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WOMEN AND MIGRATION INTERIM REPORT ON TRAFFICKING IN WOMEN

By Annette Lansink (*Rapporteur*)

1. Introduction

This Interim Report builds on the Preliminary Report on Women and Migration by this *Rapporteur* that was presented at the 70th International Law Conference in New Delhi, India in March 2002. The Interim Report, part of a series of reports on various forms and aspects of migration, focuses on trafficking in women and the creation of an international human rights framework to combat trafficking in women. The Interim Report examines the possibility of setting up a more sustained human rights framework that can guide national legislators and policy makers in the drafting or improvement of anti-trafficking laws and policies. This approach centres the human rights and interests of women and moves beyond a crime prevention and criminal justice framework. The main objective of this Report is to subject the UN Trafficking Protocol to a critical analysis from a human rights, migration and gender perspective. In doing so, the Report examines how the international law of trafficking can be progressively developed so as to promote the achievement of human rights standards and the incorporation of perspectives of women. Anti-trafficking measures and strategies can be situated within different and, to a certain extent, overlapping frameworks: a migration, criminal law, labour law, gender, human rights, and/or (sexual) morality framework. The context within which trafficking is primarily located determines the strategies and measures designed to address trafficking. The Report argues for a gender and a broad human rights-based approach to trafficking that situates trafficking within the desire or need of women to migrate.

While the development of international law instruments and legal rules in domestic jurisdictions are important objectives in combating trafficking, a feminist perspective requires us to interrogate the *discourses* around trafficking as well. Legal rules, one way or the other, reflect the ideological (in its broadest sense) or cultural paradigms of their exponents. To such an extent legal rules are contested terrain. Thus, due consideration must be given to ideological factors such as the desire to control women and curtail women's rights to mobility; the conflation of trafficking and prostitution; economic and political factors in the global world order; the representations of women in the social imagination and the commodification of the female body. Ultimately, these shape the form and content of proposals for law reform. In that sense, the Reports of the *Committee on Feminism and International Law* are, at times, likely to be distinguished from most other ILA Reports in that a less legalistic and more contextual approach is taken to the topic under discussion.

A feminist analysis of international law requires, at a minimum, closely scrutinising existing rules and practices, and where necessary or possible transforming rules and boundaries of international law in ways that accommodates feminist perspectives. Feminists attempt to make visible, not only the exclusionary practices of rule- and decision-making, but also the gendered nature of many concepts and principles. Hilary Charlesworth and Christine Chinkin have shown that the international legal system itself is gendered and how male perspectives are institutionalised in apparent neutral rules and principles¹. Transforming international law may thus require imagining new ways of understanding, interpretation and problem-solving. It is a task that moves far beyond issues of representation and involves interrogating discursive practices and the epistemological foundations of legal rules.

2. Global Context

Globalisation and the opening of national borders have not only led to greater international exchange of capital and goods, but also to increasing migration of labour. Improved transportation and the communications and information technology systems have contributed to a growing number of people moving across borders. Between 1985 and 2000 the number of people residing outside their country of origin increased by 67%. People migrate in search of better economic opportunities. Men and women migrate from poorer and politically less stable countries to the more secure and affluent countries within or outside the region. Contrary to popular perception, the majority of migrants live in developing countries.² Trends suggest that international migration is not going to recede, on the contrary it is predicted that migration is likely to increase over the coming decades. It is now estimated that around 175 million³ reside in a country other than the one in which they were born. Almost half of them are women. The opening up of international markets and expanding transnational social networks are factors facilitating population flows. While, those elements of globalisation enhance migration in a positive sense by increasing opportunities and choices, the downside of globalisation is that it has augmented poverty and inequality in many parts of the world, mostly in the countries of the so-called 'South'. The sociologist Manuel Castells has pointed to the accentuation of uneven development, not only between North and South, but also between countries and within countries, between the dynamic segments of societies and those at the periphery.⁴ This inequality thus becomes a 'push' factor for migration.

¹ Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: a Feminist Analysis*, 2000, Juris Publishing Manchester University Press, 49.

² ILO, Facts on Migrant Labour, 2003. It is estimated that 60% of migrants live in developing countries

³ IOM, *World Migration Report*, 2003. This figure excludes irregular migrants, but includes migrant workers, permanent immigrants, refugees and displaced persons.

⁴ Manuel Castells *The Information Age*, volume 1 *The Rise of the Network Society*, at 2, (2002) Blackwell Publishers, UK.

Simultaneously, criminal activities have become global. Transnational syndicates, using informational technologies and improved transportation systems, are illicitly trading any commodity across borders from weapons to humans or human organs. The face of capital has changed, now characterised by the technological and informational revolution, interdependency of economies globally, the global integration of financial market, selective de-regulation of markets in an increasing number of states, the strength of capital vis-à-vis labour, the incorporation of a large proportion of women into the paid workforce, and the further marginalisation of the 'South'. But the transformation that is taking place since the last two decades or so is not only social and economic, but also political, such as declining state sovereignty. Inducing the transformation of social relations are factors such as the emancipation of women and the redefinition of the relationships between the sexes and the role of family. The end of the 20th century has seen fundamental challenges to patriarchy and the patriarchal family. The institutionally enforced authority of men over women and children is unraveling in many societies. The power of women's movements, the transformation of the economy and the labour market, the rapid and global dissemination of ideas have all contributed to calling into question the role of women and the values of the patriarchal family. Together with an increase in educational opportunities for women, the transformation of gender relations has led to greater participation in the global labour market and greater autonomy of women.

Although people have always migrated, it can be said that the global economic trajectory has engendered a contemporary wave of migration that is characterised by a significant increase in the magnitude and diversity of global connections. Globalisation denotes the free flow of capital or liberalisation of capital exchanges, but the flow of labour is not 'free' and is subject to different constraints and political considerations. The international legal response often fails to take into account the social and economic factors that produce movement. It also fails to acknowledge the gendered and political nature of its responses. Ratna Kapur states that the international regime is produced in part by the "disciplinary and at times punitive legal order that has been erected to address cross-border movements".⁵ Female migration, in particular, is not addressed within the framework of the global economy and the search for better economic opportunities, but through a trafficking or smuggling lens.⁶ This response is based on a specific idea of womanhood, victim and lack of agency and produces the woman as a disempowered subject⁷, to be treated as a perpetual minor. In this scenario men migrate and women are trafficked.

The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, has pointed out that while trafficking "is a particular violent form of movement", trafficking must be understood in "the broader context of violations that are committed against women in the course of their movement and migrations" and warns against misconstruing the needs of trafficked women in ways that undermine the rights of women, especially the freedom of movement and the right to earn a living⁸. It is therefore important to guard against contributing to discursive practices that produce the female migrant as a person continuously in need to be protected or rescued. Moreover, cultural, racial or religious prejudices and stereotypes are often part of such 'Othering' practices as well. It is essential to guard against reifying a cultural 'Other' by locating migration and trafficking within simplified paradigms of helpless women,

⁵ Ratna Kapur 'Some Comments on the Legal Regulation of Trafficking, Migration and Terrorism: Impact on Cross-border Movements and Women's Rights', paper presented at the International Symposium: The International Legal Order, 4-5 November 2002.

⁶ Ibid.

⁷ See also Jyoti Sanghera 'Towards the Construction of an Empowered Subject: A Human Rights Analysis of Anti-trafficking' (conference paper on file) (2001).

⁸ United Nations, Economic and Social Council, Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, 29 February 2000, E/CN.4/2000/68.

hapless victims of a variety of oppressive regimes or sexist attitudes in so-called 'second' or 'third world' countries, and always in need to be 'rescued' by Western or other feminists.⁹

3. Trafficking

Trafficking in persons cuts across all forms of migration, amongst those who escape poverty, lack of economic, political, social and educational opportunities but also amongst those who are political refugees. Recent research conducted by the International Organization for Migration (IOM) in Southern Africa highlights the existence of trafficking of refugee women in the Southern African context. But the vast majority of people who are trafficked are migrant workers.¹⁰ Increasingly restrictive immigration policies of countries of destination have contributed to a growing market for irregular migration services. Jyoti Sanghera has said that trafficking is "an outcome of the need for people to migrate on the one hand and the growth of services in the migration market, including exploitative and violative practices, on the other hand."¹¹

There is not only an increase in the international demand for migrant workers, but the migrant workers profile is changing as well. The female migrant is becoming more visible. More women are migrating independently from their husband or family. It is estimated that almost half of the migrants are women.¹² Because of lack of opportunities at home, migrants seek economic opportunities in other countries. But migration processes and procedures affect women differently than men. Factors such as domestic violence, lack of employment, lack of educational opportunities and discriminatory practices for women contribute to women migrating. In the country of destination, the type of employment available to women differs from those available to men. Trafficking affects women and children disproportionately. Women are trafficked within and across national borders. Women who seek to escape poverty are approached or approach 'recruitment agencies' to assist them with finding employment and making travel arrangements. Or traffickers recruit victims through fake advertisements, mail-order bride catalogues and casual acquaintances¹³. Once the trafficked persons arrive in the country of destination, they may find themselves in a different situation than expected. They are forced to work, for example, in the sex industry, in sweatshops as bonded labour or forced into domestic work, instead of the job they were promised, and/or to work under conditions to which they do not agree. Upon arrival, victims are placed in conditions controlled by the traffickers. Many are physically confined and their travel documents are taken away.

Trafficking always contains a non-consensual element (such as coercion, fraud, and deception) and is done for the purposes of exploitation. Migrants fear going to the police, they may not speak the local language, or they fear the use of violence. Through the use or threat of violence, or the threat of retaliatory violence against family, traffickers seek compliance from the trafficked person. Some are kept in debt bondage. Restrictive immigration policies in many countries, a rise in transnational crime, the demand for sex work, and exploitative practices have led to an increase in trafficking and smuggling of persons across

⁹ See for example Jo Doezema 'Ouch! Western Feminists' 'Wounded Attachment' to the 'Third World Prostitute' ' vol 67 *Feminist Review* (Spring 2001) 16.

¹⁰ Anti-Slavery International/Mike Kaye *The Migration-Trafficking Nexus: Combating Trafficking through the Protection of Migrant's Human Rights*, United Kingdom, 2003.

¹¹ Jyoti Sanghera 'Towards the Construction of an Empowered Subject: A Human Rights Analysis of Anti-trafficking', above note 7. See also Jyoti Sanghera's presentation at an informal seminar in New Delhi on 2 April 2002 hosted by the Chair of the Committee, Justice Sujata Manohar. Sanghera is now an Advisor on Trafficking, UN Office of the High Commissioner for Human Rights, Geneva.

¹² International Organization for Migration, 2003.

¹³ United Nations, Office on Drugs and Crime at http://www.unodc.org/unodc/en/trafficking_human_beings.html

the world. It is said that the rise in trafficking in persons for sexual purposes is the most rapidly expanding segment of organised transnational crime.

