**Written submission to the CEDAW Committee on the Draft CEDAW General Recommendation on Trafficking of Women and Girls in the Context of Global Migration**

Berlin, 15 May 2020

Dear CEDAW Committee,

Thank you for the opportunity to submit comments in writing on the Draft CEDAW General Recommendation on trafficking in women and girls in the context of global migration (Draft General Recommendation on TWGCGM).

The comments submitted for your consideration attend firstly to the importance of a careful distinction between the transnational crime and human rights violation of trafficking on the one hand and the international crimes and human rights violations of the slave trade and slavery on the other hand in the interest of ensuring the most robust protection framework awarded to affected womxn[[1]](#footnote-1) and girls in accordance with international law.

Dr. Patricia Viseur Sellers and Jocelyn Getgen Kerstenbaum highlight in their forthcoming publication “Missing in Action: The International Crime of the Slave Trade” (currently available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583564>) the existence of the slave trade as an international crime, a humanitarian prohibition and a human rights violation. As reflected in the proposed alterations below, I hereby endorse the submission of Dr. Patricia Viseur Sellers and Jocelyn Getgen Kerstenbaum on the Draft General Recommendation on TWGCGM to the CEDAW Committee.

What can be observed with respect to contemporary examples, such as migrants in Libya or female Yazidis in Iraq/Syria, is the tendency for trafficking to overshadow the (often concurrent) occurrence of acts of the slave trade and slavery within trafficking – as well as their gendered dimensions. Reducing the multifaceted violations and criminal conducts to exclusively the human rights violation and transnational crime of trafficking in such cases, prohibits individuals under the protection of CEDAW - affected by a multitude of interrelated human rights violations and crimes - to be granted dual protection and for their harm to be acknowledged in form of the correct legal characterization of crimes committed against them. The Draft General Recommendation on TWGCGM must not contribute to an impunity gap by further invisibilizing (the international crimes of) the slave trade and slavery in the context of trafficking, particularly when committed against womxn and girls, whose human rights protection is the essence of the mandate of CEDAW.

Moreover, the hereby submitted comments further alert to the risk associated with conflating sexual exploitation with sex work as well as the resulting exacerbation of harm to sex workers. In that respect, the Global Network of Sex Work Projects published a Briefing Note in 2019 available at: <https://www.nswp.org/resource/briefing-note-sex-work-not-sexual-exploitation>

Lastly, in the interest of providing for the most inclusive protection framework, the conduction of gender[[2]](#footnote-2) analysis, taking note of the discrimination and violence faced by LGBTI persons due to their real or perceived SOGIESC[[3]](#footnote-3), as a basis for both the design of the Draft General Recommendation on TWGCGM and its application, remains crucial. For example, the exclusion of trans\* migrants from existing protection frameworks and research has been addressed in the following article: Anne E. Fehrenbacher, Jennifer Musto, Heidi Hoefinger, Nicola Mai, P.G. Macioti, Calogero Giametta & Calum Bennachie (2020) Transgender People and Human Trafficking: Intersectional Exclusion of Transgender Migrants and People of Color from Anti-trafficking Protection in the United States, Journal of Human Trafficking, 6:2, 182-194, available at : <https://www.tandfonline.com/doi/full/10.1080/23322705.2020.1690116>.

Please kindly note the suggested additions, alterations and deletions to the text in *italics* below.

Paragraph 1 – Addition:

1. (…) 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. Perpetrators enjoy widespread impunity and women and girls continue to be subjected to extreme forms of gender-based violence, constituting a violation of their human rights and an obstacle to their achievement of substantive equality. *Efforts to analyze gender dimension of trafficking in women and girls in particular as well as, trans\* and non-binary persons, are vital to comprehend both practices and patterns of trafficking in all persons for the design of the most inclusive protection framework.1* The call for strategic global action (…)

New Footnote 1 – Addition:

*1 Anne E. Fehrenbacher, Jennifer Musto, Heidi Hoefinger, Nicola Mai, P.G. Macioti, Calogero Giametta & Calum Bennachie (2020) Transgender People and Human Trafficking: Intersectional Exclusion of Transgender Migrants and People of Color from Anti-trafficking Protection in the United States, Journal of Human Trafficking, 6:2, 182-194; Tomasiewicz, M. L. (2018). Sex trafficking of transgender and gender nonconforming youth in the United States. Chicago: Loyola University School of Law Center for the Human Rights of Children.*

Paragraph 10 – Addition:

10*.* Noting the distinction between the smuggling of migrants and trafficking in persons, the Committee highlights the particular vulnerability of smuggled migrants to being trafficked *which may encompass being subjected to slavery as well as slave trade. Noting the distinctions between the international crime and human rights violation of the slave trade and the transnational crime and human rights violation of trafficking in persons, the Committee recognizes that the difference in criminal conduct committed against women and girls ought to be concurrently recognized as such and that women and girls retain concurrent protection from all such violations. Noting the distinction between sexual exploitation and sex work, the Committee notes sexual exploitation does not refer to sex work.13*

Fotnote (previously) 13 (now 14) – Addition:

13 *Article 1(2) of the 1926 Convention to Suppress the Slave Trade and Slavery, defines the slave trade as: “. . . all acts involved in the capture, acquisition or disposal of a person with intent to reduce him [or her] to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him [or her]; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.” The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery updated the definition of the prohibition of the slave trade by outlawing the act of conveyance or attempting to convey by “whatever means of transport,” including aircraft. Article 8 of the* *International Covenant on Civil and Political Right states that, “slavery and the slave trade shall be prohibited in all their forms.” Global Network of Sex Work Projects Briefing Note 2019 outlines the problems with the conflation of the term ‘sexual exploitation’ with sex work and how this exacerbates harms to sex workers, available at:* [*https://www.nswp.org/resource/briefing-note-sex-work-not-sexual-exploitation*](https://www.nswp.org/resource/briefing-note-sex-work-not-sexual-exploitation)

Paragraph 11 – Alteration:

11. *Moreover,* combating the crime of trafficking in women and girls requires engagement *and implementation* of the larger protection framework *on the domestic level* stemming from international humanitarian law, refugee *law, international* criminal *law,* labour and *international* private law*,* ~~and~~ the statelessness conventions *and international human rights law instruments, including the Convention for the Rights of the Child and relevant optional protocols.*

Footnote (previously) 14 (now 15) – Addition:

14 Geneva Conventions (I, II, III and IV), 1949, and the Additional Protocols I and II, 1977, relating to the protection of victims of international and non-international armed conflict respectively; *International Committee of the Red Cross (ICRC), Study of Customary Law: Slavery and the Slave Trade, Rule 94.* Rome Statute of the International Criminal Court, 1998; … ILO Convention No. 189 Concerning Decent Work for Domestic Workers, 2011, and Domestic Workers Recommendation (No. 201), 2011; *International Covenant on Civil and Political Rights; Convention for the Rights of the Child; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*.

Section IV – Deletion:

IV. Root causes ~~and discouraging the demand that fosters exploitation through trafficking~~

Section IV, Subsection a) – Addition:

a) Women and girls, *as well as LBGTI persons subjected to gender-based discrimination and violence*, are disproportionately affected by human trafficking

Section IV, Subsection b) – Deletion:

b) Trafficking in women and girls constitutes gender-based violence ~~against women~~

Footnote (previously) 17 (now 18) – Addition:

17 This includes *the following acts which could also be legally characterized as slave trade and slavery under international humanitarian law, international criminal law and international human rights law*: child marriage of girls fleeing humanitarian crises . . . .

Paragraph 14 – Alteration:

14. …unequivocally a phenomenon rooted in *structural* ~~gender-based~~ discrimination *against women and girls* and inequality *for women and girls* ~~and constitute~~ *constituting* gender-based violence against women.24

Paragraph 15 – Alteration:

15. Trafficking in women and girls may amount to *slavery, the slave trade*, torture or cruel, inhuman or degrading treatment.25 The direct obligation of non-State actors to respect the prohibitions of *slavery, slave trade* and torture, as peremptory (*jus cogens*) *norms* is set out in both international humanitarian law and human rights law. 26 States parties’ obligation to exercise due diligence to prevent, investigate, prosecute and punish acts of trafficking is reinforced by international criminal law. ~~including jurisprudence of the international and mixed criminal tribunals and the~~ *The* Rome Statute of the International Criminal Court *recognizes that whenever trafficking entails the exercise of any or all the powers of ownership in the context of a widespread attack against a civilian population*, ~~pursuant to which~~ enslavement as ~~in the course of trafficking in women and girls may constitute a war crime,~~ a crime against *humanity may be pursued. If the enslavement targets individuals by reason of the identity of a group or collectivity or targeted the group or collectivity as such based on gender grounds, such acts shall be accumulatively pursued as gender-based persecution as a crime against humanity. Moreover, under customary international criminal law, acts of trafficking might also be pursued as constitutive elements of war crimes, other crimes against humanity, and/or genocide.* 27

Footnote (previously) 26 (now 27) – Addition:

26 General Recommendation No. 35 (2017) (CEDAW/C/GC/35), para. 25; *International Committee of the Red Cross (ICRC), Study of Customary Law: Torture, Rule 90 and Slavery and the Slave Trade, Rule 94 are non-derogable prohibitions; UN Human Rights Committee (HRC), ICCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 7 prescribes derogation,* inter alia*, from Article 7 (torture or cruel, inhuman or degrading punishment) and Article 8 (prohibition of slavery, slave trade and servitude) during states of emergency.*

Footnote (previously) 27 (now 28) – Alteration:

27 General recommendations: No. 30 (2013) (CEDAW/C/GC/30), para. 23; No. 35 (2017) (CEDAW/C/GC/35), para. 16: ref. articles 7 (1) (g), 8 (2) (b) (xxii) and 8 (2) (e) (vi*) of the Rome Statute of the International Criminal Court provides that trafficking can constitute enslavement whenever any or all of the powers of ownership are exercised over the trafficked persons*.

Paragraph 28 – Deletion:

28. Women’s rights framework to human development: Take responsibility, in view of the Sustainable Development Goals, to address the root causes of trafficking, in particular: the acceptance and normalization of gender-based violence ~~against women~~.

Section IV, Subsection e) – Deletion:

e) Root causes of trafficking in women and girls ~~and discouraging the demand that fosters their exploitation through trafficking~~

Paragraph 19 – Deletion:

Identifying, addressing and eliminating the root causes ~~and discouraging the demand that fosters~~ *of* all forms of exploitation of women and girls through trafficking are key to States parties’ prevention efforts.

Paragraph 23 – Deletion:

23. The patriarchal norms and values, ~~sometimes~~ formalised in legislation, including family laws, facilitate trafficking for child/early and forced marriage.

Paragraph 24 – Deletion:

24. (…) resulting in, *inter alia*, low levels of education, and low awareness on how traffickers operate, render rural women especially vulnerable to exploitation, ~~in particular in prostitution and as domestic workers and~~ in conflict-affected regions.

Paragraph 25 b) – Addition:

b) Disaggregating data collected on victims of trafficking by sex, age, disability, *race*, ethnicity, nationality, immigration status, location, socioeconomic status 49 and all forms of exploitation…

Paragraph 27 b) – Deletion:

~~b) Where applicable, instituting penal legislation to sanction the users of goods and services that result from trafficking in persons~~

Paragraph 27 d) – Deletion:

d) Investigating, prosecuting and convicting all perpetrators involved in the trafficking of persons, ~~including those on the demand side~~.

Paragraph 29 c) – Addition:

c) Has as its objective to combat trafficking for purposes of, among others, child and forced marriage, debt bondage, serfdom, forced or compulsory labour, *slave trading*, slavery and sexual exploitation.

Paragraph 29 e) – Addition:

e) Includes specific provisions addressing the prevention of trafficking in women and girls and the *social and* economic and physical and psychological rehabilitation of victims.

Paragraph 29 h) – Deletion:

h) Sets a clear time frame for establishing specialized tribunals to effectively prosecute and adequately punish traffickers76, with an emphasis on proactive ~~and victimless~~ investigations and prosecutions of human trafficking crimes;

Paragraph 29 j) – Addition:

j) Provides judges, prosecutors, criminal, financial and border police, asylum and immigration authorities and other law enforcement officials with mandatory training in *gender analysis* *and the* gender-sensitive application *of the anti-trafficking legislation*.

Paragraph 35 – Addition:

35. (… ) Forcibly displaced women are often subjected to gross human rights violations, including risks relating to trafficking for purposes of sexual or labour exploitation, *slave trading,* slaveryand servitude, including the abduction or recruitment of women and girls into armed forces and groups.

Paragraph 72 f) – Addition:

f) Allocate adequate resources to establish sufficiently funded, well-equipped, separate shelters, or specialized units within existing shelters and crisis centres, with specially trained staff that focus on the provision of assistance specifically to women *and LGBTI* victims of trafficking ensuring they are treated with dignity and in a confidential manner

Paragraph 77 – Deletion:

77. (…) According to article 2(e) of the Convention, States parties will be held responsible should they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by both State and non-State actors, including private individuals or entities, that result in gender-based violence ~~against women~~, including trafficking in women.

Sincerely,

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1. Womxn referring to the inclusion of cis-gender women and lesbian, gay, transgender and intersex (LBGTI) persons within the term. [↑](#footnote-ref-1)
2. Building on the recognition as established in: CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 5, a gender analysis in this context means a methodological tool to reveal the experiences of individuals who have suffered gender-based discrimination inclusive of experiences of individuals outside the normative binary notion of gender. Only this allows for those affected by trafficking outside the gender binary to not be marginalized and stripped of protection. [↑](#footnote-ref-2)
3. Sexual orientation, gender identity and expression, and sex characteristics (SOGIESC). [↑](#footnote-ref-3)