 12.1.1 (quoting CEDAW Comm., *General Recommendations Made by the Committee on the Elimination of Discrimination Against Women*, *General Recommendation No. 19*, ¶ 9, U.N. Doc. A/47/38 (1992) (relating to violence against women) [hereinafter *General Recommendation No. 19*]).

Committee recognized that Austria had in place the framework to address domestic violence through legislative action, criminal and civil law, public education, provision of shelters and counseling, and rehabilitation for perpetrators.<sup>61</sup> However, the Committee observed that,

in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.<sup>62</sup>

The Committee found that the police failed to exercise due diligence to protect the victim and that the public prosecutor should not have denied the requests of the police to arrest the husband.<sup>63</sup> The Committee recommended that Austria strengthen the implementation of federal preventive and prosecutorial law

to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim; and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.<sup>64</sup>

In another complaint against the Austrian government, the fact pattern showed that the victim and her husband frequently argued.<sup>65</sup> She asked for a divorce, but he refused and on multiple occasions threatened to kill her.<sup>66</sup> She twice sought a restraining order, but the public prosecutor rejected the requests.<sup>67</sup> The victim then filed a petition for divorce before the district court, which issued a temporary restraining order.<sup>68</sup> Shortly thereafter, her husband followed her from work and stabbed her to death.<sup>69</sup> He was arrested and

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<sup>61</sup> *Id.* ¶ 12.1.2.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* ¶ 12.1.5.

<sup>64</sup> *Id.* ¶ 12.3(a)–(b).

<sup>65</sup> *Yildirim v. Austria*, Communication No. 6/2005, CEDAW Comm., U.N. Doc. CEDAW/C/39/D/6/2005, ¶ 2.2 (2007).

<sup>66</sup> *Id.* ¶¶ 2.2, 2.3, 2.6, 2.9.

<sup>67</sup> *Id.* ¶¶ 2.4, 2.6, 2.9.

<sup>68</sup> *Id.* ¶¶ 2.11, 2.12.

<sup>69</sup> *Id.* ¶ 2.13.

sentenced to life imprisonment.<sup>70</sup> The victim's representative argued that the deceased was a victim of a state violation of CEDAW Articles 1, 2, 3, and 5, and that the state failed to protect her when the public prosecutors did not order the husband detained.<sup>71</sup>

The CEDAW Committee concluded that Austria had violated Articles 2 and 3 because a state party can be held accountable for the conduct of non-state actors.<sup>72</sup> In addition, the state violated Article 1 of the Convention and General Recommendation 19 of the Committee, which stated that the definition of discrimination in Article 1 includes violence against women.<sup>73</sup> The Committee recommended that the state fully implement the Federal Act for the Protection against Women within the Family; promptly prosecute perpetrators of domestic violence; actively cooperate with non-governmental organizations; coordinate the work of police, public prosecutors, and judges; and train officials on the international standards to combat domestic violence.<sup>74</sup>

In another case before the CEDAW Committee, the victim was a Pakistani citizen living in the United Kingdom with her two children.<sup>75</sup> She was seeking asylum based on the argument that if she were deported, she would be subject to death at the hand of her former husband.<sup>76</sup> The victim had married in Pakistan and had two children.<sup>77</sup> Her husband started to drink alcohol, took drugs, gambled, and asked his wife for money to support his habits.<sup>78</sup> On several occasions, she endured marital rape.<sup>79</sup> She and her husband divorced; nonetheless, her husband continued to harass her.<sup>80</sup> She reported him to the police, who failed to provide her with any protection.<sup>81</sup> Three years after the divorce, her ex-husband and others armed with knives threatened to kill her at her apartment.<sup>82</sup> She moved to the United Kingdom, where she sought

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<sup>70</sup> *Id.* ¶ 2.14.

<sup>71</sup> *Id.* ¶ 1.

<sup>72</sup> *Id.* ¶ 12.1.6.

<sup>73</sup> *Id.*; *General Recommendation No. 19*, *supra* note 60, ¶ 7.