The most important differences between trafficking and smuggling are the use of force/coercion for the purposes of exploitation. Smuggling is defined as 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 of which the person is not a national or permanent resident. Smuggling involves "migrants who have consented to the smuggling".¹⁴ Trafficked persons, on the other hand, have not consented or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive means used by the trafficker. In addition, upon arrival in the country of destination the involvement of the smuggler ends, but the trafficker continues to exploit the labour or services of the trafficked person in the country of destination to generate profits for the trafficker.¹⁵ Moreover, smuggling is always transnational, but trafficking can occur within one country. But as Anne Gallagher points out, implementation of the distinction between trafficked persons and smuggled migrants "is likely to be both difficult and controversial"¹⁶ The distinction will not always be obvious without active investigation. The journey may also contain elements of both smuggling and trafficking, a person may start her or his illegal migration into another country as a smuggled person, only to be deceived or forced into an exploitative situation to render services or labour. Moreover, states have an interest to identify a person as being smuggled rather than trafficked: the trafficked person is afforded better protection, which imposes a greater financial and administrative burden on the state.¹⁷

Trafficking in persons is not confined to prostitution or the sex industry. Although often conflated with prostitution, trafficking is not limited to the purpose of prostitution, but also covers other forms of exploitation such as forced labour or services or slavery. The United States Government has estimated,¹⁸ that between 600.000 to 800.000 persons are trafficked across international borders annually. This figure is in addition "to a far larger yet indeterminate number of people trafficked within countries". The U.S. Government estimates that over half of all trafficked persons internationally are trafficked for sexual exploitation¹⁹. Eighty percent of the trafficked persons are women and half are children.²⁰

Trafficking in South Asia and South East Asia is well documented and governments and non-governmental organisations in these regions have for many decades focused on ways to combating trafficking.²¹ It has been estimated that the largest number of trafficked persons comes from Southeast Asia (over 225.000) and South Asia (150.000).²² The "former Soviet Union is now believed to be the largest new source for trafficking for prostitution and the sex industry". More than 100.000 trafficked persons are trafficked from the former Soviet Union and an additional 75.000 from Eastern Europe each year.²³ In 1998 the Ukrainian Ministry of Interior estimated, that 400.000 Ukrainian women had been trafficked in the past decade.²⁴ Women from Eastern Europe are being trafficked to Western Europe and Central Asia.²⁵ Western

¹⁴ http://www.unodc.org/unodc/en/trafficking_victim_consent.html

¹⁵ Ibid.

¹⁶ Anne Gallagher 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' *Human Rights Quarterly* (November 2001) at 1000.

¹⁷ Ibid.

¹⁸ US State Department, *Trafficking in Persons Report 2004*. The estimates in the US *Trafficking in Persons 2003 Report* were 800.000 to 900.000.

¹⁹ Ibid.

²⁰ Ibid.

²¹ See also the Preliminary Report on *Women and Migration*, ILA Report of the 70th Conference, New Delhi 299-337(2002).

²² Francis T Miko and Grace (Jea-Hyun) Park 'Trafficking in Women and Children: The U.S. and International Response' Congressional Research Service Report 98-649 C, U.S. Department of State (2000)

²³ Because trafficking is an underground criminal activity most figures are estimates.

²⁴ IOM, *Trafficking in Migrants*, IOM Quarterly Bulletin, Special Issue, April 2001. However, the figure of 400.000 is disputed (conversation with Gulnara Shahinian).

Europe is a destination region for victims of trafficking coming from a wide range of source countries. For example, Nigerian women are being trafficked to Italy, Belgium and the Netherlands. Thai and Brazilian women have been trafficked to Great Britain and Ukrainian women to Germany and the Balkans. There is less data available on trafficking in Latin America and Africa, but that does not mean that trafficking is not a serious problem. It is estimated that, more than 100.000 persons come from Latin America and the Caribbean and over 50.000 persons are trafficked from Africa.²⁶ There is increasing concern about the growth in trafficking in Africa in recent years. Recent research by UNICEF²⁷ and a survey done by the IOM (International Organization for Migration) indicates an increase in trafficking from African countries to Europe, to the Middle East and within Africa (e.g. from Ghana, Mali to Nigeria; from Mozambique, Swaziland to South Africa).²⁸ Substantial trafficking takes place within national borders and within a sub-region.

In a recent research study on *Trafficking in Women and Children for Sexual Exploitation in Southern Africa*, the IOM concluded that the Southern African region hosts a diverse range of trafficking activities, from "the global operations of Chinese triad societies, and Russian and Bulgarian 'mafia' that touch the region as an afterthought, to the local land-border trade in African women and children."²⁹ South Africa is a country of origin, transit and destination for traffickers. Trafficking in South Africa takes place within the country, cross-border within the region, and, from as far as, Thailand, China and Eastern Europe. To give one example, Mozambican girls and women between 14 and 24 are offered jobs as waitresses or sex workers in Johannesburg. Once in Johannesburg they are being sold to brothels for a thousand rand (about \$150), sold on private order, or shopped around to mineworkers as 'wives', according to the IOM. The IOM estimates that at least one thousand Mozambican victims are recruited, transported and exploited in this way every year.³⁰ Another example is trafficking in Malawi, which is characterised by three distinct trafficking flows: (i) victims trafficked to Europe; (ii) land border trafficking to South Africa; (iii) victims trafficked by sex tourists from Europe.³¹ The IOM identified at least nine distinct trafficking patterns in Southern Africa. However, there are weaknesses in the survey. The weaknesses are a result of inadequacies associated with incomplete data that have a bearing on the conclusions on trafficking flows in the region.³²

²⁵ IOM, *Trafficking in Migrants*, IOM Quarterly Bulletin, Special Issue, April 2001.

²⁶ Miko and Park, above note 22.

²⁷ UNICEF, Innocenti Research Centre, *Trafficking In Human Beings, Especially Women and Children*. Report released on 24 April 2004.

²⁸ IOM (2001), above note 24.

²⁹ IOM, Pretoria, *Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa*, May 2003, 3rd edition. Research findings were first presented on 24 March 2003.

³⁰ Ibid. There is little research on transnational trafficking in Southern Africa. The quality of the IOM research on trafficking in women and children is contested. Patterns of trafficking are established on the basis of 232 interviews, including with 25 victims in eleven countries. See also Ted Leggett 'Hidden Agendas? The risks of Human Trafficking Legislation' *South African Crime Quarterly*, Institute for Security Studies (2004). Other relevant research on trafficking in Africa is by the Innocenti Research Centre of UNICEF (2004) and two research reports by Molo Songololo, a non-governmental organisation. Molo Songolo's research on trafficking in women was based on interviews with foreign women working in prostitution.

³¹ IOM, *ibid.* at 13. Victims trafficked to Europe are held in slavery-like conditions. According to the Report one brothel in the Netherlands brands trafficking victims. The research identified the following three trends in Malawi : (i) victims trafficked by air (via Johannesburg) to Europe (traffickers are Malawian business women with links to Nigerian criminal syndicates); (ii) land border trafficking to South Africa by long-distance truck-drivers and Malawian business women and victims are recruited with offers of marriage, study or employment); and (iii) child victims trafficked by sex tourists from Europe (traffickers pay money to the parents and promise educational opportunities for the child in Europe, who are sexually exploited, sold to pedophile rings and feature in pornographic videos).

³² Some country patterns were based on interviews with very few trafficked persons, see above note 30. Others are apparently corroborated by other information such as the Malawi pattern mentioned above in note 29 (conversation with one of the researchers, Maciej Pieczkowski).

There are different patterns and purposes of trafficking in various regions. Women are trafficked for work in the sex industry, but trafficking also occurs for purposes of labour in sweatshops, for marriage, or for domestic work³³. Due to the feminisation of poverty, lack of educational and economic opportunities, discrimination, certain customary practices, ideological representations of women and their roles in family and society, women have been more vulnerable to trafficking than men. This insight, however, has led to the adoption of overprotective measures. In some countries this has led to the adoption of draconian measures against migration.³⁴ It is important to guard against treating women as minors and confusing protection against exploitation with curtailing freedom of movement or controlling their sexuality. Jyoti Sanghera puts it succinctly "trafficking is the process of transforming an agent into a victim within the context of migration".³⁵ While trafficking must be combated effectively with the imposition of heavy penalties, the ways and means of fighting trafficking in children and trafficking in women must be differentiated. Trafficking in children is outside the scope of this Report, children need protection, and special attention must be given to their needs and vulnerability. Children must always be protected against participation in prostitution. Adults, and that includes women, must be treated as persons endowed with agency and autonomy.

The adoption in Palermo, at the end of 2000, of the Convention Against Transnational Organized Crime and the three Protocols is regarded as a milestone in the global efforts to combat transnational organised crime. The Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children deals comprehensively with trafficking in persons³⁶. It has been signed by 117 states and ratified by 62 states, and entered into force on 25 December 2003.³⁷ Besides the United Nations Palermo Trafficking Protocol of 2000, a regional instrument, the SAARC Convention on Trafficking in South Asia was signed in 2002. These treaties attempt to combine a transnational criminal law approach with safeguarding certain - albeit limited - human rights for trafficked persons.

The main objective of this Report is to examine the UN Trafficking Protocol critically by using a human rights and gender analytical framework. It provides an overview of the most relevant provisions and examines which sections of the treaty fall short of international human rights standards. Such a critique may assist civil society and governments, who intend or are in the process of incorporating the Palermo Trafficking Protocol into their domestic law, in designing anti- trafficking programmes within their jurisdiction.

³³ Trafficking also happens for purposes of begging, and for the purpose of being used as camel jockeys. (According to Anti-Slavery International (2003) children from Pakistan and Bangladesh as young as four are trafficked to the United Arab Emirates to be used as camel jockeys, but the UAE has since 2002 put a stricter ban on the use of children under 15 years).

³⁴ See for example, draft legislation in Nepal mentioned by Jyoti Sanghera and Ratna Kapur '*An Assessment of Laws and Policies for the Prevention and Control of Trafficking in Nepal*' (December 2000), The Asia Foundation, Kathmandu and Horizons Project Population Council, New Delhi.

³⁵ Jyoti Sanghera, above note 7 at 9.

³⁶ Trafficking Protocol, G.A. res.55/25, UN Doc. A/45/49 (2001). Convention against Transnational Organized Crime, GA res. 55/25, (2001). http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2.

³⁷ http://www.odccp.org/odccp/crime_cicp_signatures_trafficking.html Countries that ratified the Convention have established a body to monitor implementation of the Convention and the Trafficking Protocol. In terms of Art 32 of the Convention the Secretary-General of the United Nations must convene a Conference of Parties within one year of the date that the Convention enters into force, to improve the capacity of States Parties to combat transnational organised crime and to promote and review the implementation of the Convention and the Protocol. The Conference was held in Vienna during June/July 2004. See <http://www.unodc.org>

4. Locating Trafficking in Women within a Human Rights Framework

In July 2002 the United Nations High Commissioner for Human Rights (UNHCHR) presented its Recommended Principles and Guidelines to the UN Economic and Social Council.³⁸ These, together with the (unofficial) Annotations by the Washington based International Human Rights Law Group,³⁹ the UN Interpretative Notes,⁴⁰ the European Union Council Framework of 19 July 2002,⁴¹ recommendations by Anti-Slavery International,⁴² the Report of the Special Rapporteur on Violence Against Women,⁴³ and other documents form the basis of the following discussion and proposals.

4.1 Prosecuting Trafficking

The United Nations Trafficking Protocol is primarily an instrument to combat the growth of transnational organized crime. It is a law enforcement rather than a human rights treaty, as evidenced in the comparatively weaker sections relating to protection and assistance to the trafficked person⁴⁴. However, since protection and assistance is one of the three purposes of the Protocol, the Committee recommends that governments adopt domestic laws and policies that protect the rights of trafficked persons and provide assistance in accordance with international human rights law standards. Article 6 CEDAW imposes an obligation on States: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women". The Committee on the Elimination of All Forms of Discrimination Against Women, in General Recommendation No.19 (11th session 1992), states that trafficking is incompatible with the equal enjoyment of rights by women, with respect for their rights and dignity and that it puts women at special risk of violence and abuse.

