

**USING THE
OPTIONAL
PROTOCOL
UNDER CEDAW
TO COMBAT
HUMAN
TRAFFICKING**

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1. Introduction

Human rights advocates have hailed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹ as an international bill of rights for women. The Convention and its supplemental treaty, the Optional Protocol, provide a powerful tool to combat discrimination against women and promote the rights of women and girls. In particular, the Optional Protocol communications procedure – an individual complaint mechanism – has been used to advance the rights of domestic violence victims, address the harmful effects of gender stereotyping, and challenge the practice of forced sterilization.

Human trafficking is another critical area in which the CEDAW Convention and the Optional Protocol have immense potential to hold states accountable for their failure to protect and promote the rights of women and girls. Article 6 of the CEDAW Convention specifically addresses human trafficking violations. But none of the published decisions under CEDAW's Optional Protocol to date have directly addressed human trafficking on the merits.

Despite two decades of sustained attention to human trafficking, states continue to arrest victims while allowing traffickers to operate with impunity. The Optional Protocol can be used to highlight these failures. The CEDAW Committee can order states to make significant policy changes to remedy violations of women's rights. And the Committee can even order temporary measures to protect a victim while the case is pending.

Advocates at International Women's Rights Action Watch,² the Global Alliance Against Traffic in Women,³ the Australian Women's Rights Commission,⁴ and the United Kingdom's Equality and Human Rights Commission⁵ have published excellent, practical guides on CEDAW. The CEDAW Committee itself has issued guidelines for the submission of individual complaints through the Optional Protocol's communications procedure.⁶ An array of secondary sources provide helpful guidance on using CEDAW as a key instrument to combat discrimination against women worldwide.⁷

¹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, entered into force Sept. 3, 1981.

² International Women's Rights Action Watch, *Producing Shadow Reports to the CEDAW Committee: A Procedural Guide* (2009), <http://hrlibrary.umn.edu/iwraw/proceduralguide-08.html>; International Women's Rights Action Watch, *Our Rights Are Not Optional!* (2008), http://www.karat.org/wp-content/uploads/2012/01/Our_Rights_Guide.pdf

³ For an excellent primer on how best to use CEDAW's reporting regime to hold states accountable for human trafficking, see Global Alliance Against Traffic in Women, *A Toolkit for Reporting to CEDAW on Trafficking in Women and Exploitation of Migrant Women Workers* (2011).

⁴ Simone Cusack, *Mechanisms for Advancing Women's Human Rights: A Guide to Using the Optional Protocol to CEDAW and Other International Complaint Mechanisms* (Australian Human Rights Commission, 2011).

⁵ Equality and Human Rights Commission, *A Lever for Change: Using the Optional Protocol to the Convention on the Elimination of All forms of Discrimination against Women* (2010).

⁶ United Nations Human Rights Office of the High Commissioner, *Human Rights Bodies – Complaints Procedure*, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>.

⁷ For these guides, see Appendix A.



But the Optional Protocol could also become a key instrument to combat the human trafficking of women and girls worldwide. This toolkit builds upon the foundational guidance already published, focusing on CEDAW's Optional Protocol and the potential for human trafficking individual complaints. The toolkit provides an overview of CEDAW and the Optional Protocol; a snapshot of the CEDAW Committee's jurisprudence on human trafficking; and maps out strategies to use this mechanism to protect the rights of trafficked women and girls.

2. Why Human Trafficking?

According to the International Labor Organization, 21 million men, women, and children are victims of forced labor—including forced sexual exploitation.⁸ Of that number, 55%, or an estimated 11.4 million victims, are women and girls.⁹ More women than men are victims of human trafficking worldwide.

More women than men



*Source: International Labor Organization, “Statistics and Indicators on Forced Labor and Trafficking”, available at: <http://www.ilo.org/global/topics/forced-labour/policy-areas/statistics/lang--en/index.htm>.

Article 6 of the CEDAW Convention identifies trafficking in women as an area in which state parties have legal obligations. The full text of Article 6 of CEDAW is as follows:

“ States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. ”

⁸ International Labor Organization, “Statistics and Indicators on Forced Labor and Trafficking”, available at: <http://www.ilo.org/global/topics/forced-labour/policy-areas/statistics/lang--en/index.htm>.

⁹ *Id.*



The CEDAW Committee has never issued a human trafficking decision on the merits based on a complaint under the Optional Protocol. However, the Committee has identified trafficking as a contributing factor in increasing women's vulnerability to violence.¹⁰ While regional human rights mechanisms exist in the Americas, Europe, and Africa, the CEDAW Committee is a highly specialized body that could be an excellent forum for holding states accountable for human trafficking.

CEDAW Article 6 makes no distinction between labor trafficking and sex trafficking; both may be brought under the Optional Protocol. While women compose the majority of sex trafficking victims,¹¹ they are also held in forced labor throughout the globe. Traffickers force women into domestic work, agricultural work, garment manufacturing, food processing, and other industries. It is also likely that a female labor trafficking victim will experience both labor exploitation and sexual violence.

The Optional Protocol has the potential to be a powerful tool to achieve justice and accountability for trafficking victims. For many victims of trafficking, the Optional Protocol may be the only complaint mechanism available for redress after exhausting domestic remedies.¹² For example, the Asia-Pacific region currently has no regional human rights mechanism. The Asia-Pacific region is estimated to have the largest number of forced labor victims in the world.¹³

¹⁰ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, ¶¶ 13 – 16, U.N. Doc. CEDAW/C/GC/19 (1992) [hereinafter General Recommendation No. 19].

¹¹ *Id.*

¹² Currently, regional human rights courts operate under the auspices of the Organization of American States, the Council of Europe, and the African Union. Both the Arab League and the Association of Southeast Asian States (ASEAN) have proposed human rights mechanisms.

¹³ International Labor Organization, *Statistics and Indicators on Forced Labor and Trafficking*, available at: <http://www.ilo.org/global/topics/forced-labour/policy-areas/statistics/lang--en/index.htm>.

3. What is CEDAW?

The Convention on the Elimination of All Forms of Discrimination against Women is an international treaty that obligates States Parties¹⁴ to end **discrimination** against women. To that end, States Parties have a legal obligation to:



Respect



Protect



Promote and fulfil women's right to non-discrimination.

Discrimination – Any distinction, exclusion or restriction made on the basis of sex that affects women's enjoyment of human rights, irrespective of their marital status, on an equal basis with men, in political, economic, cultural, civil or any other field. *Article 1, CEDAW*

The Convention identifies key areas where States Parties must eliminate discrimination against women, including trafficking and prostitution, political and public life, nationality, education, employment, health, and marriage and family life.¹⁵

Articles 2 through 5 lay out the affirmative actions that States Parties must take to eliminate discrimination against women:

- taking measures to eliminate discrimination by any person, organization or enterprise;
- adopting appropriate legislative and other measures to prohibit all discrimination against women, including sanctions where appropriate;
- establishing the legal protection of women's rights on an equal basis to those of men and ensuring the effective protection of women against discrimination through competent national tribunals and other public institutions; and
- modifying or abolishing laws, regulations, customs and practices that constitute discrimination against women.

¹⁴ These obligations apply only to those states that have ratified CEDAW. Many countries have ratified the treaty with reservations. Although the CEDAW Committee routinely challenges and condemns these reservations, states cannot be forced to comply with articles where they have entered a reservation. Similarly, reservations can interfere in enforcement through the communications (individual complaint) mechanism. CEDAW Committee, Statements on reservations to the Convention on the Elimination of All Forms of Discrimination against Women, excerpted from Report of the Committee on the Elimination of Discrimination against Women (A/53/38/Rev.1), *available at*: <http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/Reservations-English.pdf>.

¹⁵ Articles 6 through 16 codify these and other substantive rights accorded to women.

Periodic Reports – national reports submitted every four years that indicate the measures a State Party has adopted to implement the Convention

Concluding Observations – written recommendations issued to a State Party based on review of its periodic report

General Recommendation – recommendation on the implementation and interpretation of specific articles or thematic issues

The Convention also establishes the CEDAW Committee and describes its functions and powers. Under the Convention, States Parties agree to submit **periodic reports** every four years to the CEDAW Committee. The Committee's 23 independent experts meet three times a year to consider these periodic reports and issue **concluding observations** on individual governments' compliance with their treaty obligations. The Committee also adjudicates the individual complaints filed for review under the Optional Protocol.

