**Comments on the Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration**

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**General Remarks**

**“[…] In the context of global migration.”** The emphasis in **the title** of the draft general recommendation to the context of global migration is, at present, misleading. The specificity of the migration context is not followed through in the structure and focus of the general recommendation, as the content of the general recommendation then engages with issues that go well beyond migration. In particular, the recommendations, that are to be welcome in a broader context of anti-trafficking, are nevertheless much more elaborate and are not specific to the global migration context (e.g. **paragraph 27**, and more generally **Section IV- VI**).As a result, the specific context of global migration and the occurrence of human trafficking is not elaborated. For example, the distinction between human trafficking and human smuggling is alluded to in **paragraph 10**, however, there should be more acknowledgement that, in context of global migration, these two phenomena are even more blurred, in particular the potential overlap with the profit-making element in the definition of human smuggling.[[1]](#footnote-1)

**Lack of thematic focus.** An increased specificity of the migration context could provide for more thematic focus for **Section III** that shows the interconnected nature of the topics discussed, e.g. extraterritoriality, recruitment agencies and supply chains – domestic workers and tied visas. Similarly, whilst the presentation of **Section V & VI** is much more systematic, it should also be much more specific to the migration context.

**Implicit emphasis on victims of sexual exploitation.** Despite the Concept Note of the general recommendation clearly stating that the intention is not to broach prostitution policy,[[2]](#footnote-2) there is still an implicit, underlying sense in the text that the focus is on victims of sexual exploitation more than other forms of exploitation. For example, the emphasis on discouraging demand that fosters exploitation, in some places very clearly emphasises the forced provision of sexual services and not other (work or) services provided by trafficking victims (**paragraphs 20 & 22**). Where there is a recommendation to classify trafficking victims as social group in **paragraph 45(c),** does this implicitly refer to victims of sexual exploitation, or is it a proposal that is intended to encompass victims of all forms of trafficking?

**Weak legal analysis/interpretation.** The references to refugee law and its interpretation can be bolstered by more stringent references (see below **paragraphs 17 & 39**). There is a heavy reliance on CEDAW outputs. References to other treaty bodies and UN bodies, which have a thematic focus on issues raised throughout the document, e.g. in the context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, or the ILO labour rights framework, would be of added value. Currently they are only mentioned briefly in the final part on ratification in **Section VII Paragraph 103 (d) & (e).** Furthermore, at times it might be worth drawing on regional aspects to reinforce recommendations, e.g. in **sections V and VI** on victim protection and access to justice aspects regarding positive obligations development can be drawn upon from jurisprudence of the European Court of Human Rights,[[3]](#footnote-3) or the Inter-American Court of Human Rights,[[4]](#footnote-4) while aspects regarding the non-prosecution principle of victims of human trafficking can be drawn from European regional anti-trafficking legal instruments.

**Specific Comments**

**I: Introduction**

Paragraph 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****.*”

It should be acknowledged that human trafficking is something that can also affect men and boys, and not just women and girls. The language in the international instruments makes this apparent by using the phrase “especially women and children.” The emphasis in the draft general recommendation is understood, but the recognitions of men and boys as victims should be acknowledged.

Paragraph 2: “*the phenomenon persists due to States parties’ failure to effectively address the root causes of trafficking in women and girls and to discourage the* ***demand that******fosters the exploitation of women and girls, which leads to trafficking***.”

This is incorrect phasing, it is not the exploitation that leads to trafficking but vice versa, trafficking that leads to exploitation, but in this context, it would be more correct to say: demand that fosters exploitation and trafficking of women and girls.

Paragraph 2: “*Inadequate attention to women’s and girls’ experiences as victims of trafficking results in low rates of identification, assistance and protection. Restrictive migration policies and over-reliance on the criminal justice system to address trafficking in women and girls are barriers for victims’ access to justice and other services including health and psychosocial support*.”

Elaborate and give more focus to the issue at hand, namely, the context of global migration. What aspects in the migration policies should be amended, what aspects do have these adverse impacts? etc.

Paragraph 3: “***It affirms States parties’ obligation of due diligence*** *to prevent, investigate, prosecute and punish trafficking in women and girls, to protect victims as well as to provide reparations*.”