Trafficking is a human rights violation and action to combat trafficking needs to be rooted in protecting the human rights of trafficked persons. Of relevance, in this regard, are the Universal Declaration of Human Rights and general or specific human rights law treaties such as the UN Slavery Convention and the Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions and Practices Similar to Slavery; the International Covenants on Civil and Political Rights and Social, Economic and Cultural Rights; the UN Convention on the Elimination of All Forms of Discrimination Against Women; the UN Convention on the Rights of the Child and the Optional Protocol on the sale of children, child prostitution and child pornography; the UN Convention on the Protection of the Rights of All Migrant Workers and their Families (1990); and regional conventions, such as the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the American Convention on Human Rights; the OAS Convention on the Prevention, Punishment and Eradication of Violence Against Women, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter. In addition to human rights law treaties, international criminal law (UN Convention against Transnational Organized

³⁸ United Nations High Commissioner for Human Rights, Report to the Economic and Social Council, UN Doc. E/2002/68/Add.1, 20 May 2002.

³⁹ Ann D. Jordan, Director Initiative Against Trafficking in Persons, International Human Rights Law Group, Washington, DC, at http://www.hrlawgroup.org/initiatives/trafficking_persons/. Now at <http://www.globalrights.org>

⁴⁰ The Interpretative Notes (*travaux préparatoires*) A/55/383/Add.1 Addendum to the Protocol at http://www.odccp.org/crime_cicp_convention_documents.html

⁴¹ Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings (official Journal L 203, 01.08.2002), <http://europa.eu.int/scadplus/leg/en/Pvb/133137.htm>.

⁴² See note 10 above.

⁴³ See note 8 above.

⁴⁴ See also a Note by the UNHCHR, UNICEF and IOM on the draft Protocol concerning migrant smuggling and trafficking in persons to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, eight session, Vienna, 21 February-3 March 2000, A/AC.254/27.

Crime, Trafficking and Smuggling Protocols, Rome Statute of the International Criminal Court), labour conventions (ILO Conventions No. 29, 105, 182 and also ILO Conventions No.97 and 143 on migrant workers), customary international law and non-legally binding instruments, such as the Beijing Declaration and Platform of Action (1995) and the UN World Conference on Human Rights (1993), are relevant to trafficking and the protection of human rights of trafficked persons.

The purposes of the Palermo Trafficking Protocol are:

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

Trafficking has been defined in article 3 of the Trafficking Protocol:

"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 purposes 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."⁴⁵

The Human Rights Law Group has suggested that the international definition is not appropriate for use in national legislation, because the language is ambiguous and it has too many elements that would have to be proven by prosecutors. The Human Rights Law Group proposes the following definition for inclusion in domestic criminal codes: "Trafficking in persons" shall mean the recruitment, transportation, harbouring or receipt of persons by any means, for forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁴⁶ The advantage of such a definition is that the specific means used to move someone into a trafficking situation (such as by means of the use of force, other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability⁴⁷) need not to be proven. In addition, this definition only uses crimes that are defined in international law (such as forced labour or services, slavery or practices similar to slavery).⁴⁸ The Council of the European Union, Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings,⁴⁹ instructs Member States to adopt the necessary measures to ensure that the acts described in the Palermo Trafficking Protocol's definition are punishable.

International law does not define the following two terms of article 3: "exploitation of the prostitution of others" and "other forms of sexual exploitation". As briefly pointed out in the Preliminary Report, the terms were intentionally left undefined in the Palermo Protocol. The delegates that negotiated the Trafficking Protocol were unable to reach agreement on a definition. The proposal of the Human Rights Caucus not to define the terms, so as to allow Governments to determine their own position on the criminalisation or not of non-coerced adult sex work was accepted. It had been suggested that, since forced

⁴⁵ Trafficking for body organs only occurs when a *person* is transported for the purpose of removing organs.

⁴⁶ Ann Jordan, Human Rights Law Group, above note 39, at 7.

⁴⁷ According to the UN Interpretative Note: "The *travaux préparatoires* should 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."

⁴⁸ Although servitude is not defined as such in international law, international law does list specific instances of servitude in the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

⁴⁹ 2002/629/JHA

or coerced adult sex work is covered in the Palermo Trafficking Protocol in the context of slavery, forced labour or servitude, national legislation does not need to include the terms. If national governments, however, intend to do so, they would have to define these terms. A possible definition has been suggested: "sexual exploitation" means the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, coercion, abduction, force, abuse of authority, debt bondage or fraud⁵⁰. "Exploitation of the prostitution of others" could be defined as: obtaining by a person of any financial or other benefit from the sexual exploitation of another person⁵¹.

4.1.1 Sexual Exploitation and Feminist Contestations

The negotiations of the Trafficking Protocol were characterised by disagreements among feminist NGO's on the definition of trafficking and its relation to prostitution. The controversy over the definition of trafficking and the in- or exclusion of consensual participation in prostitution or voluntary migrant sex work led to heated debates and delays during the negotiation process⁵². Feminist NGO's and UN agencies, such as the Office of the High Commissioner for Human Rights made interventions into the negotiations. Alliances were formed and two main coalitions emerged. According to Anne Gallagher, the "International Human Rights Network" comprised of NGO's who oppose all forms of prostitution ("abolitionist") and intended to ensure that trafficking remained linked to both forced and consensual prostitution, in line with the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. The "Human Rights Caucus", on the other hand, sought to exclude voluntary migrant sex work from the definition of trafficking.⁵³

Gabrielle Simm examines the two dominant feminist positions adopted at the negotiations of the Trafficking Protocol.⁵⁴ The feminist interventions were "largely determined by whether the relevant feminist NGO or UN agency understood prostitution as sexual slavery or as sex work, and whether it saw trafficking as synonymous with prostitution or as capable to a wide range of forced labour activities".⁵⁵ Radical feminists regard all prostitution as sexual slavery and consent to prostitution impossible under the present patriarchal social system. But the second coalition of groups makes a distinction between forced and voluntary prostitution. Simm uses the term materialist feminists to describe the group.⁵⁶ Others, however, have used the term liberal or libertarian feminism for the same group or theoretical position.⁵⁷

The Coalition Against Trafficking in Women (CATW) argued against the "inclusion of a requirement to prove lack of consent to prostitution" as it sees all prostitution as the abuse of a position of vulnerability.⁵⁸ Over 140 NGO's supported the "Human Rights Network" According to CATW all prostitution is forced and a form of violence against women. To pay for commercial sex services is an act

⁵⁰ Human Rights Law Group, above note 39, at 9.

⁵¹ Ibid.

⁵² Section 4.1.1 is not intended to revive the forced v voluntary prostitution or sex work debate, its purpose is to contextualise and describe the different positions taking by feminist groupings during the negotiations of Section the Trafficking Protocol.

⁵³ Anne Gallagher, above note 16 at 1002. Anne Gallagher was Advisor on Trafficking, Office of the High Commissioner for Human Rights.

⁵⁴ Gabrielle Simm 'Negotiating the United Nations Trafficking Protocol: Feminist Debates' *Australian Year Book of International Law* vol 23 (2004) 135 at 137. See also Kara Abramson on this debate, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' *Harvard International Law Journal* vol. 44 (2) (2003).

⁵⁵ Ibid. at 136.

⁵⁶ Ibid. at 142 and 139.

⁵⁷ Kara Abramson, above note 54. Bridget Anderson and Julia O'Connell Davidson *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, IOM December 2003, Geneva.

⁵⁸ Ibid.

of sexual exploitation. CATW regards sexual exploitation of women, including prostitution, as being cruel, inhuman and degrading treatment. This organisation has called upon governments to penalise not only the traffickers and pimps, but also the men who buy women for sex.⁵⁹ The UN Working Group on Contemporary Forms of Slavery of the Sub-Commission on the Promotion and Protection of Human Rights also adopted the 'sexual slavery position'.

All other UN bodies, such as the UNHCHR and UNICEF who intervened in the negotiating process, argued that it was necessary to distinguish between voluntary and forced prostitution. This position was supported by major NGO's, such as the Global Alliance Against Trafficking in Women (GAATW), the International Human Rights Law Group, Stichting Tegen Vrouwenhandel, La Strada, Women's Consortium, under the umbrella of the Human Rights Caucus.⁶⁰ Accordingly, this view holds that only forced prostitution is akin to slavery or forced labour and trafficking for the purpose of prostitution falls within this category. However, prostitution that is not forced is sex work. These NGO's and 'materialist feminists' argue that sex workers should be granted the protection of labour laws relating to union representation, occupational health and safety, worker's compensation, taxation and insurance.⁶¹

Many anti-trafficking measures are informed by a "rescue and rehabilitation" approach, which has been criticised by those who stress autonomy and agency of women. When sex workers decide to migrate their choice should be respected. As Jamie Chuang points out the normative debates over "whether women should be permitted to consent to prostitution tend to derail efforts to combat the forced or slavery-like conditions under which a prostitute may work".⁶² While critiquing both the 'autonomy' and 'protectionist's' arguments, Kara Abramson suggests that, neither factors that complicate meaningful consent, particularly in the arena of sex work should not be overlooked, nor should the agency of women to choose this work be denied.⁶³ For Andrea Dworkin, however, male dominance "means that society creates a pool of prostitutes by any means necessary so that men have what men need to stay on top, to feel big, literally, metaphorically, in every way...". Prostitution is not regarded as a free choice, but as the "absence of meaningful choices".⁶⁴ Catherine MacKinnon puts it this way "if prostitution is a free choice, why are women with the fewest choices the ones most often found doing it?"⁶⁵ Dworkin and MacKinnon, leading American radical feminists in the 1980's, have consistently campaigned against prostitution.⁶⁶ But a current generation of feminists, motivated by different theoretical positions, and wary of 'grand narratives' of dominance and victimization, have sought to highlight agency and multiplicity of subject positions. The different motives inform the measures that are advocated in the fight against trafficking.

⁵⁹ CATW (Coalition against Trafficking in Women) at <http://www.catwinternational.org>.

⁶⁰ GAATW (Thailand with offices in many other countries), International Human Rights Law Group (US), Stichting Tegen Vrouwenhandel (Netherlands), La Strada (Poland, Ukraine, Czech Republic and many other countries), Women's Consortium (Nigeria).

⁶¹ Gabrielle Simm, above note 54 at 140, 142. There are more strands of feminism, such as postcolonial feminism and third world feminism, and postmodern feminism, that do not necessarily support one or the other approach in the debate. Postmodern feminism emphasises difference and deconstructing monolithic categories such as 'women' and dominance theories. There are divergent views and approaches on the above debate on prostitution within postcolonial and so-called third world feminism

⁶² Janie Chuang 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 *Harvard Human Rights Journal* 65 at 86.

⁶³ Kara Abramson 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' *Harvard International Law Journal* vol. 44 (2) (2003) 473 at 492 and 495.

⁶⁴ Dorchen Leidholdt 'Prostitution: A Violation of Women's Human Rights' *Cardozo Women's L.J.* (1993) 133, 136 quoted in Kara Abramson 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' *Harvard International Law Journal* vol. 44 (2) (2003) at 489.

⁶⁵ Catherine A MacKinnon 'Prostitution and Civil Rights' *Michigan Journal Gender & Law* (1993) at 28.

⁶⁶ See also CATW, Janice Raymond *Prostitution as Violence Against Women: NGO Stonewalling in Beijing and Elsewhere*, and Donna M Hughes and Claire M Roche (ed) *Making the Harm Visible: Global Sexual Exploitation of Women and Girls, Speaking Out and Providing Services*.

