**Comments on the Draft General Recommendation**

**on trafficking in women and girls in the context of global migration**

This document provides comments on the Draft General Recommendation on trafficking in women and girls in the context of global migration (the DGR) made by the Committee on the Elimination of Discrimination Against Women (the Committee). The comments are focused on the importance of acknowledging and condemning on the DGR **the arbitrary use of pretrial detention for cases of trafficking, due to its disproportionate impact on women.** The comments have been elaborated by **Intersecta**, a Mexico City based, feminist research and advocacy organization focused on promoting gender equality. We hope they prove useful for the Committee’s important work writing the DGR.

**1. Suggested additions**

At the end of paragraph 86, we suggest adding a sentence in which the Committee condemns “the use of arbitrary detention practices, including the arbitrary use of pretrial detention for cases of trafficking.”

In paragraph 92, the Committee refers to the “adverse collateral effects of anti-trafficking efforts” and includes several subparagraphs. We suggest adding a subparagraph “f)”, stating the following: “Ensure that anti-trafficking efforts do not rely on the arbitrary use of pretrial detention, including the use of mandatory pretrial detention.”

**2. Justification for the additions**

In paragraph 80 of the DGR, the Committee affirms that “existing justice systems may be more likely to violate women’s rights than to protect them”. It also states that “victims of trafficking may be subject to prosecution for acts they were forced to commit as part of their exploitation”. Given this reality, the Committee condemns a variety of practices that allow victims to be criminalized and recommends States implement different safeguards against them. Our purpose with these comments is to shine light on yet **another way in which victims can be subjected to additional violence**, which **is through** the use of arbitrary incarceration practices, including **the use of *mandatory* pretrial detention**, which in some countries –including Mexico– has been established for the crime of trafficking.[[1]](#endnote-1) We believe that explicitly disavowing the arbitrary use of pretrial detention, including the use of mandatory pretrial detention, will contribute to reducing women’s human rights violations in the context of anti-trafficking efforts, which is one of the objectives of the DGR.

**A. Legal grounding for the additions**

**Several international human rights bodies have already condemned the use of *mandatory* pretrial detention**, including the United Nations Human Rights Committee,[[2]](#endnote-2) the United Nations Committee Against Torture,[[3]](#endnote-3) the United Nations Working Group on Arbitrary Detention,[[4]](#endnote-4) the United Nations Office on Drugs and Crime,[[5]](#endnote-5) the Inter-American Commission of Human Rights,[[6]](#endnote-6) and the Inter-American Court of Human Rights.[[7]](#endnote-7) The Human Rights Committee (HRC), in particular, has condemned the use of *mandatory* pretrial detention for being a violation of Article 9, paragraph 3 of the International Covenant on Civil and Political Rights.[[8]](#endnote-8)

According to the HRC’s logic, ***mandatory* pretrial detention is a violation of people’s right to liberty, because it is arbitrary**, given that people’s circumstances are *not* taken into account when imposing it. They are just sent to prison automatically, merely for the crime for which they are charged or investigated. Given how *mandatory* pretrial detention *works* in Mexico with regards to crimes like trafficking –disproportionately impacting women–, we hold that **it can also be a form of *indirect* discrimination against women,** thus violating article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women.

We know **the CEDAW Committee has an interest in women in detention** and has, on previous occasions, expressed concern for the use of pretrial detention. For instance, in its Concluding Observations to Argentina’s Seventh Periodic Report, it recommended that the State take “measures to limit the use of pre-trial detention of women, including by widening the recourse to precautionary measures”.[[9]](#endnote-9) In its Concluding Observations to Mexico’s Ninth Periodic Report, the CEDAW Committee welcomed what little initiatives were taken in the country to “reduce preventive detention, and to apply non-custodial measures” and recommended that the State “further strengthen the reform of the prison system and harmonize the use of non-custodial sanctions and measures”.[[10]](#endnote-10)

In line with the CEDAW Committee’s observations, we hold that **practices such as *mandatory* pretrial detention must also be repudiated, in general, and for cases of trafficking, in particular, because they disproportionately violate women’s rights**, as we intend to show.

**B. Empirical basis for the additions**

Over the last two decades, Mexico has implemented a variety of legal and institutional reforms aimed at facilitating the prosecution and punishment of the crime of trafficking.[[11]](#endnote-11) Although these reforms had as a purpose dismantling trafficking networks and protecting victims’ rights, **they have not only failed to achieve these ends, but, in some cases, they are causing even further harm, a harm that is disproportionately falling on women**. Such is the case of *mandatory* pretrial detention, a measure that establishes that *any* person that is being investigated for the crime of trafficking *must* be incarcerated for the duration of the process.[[12]](#endnote-12) Although in its wording this measure is not intended to hinder women’s rights, in practice, that is precisely what it does.