For more on how anti-trafficking advocates can engage in the periodic review process see Global Alliance Against Traffic in Women, ***A Toolkit for Reporting to CEDAW on Trafficking in Women and Exploitation of Migrant Women Workers*** (2011).¹⁶

The Committee also publishes **general recommendations** that focus on specific articles or substantive rights under the Convention. As of December 2016, the CEDAW Committee had adopted 34 general recommendations.¹⁷

As of October 2018, 189 states had ratified CEDAW, committing themselves to combating discrimination against women in all spheres of life.

¹⁶ Available at: http://www.gaatw.org/publications/A_Toolkit_for_Reporting_to_CEDAW_GAATW2011.pdf.

¹⁷ The CEDAW Committee's General Recommendations are available at: <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.



Under the Convention, States “must exercise **due diligence** to prevent, investigate, punish and ensure redress for the acts of private individuals or entities that impair the rights enshrined in the Convention.”²⁰ This can take many forms, foremost being the adoption of constitutional and legislative measures to protect women from violence and discrimination. However, legislation alone is not enough. States must also provide administrative and financial support for the implementation of the Convention.²¹

Due diligence – This standard holds States responsible for non-state acts that violate human rights. First outlined by the Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras*, States have an obligation to “prevent, investigate, and punish any violation of . . . rights”.¹⁸ The existence of a legal system is not enough to fulfill a State’s due diligence obligations, instead a State must “conduct itself so as to effectively ensure the free and full exercise of human rights.”¹⁹

¹⁸ *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4, ¶ 166 (July 29, 1988).

¹⁹ *Id.* at ¶ 167.

²⁰ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations*, ¶ 15, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013) [hereinafter *General Recommendation No. 30*].

²¹ *Id.*

4. The Optional Protocol Communications Procedure

In the 1990s, women’s human rights advocates pressed for the creation of a complaints mechanism under CEDAW. The General Assembly adopted the Optional Protocol to the Convention on October 6, 1999,²² creating the opportunity for individuals to file complaints directly with CEDAW. Since the Optional Protocol opened for signature, 109 countries have ratified the Optional Protocol.²³

In July 2004, the Committee adopted its first decision on a communication submitted under Article 2 of the Optional Protocol. The Committee had registered 130 individual communications against 36 State Parties, as of July 2018.²⁴

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women is a supplemental international treaty. The Optional Protocol entered into force on December 22, 2000. The Optional Protocol creates two separate mechanisms to address violations of women’s rights:



Communications Procedure

Allows individual women or groups of women to allege violations of the rights enshrined in CEDAW



Inquiry Procedure

Allows the Committee to conduct investigations into grave and systematic abuses of women’s rights in a particular country

As of July 2018, the Committee has decided on 72 communications²⁵ and completed four inquiries.²⁶ While the focus of this toolkit is on the communications procedure, the inquiry procedure can be useful where victims fear retaliation for filing individual communications or where individual complaints do not reflect the systemic nature of human rights violations. For more on the inquiry procedure see International Women’s Rights Action Watch Asia Pacific, *Our Rights Are Not Optional* (2008).²⁷

²² UN General Assembly Resolution 54/4 (A/RES/54/4)

²³ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 2131 U.N.T.S. 83, entered into force Dec. 22, 2000. The figure of 109 is current as of September 2018. To track the number of ratifications, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en.

²⁴ Report of the Committee on the Elimination of Discrimination against Women Seventieth Session, Annex 1, ¶ 5 CEDAW/C/2018/II/CRP. There are 47 pending registered cases as of July 2018. *Id.*

²⁵ *Id.*

²⁶ As of July 2018, the CEDAW Committee has published only four inquiries. The Committee has investigated the serial rapes, murders, and disappearances of women in Ciudad Juarez, Mexico; missing and murdered aboriginal women in Canada; restrictions on sexual and reproductive health services for women in Manila, Philippines; and restrictions on abortions in Northern Ireland. To access these inquiry reports, visit <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/InquiryProcedure.aspx>.

²⁷ Available at: http://www.karat.org/wp-content/uploads/2012/01/Our_Rights_Guide.pdf.

Under the communications procedure, the CEDAW Committee considers complaints submitted by individuals or groups of individuals alleging violations of CEDAW committed by States Parties that have ratified the Optional Protocol—in addition to becoming a party to the CEDAW Convention.

Table 1: States Parties to the Optional Protocol

Albania	Canada**	Hungary**	New Zealand	Slovenia
Andorra	Central African Republic	Iceland	Niger	Solomon Islands
Angola	Colombia	Ireland**	Nigeria	South Africa
Antigua and Barbuda	Cook Islands	Italy**	Norway	South Sudan
Argentina**	Costa Rica	Kazakhstan**	Panama	Spain**
Armenia	Côte d'Ivoire	Kyrgyzstan	Paraguay	Sri Lanka
Australia**	Croatia	Lesotho	Peru**	Sweden
Austria**	Cyprus	Libya	Philippines**	Switzerland**
Azerbaijan	Czech Republic**	Liechtenstein	Poland	Tajikistan
Bangladesh	Denmark**	Lithuania	Portugal	Thailand
Belarus**	Dominican Republic	Luxembourg	Republic of Korea	The former Yugoslav Republic of Macedonia
Belgium	Ecuador**	Maldives	Republic of Moldova**	Timor-Leste
Belize	Equatorial Guinea	Mali	Romania	Tunisia
Bolivia (Plurinational State of)	Finland**	Mauritius	Russian Federation**	Turkey**
Bosnia and Herzegovina	France**	Mexico**	Rwanda	Turkmenistan
Botswana	Gabon	Monaco	Saint Kitts and Nevis	Ukraine**
Brazil**	Georgia**	Mongolia	San Marino	United Kingdom of Great Britain and Northern Ireland**
Bulgaria**	Germany**	Montenegro	Sao Tome and Principe	United Republic of Tanzania**
Burkina Faso	Ghana	Mozambique	Senegal	Uruguay
Cabo Verde	Greece	Namibia	Serbia	Vanuatu
Cambodia	Guatemala	Nepal	Seychelles	Venezuela (Bolivarian Republic of)
Cameroon	Guinea-Bissau	Netherlands**	Slovakia	

Source: United Nations Office of the High Commissioner for Human Rights, “Status of Ratification: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women”, available at: <http://indicators.ohchr.org/>

** Respondent party to a complaint. Researchers identified 30 out of 36 State Party respondents and 101 out of 130 communications. The remaining communications are not available on the Committee’s public databases.

Table 2: State Party Respondents

Region	State Party	# of Communications
Africa	United Republic of Tanzania	1
Americas	Argentina	1
	Brazil	1
	Canada	5
	Ecuador	1
	Mexico	1
	Peru	1
Asia	Australia	1
	Kazakhstan	1
	Philippines	3
Europe	Austria	4
	Belarus	1
	Bulgaria	4
	Czech Republic	2
	Denmark	29
	Finland	1
	France	2
	Georgia	2
	Germany	1
	Hungary	3
	Ireland	5
	Italy	1
	Netherlands	6
	Republic of Moldova	2
	Russia Federation	5
	Spain	4
	Switzerland	4
	Turkey	3
	Ukraine	1
	United Kingdom of Great Britain and Northern Ireland	6

Since the Optional Protocol came into effect, the Committee has decided 72 cases; as of September 2018, 47 communications remain pending.²⁸ Only 36 out of 109 State Parties to the Optional Protocol have been party to a public communication. The Committee has considered more claims against Denmark than any other State party, and more claims against countries in Europe than any other region (Table 2).