The dual illegality of sex work and migration encourages smugglers and traffickers, because the traffickers and pimps threaten trafficked sex workers with deportation if they go to the police. It has been said that, criminalisation of sex work has been unsuccessful in dismantling the sex industry.⁶⁷ This school of thought advocates legalising prostitution, so that prostitution or sex work can be regulated, and women working in the sex industry can rely on labour law protection against exploitative conditions. Marjan Wijers, points to the different economic situations prevailing for male and female migrants "male migrants entered the formal labor market through formal channels. They didn't have the most attractive types of employment, but at least they had work permits. Women have been relegated to the informal sector in traditional women's work: domestic and sexual services, either in the sex industry or in arranged marriages. These jobs are often not recognized as 'work'; there are no labour protections for them, no access to legal working permits."⁶⁸

Legal constraints on entry and work permits promote the growth of unregulated markets, where illegal or legal migrants in coercive circumstances ply their trade and exploitative conditions exist. Would legalisation of sex work and brothels, like the Netherlands has done, decrease the problem of trafficking? Until brothels were legalised in the Netherlands, brothel owners employed, an estimated, 40 to 75 % illegal immigrants. As, it was said, there "was no real incentive to deny jobs to illegal migrants". Now, however brothels are at risk to lose their license and are therefore more reluctant to employ illegal migrants.⁶⁹ While trafficked persons enter the country legally or illegally, even if they entered legally, traffickers often take away passports or other travel documents so that the person cannot prove that they have a right to be in the country.⁷⁰ Legalising the sex industry, unionism of sex workers to prevent downward pressure on wages by illegal migrants, and EU immigration regulations have contributed to 'keeping the foreigners out' as foreigners would not be able to obtain a work permit to work in licensed brothels. In principle a sex worker without a European Union passport could apply for a permit as self-employed worker if they can prove an economic interest of the state, but this would mostly fail.

Interestingly, the European Court of Justice in *Jany and Others v Staatssecretaris van Justitie* held that prostitution is a provision of services for remuneration which falls under the concept of economic activities for self-employed persons in terms of the association agreements between the EU and Poland and the Czech Republic. Applicants from these two countries had to show that they genuinely intended to take up an activity as self-employed persons without entering into an employment contract or without recourse to public funds and with, from the onset, sufficient financial resources.⁷¹ In response to an argument on behalf of the Dutch Minister of Justice, the Court held that "conduct which a Member State accepts on the part of its own nationals cannot be regarded as a threat to the public order" when it is practiced by self-employed Polish or Czech prostitutes. The Court held that in terms of the association agreements the Dutch government could not refuse residence permits.

⁶⁷ Leah Platt 'Regulating the Global Brothel' TAP: Vol. 12, Iss. 12, at <http://www.prospect.org/printV12/12/platt-1.html>

⁶⁸ Marjan Wijers quoted in Leah Platt 'Regulating the Global Brothel'. Marjan Wijers and Lin Lap-Chew are the authors of international study carried out by the Foundation Against Trafficking in Women (STV) and the Global Alliance Against Trafficking in Women (GAATW) *Trafficking in women, forced labour and slavery-like practices in marriage, domestic labour and prostitution*, Utrecht/Bangkok (1997). Wijers is an expert on the consultative 'Experts Group on Trafficking in Human Beings' appointed in 2003, European Commission Decision 2003/209/EC of 25 March 2003,

⁶⁹ Leah Platt, 7.

⁷⁰ Anti-Slavery International (2003), above note 10.

⁷¹ *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, European Court Reports 2001, 1-08615, Judgment 20 November 2001, Case C-268/99. Judgment at http://europa.eu.int/smartapi/cgi/sga+docu?smartapi!prod!CELEX_numdoc&Lg=en=numdoc=61999J0268

In 1999, the Swedish went against the European trend of 'liberalising' prostitution and adopted an approach to prostitution more in line with the abolitionist camp that views prostitution degrading and a form of violence against women. The law prohibits the buying of sexual services as it is regarded as an unequal contract in a male dominated society. Buyers, not sellers, of sexual services are criminalised.⁷² The present Swedish position, reverses the earlier position during the 1960's and 1970's to promote the decriminalisation of prostitution and commercial sex, and contrasts with the approaches taking by the Dutch, Danish and German governments. These divergent trends illustrate the different feminist attitudes to prostitution or sex work. Understandably with so much contestation surrounding the issue, the Trafficking Protocol, as the *travaux préparatoires* indicate, leaves it to individual states to criminalise or decriminalise prostitution or sex work.

Now that the Trafficking Protocol has adopted a coercion-based definition of trafficking and broadened trafficking to cover a wide range of exploitative situations, the relevance of the trafficking-prostitution has declined. The Dutch Working Group on Feminism and International Law⁷³ correctly emphasises that in the context of trafficking, sex work is always objectionable, because it is done under conditions of deceit, fear and coercion. But that outside the context of trafficking, the question whether sex work can ever be regarded as voluntary work, raises another debate that should not obfuscate the development of effective legal strategies to combat trafficking. Conflating trafficking and prostitution shifts the focus of attention from exploitative labour or services and coercive or abusive means inherent in trafficking to the type of work. It also ignores trafficking for other purposes such as other forms of forced labour, domestic work and commercial marriages. For related reasons, Abramson proposes a labour-based definition of trafficking that centers on the illicit movement of people and illegal or poorly regulated forms of labour. Thus the traditional 'association' of trafficking and prostitution⁷⁴ has made many activists cautious about the definition of trafficking and 'incorporating' the prostitution-debate into it. This explains the advocacy of some human rights groups, which prefer linking trafficking to slavery, forced labour and slavery-like practices and using the existing definitions in international law without trying to define forms of sexual exploitation.⁷⁵

4.1.2 Forced Labour, Slavery, Slavery-like Practices and Servitude

The term "forced labour" is defined in article 2 (1) of the International Labour Organization Convention Concerning Forced Labour No.29 as follows: "forced or compulsory labour shall mean all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." Exploitation of illegal and legal migrants and forced labour occurs in many sectors, in domestic work, industry, agriculture, tourism, cleaning and construction. Migrant workers rights are inadequately protected in the national laws of many countries. Inadequate labour and human right protection of migrants, together with the lack of regular migration opportunities and the need to migrate for reasons of economic survival, create an environment in which trafficking and exploitation flourishes. Although irregular migrants are most at risk of being subjected to forced labour and

⁷² Sari Kouvo, http://www.penelopes.org/Anglais/xarticle.php?id_article=21

⁷³ The Rapporteur is grateful to Committee member Rikki Holtmaat and Marjan Wijers, member of the Dutch Working Group, for very helpful comments on the draft Report, that were submitted on behalf of the Dutch Working Group on Feminism and International Law.

⁷⁴ The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. See this Committee's Preliminary Report, ILA Conference 2002, New Delhi Conference. In *Jordan v State 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC)* the State contended that one of the eight reasons to prohibit prostitution was to curb the extent of prostitution in South Africa for its association with and encouragement of trafficking in women. *Judgment also at* <http://www.concourt.gov.za/files/jordan/jordan.pdf>

⁷⁵ *Inter alia*, GAATW and the Human Rights Law Group.

exploitation, legal migrants are at risk as well. Trafficking for the purposes of forced labour or services includes trafficking for labour in sweatshops, for domestic work, commercial marriages and for forced prostitution. Like trafficking for forced prostitution, women who are trafficked for forced domestic labour and marriage are recruited by deceptive, coercive, fraudulent or violent means and made to work under exploitative conditions or subjected to slavery-like conditions.⁷⁶ The focus should be on the forced labour conditions or slavery-like practices of labour or services rather than on the question of whether the work or services are inherently exploitative (such as is often done in relation to prostitution, but not regarding domestic or other work).

The United Nations Slavery Convention (1926) defines slavery as follows: "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" In terms of Article 1 of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slave Trade "practices similar to slavery" include debt bondage, serfdom, forced marriage and other forced practices.⁷⁷

The ICTY Appeals Chamber in *Prosecutor v Kunarac* accepted the thesis that the traditional concept of slavery, as defined in the 1926 Slavery Convention ("chattel" slavery) has evolved to encompass various contemporary forms of slavery which are all based on the exercise of any or all of the powers attaching to the right of ownership. These contemporary forms of slavery form part of enslavement as crime against humanity under customary international law. The indicia of enslavement include the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour". According to the Appeals Chamber consent is not an element of the crime and they reject the contention that the lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent. Consent is "often rendered impossible or irrelevant by a series of influences such as detention, captivity or psychological oppression".⁷⁸

The Rome Statute of the International Criminal Court includes enslavement (art.7.1(c)) as a crime against humanity. "Enslavement" means the exercise of any or all of the powers attached to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in

⁷⁶ Janie Chuang, above note 62.

⁷⁷ Practices similar to slavery: (a) "debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

(b) "Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status

(c) "Any institution or practice whereby:

- (i) 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 or guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person;

(d) "Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour."

⁷⁸ <http://www.icty.org> *Prosecutor v Kunarac and others*, Appeals Chamber, Judgement of 12 June 2002, paras 106 - 124. Sexual slavery under the crime of "enslavement" (there is no explicit crime of sexual slavery in the ICTY Statute).

particular women and children. Signifying a move to link trafficking and slavery-like practices.⁷⁹ In times of armed conflict, women are extremely vulnerable to slavery. Korean women were forced into sexual slavery and held as so-called 'comfort women' by the Japanese during the Second World War. The Women's War Crimes Tribunal 2000 for the Trial of Japanese military sexual slavery held that the original Tokyo Tribunal had failed to address the issue of sexual slavery and rape⁸⁰. The Women's Tribunal found that the Japanese military had established "sexual slavery facilities and a complex trafficking network to compel women into providing sexual 'service' where soldiers were stationed... and that women and girls were forced or coerced into these stations, often 'recruited' by deceptive promises".⁸¹ Captured women in the former Yugoslavia were held and subjected to rape, in Sierra Leone women were abducted and held as sex slaves. There are many other examples of sexual slavery during war and armed conflict. Article 7(1)(g) of the ICC Statute mentions sexual slavery explicitly: "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity". CEDAW General Recommendation 19 (1992) also links wars, armed conflicts and the occupation of territories to increased trafficking in women and the need for States to provide specific protective and punitive measures.⁸²

It is clear from the above that existing understandings of forced labour or services, slavery or practices similar to slavery or servitude would cover all forms of trafficking - from trafficking into forced begging to forced prostitution. Individual states can decide whether they find it necessary to include 'sexual exploitation' in addition to the above. The EU Council Framework of 19 July 2002 follows the UN Trafficking Protocol, but mentions, in addition, pornography within the ambit of "sexual exploitation".⁸³

Article 3 (b) of the Trafficking Protocol states: "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." Even if the domestic legislation would not list the specific means, such as force, coercion, deception etc, consent of the trafficked person would still be irrelevant if the person is held under conditions of forced labour, slavery, debt bondage and other forced conditions. When a woman is threatened or locked up in a room, or when her movements and contacts with other persons are controlled by the trafficker, then any initial consent to work for little money as a domestic worker or as a prostitute is no longer relevant, because she did not consent to be held under threat or in debt bondage or slavery-like conditions. Characteristic of trafficking is its non-consensual nature. The lack of informed consent distinguishes it from other forms of migration⁸⁴

Article 3 (c) deals with trafficking in children. Any recruitment, transfer, harbouring or receipt of a person for the purposes of exploitation is regarded trafficking whether by force, deception or fraud etc. or not is irrelevant. It is advisable that governments, when drafting their anti-trafficking legislation, clearly distinguish between trafficking in adults and in children. To reiterate, children need to be protected, the best interests of the child should be paramount. A child should never be regarded as consenting to exploitation or to participation in prostitution. The Committee recommends, that domestic legislation addresses the

⁷⁹ Radikha Coomarswamy calls this "the modern approach to link trafficking and practices similar to slavery", above note 8.