**i. Women are disproportionately persecuted for trafficking in Mexico**

In the case of Mexico, as it happens in many countries, the crime of trafficking is rarely prosecuted.[[13]](#endnote-13) In the few cases in which the criminal system does intervene though, **statistics show that women *are* being prosecuted and incarcerated –disproportionately– for this crime**.

For instance: in 2018, while in most common crimes –robbery, homicide, kidnapping, assault, drug related crimes–, those attributed to incarcerated women represented between 0.4% and 11% of crimes for which people were in prison,[[14]](#endnote-14) trafficking crimes attributed to incarcerated women represented 24% of the crimes of those incarcerated for trafficking. In other words: although trafficking is a crime that is rarely persecuted, when it is persecuted, women appear far more often as those being accused and incarcerated than in most crimes. This itself is cause for concern, though not surprising given the Committee’s own acknowledgement –on paragraph 86 of the DGR– of how violent raids against trafficking can be used against women.

**ii. Women are disproportionately incarcerated in pretrial detention for trafficking in Mexico**

An additional problem is that **many of these women were actually being held in pretrial detention**. In 2018, in state prisons, women had not yet been judged for 37% of the crimes of trafficking for which they were incarcerated; in federal prisons, the percentage increased to 75%.

**In the case of pretrial detention for trafficking, it is also possible to see a disparate impact on women,** when compared to men: while crimes of trafficking represented 0.9% of all the crimes for which women were held in pretrial detention, in the case of men, they represented 0.2%. In other words: the crime of trafficking disproportionately contributes to the number of women being held in pretrial detention, when compared to men.

**iii. The case of Mexico is not exceptional**

Gender disparities in the rate of pretrial detention can be seen in most crimes in Mexico. The overall result of this is that for every single year since 2006, the percentage of women imprisoned in pretrial detention is greater than the percentage of men.[[15]](#endnote-15) The gap between women and men actually *widened* in 2008, which is when *mandatory* pretrial detention was included in the Federal Constitution.[[16]](#endnote-16) Today, according to the latest estimates published in December 2019, while 45.2% of women in prison were in pretrial detention, in men only 37% were in the same situation.[[17]](#endnote-17)

**The case of Mexico**, however, according to a Report by the Special Rapporteur on violence against women, its causes and consequences **is not that exceptional**: “many countries hold women in pretrial detention”, often in numbers “equivalent to or larger than the number of convicted female prisoners”, and, in many cases, “women are generally more impacted than men by pretrial detention”.[[18]](#endnote-18)

**iv. Arbitrary incarceration practices are part of the problem**

Given what we know about the impact of pretrial detention in women, in Mexico and worldwide, we believe that an explicit condemnation of arbitrary incarceration practices in the DGR is in place.

In addressing this issue, though, we believe it is not enough, for instance, to just call for a change in practices on the part of prosecutors and judges. The reason why this is so is that, at least in countries like Mexico, sending women to pretrial detention for cases of trafficking is not even up to prosecutors and judges because of *mandatory* pretrial detention. The point of this measure –which is established in law–[[19]](#endnote-19) is, precisely, to exclude them from making any type of decision with regards to pretrial detention. This means women are not even being judged on whether or not they should be sent to prison for the duration of the process, they are just sent there automatically. Given that there is no possibility of reviewing their detention, there is no way they can get out, unless procedural limits are hit[[20]](#endnote-20) or they are absolved.

Precisely what statistics also show, though, is that absolutions for *trafficking* for women are high.In 2018, at the state level, while absolutions represented 9% of judicial decisions for all crimes attributed to women, **in the case of trafficking, absolutions for women rose to 78%**.[[21]](#endnote-21) The problem, again, is that, **until absolution comes, they are forced to be in prison,** with everything that being in such a place entails, including being submitted to even more State violence. This needs to change. We need to change the mechanisms that allow women to be submitted to even further violence in the context of anti-trafficking efforts.