Communications Procedure

In order to submit a communication, an individual must meet several basic requirements:

a) WHERE: A communication must be directed against a State Party to the Optional Protocol and not any other entity, such as a private individual or company. The conduct of non-state actors could fall under a communication to the extent that a State Party failed to prevent or address the private party's action. This failure, rather than the underlying private party's action, would constitute the State Party's violation of CEDAW.

b) WHO: Communications may be submitted by individuals, or a group of individuals, from a State Party that has ratified the Optional Protocol (see Table 1 above), who have suffered a personal, direct violation of a human right under CEDAW. Generally, others may submit a

²⁸ Report of the Committee on the Elimination of Discrimination against Women, Seventieth session, Annex 1, ¶ 5 CEDAW/C/2018/III/CRP. Pending communications are not available to the public. *See also, Table of pending cases, COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, <https://www.ohchr.org/Documents/HRBodies/CEDAW/PendingCases.docx> (last visited Sept. 11, 2018).*

communication on behalf of a complainant only with the complainant's consent. However, others can submit a communication on behalf of an individual or group without consent when justified. There are several instances in which it may be justifiable to submit a communication without consent, including:

- Instances in which a very large group of individuals exists such that the number of complainants renders obtaining consent impractical; and
- Cases in which a complainant is in detention or other confinement, or lacks the legal authority to consent.
- Cases in which the complainant is deceased.

c) WHAT: In order for the Committee to have subject matter jurisdiction, a communication must make out a claim that a State party violated a substantive right under CEDAW, which could include rights that are: (i) set out in Articles 2 through 16, (ii) derived from a right set out under CEDAW or (iii) interpreted as a pre-condition for enjoyment of a right recognized under CEDAW.

d) RULES OF PROCEDURE: A communication must be in writing in English, French, Spanish, Chinese, Arabic or Russian, and there must be an identifiable individual or group of individuals that have suffered a personal, direct violation of a human right under CEDAW.



Of the 72 completed communications, 33 have been decided on the merits. More than half of the published communications were rejected on inadmissibility grounds. Admissibility is a key factor to consider when drafting a complaint.

Admissibility

In order to prevail, a complainant must clear multiple hurdles. Failure to clear even one of these grounds can result in a ruling that the complaint is inadmissible, and cannot be reviewed. These procedural hurdles include:

1. The complaint is submitted by or on behalf²⁹ of **individuals or groups of individuals** that claim to be victims of a violation of the Convention;
2. The complainant has **exhausted all domestic remedies**, unless such remedies are unavailable, unreasonably prolonged, or unlikely to bring effective relief;
3. The complainant's allegations are **sufficiently substantiated**;
4. The violation took place on the **territory of a State Party** to the Convention;
5. The violation must have occurred in the period after the Optional Protocol's ratification and entry into force for the State Party named in the complaint (**ratione temporis**); and
6. The individual(s) filing the complaint must be under the jurisdiction of the State Party named in the complaint.

Exhaust domestic remedies – the complainant must have attempted to resolve her issue within domestic courts prior to filing a communication with the Committee. A complainant must have obtained a final decision from the highest domestic court potentially providing recourse. Domestic proceedings cannot be ongoing. The complainant must have raised the substance of the claim under CEDAW at the domestic level.

In addition, no other international tribunal can be considering the matter, and it cannot be a case previously submitted to the CEDAW Committee. Failure to clear any one of the grounds for inadmissibility outlined above will result in dismissal of the case.

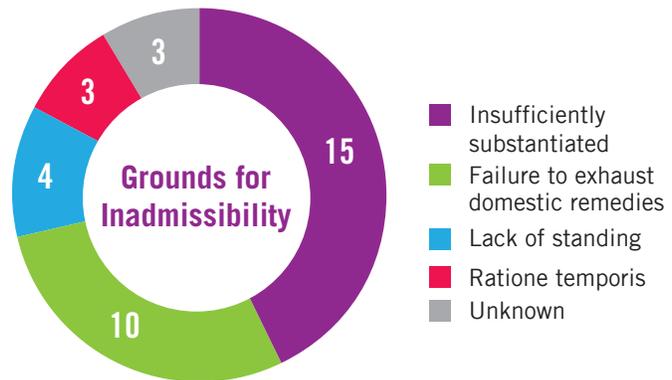
When the Committee finds that a communication is inadmissible, the Committee will dismiss the communication. The Committee may review a decision of inadmissibility, upon written request by or on behalf of the communication's author presenting reasons why the bases for inadmissibility are no longer applicable.

The CEDAW Committee has found cases inadmissible for failure to substantiate claims, failure to exhaust domestic remedies, failure to show that the complainant had standing, and *ratione temporis*.

²⁹ An individual or organization may submit a communication on behalf of individuals or groups of individuals with their consent, unless the author can justify acting without such consent. Optional Protocol, art. 2.

Substantiation – the communication must provide specific relevant facts that explain how the State Party’s action constitutes a violation of the specific article invoked. Neither broad claims about a general situation nor statistics, in and of themselves, will be sufficient.

Ratione temporis – the alleged violation must have occurred after the respondent State Party ratified the Optional Protocol



*Two cases had more than one ground for inadmissibility. Researchers could only identify 30 of 36 communications declared inadmissible. The remaining communications are not available on the Committee’s public databases.

Remedies

If the complaint is admissible, the Committee will determine the case on the merits and issue a final view. If the Committee finds that the State Party has committed a violation of the Convention, it may issue general and specific recommendations to remedy the violation. These recommendations are not legally binding, but there is an expectation that States will participate in good faith under CEDAW and comply with the Committee’s decisions.³⁰

The Committee has issued a range of recommendations in its final views. Examples of specific recommendations include instructions to the State Party to issue restitution, compensation, or other remedies for the victim. For example, in *A.T. v. Hungary*, the Committee held that Hungary’s lack of adequate legislative and judicial protection for domestic violence victims did not provide the petitioner, A.T., with immediate relief from the abuse nor gave her high priority in court proceedings. The Committee recommended that Hungary should:

Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights.³¹

³⁰ It is worth noting that States who have ratified the Optional Protocol can opt-out of the inquiry procedure but cannot opt-out of the communications procedure. Optional Procedure, art. 10.

³¹ *A.T. v. Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005), available at <http://hrlibrary.umn.edu/cedaw/decisions/2-2003.html> (visited October 7, 2018).

The Committee also issues general recommendations that aim to end ongoing violations, remedy past violations, and prevent a repeat of the violation. In response to individual complaints filed under the Optional Protocol, the Committee has recommended that:

Hungary should ensure that legislative standards for informed consent in cases of sterilization conform with international human rights and medical standards, and also monitor health centers to ensure that there is fully informed consent before sterilization procedures are carried out.³³

Bulgaria should amend its domestic violence laws to ease the administrative and legal burdens on domestic violence victims.³²

The **Philippines** should take measures to ensure that sexual assault cases are conducted in a manner that is impartial and fair, including emphasizing lack of consent in rape legislation, removing force and violence as requirements in sexual assault laws, and instituting gender sensitivity training for rule of law personnel.³⁴

³² *V.K. v. Bulgaria*, Communication No. 20/2008, ¶ 9.16 U.N. Doc. CEDAW/C/49/D/20/2008 (Aug. 17, 2011), available at <https://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-20-2008.pdf> (visited October 7, 2018).

³³ *A.S. v. Hungary*, Communication No. 4/2004, ¶ 11.5 U.N. Doc. CEDAW/C/36/D/4/2004 (Aug. 29, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf> (visited October 7, 2018).

³⁴ *Vertido v. the Philippines*, Communication No. 18/2008, ¶ 8.9 U.N. Doc. CEDAW/C/46/D/18/2008 (Sept. 1, 2010), available at https://www2.ohchr.org/english/law/docs/CEDAW.C.46.D18.2008_en.doc (visited October 7, 2018). For a first-person essay on filing this complaint, please see Karen Tayag Vertido, “Using the Optional Protocol of CEDAW,” March 14, 2013, available at <https://opcedaw.wordpress.com/category/communications/karen-tayag-vertido-v-the-philippines/> (visited October 7, 2018).

5. Women's Rights Under the Optional Protocol

The Committee has never assessed a violation of Article 6 on its merits. But other areas in which the Committee already has established precedent can serve as a guide for anti-trafficking advocates.

Communications have included claims relating to asylum, domestic violence, child custody, employment, gender-based violence, and, in a small number of cases, human trafficking. Several communications related to violence against women have been successful in affirming a State Party's duty to prevent, investigate, prosecute, and punish private actors inflicting violence on women. These decisions have held States Parties accountable for the actions of private actors within their jurisdiction.