It is necessary to clarify the scope and meaning and understanding of due diligence from a state’s perspective, and how this is to differ to the due diligence of private actors (also relevant to the due diligence of companies in **paragraph 62**). Reference should be made to the Framework for Business and Human Rights and the Guiding Principles on Business and Human Rights.[[5]](#footnote-5)

**II: Objective and Scope**

Reference to trafficking in the context of global migration is completely absent in this section on objective and scope and should be added. As such, a definition of “global migration” would be helpful here since it would clarify the scope of measures and prevent the ambiguities mentioned above in this comment to arise.

Furthermore, there is a lack of attention placed on nationals who, after displacement, are at risk of internal trafficking. Perhaps a similar paragraph as to the one that acknowledges regional approaches (**paragraph 6**) would be a pertinent addition.

The objective and scope should acknowledge labour migration, in particular, making reference to the economic sectors that are specifically targeted by exploiters/traffickers for (often undocumented) migrant women and children.

**III: Legal Framework**

Again, focus on trafficking in the context of global migration is completely absent. In particular, the applicable legal framework on refugee law, international labour standards and rights of migrant workers is not included (we note that they are listed in **Section VII Paragraph 103**).

Paragraph 10: “***the******distinction between the smuggling of migrants and trafficking in persons****.*”

This needs to be elaborated so that it is more specific to the situation of global migration. For example, the blurred boundaries between these two phenomena should be explained.

**IV: Root causes and discouraging the demand that fosters exploitation through trafficking**

The structure needs some rethinking. The sub-sections do not follow from the title of section 4 on root causes and discouraging demands and the same topic (root causes and demand) is repeated in sub-section IV(e).

Overall, the section is not specific to trafficking in the context of global migration. Reference should be made to armed conflicts causing migration flows where women are often traveling/fleeing alone with children, risks of women in refugee camps, exploitation as survival strategy during migration.[[6]](#footnote-6)

***b. Trafficking in women and girls constitutes gender-based violence against women***

Paragraph 14: **“***In its general recommendation No. 19 (1992) on violence against women, the Committee clarified that discrimination against women included gender-based violence* ***the prohibition of which has evolved into a principle of customary international law.”***

Is there any evidence to support this claim?

***c. Scope of application of the Convention***

Paragraph 17:“*This includes obligations towards States parties’ nationals who are trafficked abroad. The obligations of States parties under the Convention apply without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers, migrants with irregular status and stateless persons,* ***within their territory or effective control****, even if not situated within the territory.*”

This suggests that States have obligations towards persons within their territory or effective control, whereas the start of the paragraph suggests they have obligations when their actions affect human rights, regardless whether the affected persons are in their territory. They reflect a different understanding of jurisdiction and imply a different scope of human rights protection.

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

See comment above about repetition of root causes and discouraging demand in title of section

Paragraph 19: **“***Identifying, addressing and eliminating the root causes and discouraging the demand that fosters all forms of exploitation of women and girls through trafficking are key to States parties’ prevention efforts*.”

The presentation of root causes is very much based on well-established overview of push factors. But these traditional causes are nuanced. More needs to be considered on the particular characteristic of vulnerability as it is not just through a position of vulnerability alone that you are trafficked, instead it constitutes an increased risk of being trafficked, requiring an “abuse of a position of vulnerability”. More on the meaning of vulnerability and how it plays out in a situation of migration would be more useful than repetition of the known/established root causes.

Paragraph 27: “***Discourage the demand that fosters all forms of exploitation of persons,*** *especially women and children, that leads to human trafficking.”*

Again, exploitation that leads to THB is incorrect understanding of the definition. See above comment relating to paragraph 2.

Paragraph 27(d): “*Investigating, prosecuting and convicting all perpetrators involved in the trafficking of persons, including* ***those on the demand side****.”*

This wording needs clarification/explanation, as it suggests that potential users of trafficked goods and services (paragraph 27(a)) are here considered as perpetrators and thus could be involved in the trafficking process. It is necessary for all constituent elements of the offence to be present in order for an individual to be a perpetrator.