The DGR, on paragraph 3, acknowledges the fact that, “despite the plethora of existing anti-trafficking legal and policy frameworks at the national, regional and international levels, trafficking in women and girls remains pervasive globally.” Its purpose, then, according to paragraph 3, is to set out a practical guidance on how to overcome this reality “using a gender transformative approach – characterized by anti-trafficking measures that are gender-sensitive, rights and needs-based, and evidence-led.” The point, in other words, is to provide guidance as to *how* to tackle trafficking adequately: what practices to pursue and what practices to avoid. Precisely because it is not “rights and needs based, and evidence led”, precisely because it hinders women’s rights and submits them to further violence, *arbitrary* pretrial detention –including *mandatory* pretrial detention– should be considered amongst the latter.

1. In Latin America, Honduras and Colombia are examples of States that have implemented measures that are analogous to mandatory pretrial detention for the cases of trafficking. *See* for Honduras, Código Procesal Penal, article 184 ([Decreto No. 56-2013](http://www.poderjudicial.gob.hn/transparencia/regulacion/diariooficiallagaceta/Documents/Decreto%2056%202013%20Reforma%20al%20Codigo%20Procesal%20Penal%20%28Medidas%20sustitutivas%29.pdf)); and for Colombia, [Ley 1474](http://www.secretariasenado.gov.co/senado/basedoc/ley_1474_2011.html), article 39. [↑](#endnote-ref-1)
2. United Nations Human Rights Committee, CCPR/C/GC/35, sec. IV. [↑](#endnote-ref-2)
3. Mexico “should also eliminate mandatory pretrial detention in law and in practice. The State party should significantly reduce the use of pretrial detention and ensure that it always considers the possibility of using alternatives to deprivation of liberty and that pretrial detention is used as a last resort only, on an exceptional and reasoned basis, when strictly necessary and for the shortest possible time”. United Nations Committee Against Torture, CCPR/C/MEX/CO/6, para. 35. [↑](#endnote-ref-3)
4. “El Grupo de Trabajo hace un llamamiento a México para que derogue esta norma constitucional y la legislación que ordena la prisión preventiva automática, o para que al menos la modifique de acuerdo con el artículo 9, párr. 3, del Pacto.” United Nations Working Group on Arbitrary Detention, A/HRC/WGAD/2018/1, para. 65. [↑](#endnote-ref-4)
5. United Nations Office on Drugs and Crime, *Handbook on Women and Imprisonment*, 2014, p. 109. [↑](#endnote-ref-5)
6. CIDH, “Cuarto informe de seguimiento de recomendaciones formuladas por la CIDH en el Informe sobre situación de derechos humanos en México”, 2020, para. 253; CIDH, “Informe sobre medidas dirigidas a reducir el uso de la prisión preventiva en las Américas”, OEA/Ser.L/V/II.163. Doc. 105, July 3, 2017, para. 91; CIDH, “Informe sobre el Uso de la Prisión Preventiva en las Américas”, OEA/Ser.L/V/II., Doc. 46/13, December 30, 2013, para. 151. [↑](#endnote-ref-6)
7. Inter-American Court of Human Rights, Case of Women Victims of Sexual Torture in Atenco v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 28, 2018, Series C No. 371, para. 251. [↑](#endnote-ref-7)
8. “The second sentence of paragraph 3 of article 9 requires that detention in custody of persons awaiting trial shall be the exception rather than the rule. […] Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. […] *Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.* […] Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case. […] After an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives.” United Nations Human Rights Committee, CCPR/C/GC/35, sec. IV. [↑](#endnote-ref-8)
9. CEDAW/C/ARG/CO/7, para. 45 (a). [↑](#endnote-ref-9)
10. CEDAW/C/MEX/CO/9, para. 49-50. [↑](#endnote-ref-10)
11. For an overview of Mexico’s regulatory framework on trafficking –as it relates to sexual trafficking at least–, *see* Claudia Torres, “Ambigüedades y complejidades: la ley de trata con fines de explotación sexual y el no reconocimiento del trabajo sexual en México”, México: Cátedra Extraordinaria Trata de personas de la UNAM, 2016. [↑](#endnote-ref-11)
12. In Mexico, the first step prosecutors have to take in the process is to formally “link” a person to the commission of a crime. The standard to do this is even lower than the standard to formally accuse someone for the commission of a crime. In order to “link” a person, there need only be certain clues (“indicios”) that the person was involved in a crime. In order to accuse, prosecutors have to be as specific as possible as to how that person was involved in the commission of a crime and to have evidence to prove every single element of the crime. They must be ready, in other words, to actually go to trial. *Mandatory* pretrial detention in Mexico must be imposed on people as soon as they are being formally *linked* to the commission of a crime. This means that it is not even necessary for them to be *accused*. The point precisely is to allow prosecutors to continue investigating to see *if* they have enough to charge a person, while defendants are in prison. [↑](#endnote-ref-12)