Advocates in the domestic violence field have used the Optional Protocol to advance the rights of women:

- ***V.K. v. Bulgaria (CEDAW/C/49/D/20/2008)***: A victim of domestic violence was unable to seek immediate refuge because all the shelters in her area were overcrowded. Although she was granted an immediate protection order, the court did not issue V.K. a permanent order. The Bulgarian court held that there had been no imminent threat to V.K.'s life in the month prior, nullifying the need for a permanent order. The Committee held that Bulgaria failed to effectively protect the petitioner from domestic violence. It recommended that Bulgaria provide financial compensation to V.K. for the violations of her rights. The Committee also issued several general recommendations to Bulgaria, including: remove administrative and legal burdens for protection order applications; amend domestic violence laws to ease to ease to burden of proof on the victim; ensure that there are sufficient shelters for domestic violence victims; and train rule of law professionals on domestic violence.
- ***Goekce vs. Austria (CEDAW/C/39/D/5/2005) & Yildirim v. Austria (CEDAW/C/39/D/6/2005)***: Two Austrian NGOs filed petitions on behalf of two Austrian nationals who suffered years of domestic violence and were ultimately killed by their husbands. Although Austria had adopted comprehensive legislation against domestic violence, the petitioners argued that, in practice, the State failed to provide adequate protection for the victims. In both cases, the courts chose not to detain or imprison the victims' violent husbands. The Committee held that Austria violated the victims' rights and issued a series of practical recommendations. As a result, NGO advocates were able to close the gap between de jure and de facto responses to domestic violence. The Committee issued several recommendations to Austria including measures to strengthen implementation and monitoring of domestic violence laws; speedy application of both criminal and civil remedies for victims of domestic violence; and strengthened training and education on domestic violence for rule of law professionals.

- ***A.T. v. Hungary (CEDAW/C/32/D/2/2003)***: A.T.’s husband physically abused her for a period of four years. During this time, A.T. was unable to access shelter services, as they were unable to accommodate her and her two children. Protection or restraining orders were unavailable to A.T. under the Hungarian law. A.T. initiated proceedings to keep her husband from accessing the family home, but was unsuccessful in both the District and Regional Courts. The Committee found that the lack of adequate legislative and judicial protection for domestic violence victims in Hungary, which did not provide A.T. with immediate relief from the abuse nor gave her high priority in court proceedings, was a manifestation of widespread gender stereotyping in the State. This amounted to a violation of its obligations to promote gender equality. The Committee recommended that Hungary take immediate measures to ensure the physical and mental integrity of A.T. and her family, including securing safe housing, child support, legal assistance, and financial reparations for physical and mental harm suffered. Generally, the Committee recommended that Hungary take measures to prevent and respond to domestic violence, including implementation of the national strategy on domestic violence; training for rule of law professionals; and introduction of specific domestic violence laws.



The Committee has addressed the harmful effects of gender stereotyping:

- ***Vertido v. Philippines (CEDAW/C/46/D/18/2008)***: The victim, Karen Vertido, was raped by her employer. After a prolonged period of litigation, the Philippine court acquitted the defendant. The court challenged the credibility of Ms. Vertido’s testimony, opining that she had ample opportunities to escape. The Committee held that the State Court relied on gender-based myths and misconceptions about rape and rape victims, in violation of the State’s obligations under the Convention to end gender discrimination in the legal process. The Committee recommended that the Philippines provide Ms. Vertido appropriate compensation for harms suffered as a result of these violations. The Committee recommended that the Philippines address systemic gender stereotyping through efforts to ensure that sexual assault cases are conducted in an impartial and fair manner. Specific recommendations included gender-sensitivity training for rule of law professionals and amending existing rape laws to include a focus on “lack of consent”; expanding the definition of coercion beyond physical violence; and removing the requirement of penetration.

In the area of health, the Committee has assessed the issue of forced sterilization:

- ***A.S. v. Hungary (CEDAW/C/36/D/4/2004)***: A.S., a Hungarian Roma woman, required an emergency Caesarian section following a late miscarriage. A doctor had her sign consent forms while she was on the operating table. The form included a barely legible hand-written stipulation that the signee consented to a sterilization procedure. A.S. did not understand what had happened until after the operation. She pursued domestic legal proceedings for violation of her civil rights and negligent sterilization, but was rejected in county and appellate courts. Under the circumstances of the case, the Committee found that a third instance review could not be expected of A.S. The Committee concluded that Hungary violated A.S.’ rights to (1) information on family planning, (2) fully-informed consent to medical procedures, (3) appropriate services regarding pregnancy and the post-natal period, (3) right to determine the number and spacing of her children. It recommended that Hungary financially compensate A.S. and take measures to make sure health personnel are aware of and carry out patients’ rights to fully informed consent.

Table 3: CEDAW Communications Decided on the Merits

	Case Name	Symbol/Title	Articles Invoked	Violation
1	A.T. v. Hungary	CEDAW/C/32/D/2/2003	2, 5, 16	2, 5, 16
2	Nguyen v. The Netherlands	CEDAW/C/36/D/3/2004	11	No violation
3	A.S. v. Hungary	CEDAW/C/36/D/4/2004	10, 12, 16	10, 12, 16
4	Goekce v. Austria	CEDAW/C/39/D/5/2005	1, 2, 3, 5	1, 2, 3
5	Yildirim v. Austria	CEDAW/C/39/D/6/2005	1, 2, 3, 5	1, 2, 3
6	Vertido v. The Philippines	CEDAW/C/46/D/18/2008	1, 2, 2005	1, 2, 5
7	Pimentel Teixeira v. Brazil	CEDAW/C/49/D/17/2008	2, 12	1, 2, 12
8	V.K. v. Bulgaria	CEDAW/C/49/D/20/2008	1, 2, 5, 16	1, 2, 5, 16
9	Abramova v. Belarus	CEDAW/C/49/D/23/2009	1, 2, 3, 5	1, 2, 3, 5
10	L.C. v. Peru	CEDAW/C/50/D/22/2009	1, 2, 3, 5, 12, 16	1, 2, 3, 5, 12
11	Kell v. Canada	CEDAW/C/51/D/19/2008	1, 2, 14, 15, 16	1, 2, 16
12	R.K.B. v. Turkey	CEDAW/C/51/D/28/2010	1, 2, 5, 11	1, 2, 5, 11
13	Jallow v. Bulgaria	CEDAW/C/52/D/32/2011	1, 2, 3, 5, 16	1, 2, 3, 5, 16
14	V.P.P. v. Bulgaria	CEDAW/C/53/D/31/2011	1, 2, 3, 5, 12, 15	1, 2, 3, 5, 12, 15
15	R.P.B. v. The Philippines	CEDAW/C/57/D/34/2011	1, 2	1, 2
16	de Blok et al. v. The Netherlands	CEDAW/C/57/D/36/2012	11	11
17	Gonzalez Carreno v. Spain	CEDAW/C/58/D/47/2012	2, 5, 16	2, 5, 16
18	E.S. and S.C. v. United Republic of Tanzania	CEDAW/C/60/D/48/2013	2, 5, 13, 15, 16	2, 5, 13, 15, 16
19	X and Y v. Georgia	CEDAW/C/61/D/24/2009	1, 2(b)-(f), 5(a)	1, 2(b)-(f), 5(a)
20	Belousova v. Kazakhstan	CEDAW/C/61/D/45/2012	2(e), 5(a), 11, 14	2(e), 5(a), 11(1)(a) and (f)
21	A. v. Denmark	CEDAW/C/62/D/53/2013	1, 2 (c)-(d), 3, 12, 15, 16	2(c)-(d)
22	M.W. v. Denmark	CEDAW/C/63/D/46/2012	1, 2 (a)-(f), 3, 4, 5 (a)-(b), 9, 15(1), 15(4), 16(d)-(g)	2(e), 5(a), 11(1)(a) and (f)
23	Medvedeva v. Russia	CEDAW/C/63/D/60/2013	1, 2(c)-(f), 11(1)(b),(c),(f)	2(c)-(f), 11(1)(b), (c), (f)
24	N.Q. v. U.K.	CEDAW/C/63/D/62/2013	1, 2(c)-(e), 3, 5, 16	No violation
25	F.F.M. v. Denmark	CEDAW/C/67/D/70/2014	1, 2, 3, 5, 16	No violation
26	Trujillo Reyes and Arguello Morales v. Mexico	CEDAW/C/67/D/75/2014	1, 2, 3, 5, 15	1, 2(b)-(c), 5
27	A.M. v. Denmark	CEDAW/C/67/D/77/2014	1, 2, 3, 5, 16	No violation
28	N.M. v. Denmark	CEDAW/C/67/D/78/2014	3, 5, 7	No violation

* Researchers could only identify 28 of 33 communications decided on the merits. The remaining communications are not available on the Committee's public databases.