⁸⁰ The Women's War Crimes Tribunal, a non-governmental organisation tribunal, was organised by women's NGO's in Asia to 'complete' the Tokyo War Crimes Tribunal, by adjudicating on the issue of 'comfort women', the *Prosecutors and the People's of the Asia-Pacific Region v Emperor Hirohito et al and the Government of Japan*.

⁸¹ http://210.145.168.243/pk/153th_issue/200122304.htm Committee member Christine Chinkin was one of the four judges on the Tribunal.

⁸² CEDAW, General Recommendation No. 19 (1992) on Violence Against Women, no.15.

⁸³ EU Council Framework Decision under Article 1 Offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation, reads "...for the purpose of exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography".

⁸⁴ See Radhika Coomaraswamy, above note 8 at 12.

special needs of children beyond the requirements of the Palermo Protocol, and include relevant provisions from Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the International Labour Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No.182.⁸⁵

4.1.3 Mandatory Law Enforcement Provisions

All states that ratify the Trafficking Protocol must adopt legislative and other measures to establish as criminal offences the conduct set forth in article 3. The law enforcement provisions in the Protocol and the Convention are mandatory. The Human Rights Law Group in a Protocol Annotation on article 5 (2) draws attention to the fact that the Trafficking Protocol is intended to punish the traffickers and not the trafficked victims, and that the trafficked persons should not be prosecuted for 'organizing' or 'participating' or 'assisting' in their own trafficking. It is important that effective and proportionate sentences are imposed on individuals and legal persons found guilty of trafficking. The Protocol does not prescribe minimum sentences, unlike the Council Framework of the European Union of 19 July 2002 that imposes, in specific circumstances, a penalty of at least eight years. Recent judgements in the U.S. highlight the severe sentences imposed on traffickers. In *U.S. v Jiminex-Calderon*, the accused were sentenced to 17 years, while in *U.S. v Bungos* the accused was sentenced to 8 years for his involvement in a sex trafficking ring in New Jersey.⁸⁶

The Convention against Transnational Organized Crime compels States to adopt legislative, administrative and other measures against corruption of public officials⁸⁷. Criminalising corruption should be included in national anti-trafficking laws and policies. The UNHCHR also recommend legislative provisions for the punishment of public sector involvement or complicity in trafficking and related exploitation.⁸⁸ Confiscation, seizure and disposal of confiscated proceeds are also dealt with in the Convention. An interesting proposal is contained in article 14 of the Convention, dealing with the disposal of confiscated proceeds of crime or property. It allows States to give special consideration to concluding agreements on contributing (part of) the value of confiscated proceeds to a special fund for technical assistance to developing countries and countries with economies in transition, and to intergovernmental bodies specializing in the fight against organized crime.

Anti-Slavery International quote estimates of \$ 7 to \$ 10 billion net profits worldwide for those involved in trafficking in persons.⁸⁹ The United Nations estimates that the profits from human trafficking rank it among the top revenue sources for organised crime, after the trade in drugs and arms⁹⁰. The high-profit nature of trafficking and the transnational nature of the crime, even if assets were found in only one country, should encourage governments to share the assets. It is recommended that distribution of assets should, in the first place, take into consideration compensation, restitution and damage awards to the trafficked persons, and secondly to fund other victim services and anti-trafficking programmes. The

⁸⁵ See also Human Rights Law Group. The Human Rights Caucus, UNHCHR, UNICEF and IOM also recommended addressing the special needs of children.

⁸⁶ Cases without citation are mentioned in the Calendar on <http://www.legislationline.org/>

⁸⁷ Article 8, 9 of the UN Convention Against Transnational Organized Crime

⁸⁸ UNHCHR Guideline 4.

⁸⁹ Anti-Slavery International, *The Migration-Trafficking Nexus: Combating Trafficking through the Protection of Migrants' Human Rights*, 2003, 6, quoting UNICEF UK *End Child Exploitation: Stop the Traffic*, London, 2003. The IOM study, mentioned above in note 29, estimates that the Mozambican victims generate one million South African rands profit (approx. \$150,000) for the traffickers per year.

⁹⁰ See US Department 2004 *Trafficking in Persons Report*. Whether this is correct is debatable. Most estimates and rough guesses have become facts in the trafficking discourse.

Convention and Protocol are aimed at combating transnational organized crime, that is, crimes or offences involving more than one State, committed by an organized criminal group (a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established by the Convention or Trafficking Protocol, in order to obtain, directly or indirectly, a financial or material benefit).⁹¹ It is recommended that, in addition, national anti-trafficking legislation also punish individual traffickers and trafficking within the country.

4.2 Protection of and Assistance to Trafficked Persons

The United Nations High Commissioner for Human Rights has recommended that the human rights of trafficked persons should be at the centre of all efforts to prevent and combat trafficking, and to protect, assist and provide redress to victims. Anti-trafficking measures should not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked. States have a responsibility under international law to assist and protect trafficked person.⁹² Trafficked persons are often unwilling to seek the assistance of the police and pursue charges against the trafficker for a variety of reasons, such as threat or use of violence, irregular immigration status, debt bondage, emotional attachment to the trafficker and/or lack of alternatives.⁹³ These factors explain how traffickers maintain control over trafficked migrants, and the lack of co-operation with law enforcement authorities against traffickers. Even when prosecution does take place, inappropriate national legislation for these offences often prevents conviction or traffickers are given light sentences.⁹⁴ Many countries do not have legislation dealing specifically with trafficking. But under the European Union Council Framework Decision on Combating Trafficking in Human Beings (2002), all EU states (including the new EU member states who acceded in March 2004) must make amendments to their domestic law by 1 August 2004.

According to article 6 of the Palermo Trafficking Protocol: each State Party, in appropriate cases and to the extent possible, shall protect the privacy and identity of victims of trafficking, and provide information and some assistance in legal proceedings. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of trafficking persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations, and other elements of civil society, and, in particular, the provision of

- (a) appropriate housing
- (b) counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking can understand
- (c) medical, psychological and material assistance
- (d) employment, educational and training opportunities⁹⁵

The obligations contained in this important article are weak ("in appropriate cases", "to the extent possible", "shall consider"). Although at the negotiating phase, the Human Rights Caucus did not succeed in persuading government delegates to commit to providing basic services, article 6 (3) "does reflect a consensus that certain services are necessary"⁹⁶. The recommendations of the UNHCHR go further. The UNHCHR recommends that states ensure that trafficked persons are protected from further exploitation and

⁹¹ Certain crimes, e.g. corruption, do not need the requirements of transnationality and being committed by an organized criminal group.

⁹² See the UNHCHR Recommended Principles 1,2, and 3 'The Primacy of Human Rights'.

⁹³ Ibid.

⁹⁴ Ibid. at 7. The statistics given by the Vice-Unit in London during the period 1999-2002 show that less than half of the traffickers charged under the 1956 Sexual Offences Act served prison sentences so far, and only a small percentage served sentences for more than two years, quoted in Anti-Slavery International (2003).

⁹⁵ Article 6.3 of the Palermo Trafficking Protocol

⁹⁶ Human Rights Law Group, Annotations on Protocol Article 6, page 20.

harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked persons to cooperate in legal proceedings. Furthermore, they recommend that legal and other assistance is provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers.⁹⁷ The Special Rapporteur on Violence Against Women, also recommends the provision of free legal services and access to a competent, qualified translator during all proceedings. The provision of medical and psychological care should be adequate and confidential. HIV testing services should be strictly confidential and only be provided upon request by the person concerned and be accompanied by appropriate pre- and post test counselling.⁹⁸ The Philippines, for example, has recently adopted anti-trafficking legislation, which provides for gender sensitive re-integration and rehabilitation programmes, counseling, medical and psychological services, mandatory free legal service, temporary shelter, and educational assistance to trafficked children.⁹⁹

According to the *travaux préparatoires*, paragraph 3 of article 6, is applicable to both the receiving State and the State of origin of the victims of trafficking, provided they are in their territory¹⁰⁰. Implementation, while desirable, is not always easy for developing countries or countries with economies in transition, especially when they are both receiving and country of origin. Ann Jordan, correctly points out, that, while the Trafficking Protocol treats law enforcement as a shared responsibility, victim issues are treated as the individual responsibility of the state.¹⁰¹ Here a mechanism of sharing resources is in place. It is, ultimately, in the interest of all countries to combat trafficking effectively.

Fear of being deported or being held in detention centres or prison may prevent trafficked persons from reporting the crime. Lack of alternatives such as lack of money, language barriers, fear of law enforcement officials curtails the options the trafficked victim has.¹⁰² To break the trafficking cycle, victims need an incentive to come forward, such as awareness that they are protected and will be assisted. Domestic legislation should make efforts to provide basic necessities such as food and clothing, and medical and psychological assistance. Similarly, the UNHCHR recommends that appropriate social support sufficient to meet the immediate needs of trafficked persons be made available, this should not be discretionary upon governments.¹⁰³ Governments could work together or refer to non-governmental organisations service providers in this regard.

Article 6 (4) provides that governments shall take into account, the age, gender and special needs of victims of trafficking, in particular the special needs of children, including appropriate housing, education and care. Governments must also endeavour to provide for the physical safety of trafficked persons within their territory.¹⁰⁴ This does not impose an obligation on governments to ensure that it is not dangerous for a victim to return home. Governments, when drafting national legislation to incorporate provisions of the Trafficking Protocol into domestic law, may want to consider giving preference to include the stronger language and obligations contained in the Convention's article 24 and, arguably¹⁰⁵ article 25, on protection

⁹⁷ UNHCHR Recommended Principles and Guidelines, principles 8 and 9.

⁹⁸ Report of the Special Rapporteur, Radhika Coomaraswamy, E/CN.4/2000/68.

⁹⁹ Anti-Trafficking in Persons Act 9208 of 2003. The Rapporteur appreciates the information provided by Committee member Zenaida Reyes.

¹⁰⁰ UN Interpretative Note on Article 6 (3).

¹⁰¹ Ann Jordan, Human Rights Law Group, Annotation on Article 6 (3) p 22.

¹⁰² See also Anti-Slavery International, above note 10, at 6.

¹⁰³ UNHCHR Guidelines

¹⁰⁴ Article 6(5) Lastly, the section requires domestic legal system to include measures that offer victims of trafficking the *possibility* of obtaining compensation. It would have been better if the *right* of trafficked person to pursue civil claims was enshrined in law.

¹⁰⁵ Note that according to article 25 (3) "these provisions do not add any additional protections" to those contained in the Trafficking Protocol, but the language of the Convention suggests otherwise: its obligations are differently phrased. See Human Rights Law Group Annotation on Article 25 of the Convention.

of witnesses and, assistance and protection of victims, respectively, into the anti-trafficking legislation. Article 24 of the Convention Against Transnational Organized Crime deals with protection of witnesses, including victim witnesses and requires, that governments must take appropriate measures to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony, and as appropriate, for their relatives and other persons close to them. It also provides for the possibility to use communications technology such as video links to ensure the safety of the witness, and the consideration of agreements with third party countries to relocate the witness.