13. Throughout this document, we will refer to the latest data available in Mexico regarding the crime of trafficking, corresponding to the year of 2018. This data comes from the National Institute of Statistics and Geography’s (INEGI) Census on the state prison systems (Censo Nacional de Gobierno, Seguridad Pública y Sistema Penitenciario Estatales 2019) and the Census on the federal prison system (Censo Nacional de Sistema Penitenciario Federal 2019). As it is possible to see, we do not refer to the number of *women* being incarcerated for trafficking, but rather refer to the number of *crimes* attributed to women incarcerated for trafficking. This is because the Censuses do not allow us to know the number of women incarcerated for trafficking (or for any crime, for that matter); they only allow us to know the number of crimes attributed to incarcerated women. Although we refer to the data for 2018, the same tendencies we refer to in this document can be seen in previous years. [↑](#endnote-ref-13)
14. In 2018, in state prisons, crimes attributed to incarcerated women for robbery represented 0.4% of the total for robbery; crimes attributed to incarcerated women for drug related crimes represented 6.75% of the total for drug related crimes; crimes attributed to incarcerated women for assault represented 4.8% of the total for assault; crimes attributed to incarcerated women for kidnapping represented 11.26% of the total for kidnapping; crimes attributed to incarcerated women for homicide represented 5.5% of the total for homicides, and crimes attributed to incarcerated women for rape represented 1.1% of the total for rape. [↑](#endnote-ref-14)
15. Since 1986, only in 5 years the percentage of men in prison without a conviction (out of the total of men in prison) has been *higher* than the percentage of women in prison without a conviction (out of the total of women in prison). Those are the years of 1999, 2000, 2001, 2002, and 2005. Cuaderno mensual de información estadística penitenciaria nacional, 1986-2019. [↑](#endnote-ref-15)
16. The difference in percentage of men and women in prison without a conviction per year was of 1.4 in 2006 (44% women *vs*. 42.6% men); 0.9 in 2007 (42.3% women *vs.* 41.4% men); 3.3 in 2008 (43.6% women *vs.* 40.3% men); 5.6 in 2009 (46.4% women *vs.* 40.8% men); 8 in 2010 (49.3% women *vs.* 41.3%); 7.9% in 2011 (50.7% vs. 42.8%); 10.2 in 2012 (50.9% vs. 40.7%); 11.6 in 2013 (53.1% vs. 41.5%); 11.3 in 2014 (52.7% vs. 41.4%); 10.9 in 2015 (51.8% vs. 40.9%); 11.1 in 2016 (48.4% vs. 37.3); 9.3 in 2017 (47.4% vs. 38.1%); 7.2 in 2018 (44.7% vs. 37.5%); and 8.2% (45.2% vs. 37%). Órgano Administrativo Desconcentrado de Prevención y Readaptación Social, Cuaderno mensual de información estadística penitenciaria nacional, December 2019. [↑](#endnote-ref-16)
17. *Ibidem*. [↑](#endnote-ref-17)
18. A/68/340, para. 29-30. [↑](#endnote-ref-18)
19. Mandatory pretrial detention in Mexico has *constitutional* grounding: it was established in article 19 of the Federal Constitution in 2008. This is when the crime of trafficking was included in the list of crimes that warrant mandatory pretrial detention. The Constitution was amended in 2019 to *expand* the number of crimes in the list (the amendment was published on April 12, 2019). The list of crimes that currently warrant mandatory pretrial detention, per article 19, are: abuse or sexual violence against minors; organized crime; homicide; femicide; rape; kidnapping; trafficking; robberies against houses and robberies against freight transportations; the use of social programs for electoral purposes; corruption; illegal oil siphoning; disappearances (committed by public and private agents); crimes committed through violent means, such as with the use of arms and explosives; crimes related to the use of firearms and explosives which are of the exclusive use of the military; and any “grave crimes” determined by law which are committed against the security of the nation, the free development of the personality, and health. [↑](#endnote-ref-19)
20. Although the Constitution limits the duration of pretrial detention to two years, we know this time limit is not always respected. According to the National Survey on People Deprived of Liberty (Encuesta Nacional de Población Privada de la Libertad 2016), of the women who were in prison in 2016 already convicted, 23.40% said judges had taken *more* than two years to hand in their rulings *since they had been incarcerated*. [↑](#endnote-ref-20)
21. Instituto Nacional de Estadística y Geografía, Censo de Impartición de Justicia Estatal 2019. [↑](#endnote-ref-21)