Paragraph 29 (h): **“***Sets a clear time frame for* ***establishing specialized tribunals*** *to effectively prosecute and adequately punish traffickers, with an* ***emphasis on proactive and victimless investigations and prosecutions*** *of human trafficking crimes*.”

Are specialised tribunals only for victims who are women and girls or for all trafficking victims regardless of gender? If tribunals are specialised, then it would further remove the possibility of a holistic prosecution response that includes other offences e.g. labour law violations, fraud, deceit etc that are included on a mixed indictment in criminal proceedings? Would it mean that some cases are missed? Or indeed, would some cases be prosecuted as other offences, because human trafficking requires a specialised tribunal? This is potentially problematic, as the threshold of human trafficking is already high and the requirement of specialized tribunals could raise the bar further.

If victimless investigations and prosecutions were to be a true goal, it is necessary to ensure that cooperation with criminal proceedings is not a condition of access to support and assistance

Victim participation in the criminal proceedings could also generate rehabilitation for the victim and therefore victims’ rights should be taken into account.

***f. Forcibly displaced women and girls face a higher risk of being trafficked***

Paragraph 39: “*The Committee has recognized that gender-based violence against women is one of the* ***major forms of persecution experienced by women that may be grounds for granting refugee status and asylum****.* ***Trafficking in women and girls breaches specific provisions of the Convention and is therefore recognized as a legitimate ground for international protection in law and in practice.***”

In connection to paragraph 45(c), it seems useful to at least acknowledge that “women” in general have been partially defined to constitute a particular social group in refugee law.[[7]](#footnote-7)

The aspect of international protection for victims of trafficking should be elaborated with reference to the UNHCR guidelines on international protection for victims of trafficking. The statement on the recognition of victims of trafficking as a legitimate ground for international protection in law and practice is too strong, the UNCHR Guidelines are much more nuanced.[[8]](#footnote-8) Furthermore, the sentence itself is a bit ambiguous: does “Convention” refer to CEDAW, Palermo Protocol or the Refugee Convention?

Considering violations of the CEDAW Convention as a ground for international protection is unspecified and beyond the application of the refugee convention and international protection more general.

Paragraph 42(j):*“accommodation facilities for* ***displaced persons****.”*

Both displaced persons and forcibly displaced persons is used. Is there a reason for this distinction? If so, provide explanation as to what is understood by the distinction. If not, check for consistency.

Paragraph 45(c): “*classify victims of trafficking under the* ***“social group” ground*** *in the refugee definition****”***

In recognition of the nuances of such a categorisation, guidelines should be further elaborated on this proposition.

***g. Women and girl migrants’ increased risk of being trafficked***

Paragraph 58(f):“*Establish a mechanism for monitoring the implementation of these laws*”

Be more specific on what is meant by mechanism. Monitoring by labour inspectorates? Or allow for labour inspection in at risk sections eg. Domestic care?

Suggested new sub-clause for paragraph 58 (and/or Paragraph 65(c)):*“Establish complaints mechanisms for migrant workers, regardless of migration status, to recuperate unpaid wages or effective access to compensation, including via state compensation funds.”*

Paragraph 62(b): “*Ensure that businesses are not involved in, facilitate and/or benefit from trafficking within their supply chains, and effectively remedy violations and punish perpetrators”*

* Such mechanisms e.g. reporting obligations must be meaningful and not just refer to reporting, but also actual implementation and consequences for lack of action.[[9]](#footnote-9)

Suggested new sub-clause for paragraph 62: **“***Establish laws that provide for the recuperation of damages etc from top of supply chain or if contractor is a foreign company.”*

**V. Victim identification, assistance and protection**

***a. Victim identification***

Paragraph 68(e): **“*Ensure adequate protection and support*** *for both victims of trafficking and for presumed victims while* ***identification processes are carried out*”**

* This must include unconditional implementation of reflection and recovery period, regardless of need to pursue investigation. If investigation is pursued during this period, adopt a victimless approach and then corroborate victim statement/testimony after it has expired.