Article 7 of the Palermo Trafficking Protocol requires a State to consider adopting legislation or other appropriate measures that permit victims of trafficking to remain in its territory, temporarily or permanently, in appropriate cases. There is no obligation upon the State. The UNHCHR has suggested that States provide protection and temporary residence permits to victims and witnesses during legal proceedings. It is recommended that national anti-trafficking legislation protects trafficked persons against summary deportation or return, and provides for the right to remain lawfully within the country for the duration of any legal proceedings¹⁰⁶. Anti-Slavery International recommends a reflection period of three months in the case of adults, in which the immigration status of trafficked persons is "temporarily regularised" so that they can make "an informed decision on what to do next"¹⁰⁷. In the Netherlands, this reflection period is three months. If the trafficked persons decide to co-operate in criminal proceedings against traffickers, they may stay as long as the proceedings last. During their stay, they are offered assistance by social security institutions (including financial and legal services).¹⁰⁸ In Italy, under article 18 of the Immigration law, a six months residency permit can be issued on the basis that a victim is in danger or is co-operating in criminal proceedings.¹⁰⁹ In Germany, trafficked persons have a reflection period of four weeks. If the victims decide to co-operate, they are granted a stay of deportation for the length of the criminal proceedings. They have access to the labour market and are referred to a specialised victim support organisation by the law enforcement officials. If the police or social inspection services in Belgium have good reason to believe a person is a trafficking victim, the person is granted a legal residence status for 45 days. If the victim decides to press charges and the prosecutor's office decides to proceed a renewable permit valid for three months is granted. The trafficked person, who is also entitled to social benefits, must be assisted by government funded non-governmental organisations in Belgium.¹¹⁰ The Kosovo/FRY trafficking regulation does not provide for a residence permit.¹¹¹ The United States Trafficking Victims Protection Act provides for a so-called T visa if the victim (I) complies with any reasonable request for assistance in the investigation or prosecution and (II) would suffer extreme hardship involving unusual and severe harm upon removal from the US (both requirements have to be satisfied).¹¹²

The EU Council Directive on 'the short term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities'¹¹³ proposes that residency permits are to be introduced for adult victims of trafficking. In terms of this proposal the victims will be granted a 30-day period in which to consider whether they will cooperate with the authorities in the prosecution of traffickers, and calls for the possibility of issuing a six month residency permit for those who cooperate with the authorities. Although the Justice and Home Affairs Council of the

¹⁰⁶ UNHCHR, Recommended Principles and Guidelines.

¹⁰⁷ Anti-Slavery International, 2003, at 8-9.

¹⁰⁸ In the Netherlands trafficking is limited to trafficking for the purpose of prostitution. Art. 250. Wetboek van Strafrecht

¹⁰⁹ Anti-Slavery International, 2003 at 10.

¹¹⁰ Angelika Kartusch, Ludwig Boltzmann Institute for Human Rights, Vienna, *Reference Guide for Anti-Trafficking Legislative Review: with particular emphasis on South Eastern Europe*, OSCE/ODIHR 2001 at 64.

¹¹¹ *Ibid.* at 67.

¹¹² Trafficking Victims Protection Act (art.107).

¹¹³ 11 February 2002, COM (2002) 71 final, 2002/0043 (CNS).

EU had reached agreement on the issue in November 2003,¹¹⁴ and the EU Council adopted the Directive in April 2004, the reflection period of 30 days did not make it into the Directive. Member states are only required to indicate a period and this could be minimal (e.g. only a few hours or days). The purpose of the Directive is to fight organised crime by providing a short-term residence permit for third country nationals (non-EU nationals) who cooperate with the judicial authorities against the perpetrators.¹¹⁵ The primary purpose is not the protection of trafficked persons.¹¹⁶ The examples from the Netherlands and Italy indicate that a reflection period and temporary residence permit increases the number of prosecutions. In the Netherlands, between 1995 and June 2000, the police filed 756 reports relating to trafficking cases with the Prosecutors' Offices, 71% of which went to trial. Of these, 88% percent resulted in convictions.¹¹⁷

Article 8 imposes an obligation on the State of which that person is a national or permanent resident to accept the victim of trafficking back with due regard to the safety of that person. Repatriation shall preferably be voluntary, but this does not place an obligation on the state returning the victims,¹¹⁸ rendering the concession seemingly meaningless.¹¹⁹ However, return shall only be with due regard for the safety of that person and for the status of legal proceedings. Repatriation is subject to safety considerations. It is recommended that, the trafficked person should only be returned in accordance with the principles of *safety* and *dignity* as they are applicable to the repatriation of refugees enjoying temporary protection.¹²⁰ Article 14 of the Protocol, the savings clause, does mention, international treaty law obligations, in particular the 1951 Convention and the 1976 Protocol on the Status of Refugees and the principle of *non-refoulement* contained therein.

The UNHCHR recommends that safe and, to the extent possible, voluntary, return shall be guaranteed to trafficked persons by both the receiving state and state of origin. Trafficked persons should be offered legal alternatives in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.¹²¹ The non-binding Brussels Declaration (2002) recognises the increased level of risk after giving evidence and proposes that there should be *no* forced return unless it is safe to do so¹²².

Refugee law and the granting of asylum could provide certain categories of trafficked persons with legal residence status. The European Parliament recommended that EU Member States consider whether trafficked persons qualify for refugee status¹²³ Claims of trafficked persons for asylum on the basis of "membership of a particular group" have been considered by the UK Immigration Appeal Tribunal in recent years. The *Dzhygun* case (17 May 2000) dealt with a woman from the Ukraine who was trafficked and forced into prostitution. The Tribunal found that a trafficked woman was entitled to protection under the 1951 Refugee Convention as a member of a particular social group, namely "women in the Ukraine who are forced into prostitution against their will". The Tribunal also found that the Ukrainian authorities "rarely prosecute men for engaging women in the explosively growing sector of sexually exploitative

¹¹⁴ EU Council Directive residence permits for third country nationals victims of trafficking in human beings.

¹¹⁵ 2538th Council Meeting - Justice and Home Affairs, Brussels, 6 November 2003, 13747/03

¹¹⁶ http://www.stopvaw.org/European_Union2.html

¹¹⁷ Anti-Slavery International, *Human Traffic, Human Rights: Redefining Victim Protection*, London, 2002, 68.

¹¹⁸ UN Interpretative Note on article 8 states that the "*travaux préparatoires* should indicate that the words "shall preferably be voluntary" does not place an obligation on the State Party returning the victims."

¹¹⁹ Anne Gallagher "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis" in *Human Rights Quarterly*, November 2001, 982.

¹²⁰ See ILA Committee on Refugee Procedures, *New Delhi Report* (2002), and the UNHCR Handbook on Voluntary Repatriation: International Protection, Geneva (1996).

¹²¹ UNHCHR, *Guideline on Protection and Assistance*, no 11.

¹²² Brussels Declaration point 14, the victim as a witness.

¹²³ European Parliament 2000 Resolution (sec 23), reference provided in Angelika Kartusch, Ludwig Boltzmann Institute for Human Rights, Vienna, *Reference Guide for Anti-Trafficking Legislative Review: with particular emphasis on South Eastern Europe*, OSCE/ODIHR 2001.

work".¹²⁴ The Immigration Appellate Authority during 2002/2003 dealt with two cases involving 16-year old girls from Nigeria. The Adjudicator in *Josephine Ogbeide v Secretary of State for the Home Department* held that the trafficked person belonged to the particular social group of young girls from Nigeria whose economic circumstances were poor. In *Miss AB*, the Adjudicator found that the girl was "part of a well-documented social group of girls trafficked from West-Africa" and that, if returned, there was a danger of re-trafficking. She was granted protection under the 1951 Refugee Convention and under articles 3, 4 and 8 of the ECHR (freedom from torture, freedom from slavery and forced labour and the right to privacy and family life).¹²⁵

3.3 Preventing Trafficking

Violations of human rights are both a cause and a consequence of trafficking.¹²⁶ The Report of the Special Rapporteur on Violence Against Women highlights "the fact that the lack of rights afforded to women serves as the primary causative factor at the root of both women's migration and trafficking".¹²⁷ Governments often fail to protect and promote women's civil, political, economic and social rights. Gender discrimination intersects with other forms of discrimination such as discrimination on the basis of race, ethnicity, economic status or religion that makes marginalised and vulnerable groups even more prone to trafficking. Poverty and the failure of the State to guarantee women's rights contribute to economic and sexual exploitation.¹²⁸

According to the Trafficking Protocol, states shall establish comprehensive policies, programmes and other measures to prevent and combat trafficking and to protect victims, especially women and children, from re-victimisation.¹²⁹ They should also endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking. Governments must find ways where appropriate to cooperate with non-governmental organizations. Governments also are required to take or strengthen measures to alleviate factors that make persons, especially women and children, vulnerable to trafficking such as poverty, underdevelopment and lack of equal opportunity. This imposes an important and positive obligation on States ("shall take or strengthen measures") to address the root causes of trafficking by alleviating economic and social or legal factors, which make women and children especially vulnerable¹³⁰.

In addition, States shall adopt or strengthen measures, such as educational, social or cultural resources, to discourage the demand that fosters all forms of exploitation.¹³¹ The UNHCHR also recommends that strategies aimed at preventing trafficking shall address demand as a root cause of trafficking. The Human Rights Law Group recommends that, to discourage demand, immigration laws in receiving states should be less restrictive and allow migrants to enter and work legally with the same protection of labour rights. The UNHCHR goes further and recommends analysing the factors that generate demand for exploitative sexual services and exploitative labour and taking strong legislative, policy and other measures to *address* these issues.

The demand for sexual services is one of the root causes of trafficking for sexual exploitation. It is, however, an issue that often becomes intertwined with the debate on legalising or decriminalising

¹²⁴ Ibid. at 69 and other details of the case provided by Anti-Slavery International (2003) at 19.

¹²⁵ Anti-Slavery International (2003) at 19.

¹²⁶ UNHCHR, Recommended Principles and Guidelines.

¹²⁷ See above note 8 at par. 54.

¹²⁸ Ibid. at par. 56-57.

¹²⁹ Article 9 UN Trafficking Protocol.

¹³⁰ Ibid. Article 9(4)

¹³¹ Ibid. Article 9(5)

prostitution. But regardless of the approach one takes on legalising sex work, the demand side should be engaged in anti-trafficking strategies. One way of doing so, is raising awareness and changing male and female perceptions about women and sexual services.¹³² Moreover, discursive practices that create an eroticised hierarchy between the sexes should be examined. If trafficking is understood as a product of social, ideological, political and economic power configurations, then not only are gender, human rights and development linked together, but also the dominant notions of feminine identity and the commodification of the female body.¹³³ The demand for increased availability of the (inferiorised) female body is creating its own supply, while, at the same time, supply and discursive practices construct demand.