<sup>74</sup> *Yıldırım*, Communication No. 6/2005, ¶ 12.3(a)–(d).

<sup>75</sup> *N.S.F. v. U.K. & N. Ir.*, Communication No. 10/2005, CEDAW Comm., U.N. Doc. CEDAW/C/38/D/10/2005, ¶ 1.1 (2007).

<sup>76</sup> *Id.* ¶ 2.1.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ¶ 2.2.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ¶ 2.3.

asylum.<sup>83</sup> Her application was rejected, but she appealed on the basis of a well-founded fear of persecution if she were to return to Pakistan.<sup>84</sup> She also asserted that her removal would be a violation of the Convention on the Status of Refugees and the European Convention on Human Rights.<sup>85</sup> Her asylum and human rights appeal was rejected by the first instance court on the grounds that she could relocate within her own country and that her claim did not amount to persecution.<sup>86</sup> She then appealed to the High Court, but her application was refused, and this decision was final within the United Kingdom.<sup>87</sup> She additionally filed for “temporary protection,” which was also refused.<sup>88</sup> Her application to the European Court of Human Rights was also rejected.<sup>89</sup>

Applying Article 4 of the Optional Protocol to CEDAW, the Committee determined that the communication was inadmissible.<sup>90</sup> Under Article 4, admissibility of a communication depends on whether “all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.”<sup>91</sup> As stated by the Committee in an earlier decision, “[t]he domestic remedies rule should guarantee that States parties have an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems before the Committee considers the violation.”<sup>92</sup> In the case of the Pakistani citizen,

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* ¶¶ 2.4–2.5.

<sup>85</sup> *Id.* ¶ 2.5.

<sup>86</sup> *Id.* ¶ 2.6.

<sup>87</sup> *Id.* ¶¶ 2.8–2.9.

<sup>88</sup> *Id.* ¶ 2.11.

<sup>89</sup> *Id.* ¶ 2.13.

<sup>90</sup> *Id.* ¶ 7.5(a).

<sup>91</sup> Optional Protocol, *supra* note 48, art. 4(1).

<sup>92</sup> *Kayhan v. Turkey*, Communication No. 8/2005, CEDAW Comm., U.N. Doc. CEDAW/C/34/D/8/2005, ¶ 7.5 (2006). In this case, the CEDAW Committee concluded that the author failed to exhaust domestic remedies. *Id.* ¶ 7.9. The woman claimed that she was a victim of a violation by Turkey of Article 11 of CEDAW. *Id.* ¶ 1.1. The woman, a national of Turkey, was a teacher of religion and ethics. *Id.* ¶ 2.1. She had worn a scarf covering her hair and neck since the age of 16. *Id.* She started teaching in 1991 at state schools and continued wearing her headscarf. *Id.* ¶ 2.2. In 1999, she received warnings and then a salary deduction for wearing the headscarf. *Id.* ¶ 2.3. She appealed, and the “warnings and penalty were removed from her record.” *Id.* In 2000, an investigation started, and she was asked to submit a written statement—which she did—explaining that she was in no way disturbing the peace or violating the democratic rules of the republic. *Id.* ¶ 2.4. Similar statements were sent to the Higher Disciplinary Council of the Ministry of Education, adding that if she were to be punished, it would constitute a violation of national and international laws. *Id.* ¶ 2.7. The Council dismissed her for “spoiling the peace, quiet and work harmony.” *Id.* ¶ 2.8. She appealed to the administrative court which refused her appeal. *Id.* ¶¶ 2.9–2.10. She appealed the administrative decision to the state council, which rejected her appeal and upheld the decision of the

the Committee found that the applicant had not exhausted all available domestic remedies, including review by the High Court into her allegation of sex discrimination, a violation never asserted by the victim.<sup>93</sup> But the CEDAW Committee asserted that the definition of discrimination against women in Article 1 of the Convention includes gender-based violence—“violence that is directed against a woman because she is a woman or that affects women disproportionately”—as stated in its General Recommendation No. 19.<sup>94</sup>