***b. Victim support and assistance***

Paragraph 72:*Strengthen the* ***unconditional*** *assistance and protection provided to victims of trafficking,* Paragraph 72(e): *Strengthen the provision of services*; and Paragraph 72 (h) *provide free and immediate access*

* Should this point not be elaborated above in Section V a. on victim identification? Not everyone would have the same understanding of what it means? Here again specify to trafficking in the context of global migration. Provide for culturally sensitive support and assistance as well as rehabilitation measures. Same comment also for Paragraph 96(f) in Section VI.

**VI. Victims’ access to justice**

Paragraph 82: **“***The* ***availability and accessibility of judicial and quasi-judicial mechanisms*** *and remedies under civil, administrative and labour law should be guaranteed to women on a basis of equality and non-discrimination.”*

* These mechanisms should be available regardless of ongoing criminal proceedings or not. The outcome of criminal proceedings should not impact or influence the use of alternative mechanisms. Access to these mechanisms should not require cooperation and therefore, should also be unconditional.

Paragraph 91: “***Victim’s exemption from criminal liability***”

* Reference to the non-punishment principle in European context should be added. See also Paragraph 57(b).

Paragraph 96(d): **“***Ensure, through legislative and other means, that trafficked women can access the right to remedy and compensation through different avenues, such as criminal, civil and labour courts, and that victims are compensated, as far as possible, commensurate with their loss, injury and suffering*”

* See comments above on compensation and other mechanisms (paragraphs 58(b), 58(f) & 62(b) and 65)

Paragraph 97: “***Tracking proceeds of crime***”

* Such measures will require implementation of timely financial investigations, with a focus on this from the beginning of e.g. para 86 on corporate supply chains: Establish laws that provide for the recuperation of damages etc from top of supply chain or if contractor is a foreign company.

**VII. Treaty ratification or accession**

Paragraph 103(e): “*ILO Labour rights framework*”

* Add ILO Forced Labour Conventions (No.29) 1930 & (No.105) 1957, ILO Protocol (P029) & Recommendation (R203) 2014.

1. Article 3(a), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime/ [↑](#footnote-ref-1)
2. Concept Note prepared for the Committee on the Elimination of Discrimination Against Women on its elaboration of a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration (2019), paragraph 53. [↑](#footnote-ref-2)
3. *Rantsev v. Cyprus and Russia* (Application No. 25965/04) [2010]; *Chowdury and Others v. Greece* (Application no. 21884/15) [2017]. [↑](#footnote-ref-3)
4. *Trabajadores de la Hacienda Brasil Verde v. Brazil, Judgment*, Inter-Am. Ct. H.R. (ser. C), 129-130 (Oct. 20, 2016). [↑](#footnote-ref-4)
5. Protect, Respect and Remedy: a Framework for Business and Human Rights, 2008, A/HRC/8/5; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, as annexed to the report of the Special Representative, 2011, A/HRC/17/31. [↑](#footnote-ref-5)
6. C. Healy, *Targeting Vulnerabilities. The Impact of the Syrian War and Refugee Situation on Trafficking in Persons,* ICMPD (2015), O. Peyroux, *Trafficking in Human Beings in conflict and post-conflict situation,* [↑](#footnote-ref-6)
7. UNHCR, Guidelines on international protection: the application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, 2006, HCR/GIP/06/07, para 38; Jane Connors, "Legal Aspects of Women as a Particular Social Group", International Journal of Refugee Law, Volume 9, Issue Special\_Issue, October 1997, Pages 114–128; Michelle Foster, "The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership in a Particular Social Group'", Legal and protection policy research series, 2012, pp40-48, available at: https://www.refworld.org/pdfid/4f7d94722.pdf [↑](#footnote-ref-7)
8. UNHCR, Guidelines on international protection: the application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, 2006, HCR/GIP/06/07. [↑](#footnote-ref-8)
9. Genevieve LeBaron (2018) The Global Business of Forced Labour: Report of Findings, SPERI & University of Sheffield; Nicola Phillips, Genevieve LeBaron and Sara Wallin, Mapping and measuring the effectiveness of labour-related disclosure requirements for global supply chains (June 2018) ILO Research Department Working Paper No. 32. [↑](#footnote-ref-9)