In their multi-country pilot study on the demand for the labour/services of trafficked persons in two sectors (prostitution and domestic work), Bridget Anderson and Julia O'Connell Davidson point out that, demand can refer to employer's need for cheap and docile labour, or to consumer demand for cheap goods and/or services, or for household or subsistence labour, or to any or all of these.¹³⁴ The study explores the social construction of the demand for sexual and domestic services and its relation to supply. The research suggests that three related factors are key to explaining the "exploitative conditions experienced by many migrant domestic and sex workers:

- a) the unregulated nature of the labour market segments in which they work;
- b) the abundant supply of exploitable labour and
- c) the power and malleability of social norms regulating the behaviour of employers and clients."¹³⁵

The researchers doubt whether punitive policies against consumers/clients would have the desired outcome. They also point out that while regulating domestic and sex work seems advisable, it would not, in itself, counteract racism, xenophobia and prejudice against migrants, it may even drive migrant workers out of these sectors. It is therefore recommended that governments not merely regulate but also address the "social devaluation", vulnerability and marginalisation of migrants in order to limit their exploitation and abuse.¹³⁶

The Beijing Platform for Action, calls upon governments to take appropriate measures to address the root causes, that encourage trafficking in women and girls for prostitution and other forms of commercialised sex, forced marriages, and forced labour.¹³⁷ The Vienna Declaration and Programme of Action of the World Conference on Human Rights (1993), also highlights the need to eliminate international trafficking, as a form of gender-based violence, though international cooperation in economic and social development.¹³⁸ All this indicates a strong consensus on the importance of addressing the root causes of trafficking and designing programmes and strategic interventions that would address these factors. The Committee on the Elimination of All Forms of Discrimination Against Women, in General Recommendation No.19 on Violence Against Women emphasises that traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence and coercion. It also addresses the causes and effects of trafficking and exploitation of

¹³² http://www.stopvaw.org/Demand_for_Women_s_Sexual_Services.html

¹³³ See for a discussion on this topic Annette Lansink 'Trafficking and the Commodification of the Female Body', paper presented at the University of the Witwatersrand, Workshop Law and Society, 25-26 September 2003, Johannesburg.

¹³⁴ Bridget Anderson and Julia O'Connell Davidson *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, IOM, December 2003, Geneva at 10.

¹³⁵ *Ibid.* at 44

¹³⁶ *Ibid.* at 44-45. In France, for example, there is some regulation of domestic workers, but migrants, in particular undocumented migrants, are subjected to very exploitative conditions in the informal economy.

¹³⁷ Fourth World Conference on Women, Beijing (1995) Platform for Action, A/CONF.177/20, Strategic Objective D3, para.130b. See also para. 99, 122, 130(d).

¹³⁸ Vienna Declaration and Programme of Action, A/conf.157/23, 25 June 1993.

the prostitution of women, by linking poverty and unemployment to increased vulnerability to trafficking and forcing women into prostitution, domestic work and organised marriages.¹³⁹

The Brussels Declaration (2002) on Preventing and Combating Trafficking in Human Beings brought together the EU member states, candidate countries, neighbouring countries such as Russia and Ukraine, US, Canada and China, regions, international governmental organisations, and non-governmental organisations. It was organised by the IOM, in close cooperation with the European Parliament and the European Commission. The Declaration, because of its broad-based participation is a relevant indicator, but not legally binding, albeit that the EU has adopted certain conclusions.¹⁴⁰ The root causes of trafficking, including unemployment, poverty, gender inequalities, the status of girls, social and cultural attitudes, and the demand for sexual services, cheap labour and other forms of exploitation were located at the forefront of the efforts to fight human trafficking. Thus, the Brussels Declaration (2002) calls upon countries "to address the reduction of the demand for sexual services and cheap labour" with education to equal and respectful relationships between the sexes, and awareness campaigns especially targeting clients.¹⁴¹

Restrictions on legal entry have pushed migration into the illegal sector, hence the search for facilitators of migration. False information and lack of awareness of the potential dangers may deceive women when encountering these facilitators. Raising awareness and information campaigns, aimed at potential victims, policy makers, law enforcement officers and other target audiences, such as at media professionals, are important tools in the fight against trafficking. It is also recommended that modules in school and college curricula are developed on legal and illegal migration and the dangers involved in trafficking and irregular migration. The US Trafficking Victims Protection Act of 2000 obliges US authorities to carry out programmes to increase public awareness of the dangers of trafficking and the protection mechanism available to assist trafficked persons.¹⁴² The Committee of Ministers' Recommendation R 2000 (11) of the Council of Europe, dealing exclusively with trafficking in women, also recommends incorporating gender perspectives in public awareness campaigns.

According to article 10 of the Trafficking Protocol, states must provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons, and promote the rights of the victims. The training should take into account the need to consider the human rights and child and gender-sensitive issues. Here again, cooperation with non-governmental organizations is encouraged.¹⁴³ The Brussels Declaration, also suggests that specialised, joint training should be set up, which targets police investigators, prosecutors, IGO and NGO personnel, aimed at improving the conduct of counter-trafficking operations, "the identification and rescue of trafficked victims" and of their subsequent treatment by the police and criminal justice system,¹⁴⁴ as well as general multi-disciplinary and human rights based training for judicial, law enforcement, medical, education, diplomatic and immigration, IGO and NGO personnel. Information campaigns, such as the one carried out by the New Zealand's Human Rights Commission could be considered. Pink slips were pasted on bus stands, railway stations and other public places, for Thai women who had been trafficked into New Zealand, offering the assistance of the

¹³⁹ CEDAW General Recommendation No. 19 (CEDAW, 11th session, 1992). Report of the Committee on the Elimination of Discrimination against Women, UN GAOR, 48th sess, Suppl.No.38, UN Doc A/47/38 (1993).

¹⁴⁰ On 8 May 2003.

¹⁴¹ http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/workshop/brusels_decl_en.

¹⁴² The US Trafficking Victims Protection Act of 2000, (22 U.S.C 7101), (sec106 (b)). The Trafficking Victims Protection Act was recently amended by the Trafficking Victims Protection Reauthorization Act of 2003.

¹⁴³ Other sections of the Trafficking Protocol: article 11 deals with border measures, article 12 with security and control of documents, article 13 with legitimacy and validity of documents, article 14 with savings clause, article 15 with settlement of disputes, article 16 with signature, ratification, acceptance, approval and accession, article 17 with entry into force, article 18 with amendment, article 19 with denunciation, article 20 with depositary and languages.

¹⁴⁴ Brussels Declaration (2002) at 9.

Human Rights Commission¹⁴⁵ At the end of 2003, the city of Zagreb won an award for a highly effective and innovative anti-trafficking campaign that provided information on daily food products and increased the awareness rate from 45 to 80%. New legislation in the Philippines also promotes comprehensive community education and information campaigns.¹⁴⁶ The strong NGO community in the Philippines has over the years been involved in developing information and prevention initiatives as well, including through raising awareness on radio, television and announcements in cinemas.¹⁴⁷ It is advisable that awareness campaigns focus on providing information on safe and legal migration, so that women can make informed decisions about migration.¹⁴⁸ While necessary, information and education campaigns alone are not sufficient to eradicate the multi-billion business of trafficking. It also tends to shift the focus of attention from economic and social causes that necessitate women to migrate. Where this is possible education and empowerment should be linked.

In addition to training and information campaigns, the Brussels Declaration (2002) highlights the importance of a human rights based approach to trafficking that emphasises gender perspectives. Accordingly, a European counter-trafficking strategy should include combating gender-based violence and patriarchal structures. It advocates for the establishment of support programmes aimed at the full participation and empowerment of women, in particular in educational facilities and economic life. These support programmes should aim to strengthen efforts to tackle poverty and marginalisation. Major strategies must aim at economic empowerment of women, such as micro credit programmes to enable women to start small industries, and should include the creation of a proper infrastructure to advise women on the marketability of the goods they market and suitable markets.

The Asian Development Bank regards trafficking in women and children as a major challenge to its mission of poverty reduction, and has made recommendations on strengthening the participation of vulnerable groups in mainstream development, reducing gender discrimination and promoting the development of social capital.¹⁴⁹ The Asian Development Bank contributes to capacity building by developing and implementing policies and programmes to address its strategic goals: poverty reduction and promoting gender equality to effectively combat trafficking in women and children. The ADB aims at improving mechanisms to target and identify risks to those most vulnerable to trafficking, rebuild social and human capital among mobile (or potentially mobile) populations through emergency loans and assistance in postconflict reconstruction, mitigate development-induced risks, encourage safe migration, extending benefits of social protection to mobile populations and stem demand for trafficked labour.¹⁵⁰ The South Asia Strategy (2001) formulated for the Yokohama Conference, advocates economic safety nets,

¹⁴⁵ Justice Sujata Manohar, 'Focal Point on Trafficking in Human Beings, National Human Rights Commission, India, 'Trafficking in Women and Girls', presented at the Expert Group Meeting on "Trafficking in Women and Girls", 18-22 November 2002, New York, EGM/TRAF/2002/WP The Indian Human Rights Commission contemplates similar strategies.

¹⁴⁶ Trafficking in Persons Act 2003, above note 99. Information provided by Zenaida Reyes.

¹⁴⁷ *Combating Trafficking in South-East Asia, A Review of Policy and Programme Responses*, IOM Migration Research Series, No 2, 53.

¹⁴⁸ Elaine Pearson cautions against construing the concept of safe migration too narrowly. It might then become another way to prevent illegal migration rather than being seriously concerned with prevention of trafficking, Global Alliance Against Traffic in Women (GAATW), Issue 21, July 2004, Alliance News Prevention of Trafficking, at 14.

¹⁴⁹ *Combating Trafficking of Women and Children in South Asia*, Regional Synthesis Paper for Bangladesh, India and Nepal, and the supplementary report, *Guide for Integrating Concerns into ADB Operations*, Asian Development Bank (ADB), April 2003. The Rapporteur is grateful to Andrew Byrnes, co-Rapporteur of the Committee on International Human Rights Law and Practice and former Committee Member: Feminism and International Law, for reference to the ADB Report and other helpful comments and suggestions.

¹⁵⁰ Ibid.

community based initiatives to strengthen economic security for marginalised families and alternative sources of sustainable livelihoods.¹⁵¹

The importance of support programmes can be illustrated with two examples from India. The state government of West Bengal has started a scheme called STEP -Support with Training and Employment Programmes with the help of an NGO (Development Dialogue), in the Murshidabad District. This district supplies 23 % of Kolkata's prostitutes. The new scheme trains women in silk yarn production. In a cluster of ten villages, 1230 women have been trained, and are assisted by the government to gain access to the market. Another interesting scheme is in the southern district of Karnataka, started by Karnataka State Level Corporation for training women in handloom weaving. Four thousand five hundred women have thus secured employment, and one quarter of these women and girls are children of Devadasis (i.e. women traditionally dedicated to a temple and later used for sexual exploitation). With the help of these schemes and the possibility of earning a livelihood, a second generation of trafficking is prevented.¹⁵²

A broad human rights approach would incorporate development strategies within the measures adopted to fight trafficking. When second generation human rights (social, economic and cultural rights) are brought within the ambit of judicially enforceable entitlements in international law, then strategic interventions would be addressing the root causes of trafficking more effectively. This recognition points to the need to engage the structural dimensions of the international legal and political order. As long as measures are solely based on individual civil rights, the social and economic factors remain unchallenged. While awareness of the boundaries and limits of the law (particularly, in international law) is in place, that should not deter us from advocating shifting these boundaries a little - at least on the discursive level. Until now, anti-trafficking strategies and measures have largely focused on law and order, national security and organized crime, and only to a limited extent on assistance to the victims, and very little on the prevention of trafficking by engaging social and economic causes in a structural manner.

Jean D'Cunha has argued that the dominant discourses and interventions on trafficking need rethinking so as to accommodate a gender and rights based development framework.¹⁵³ A gender perspective on trafficking holds that the differences, that disadvantage women and children the most, are grounded in "their most marginalized social locations - gender, age, class, ethnicity" and holds that enabling policies and initiatives should empower women to access remedies and claim rights.¹⁵⁴ She argues for a balance between interventions providing immediate post-trafficking and long-term preventive interventions. Economic empowerment strategies, including national development strategies that provide sustainable livelihood and living opportunities for women and reduces vulnerability to trafficking are required in this regard¹⁵⁵. In that sense gender and economic empowerment are intertwined.