In a communication to the CEDAW Committee concerning the Hungarian government, a Hungarian Roma woman, the mother of three children, was forcibly sterilized.<sup>95</sup> The victim became pregnant, went into labor, and was taken to the hospital.<sup>96</sup> The attending physician found that the fetus had died and informed her that a caesarean operation must be performed to remove the dead fetus.<sup>97</sup> While on the operating table, the victim was asked to sign a consent form which included consent to the caesarean and also to sterilization.<sup>98</sup> The bottom of the form read: “Having knowledge of the death of the embryo inside my womb I firmly request my sterilization . . . . I do not intend to give birth again; neither do I wish to become pregnant.”<sup>99</sup> The victim

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administrative court. *Id.* ¶¶ 2.11–2.12. She complained to the CEDAW Committee that she was a victim of a violation by the state of Article 11 of CEDAW, which guarantees a woman’s right to work, and that the act of forcing her to choose between working and uncovering her head violated her right to freedom of religion under international law. *Id.* ¶ 3.1. Although the dress code embodied in the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments of 25 October 1982 specified that “[h]eads should be uncovered at the work place,” she alleged that the regulation is no longer applied in practice and was not enforced. *Id.* ¶ 3.3. The Committee noted that Kayhan never raised the issue of discrimination based on sex. *Id.* ¶ 7.6. Instead she focused on the inappropriateness of the penalty imposed against her, political and ideological issues, or her right to religion and freedom of choice. *Id.* The Committee, therefore, did not find it necessary to consider the availability and adequacy of other local remedies, including, as the state noted, review in accordance with the regulation on complaints and applications by civil servants, initiation of an action before the Turkish parliament under Article 74 of the constitution, and the remedy provided under Article 54 of the law on Administrative Judicial Procedures (the section regarding remedies against decisions). *Id.* ¶ 4.1. The Committee concluded that “the author should have put forward arguments that raised the matter of discrimination based on sex in substance and in accordance with procedural requirements in Turkey before the administrative bodies that she addressed before submitting a communication to the Committee.” *Id.* ¶ 7.7.

<sup>93</sup> *N.S.F.*, Communication No. 10/2005, ¶ 7.3.

<sup>94</sup> *Id.*; *General Recommendation No. 19*, *supra* note 60, ¶ 6.

<sup>95</sup> *A.S. v. Hungary*, Communication No. 4/2004, CEDAW Comm., U.N. Doc. CEDAW/C/36/D/4/2004, ¶ 1.1 (2006).

<sup>96</sup> *Id.* ¶ 2.1–2.2.

<sup>97</sup> *Id.* ¶ 2.1.

<sup>98</sup> *Id.* ¶ 2.2.

<sup>99</sup> *Id.*

claimed that she would never have agreed to the sterilization as she is a strict Catholic who follows traditional Roma customs.<sup>100</sup>

In October 2001, she filed a civil action against the hospital for failure to obtain full and informed consent for sterilization from the victim.<sup>101</sup> The town court rejected her claim on the ground that such consent was obtained.<sup>102</sup> She appealed, but again her appeal was rejected.<sup>103</sup> The appellate court found that the hospital was negligent in providing detailed information on sterilization and other options of birth control, and that the written consent of the victim did not preclude the hospital's liability for such negligence.<sup>104</sup> Nonetheless, the court concluded that the victim did not lose her reproductive capacity permanently and that the likelihood of her becoming pregnant by artificial insemination could not be excluded.<sup>105</sup> The victim claimed that Hungary had violated Article 10 of CEDAW, which states:

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

. . . .

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.<sup>106</sup>

In addition, the CEDAW Committee has issued several relevant General Recommendations. General Recommendation No. 21 states that women should have access to “information about contraceptive measures and their use, and guaranteed access to sex education and family planning services.”<sup>107</sup>

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<sup>100</sup> *Id.* ¶ 2.4.

<sup>101</sup> *Id.* ¶ 2.5.

<sup>102</sup> *Id.* ¶ 2.6.

<sup>103</sup> *Id.* ¶ 2.8.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> CEDAW, *supra* note 7, art. 10.