6. What is the CEDAW Committee's Position on Trafficking in Persons?

The Convention is clear: States Parties have an obligation to address trafficking in women and girls. In its General Recommendations, the Committee has noted that:

- Trafficking makes women more vulnerable to violence;³⁵
- There is a need for officials to be trained and sensitized to the needs of trafficked women;³⁶
- Trafficking in women and girls is exacerbated during and after conflict;³⁷ and
- Trafficking may also be a basis for refugee status.³⁸

The Committee identified women victims of trafficking as a group that is “particularly vulnerable to discrimination through civil and penal laws, regulations and customary laws and practices.”³⁹

General Recommendation No. 19 (violence against women)⁴⁰ and General Recommendation No. 26 (women migrant workers)⁴¹ are key to the analysis of any human trafficking complaint.

As of October 2018, only six communications have squarely raised human trafficking, alleging a violation of Article 6.⁴² The State Party defendants in these cases – Austria (twice), the Netherlands (twice), Spain, and Switzerland – faced allegations that they had failed to act in the face of human trafficking. The CEDAW Committee deemed four communications inadmissible, either as insufficiently substantiated or for failure to exhaust domestic

³⁵ *General Recommendation No. 19, supra note 10* at ¶¶ 13-16.

³⁶ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 32: Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, ¶¶ 15, 44 – 46, U.N. Doc. CEDAW/C/GC/32 (Nov. 14, 2014) [hereinafter *General Recommendation No. 32*].

³⁷ *General Recommendation No. 30, supra note 20* at ¶¶ 39– 41.

³⁸ *General Recommendation No. 32, supra note 38*.

³⁹ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

⁴⁰ *General Recommendation No. 19, supra note 10*.

⁴¹ *General Recommendation No. 32, supra note 38*.

⁴² See *J.O. v. Switzerland*, Communication No. 115/2017, U.N. Doc. CEDAW/C/70/D/115/2017 (July 9, 2018); *X v. Austria*, Communication No. 67/2014, U.N. Doc. CEDAW/C/64/D/67/2014 (Aug. 10, 2016); *N v. the Netherlands*, Communication No. 39/2012, U.N. Doc. CEDAW/C/57/D/39/2012 (Mar. 11, 2014); *Maimouna Sankhé v. Spain*, Communication No. 29/2011, U.N. Doc. CEDAW/C/56/D/29/2011, (Oct. 28, 2013); and *Zhen Zhen Zheng v. the Netherlands*, Communication No. 15/2007, U.N. Doc. CEDAW/C/42/D/15/2007 (Oct. 26, 2009).

remedies.⁴³ The Committee discontinued one communication when it became impossible to contact the complainant.⁴⁴ One communication is pending.⁴⁵

The following case summaries provide insight into how the Committee might scrutinize a trafficking case in the future. The case summaries also highlight pitfalls to avoid when drafting a petition.⁴⁶

1. *Zhen Zhen Zheng v. the Netherlands (CEDAW/C/42/D/15/2007)*

Nationality of author: China

Respondent state: The Netherlands

Date of communication: 22 January 2007

Date of decision: 14 November 2008

Outcome: Communication declared inadmissible for failure to exhaust domestic remedies

The petitioner, Ms. Zheng, claimed that the Netherlands failed to fulfill its obligations under Article 6 CEDAW when authorities failed to recognize her as a victim of human trafficking and did not provide her information on specialized legal aid for trafficking victims. The communication was ultimately dismissed for failure to exhaust domestic remedies.

Factual Background

Ms. Zheng was born in China and orphaned at an early age. She was raised by her grandmother until the time of her death, at which point Ms. Zheng was forced to live on the streets. Ms. Zheng alleged in her communication that she was eventually forced into prostitution. Ms. Zheng had a low level of education and was illiterate.

Ms. Zheng alleged that she was later trafficked to the Netherlands as a minor for forced prostitution. Ms. Zheng was locked in a house and forced to sleep with men. She was eventually able to escape but was later taken in by a Chinese woman and forced to do heavy housework. When the victim became pregnant, she was put out on the street.

⁴³ See *X v. Austria*, Communication No. 67/2014, U.N. Doc. CEDAW/C/64/D/67/2014 (Aug. 10, 2016); *N v. the Netherlands*, Communication No. 39/2012, U.N. Doc. CEDAW/C/57/D/39/2012 (Mar. 11, 2014); *Maimouna Sankhé v. Spain*, Communication No. 29/2011, U.N. Doc. CEDAW/C/56/D/29/2011, (Oct. 28, 2013); and *Zhen Zhen Zheng v. the Netherlands*, Communication No. 15/2007, U.N. Doc. CEDAW/C/42/D/15/2007 (Oct. 26, 2009).

⁴⁴ The Committee discontinued the communication after determining that the author's location was unknown and it was impossible to contact her. *J.O. v. Switzerland*, Communication No. 115/2017, U.N. Doc. CEDAW/C/70/D/115/2017 (July 9, 2018). This case concerned non-refoulement.

⁴⁵ Communication No. 112/2017 was filed against Austria in 2017 and concerns deportation of the author. See also, *Table of pending cases*, COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, <https://www.ohchr.org/Documents/HRBodies/CEDAW/PendingCases.docx> (last visited Sept. 11, 2018).

⁴⁶ In *Maimouna Sankhé v. Spain*, the author claimed to be a victim of a violation of, *inter alia*, human trafficking under Article 6. The Committee declared the communication inadmissible for failure to exhaust domestic remedies and did not discuss the alleged Article 6 violation. The decision did summarize the author's argument that the State Party failed to include unpaid domestic work in its gross national product was a "violation attributable to the State Party." *Maimouna Sankhé v. Spain*, ¶ 5.9, CEDAW/C/56/D/29/2011, (Oct. 28, 2013).

Ms. Zheng filed for asylum in the Netherlands, and described the abuse and exploitation that she suffered. The Dutch Immigration and Naturalization Service (IND) denied Ms. Zheng's asylum application on the grounds that "she could not give details about her trip from China to the Netherlands, did not have identity documents and waited for eight months before applying for asylum."⁴⁷ Ms. Zheng's appeal of the decision was denied.

Ms. Zheng also applied for a residence permit on the basis that she would not receive sufficient and adequate care as a single mother in China. IND refused to grant the application. Ms. Zheng lodged an administrative appeal, which was denied by the District Court. Ms. Zheng appealed this decision, which was denied by the Council of State.

Following this denial, Ms. Zheng filed a new application for a residence permit based on special circumstances, specifically the length of time spent in the Netherlands and adjustment to Dutch culture. The IND, again, denied her application. Ms. Zheng's appeal of the decision was denied. Ms. Zheng then filed an application for judicial review. This application was still pending at the time Ms. Zheng submitted her communication to the Committee.

Alleged Article 6 Human Trafficking Violations

Ms. Zheng claimed that the Netherlands failed to fulfill its obligations under Article 6 when authorities failed to identify her as a trafficking victim. As a result, the State Party failed to inform Ms. Zheng of her rights under Dutch law, specifically that victims of trafficking could obtain a residence permit under certain circumstances—known as a B9 scheme.

Ms. Zheng argued that the State should have realized during the various immigration proceedings that she had been a victim of trafficking and informed her that she could report the case to the police. Furthermore, the State was not sensitive to the fact that Ms. Zheng was an uneducated and illiterate minor when she was trafficked and highly traumatized. Therefore, she was unable to furnish identity documents or detailed personal information during the immigration proceedings. Ms. Zheng argued that the State's immigration policy faulted victims for being unable to provide such information.

Admissibility Decision

The CEDAW Committee held by a majority that the claim was inadmissible for failure to exhaust domestic remedies. The Committee did not consider the merits of the communication. The Committee found that Ms. Zheng had failed to exhaust domestic remedies in two respects. First, the Committee determined that Ms. Zheng had not raised the alleged human trafficking violations under Article 6 at the domestic level. After learning of the B9 scheme, Ms. Zheng did not report her case to the police—the basis for obtaining the special permit for trafficking victims. As such, domestic authorities did not have the opportunity to remedy the alleged violation.

⁴⁷ *Zhen Zhen Zheng v. the Netherlands*, ¶ 2.4, CEDAW/C/42/D/15/2007 (Oct. 26, 2009).



Practice Pointers – A complainant:

- Must obtain a **final decision** from her highest domestic court;
- Cannot have any **pending litigation**; and
- Must **raise the claim’s substance at the domestic level**.