Christina Boswell and Jeff Crisp, in a policy brief for the World Institute for Development Economics Research of the UN University, have alluded to the need for a more holistic and comprehensive approach to international migration and the development of comprehensive strategies for addressing the

¹⁵¹ Justice Sujata Manohar, above note 146. The Second World Congress against Commercial Exploitation of Children was held in Yokohama in December 2001.

¹⁵² Examples provided by Justice Sujata Manohar (2004). See also the Philippines livelihood and skills training programmes mentioned in the Trafficking in Persons Act of 2004, above note 99. See also GAATW, Issue 21, July 2001, for example the eco tourism project in Thailand as a strategy to prevent human trafficking by generating income aimed at economic and cultural empowerment.

¹⁵³ Jean D'Cunha, Technical Advisor on Migration and Trafficking, India, 'Trafficking in Persons: a Gender and Rights Perspective', paper presented at the UN Expert Group Meeting on "Trafficking in Women and Girls", 18-22 November 2002, New York, EGM/TRAF/2002/EP.8.

¹⁵⁴ Ibid. at 8

¹⁵⁵ Ibid. at 24-28.

causes of trafficking.¹⁵⁶ Some have argued that restricting labour migration has simply channeled flows into more "more nefarious forms of migration", such as asylum and, when asylum was restricted the use of trafficking burgeoned.¹⁵⁷ This confirms that short-term responses are not adequate to combat trafficking.

In the meantime, the Committee recommends that national legislation expands on the social and economic initiatives to prevent trafficking, mentioned in the UN Trafficking Protocol. National legislation should make explicit reference to the need to eliminate discriminatory policies and practices that limit women's access to education and employment.¹⁵⁸ In addition, to legal and political factors, economic, social and cultural factors as well as international factors (including the feminisation of migration) and increasingly restrictive immigration policies underlie trafficking, a point reiterated by the UNHCHR, UNICEF and IOM in their submission during the negotiations of the UN Protocol. The Secretary-General of the UN, in his Report on Trafficking in Women and Girls, also encourages governments, inter- and non-governmental organizations, civil society to collaborate in the development of a comprehensive and multi-disciplinary approach towards prevention.¹⁵⁹

5. Conclusion

Trafficked persons are subjected to human rights violations at all stages of the trafficking process. Traffickers subject their victims to physical, psychological and/or sexual violence, hold them in debt bondage, captivity or subject victims to slavery-like practices or forced labour. Moreover, States often violate human rights of trafficked persons by failing to provide proper assistance post-trafficking, or holding victims in detention centres or deporting them back into unsafe situations. Under international human rights standards, States are obliged to take positive step to ensure that the individuals in their territory enjoy certain human rights, including preventing human rights infringements by private persons.¹⁶⁰ States are obliged to act with due diligence to prevent, investigate and punish any human rights violations, even when these violations are initially not directly imputable to a State (for example, because it is the act of a private person). The Inter-American Court of Human Rights, held in *Velasquez Rodriguez* (1989), the State liable for the wrongs committed, even by non-state actors and compensatory damages were awarded: "the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".¹⁶¹ The States Parties to the Migrant Workers Convention (1990), which entered into force on 1 July 2003, have a legal obligation to protect even irregular migrants against violence by public officials or private individuals.¹⁶²

¹⁵⁶ Christina Boswell and Jeff Crisp 'Poverty, International Migration and Asylum', Policy Brief No. 8. United Nations University, World Institute for Development Economics Research, Helsinki, 2004.

¹⁵⁷ *Ibid.* at 23.

¹⁵⁸ See also Recommendations regarding the Proposal for a Council Framework Decision on Combating Trafficking in Human Beings (Comments on the 21.12.2000 draft Framework) by Women's Rights Division, Human Rights Watch.

¹⁵⁹ Trafficking in Women and Girls, Report of the Secretary-General to the UN GA A/57/170 (July 2002). Albeit note that preventive measures have been given a rather narrow interpretation here.

¹⁶⁰ Andrew Byrnes 'Women, Feminism and International Human Rights Law: Mythological Myopia, Fundamental Flaws or Meaningful Marginalisation' *Australian Yearbook of International Law* (1992)

¹⁶¹ Velasquez Rodriguez case, Inter-American Court of Human Rights, Judgement of 21 July 1989 paragraphs 172-174.

¹⁶² UN Convention on the Protection of the Rights of All Migrant Workers and their Families, 1990, Art. 16(2). The United Nations UN Convention on the Protection of the Rights of All Migrant Workers and their Families (1990) is the most comprehensive standard dealing with migrant workers and builds on the International Labour Organizations Conventions No.97 (1949) and 143 (1975). Art 68 deals with collaboration between states to prevent dissemination of misleading information regarding migration and measures to prohibit and punish those responsible for the illegal movement of migrant workers or for the employment of undocumented migrants.

States' have an obligation to investigate and prosecute trafficking in terms of treaty obligations, but also on basis of its obligation to respect the human rights of all persons within its jurisdiction. The state must protect individuals from the violations committed by private persons and combat impunity for human rights violations. In *Calvelli v Italy* the European Court of Human Rights held that the duty to investigate is not only applicable where there is an allegation of violation by state officials, but also where the alleged perpetrator is a non-state actor.¹⁶³ In *MC v Bulgaria* the European court addressed the requirements of an effective investigation of rape by a non-state actor. In this case no charges were brought, and the Court found that the approach of the investigators and prosecutors "fell short of the requirement inherent in the states' positive obligations - viewed in the light of the relevant modern standards in comparative and international law - to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse".¹⁶⁴

The van Boven/Bassiouni Principles and Guidelines provide for the right to restitution, compensation and rehabilitation for victims of gross violations of human rights. The State has a duty to afford victims appropriate remedies and provide for or facilitate reparations. If the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim and States should endeavour to provide reparations, if the responsible party is unable or unwilling to do so.¹⁶⁵

As stated above, the Palermo Trafficking Protocol is primarily a law enforcement tool, but States are increasingly inclined to consider an integrated and holistic approach to anti-trafficking. This approach should be based on prevention, protection and punishment and include human rights and gender perspectives in all strategies. As Radhika Coomaraswamy proposes, any remedy and strategy to combat trafficking and provide assistance should be assessed in terms of whether and how it promotes and provides protection for the human rights of women. Even seemingly harmless information campaigns may have the effect of curtailing the movement of women. The Committee therefore endorses a proposal by the Dutch Working Group on Feminism and International Law to recommend that States implement a Human Rights Impact Assessment¹⁶⁶ for all their policies, especially when these policies concern limitation of entry into a State, exiting a country of origin and deporting trafficked persons from the country of destination.

In summary, preventive strategies should include short-term measures, such as awareness and information campaigns, sensitising residents on trafficking and legal migration. Awareness and educational campaigns should be directed at young children, eliminating stereotyped ideas about the roles of women and men, in accordance with CEDAW, and incorporate transformative gender perspectives into the school curricula. Secondly, training of law enforcement authorities, administration and judicial officers should aim at raising awareness on issues of safety, protection and assistance to the victim and be gender sensitive. Long-term preventive measures, should aim at improving the social and economic position of women.¹⁶⁷ Empowerment of women, in consonance with the International Covenant on Social, Economic and Cultural Rights, CEDAW, and the Palermo Trafficking Protocol should address poverty and economic and legal subordination of women, such as the lack of (or unequal) property rights for women and should include

¹⁶³ 2002 ECHR 32967/96. See also *MC v Bulgaria* 15 Butterworths Human Rights Cases 627, para. 151: "such positive obligations cannot be considered in principle to be limited solely to cases of ill-treatment by state agents. See also *Maria Gives Penha Maria Fernandes v Brazil*, Inter-American Commission on Human Rights, Case 12.051, 16 April 2001, on violence against a woman committed by her husband. The Rapporteur is grateful to Committee member Christine Chinkin for providing the above information and references, and also highly appreciates helpful general comments on the draft Report by Committee member Karen Knop.

¹⁶⁴ Ibid.

¹⁶⁵ van Boven/Bassiouni Basic Principles and Guidelines, UN Economic and Social Council, Commission on Human Rights, E/CN.4/2000/62. The Rapporteur extends her appreciation to Ineke Boerefijn, Member of the ILA Committee on International Human Rights Law and Practice for the reference.

¹⁶⁶ See above note 70.

¹⁶⁷ See also Angelika Kartusch, Ludwig Boltzmann Institute for Human Rights, Vienna, *Reference Guide for Anti-Trafficking Legislative Review: with particular emphasis on South Eastern Europe*, OSCE/ODIHR 2001.

developmental empowering strategies. National legislation should make explicit reference to the need to eliminate discriminatory policies and practices that limit women's access to education and employment,¹⁶⁸ inheritance, property rights and other. Preferably, national laws of each State should provide for free and compulsory education for all children. It is also recommended that governments address the demand for exploitative labour in various sectors of the economy by regulating and monitoring labour standards. The Committee recommends that regional cooperation among States on preventive strategies focus on development¹⁶⁹ and gender empowerment.

Protection of, and assistance to, trafficked women should include psychological, medical (including support and non-compulsory testing and counseling for HIV) and social services, including accommodation, food, clothing and financial assistance. States Parties to the International Covenant on Economic, Social and Cultural Rights are obliged to provide the right to work, to social security, an adequate standard of living, right to the highest attainable standard of physical and mental health, and the right to education. The Committee recommends that these standards be included in national anti-trafficking legislation. It is also recommended that trafficked persons are referred to government funded, non-governmental or other specialised victim support organisations for assistance and support. It is recommended that States, in accordance with CEDAW, take *effective* measures against gender-based violence and trafficking in women, and protect and assist victims,¹⁷⁰ beyond the minimum requirements contained in the Palermo Trafficking Protocol. It is recommended that States develop national plans of action to end trafficking, which systematically address gender issues and do not infringe on the freedom of movement of women.

With regard to prosecution and punishment, national governments are advised to impose appropriate sentences, as recommended in the EU Framework Decision of 19 July 2002, considering the gravity of the offence and the deterrent effect it will have. At present trafficking is regarded as a low-risk, high profit generating enterprise by transnational syndicates.¹⁷¹ National governments should ensure an adequate and effective law enforcement response, that is gender-sensitive to the needs of women and should consider establishing specialised anti-trafficking units comprising both women and men. A network of law enforcement agencies across border could be considered, in particular, but not exclusively, in regional inter-state agreements.

In short, the Committee recommends a broad-based human rights approach rather than a law-enforcement approach to combat trafficking that includes integrated and holistic strategies (addressing social and economic causes) with an appropriate centering of gender in all laws, policies and other strategies.

¹⁶⁸ See Recommendations regarding the Proposal for a Council Framework Decision on Combating Trafficking in Human Beings (Comments on the 21.12.2000 draft Framework) by Women's Rights Division, Human Rights Watch.

¹⁶⁹ See the New Partnership for Africa's Development (NEPAD) and the West African ECOWAS Declaration and Plan of Action against Trafficking in Human Beings (2001) and the Libreville Common Platform for Action 2000 to address trafficking in Africa.

¹⁷⁰ See also CEDAW Committee, General Recommendation No 19, at 24, on the establishment of support services for trafficked persons.

¹⁷¹ See Anti-Slavery International/Mike Kaye (2003) at 6.