<sup>107</sup> CEDAW Comm., *General Recommendations Made by the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21*, ¶ 22, U.N. Doc. A/47/38 (1992) (regarding equality in marriage and family relations). Furthermore, Article 12 of CEDAW states:

(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

General Recommendation No. 24 defines acceptable services as “those which are delivered in a way that ensures that a woman gives her fully informed consent [and] respects her dignity” and advises states parties to “not permit forms of coercion, such as non-consensual sterilization . . . that violate women’s rights to informed consent and dignity.”<sup>108</sup> Finally, General Recommendation No. 19 states: “Compulsory sterilization . . . adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children.”<sup>109</sup>

The Committee, acting under the auspices of Article 7 of the Optional Protocol to CEDAW, concluded that Hungary had violated Articles 10, 12, and 16 of the Convention.<sup>110</sup> The Committee recommended that the victim be provided with appropriate compensation compatible with the gravity of the violations of her rights.<sup>111</sup> It also recommended that Hungary ensure that international standards concerning women’s reproductive health and rights “are known and adhered to by all relevant personnel in public and public health centres, including hospitals and clinics.”<sup>112</sup> In addition, it advised Hungary to adhere to international standards on informed consent in cases of sterilization

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(2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

CEDAW, *supra* note 7, art. 12.

<sup>108</sup> CEDAW Comm., *General Recommendations Made by the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24*, ¶ 22, U.N. Doc. A/47/38 (1992) (regarding Article 12 on women and health). The Convention further provides that

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

...

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

CEDAW, *supra* note 7, art. 16(1).

<sup>109</sup> *General Recommendation No. 19*, *supra* note 60, ¶ 22.

<sup>110</sup> A.S. v. Hungary, Communication No. 4/2004, CEDAW Comm., U.N. Doc. CEDAW/C/36/D/4/2004, ¶ 11.5 (2006); *see also* Optional Protocol, *supra* note 48, art. 7(3).

<sup>111</sup> A.S., Communication No. 4/2004, ¶ 11.5(I).

<sup>112</sup> *Id.* ¶ 11.5(II).

by taking measures such as amending existing domestic legislation where necessary and monitoring performance by hospitals and clinics.<sup>113</sup>

In another communication concerning Hungary, the author was a Hungarian national who claimed to be a victim of violations of Articles 2, 5, and 16 of CEDAW.<sup>114</sup> The victim claimed that she was subject to severe domestic violence by her husband, the father of her two children, including death threats and threats to rape their children.<sup>115</sup> She changed the lock on the door of the family apartment when her husband moved out, but this did not prevent him from breaking into the apartment and causing her serious harm that required hospitalization.<sup>116</sup> In civil proceedings regarding the husband's access to the family's residence, the court of the first instance and an appellate court authorized the husband's right of access to the jointly-owned property for lack of substantiation of the claim that he battered the victim and because his right to his property could not be restricted.<sup>117</sup>

The Committee noted that the state admitted that the legal and institutional arrangements were not yet in place to ensure protection of the victim against domestic violence in accordance with international standards, establishing that domestic violence cases did not enjoy high priority in court proceedings.<sup>118</sup> The Committee stated that “[w]omen’s human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.”<sup>119</sup> The Committee made reference to its previous comments on the case:

[T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence.<sup>120</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> A.T. v. Hungary, Communication No. 2/2003, CEDAW Comm., U.N. Doc. CEDAW/C/32/D/2/2003, ¶ 1.1 (2005).

<sup>115</sup> *Id.* ¶ 2.1.

<sup>116</sup> *Id.* ¶ 2.2.

<sup>117</sup> *Id.* ¶ 2.4.

<sup>118</sup> *Id.* ¶ 9.3.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting CEDAW Comm., *Report of the Committee on the Elimination of Discrimination Against Women*, ¶ 321, U.N. Doc. A/57/38 (2002)).