Second, the Committee noted that at the time the complaint was submitted, Ms. Zheng had a pending application for judicial review before the District Court regarding the denial of her second application for a residence permit. The majority decision of the Committee underscores the principle that complainants must exhaust all domestic remedies before the CEDAW Committee will intervene.

Dissent

Three CEDAW Committee members dissented, finding that the State Party had violated Article 6 of the Convention. The dissenting opinion found that Ms. Zheng applied for her second residence permit on the basis of “special circumstances” and not the alleged Article 6 violations. Therefore, the resident permit procedure and Ms. Zheng’s pending application for judicial review were not relevant to the exhaustion of domestic remedies analysis. The dissent did not address the majority’s first finding that the petitioner did not raise Article 6 violations at the domestic level.

The dissenting opinion also faulted the Netherlands for failure to exercise due diligence, a substantive element of a State Party’s obligations under Article 6. The dissent held that the State Party “did not act with the due diligence that the author’s situation required by failing to recognize that she might have been a victim of trafficking in human beings and accordingly inform her of her rights...”—in particular the B9 scheme.⁴⁸ The victim’s “situation” included telltale signs of trafficking, including victim statements and corroborating medical reports. Other red flags missed by the State Party included the fact that the victim was uneducated, traumatized, and unable to explain her experience.

The three dissenting CEDAW Committee members concluded that that the State Party had violated Article 6. The dissenting opinion included several recommendations, both general and specific to Ms. Zheng. First, the dissenting opinion recommended that the State Party “take steps in order to determine whether the author is indeed a victim of trafficking and, if so, provide her with measures of protection...” The dissenting opinion also issued general recommendations, including: training for border guards, police, and immigration officers on how to identify victims of trafficking; the creation of guidelines for trauma-informed interview techniques; and the establishment of procedures for informing persons identified as victims of trafficking of services and protections.

⁴⁸ *Id.* at ¶ 8.7.

The dissenting opinion reiterated that, in light of the vulnerability of victims of trafficking, States Parties have an obligation “to protect victims of an international crime such as trafficking” and “to have law enforcement officials adequately trained so as to identify victims of such crimes and to inform them of the avenues under which they can seek protection.”⁴⁹

2. *N v. the Netherlands* (CEDAW/C/57/D/39/2012)

Nationality of author: Mongolia

Respondent state: The Netherlands

Date of communication: 16 February 2012

Date of decision: 17 February 2014

Outcome: Communication declared inadmissible for insufficient substantiation

The petitioner, N., claimed that the State Party, the Netherlands, failed to protect her from gender-based violence, sexual slavery, and physical abuse in her home country, when it denied her asylum application. The Committee held that the petitioner had failed to sufficiently substantiate her claims and dismissed the communication.

Factual Background

The petitioner was a citizen of Mongolia, where she worked at a hotel in the capital. In addition to working in the hotel, the petitioner later began to work as the personal housekeeper for the hotel’s owner, Mr. L. The petitioner alleged that she was raped by Mr. L, and became pregnant. Two days after the assault, the petitioner filed a report with the police, after which Mr. L was taken in for questioning. The police released Mr. L 72

hours later. Mr. L informed the petitioner that he “had money and connections.”

Following this, Mr. L allegedly held the petitioner in his house and regularly sexually and physically abused her. After two months, the petitioner was able to escape and reported Mr. L to the police. Having nowhere to go, the petitioner returned to Mr. L. He told the petitioner that he had bribed the police and that they would not protect her. The petitioner escaped her abuser two more times, but each time she was found, forcibly removed, and returned to Mr. L. She continued to suffer further abuse by Mr. L. The petitioner eventually escaped and fled to the Netherlands.



Practice Pointer: Substantiation –

A complainant must provide specific, not general, facts that support their claim that a State Party violated their rights under CEDAW. See *M.S. v. the Philippines*, para. 6.5, U.N. Doc. CEDAW/C/58/D/30/2011 (Aug. 15, 2014) (finding that the author did not demonstrate that the Court’s decision was negatively impacted by gender-based stereotypes).

⁴⁹ *Id.* ¶ 8.1.

Upon arrival in the Netherlands, the petitioner applied for asylum. The State rejected the application. While the State found the petitioner’s statements credible, it did not find that the petitioner’s home country, Mongolia, would be unable or unwilling to protect her from her abuser. The petitioner lodged appeals with the District Court and, subsequently, the Administrative Jurisdiction Division of the Council of State. Both appeals were rejected.

Alleged Article 6 Human Trafficking Violations

The petitioner alleged that she was subjected to sexual slavery and other abuses by her former employer in Mongolia. She alleged, if forced to return to Mongolia, she would be at risk of “sex-based violence, sexual slavery and physical abuse”⁵⁰ at the hands of her former employer. The petitioner argued that the Netherlands, in rejecting her asylum application, failed to protect her from sexual slavery, in violation of Article 6 of the Convention.



Practice Pointer: Asylum – Complainants seeking relief for the denial of an asylum application must provide evidence that removal to the complainant’s home country would constitute a “real, personal and foreseeable risk.” *M.E.N. v. Denmark*, para. 8.9 U.N. Doc. CEDAW/C/55/D/35/2011(Aug. 19, 2013). The threat has to be specific and continuing. See e.g., *M.N.N. v. Denmark*, 33/2011 at para. 8.11 & 8.12 (finding that there was no independent evidence showing that her specific ethnic group continued to practice female genital mutilation); *S.O. v. Canada*, para. 9.6, U.N. Doc. CEDAW/C/59/D/49/2013 (Dec. 19, 2014) (finding that the author failed to show that her former partner would be a continuing threat and that the authorities could not protect her).

Admissibility Decision

The Committee considered two questions in determining the admissibility of the petitioner’s communication:

“...whether the author has made a prima facie case by sufficiently substantiating her allegations of violation of articles 1, 2(e), 3 and 6 of the Convention by the State party. The Committee also has to assess whether the author has provided adequate information as to whether she would be exposed to a real, personal and foreseeable risk of serious forms of gender-based violence were she to return to Mongolia.”⁵¹

The Committee held that the petitioner had failed to provide any explanation as to why and how the State Party’s denial of her asylum application violated her rights under Article 6. The petitioner did not provide information that would indicate that her former employer in Mongolia remained a threat to her safety. The Committee also held that the petitioner did not provide evidence that the Mongolian legal system would fail to protect her from violence. Accordingly, the petitioner’s complaint was

held to be insufficiently substantiated and thus inadmissible.

⁵⁰ *Id.* ¶ 6.3.

⁵¹ *Id.* at ¶ 6.6.



3. *X v. Austria (CEDAW/C/64/D/67/2014)*

Nationality of author: Austria

Respondent state: Austria

Date of communication: 15 November 2013

Date of decision: 11 July 2016

Outcome: Communication declared inadmissible for lack of victim status and failure to exhaust domestic remedies

The petitioner, X, claimed that Austria failed to fulfill its obligations under inter alia Articles 1 and 6 of CEDAW when authorities conducted an undercover investigation into the author's sex life on suspicion of illegal prostitution. The communication was dismissed for lack of victim status and failure to exhaust domestic remedies.

Factual Background

In Austria, voluntary sex work is legal, but it is regulated at three administrative levels, national, provincial, and communal. Sex workers are required to register and undergo weekly vaginal inspections and quarterly HIV tests. Unregistered sex work is not a criminal offence, but considered an administrative offence. X, a medical doctor, alleged that in early 2007, police began an undercover investigation to determine whether X was engaging in illegal, unregistered sex work. The State Party submitted that the author posted an internet-based advertisement offering sexual acts in exchange for "pocket money."



On February 19, 2007, an undercover officer entered X's home disguised as a client. X was in her underwear, as had been arranged in previous communications. After entering the house and agreeing on the terms of payment, the officer revealed his identity, and let in more armed officers against X's will. X alleged that the officers did not allow her to dress, and that they intended to use X's nudity to obtain evidence of unregistered sex work, referred to by law enforcement as "illegal prostitution."

The police charged X with illegal prostitution, but these administrative criminal proceedings were later suspended on July 3, 2007. On August 21, 2008, the author filed a police misconduct complaint with the Independent Administrative Panel of Lower Austria. The complaint was rejected as time barred. The author appealed to the Constitutional Court, which found that the complaint did raise issues of constitutional law. The Court referred the case to the Administrative Court, which affirmed the original decision of the Independent Administrative Panel.