The Committee specifically recommended that the victim be granted a safe home, child support, legal assistance, and compensation for the harm she endured.<sup>121</sup> It also recommended that the state take the necessary measures to combat domestic violence. Specifically, it advised the state to protect victims; train judges, lawyers and law enforcement officials; enact a specific law prohibiting domestic violence, providing for protection and exclusion orders, and providing support services, including shelters; prosecute cases of domestic violence; ensure victims access to justice; and provide offenders with rehabilitation programs.<sup>122</sup>

In the only communication submitted to the CEDAW Committee under the Article 6 prohibition on human trafficking to date, a Chinese national claimed that the Netherlands was in breach of Article 6, which states that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”<sup>123</sup> The author of the communication had been orphaned as a child, and following the death of a grandmother who took care of her, she lived on the streets and was abused, raped, and forced into prostitution.<sup>124</sup> While still a minor, the author claimed to have been trafficked to the Netherlands for the purpose of prostitution.<sup>125</sup> After managing to escape, she was taken into the house of a Chinese woman, where she was made to do arduous housework and from which she was later forced out onto the street when it became clear she was pregnant.<sup>126</sup> While still a minor and pregnant with her daughter (who was born several months later), the author applied for asylum in the Netherlands, noting the abuse, intimidation, and rape that she had suffered.<sup>127</sup> This asylum request was denied by the Dutch Immigration and Naturalization Service (IND) on the grounds that the author could not provide details about her travel from China to the Netherlands, had no identity documents, and had waited eight months before filing the request.<sup>128</sup> A district court of the Hague subsequently denied an appeal of this decision on the grounds that the author faced no danger in returning to China; on the same date, the author was also refused a residency

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<sup>121</sup> *Id.* ¶ 9.6.

<sup>122</sup> *Id.*

<sup>123</sup> CEDAW, *supra* note 7, art. 6; Zhen Zhen Zheng v. The Netherlands, Communication No. 15/2007, CEDAW Comm., U.N. Doc. CEDAW/C/42/D/15/2007, ¶ 1 (2009).

<sup>124</sup> *Zheng*, Communication No. 15/2007, ¶ 2.1.

<sup>125</sup> *Id.* ¶ 2.2.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* ¶ 2.3.

<sup>128</sup> *Id.* ¶ 2.4.

permit request submitted separately to the IND.<sup>129</sup> Several subsequent applications for review were denied.<sup>130</sup> The author then applied for judicial review, which was still pending before the district court as the CEDAW Committee was reviewing admissibility of the author's communication.<sup>131</sup>

Based on the presentation of these facts, while the author acknowledged the state party's commitment to combating the crime of trafficking in persons, she claimed that it had been negligent and careless in its treatment of her application for asylum and had failed to provide her with needed specialized

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<sup>129</sup> *Id.* ¶ 2.5. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, United Nations Convention against Transnational Organized Crime Annex II, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2005), 2225 U.N.T.S. 209 [hereinafter Protocol to Prevent Trafficking], states:

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.
2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

*Id.* art. 7. Article 14 of the Council of Europe Convention on Action against Trafficking in Human Beings states:

1. Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
  - a. the competent authority considers that their stay is necessary owing to their personal situation;
  - b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.
2. The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.
3. The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.
4. If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.
5. Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

Convention on Action against Trafficking in Human Beings and its Explanatory Report art. 14, May 16, 2005, 197 C.E.T.S. 16. For a discussion regarding residency status of victims of trafficking, see Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357 (2006).

<sup>130</sup> *Zhen Zhen Zheng v. The Netherlands*, Communication No. 15/2007, CEDAW Comm., U.N. Doc. CEDAW/C/42/D/15/2007, ¶¶ 2.5, 2.6 (2009).

<sup>131</sup> *Id.*

legal assistance, protection, and support, all in breach of Article 6 of CEDAW.<sup>132</sup> In particular, the author noted that, while Dutch law allows a woman to obtain a residence permit if she informs the police that she has been a victim of trafficking, and if the police initiate a criminal investigation (B-9 scheme), IND had failed to inform her of the possibility of doing so and of obtaining the special permit.<sup>133</sup> She also claimed that during the second hearing of the asylum proceedings, at which she recounted the abuses she endured, the state party should have realized that she had been a victim of slavery and prostitution, especially given that her medical records showed that she had been traumatized.<sup>134</sup> The author also noted that a woman becomes vulnerable to those in a trafficking network once she informs the authorities about her situation.<sup>135</sup> Finally, she claimed that the state party did not take into account her low level of education, nor her status as a minor, as factors in her inability to recount her trip to the Netherlands from China and similar details requested by the state party; she asserted that the state party's immigration policy placed the blame on the victim of trafficking for her inability to provide this information.<sup>136</sup>

The state party challenged the admissibility of the author's communication, arguing that domestic remedies had not been exhausted, and furthermore that the author's claims in reference to Article 6 of CEDAW were not sufficiently substantiated as part of her domestic appeals, denying the state party an opportunity to remedy the alleged violation.<sup>137</sup> The state party noted that the author's application for judicial review was still pending as of the time she submitted her communication to the CEDAW Committee, and that her communication did not substantiate the claims being made under Article 6 of the Convention, failing to explicitly state how the article was violated in the particular case.<sup>138</sup> Finally, the state party challenged the author's claim that it had acted negligently in failing to inform the author of the B-9 scheme, stating that the author had failed, at a number of junctures throughout her asylum proceeding, to provide significant pieces of information relating to her circumstances either in China, en route from China to the Netherlands, or in

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<sup>132</sup> *Id.* ¶¶ 3.1–3.7.

<sup>133</sup> *Id.* ¶¶ 3.3–3.4.

<sup>134</sup> *Id.* ¶ 3.4.

<sup>135</sup> *Id.* ¶ 3.5.

<sup>136</sup> *Id.* ¶¶ 3.6–3.7.

<sup>137</sup> *Id.* ¶¶ 4.1–4.4.

<sup>138</sup> *Id.* ¶¶ 4.3–4.4.

the Netherlands proper.<sup>139</sup> The state party thus maintained that “there was no element in the author’s statements which should have prompted IND to notify the author of the possibility of reporting an instance of trafficking in persons to the law enforcement authorities.”<sup>140</sup> In conclusion, the state party noted that although the author had now been informed of the possibility of informing the police about her case of trafficking, she still had not done so.<sup>141</sup>

In considering this communication, the CEDAW Committee expressed the view that it

ought to be declared inadmissible under article 4, paragraph 1, of the Optional Protocol for non-exhaustion of domestic remedies both in the asylum proceedings, because the author did not appeal the decision . . . by the District Court of The Hague to the Administrative Jurisdiction Division of the Council of State, and in the residence permit proceedings because the author’s application for judicial review . . . is still pending.<sup>142</sup>

The Committee, referring to its jurisprudence, likewise observed that “the author must have raised in substance at the domestic level the claim that he/she wishes to bring before the Committee so as to enable domestic authorities and/or courts to have an opportunity to deal with such a claim.”<sup>143</sup> Finally, while sympathizing with the author’s inability to provide details regarding her identity and the trip from China to the Netherlands, as well as hardships suffered in the Netherlands, the CEDAW Committee found itself precluded from considering the case for non-exhaustion of domestic remedies.<sup>144</sup>

However, the Committee’s decision was not unanimous. A dissenting opinion issued by three Committee members argued for admissibility of the communication on the grounds that the complaint revolved around the issue of trafficking, rendering both the asylum and resident permit procedures pursued by the author irrelevant to the case.<sup>145</sup> It also argued for admissibility because the state party had an international obligation under Article 6 of CEDAW to protect trafficking victims by adequately training law enforcement officials to

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<sup>139</sup> *Id.* ¶ 4.6.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* ¶ 4.8.

<sup>142</sup> *Id.* ¶ 7.3.

<sup>143</sup> *Id.* ¶ 7.3 (citing *Kayhan v. Turkey*, Communication No. 8/2005, CEDAW Comm., U.N. Doc. CEDAW/C/34/D/8/2005 (2006); *N.S.F. v. U.K. & N. Ir.*, Communication No. 10/2005, CEDAW Comm., U.N. Doc. CEDAW/C/38/D/10/2005 (2007)).