The author filed a separate official liability complaint against the Federal Government, claiming compensation for violations of her human rights. The proceedings were cancelled after the author and the Federal Minister of the Interior reached a settlement agreement.

Alleged Article 6 Human Trafficking Violations

X argued that Austria's prostitution laws created opportunities for police to sexually harass women, in violation of Article 6 of the Convention. X contended that her forced nudity was an example of such sexual harassment. Inversely, Austria's prostitution laws failed to protect women from sexual exploitation and provided no protection against mistreatment.



Practice Pointer: Victim Status

– A complainant who receives full and final satisfaction of her claims against a State at the domestic level loses her victim status under the Optional Protocol.

Admissibility Decision

The Committee found that X's claim was inadmissible for failure to exhaust domestic remedies and lack of victim status. X did not exhaust domestic remedies in several ways: (1) X failed to lodge a police misconduct complaint within the statutory time limit; (2) X failed to raise any gender-based discrimination allegations before the local court; and (3) X did not challenge the terms of her settlement at the national level. The Committee also found that X lost her victim status when she reached a comprehensive settlement with the Austrian Federal Government.



7. How Can Anti-Trafficking Advocates Use the Optional Protocol?

A State Party's failure to take all appropriate measures to combat the trafficking of women constitutes a violation of substantive rights set forth under CEDAW, Article 6. State Parties' failures to prevent trafficking of women, or address the root causes of trafficking, constitute the type of harm that CEDAW seeks to remedy.

European Court of Human Rights Human Trafficking Jurisprudence *Rantsev v. Cyprus (Application No. 25965/04) (ECHR)*

Oxana Rantseva, a young Russian woman, traveled to Cyprus to work as a cabaret artiste for cabaret owner X.A. This performing arts visa program allowed women to work legally in Cyprus as cabaret artistes. It was widely known that these visa holders worked in the sex industry. After a few weeks, Ms. Rantseva left the apartment that she shared with other young women who worked for X.A., the cabaret owner. Ms. Rantseva's employers found her and brought her to the police with the aim of having her arrested and deported. The police determined that Ms. Rantseva was not present in Cyprus illegally and released her to her employers. Her employers took Ms. Rantseva to an apartment. She died that night after falling from the high-rise apartment building in an apparent escape attempt. But an inquest ruled Ms. Rantseva's death an accident; authorities in Cyprus did not investigate human trafficking allegations.

The victim's father, Mr. Rantsev, brought suit against both Cyprus and Russia in the European Court of Human Rights (ECHR). The ECHR noted that Article 4 (Prohibition of slavery and forced labour) of the European Convention on Human Rights created a number of positive obligations on states with respect to trafficking. It held that Cyprus violated its positive obligations to put in place appropriate legislative and administrative anti-trafficking frameworks; to provide protective measures against trafficking and exploitation; and its procedural obligation under Article 2 (Right to life) to conduct an effective investigation into the victim's death. The Court held that Russia violated its Article 4 procedural obligation to investigate potential trafficking. The ECHR ordered the Cypriot Government to pay EUR 40,000 to the applicant, Ms. Rantseva's father, and ordered the government of the Russian Federation to pay EUR 2,000 to the applicant.

Under international law, States have a due diligence obligation to 1) prevent, investigate and prosecute traffickers; 2) assist and protect victims of human trafficking; and 3) ensure remedies for victims of trafficking.⁵² This obligation is not only reactive, but proactive as well. It requires that States not only take measures to prevent, prosecute, and punish trafficking, but also adopt holistic approaches that reflect the intersection between these areas.⁵³ States also have a responsibility to address the root causes of trafficking, e.g. poverty, inequality, unfair labor practices, or restrictive immigration rules.

Addressing Root Causes of Trafficking: Visa Systems

In *Rantsev v. Cyprus and Russia*, Ms. Rantseva's visa category played a role in her vulnerability to human trafficking. The European Court of Human Rights stated that "a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking."⁵⁴ The Court held that Cyprus' artiste visa program "did not afford to Ms. Rantseva practical and effective protection against trafficking and exploitation" and violated Article 4 of the European Convention. Cyprus' artiste visa program had been repeatedly criticized for creating an increased risk of trafficking and exploitation of women traveling to the country to work as cabaret artistes.

Visas for domestic work present similar issues, leaving women vulnerable to forced labor. According to the ILO, women constitute 83 percent of domestic workers worldwide.⁵⁵ In many countries, migrant domestic worker visas are tied to individual employers. This creates a structural dependency that is ripe for abuse. Abusive employers use restrictive immigration policies to their advantage, threatening domestic workers with deportation. Faced with the prospect of irregular status or deportation, domestic workers are forced to work in exploitive conditions—often without pay. The visas effectively chain domestic workers to abusive employers. Restrictive immigration policies such as these not only fail to protect domestic workers, they, in fact, create opportunities for trafficking and exploitation.

Victim Identification

States have a due diligence obligation to identify victims of trafficking.⁵⁶ Absent identification of victims, States Parties cannot meet their other due diligence obligations to investigate and prosecute traffickers, and assist and protect victims of trafficking. The obligation to identify victims of trafficking was directly addressed by the dissent in *Zhen Zhen Zheng v. the Netherlands*, which held that the State failed its due diligence obligations when it failed to recognize that the petitioner was a potential victim of human trafficking.

⁵² *United Nations General Assembly, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children* U.N. Doc. No. A/70/260 (Aug. 3, 2015).

⁵³ *Id.* at ¶ 19.

⁵⁴ *Rantsev v. Cyprus and Russia*, ¶ 284.

⁵⁵ International Labor Organization, *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* 19 (2013).

⁵⁶ *United Nations General Assembly, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ¶ 24 U.N. Doc. No. A/70/260 (Aug. 3, 2015).

Criminalization, Investigation, Prosecution, and Punishment

The majority of countries in the world have legislation criminalizing human trafficking.⁵⁷ Despite this, the U.S. State Department reported that there were only 17,880 trafficking prosecutions worldwide in 2017.⁵⁸ Of these, just 869 were for forced labor. This implementation gap is a striking failure of all states' due diligence obligations to criminalize, investigate, prosecute, and punish trafficking.

The chart below, originally published in the 2018 State Department Trafficking In Persons Report, provides prosecution data since 2011.⁵⁹ The ILO estimates that 21 million people are held in all forms of forced labor. More than three-quarters of those are held in forced labor outside the sex industry. But as the State Department data indicate, the vast majority of prosecutions focus on sex trafficking. Labor trafficking prosecutions, identified in the parentheses, are practically non-existent.

U.S. Department of State Trafficking in Persons Report 2018 Global Law Enforcement Data

YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2011	7,909 (456)	3,969 (278)	42,291 (15,205)	15
2012	7,705 (1,153)	4,746 (518)	46,570 (17,368)	21
2013	9,460 (1,199)	5,776 (470)	44,758 (10,603)	58
2014	10,051 (418)	4,443 (216)	44,462 (11,438)	20
2015	19,127 (857)	6,615 (456)	77,823 (14,262)	30
2016	14,939 (1,038)	9,072 (717)	68,453 (17,465)	25
2017	17,880 (869)	7,045 (332)	100,409 (23,906)	5

The above statistics are estimates derived from data provided by foreign governments and other sources and reviewed by the department of state. Aggregate data fluctuates from one year to the next due to the hidden nature of trafficking crimes, dynamic global events, shifts in government efforts, and a lack of uniformity in notional reporting structures. The numbers in parentheses are those of labor trafficking prosecutions, convictions, and victims identified.

⁵⁷ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* 12 (2016).

⁵⁸ U.S. Department of State, *Trafficking in Persons Report* at 43 (June 2018).

⁵⁹ *Id.*

The European Court of Human Rights Forced Labor Jurisprudence *Chowdury v. Greece* (Application No. 21884/15) (ECHR)

Approximately 150 Bangladeshi men were recruited to work on strawberry farms in Greece. They were promised a wage of €22 per day for seven hours of work, with an overtime rate of €3 per hour. Instead, the victims worked 12 hours a day without pay. Armed guards patrolled the premises while the victims worked. The traffickers forced the migrant workers to live in makeshift tents without toilets or running water. State authorities knew about these exploitative practices, but took very limited action. The workers feared leaving the farm, terrified they might be arrested and deported. The workers also hoped that they would eventually receive their back wages. The workers went on strike three times to demand their back wages. During the third strike, the farm's guards fired on the workers.