<sup>144</sup> *Id.* ¶ 7.3.

<sup>145</sup> *Id.* ¶ 8.7.

identify potential victims of trafficking and to advise them as to the available avenues for remedies and protection, especially considering the special vulnerability of victims of trafficking.<sup>146</sup> Citing the author's interview and medical reports,<sup>147</sup> as well as Articles 3(a) and (b) of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, to which the Netherlands is a state party,<sup>148</sup> the dissenting Committee members expressed the view that clear signs were available to IND that the author had been a victim of trafficking under CEDAW. Noting the author's inability to provide details of her journey from China to the Netherlands, the Committee members argued:

In the light of the nature of the crime of trafficking and the difficulty for victims, who are often uneducated and traumatized, to report precisely and with great details their experience, we are of the view that IND did not act with the due diligence that the author's situation required by failing to recognize that she might have been a victim of trafficking in human beings and accordingly inform her of her rights, including the possibility to avail herself of the B9 scheme. Under the Palermo Protocol, such a duty is clearly established under article 6. Furthermore, we wish to recall that in the concluding observations issued to the State party in 2007, the Committee urged the State party to provide all necessary benefits to victims of trafficking regardless of whether they are able to cooperate.<sup>149</sup>

In a closing remark, the dissenting Committee members also noted that

an important purpose served by the Optional Protocol under the CEDAW Convention, when it is used by women, is that it provides

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<sup>146</sup> *Id.* ¶¶ 8.1–9.2.

<sup>147</sup> *Id.* ¶ 8.6.

<sup>148</sup> These articles define trafficking in persons as:

(a) "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;

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

Protocol to Prevent Trafficking, *supra* note 129, art. 3(a)–(b).

<sup>149</sup> *Zheng*, Communication No. 15/2007, ¶ 8.7.

States parties the opportunity to assess the weaknesses in the procedures, the legal and administrative institutions and implementation processes of the legal system that do not allow women to obtain the benefit of the law as intended and to take remedial action.<sup>150</sup>

### CONCLUSION

There has been some progress in the anti-trafficking movement since the passage of the UDHR. I have highlighted two main developments: an expansion in the definition of trafficking in persons to include all forms of exploitation, especially illicit marriage practices, and the right of victims of trafficking to file individual complaints to the CEDAW Committee, thus enhancing their access to justice. The CEDAW Committee does not make binding decisions, solely issuing recommendations expressing its views as to the merits of a complaint, and sending its “suggestions and general recommendations” to the state party in violation of a provision of the CEDAW Convention.<sup>151</sup> The Committee may also request that the state party invoke interim measures to prevent further harm, though it does not have the authority to condemn the state, nor can it impose any sanctions on it for non-compliance.<sup>152</sup> While these remedies still seem inadequate, they do, nevertheless, constitute a major development in the enforcement of international human rights law, which mainly relies on reporting mechanisms.<sup>153</sup> As one commentator concludes;

The protection of human rights, as much or even more than other areas of government policy, cries out for the vigilant involvement of individual citizens. Government policies must be subjected to probing challenges that expose hypocrisy and pierce efforts to cover-up complicity. Human rights are too important to be left in the unsupervised hands of governments.<sup>154</sup>

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<sup>150</sup> *Id.* ¶ 9.2.

<sup>151</sup> CEDAW, *supra* note 7, art. 21(1).

<sup>152</sup> CEDAW Comm., *Report of the Committee on the Elimination of Discrimination Against Women, Part I, General Rules*, Rule 63(1), U.N. Doc. A/56/38 (2001).

<sup>153</sup> See Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VAND. J. TRANSNAT'L L. 1355 (2008).

<sup>154</sup> Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 472 (2002); see also, Rachael E. Schwartz, *Chaos, Oppression, and Rebellion: The Use of Self-Help to Secure Individual Rights Under International Law*, 12 B.U. INT'L L.J. 255 (1994); Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007).