A Greek domestic court acquitted the defendants of the trafficking charges, and commuted the sentences for attempted murder to a small fine. The ECHR reiterated that human trafficking falls under the scope of Article 4 (slavery and forced labour) of the European Convention, and found that Greece failed to fulfill its positive obligation to adopt tangible measures to prevent trafficking even when the authorities were aware of the situation. The Court also found that Greece violated its procedural obligations to conduct an effective investigation into the offenses and provide effective judicial proceedings by dismissing the claims of applicants who had not been injured, acquitting defendants of trafficking charges, converting prison sentences to financial penalties, and not creating a compensation fund.

Remedies

Under international human rights law, victims of human rights violations have the right to an effective remedy. States have an obligation to ensure this right.⁶⁰ The Palermo Protocol specifically notes that States “shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”⁶¹

⁶⁰ International Covenant on Civil and Political Rights, art. 2(3).

⁶¹ Palermo Protocol, art. 6.6.



Remedies include “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”⁶² In addition, States should ensure that procedural rights are in place to allow victims to access remedies.⁶³ Remedies should also be applied without discrimination—including to non-citizens.⁶⁴

In addition to the areas identified above, other potential claims that might be made to CEDAW through the Optional Protocol include State failure to:

- Provide sufficient resources to protect victims of trafficking;
- Provide witness protection to victims testifying against traffickers;
- Provide immigration relief to trafficking victims in country;
- Provide identity documents to nationals trafficked abroad;
- Regulate labor recruiters and agents to prevent human trafficking;⁶⁵ and
- Prevent the prosecution of trafficking victims.

⁶² Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 18.

⁶³ United Nations General Assembly, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ¶ 34 U.N. Doc. No. A/70/260 (Aug. 3, 2015).

⁶⁴ *Id.* at ¶ 35.

⁶⁵ *Rantsev v. Cyprus and Russia*, ¶ 306, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010 (“The failure to investigate the recruitment aspect of alleged trafficking would allow an important part of the trafficking chain to act with impunity.”).

8. After the Petition is Filed

Filing a petition is just the beginning. When devising a strategic litigation campaign, advocates must employ a variety of tools. In addition to filing petitions on behalf of trafficking survivors, advocates should continue to bring attention to the issue through media and public awareness campaigns. Media attention throughout the communication process can raise the profile of the individual complaint – and the issue. If the CEDAW Committee does adjudicate the petition on the merits, advocates should ensure that the respondent State adopts the Committee’s recommendations. This can include drafting follow-up reports for the Committee, as well as submitting reports to other human rights mechanisms.

9. Conclusion

The CEDAW Optional Protocol, one of the most under-used individual complaint mechanisms, has enormous potential to provide remedies for women and girls trafficked internally and across borders. Trafficking of domestic workers into forced labor, one of the most common forms of labor exploitation across the globe, is rarely investigated or prosecuted. A complaint alleging forced labor and domestic servitude would strike a blow against impunity for these crimes. Women migrant workers are particularly vulnerable and often find themselves utterly without recourse for the abuses they have suffered at the hands of unscrupulous employers.

Strategic litigation takes many forms.⁶⁶ Advocates fighting for women’s human rights across the globe must use all available tools to hold states accountable. The CEDAW Optional Protocol individual complaint mechanism provides one more vehicle to combat human trafficking.

⁶⁶ See Freedom Fund & The Human Trafficking Pro Bono Legal Center [now The Human Trafficking Legal Center], *Ending Impunity, Securing Justice: Using Strategic Litigation to Combat Modern-Day Slavery and Human Trafficking* (2016), available at <http://www.htlegalcenter.org/wp-content/uploads/Ending-impunity-securing-justice.pdf> (visited October 7, 2018); Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation* (2016), available at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-roma-school-desegregation> (visited October 7, 2018).

Appendix A:

Useful Secondary Sources

In addition to the secondary sources discussed above, advocates may find the following references helpful in formulating an individual complaint to the CEDAW Optional Protocol Communications Mechanism.

1. United Nations, *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices*, by the United Nations, Economic and Social Commission for Asia and the Pacific (2004)
2. Report of the UN Special Rapporteur on trafficking in persons, especially women and children, 3 August 2015 (discussing due diligence obligations to prevent, investigate and punish trafficking in persons, to realize a victim's right to remedy) available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/260
3. Report of the UN Special Rapporteur on trafficking in persons, especially women and children, 28 July 2014 (discussing at Annex A the basic principles states shall observe to ensure the right to an effective remedy for victims of trafficking) available at <http://www.ohchr.org/EN/Issues/Trafficking/Pages/annual.aspx>
4. Periodic country reports, observations, and special reports for various countries are available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=29
5. Concluding Observations of the CEDAW Committee are available at: <http://www.refworld.org/publisher,CEDAW,CONCOBSERVATIONS,,,0.html>

Model Communication Form:

6. Model OP communication form from UN available at <http://www.un.org/womenwatch/daw/cedaw/protocol/modelform-E.PDF>

General Guides to the Optional Protocol:

7. International Network of Economic, Social and Cultural Rights (ESCR-Net), "Optional Protocol to the Convention On the Elimination of All Forms of Discrimination against Women" available at <https://www.escr-net.org/sites/default/files/ESCR-NET-Manual-Booklet-3.pdf>

8. "Mechanisms for Advancing Women's Human Rights: A Guide to Using the Optional Protocol to CEDAW and other International Complaint Mechanisms," 2011, Australian Human Rights Commission, available at https://www.humanrights.gov.au/sites/default/files/content/sex_discrimination/publication/mechanisms/opcedaw.pdf
9. "A Resource Guide: Our Rights Are Not Optional: Advocating for the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Through its Optional Protocol," 2008, International Women's Rights Action Watch Asia Pacific, available at http://www.karat.org/wp-content/uploads/2012/01/Our_Rights_Guide.pdf
10. "Part V: Individual Complaints Under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women," available at http://www.omct.org/files/2006/11/3979/handbook4_eng_05_part5.pdf
11. "Claiming Women's Economic, Social and Cultural Rights: A Resource Guide to Advancing Women's Economic, Social and Cultural Rights Using the Optional Protocol and Convention on the Elimination of All Forms of Discrimination Against Women and the Optional Protocol and International Covenant on Economic and Cultural Rights," April 2013 by International Network for Economic, Social and Cultural Rights, and International Women's Rights Action Watch – Asia Pacific (see Part Four: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women) available at <https://www.escr-net.org/sites/default/files/Guide%20on%20Women's%20ESCR%20-%20Final.pdf>
12. "A Lever for Change: Using the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women," published by the Equality and Human Rights Commission, by Ceri Hayes et al., available at http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/a_lever_for_change.pdf
13. "The Optional Protocol to CEDAW: Mitigating Violations of Women's Human Rights," Deutsches Institut für Menschenrechte, International Training Seminar for NGOs and women's rights activists, March 13-15, 2003, Berlin, Germany available at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/documentation_the_optional_protocol_to_cedaw.pdf

Exhaustion of Domestic Remedies:

14. “OP [Optional Protocol] Technical Papers No. 1: Overview of the Rule Requiring the Exhaustion of Domestic Remedies Under the Optional Protocol to CEDAW,” 2008, Donna J. Sullivan, International Women’s Rights Action Watch Asia Pacific (discussing the exhaustion requirement as construed by the Commission under other international human rights treaties).

Review Process:

15. “A Toolkit for Reporting to CEDAW on Trafficking in Women and Exploitation of Migrant Women Workers,” Global Alliance Against Traffic In Women available at http://www.gaatw.org/publications/A_Toolkit_for_Reporting_to_CEDAW_GAATW2011.pdf

Analysis of Prior Decisions:

16. “Construction and Application of United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),” December 18, 1979, 1249 U.N.T.S. 13 – Global Cases by Wooster and Li, 8 American Law Reports Int’l 523 (Originally published in 2014)

Other:

17. General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CEDAW/C/GC/32, Nov. 5, 2014 at paras. 44-46 (the Committee asks States to treat trafficking as part of gender-related persecution, noting that trafficked persons should know about their right to seek asylum, and should have equal access to domestic immigration processes and procedures).

