

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

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## 1. Introduction

The draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration (hereinafter Draft General Recommendation) presents an opportunity to consolidate the more progressive and accurate approaches to the phenomenon of trafficking that have emerged from scholars and advocates in recent years. Indeed, there is substantially greater recognition today than in the past that contemporary slavery, servitude and human trafficking are complex and multi-faceted phenomena that take many forms including and beyond the sexual exploitation of women and girls.<sup>1</sup>

Yet misconceptions remain a problem, many of which result from the shortcomings of the Palermo Protocol. Given the mandate of the CEDAW committee to place women's rights at its centre and to promote a human rights based approach in all its work, a General Recommendation on the topic offers the potential to refocus global attention on the well-being and best interests of the women most affected by trafficking, migration and forced labour.

The Committee's Draft Recommendation at the outset acknowledges these human rights dimensions to trafficking (para. 9). In turn, it is clear that a human rights approach should take priority over a criminal justice one. The Recommendation as a whole, however, needs to reflect this commitment to respecting, protecting and fulfilling the human rights of persons most affected. Unfortunately, the Draft Recommendation in its current form reflects an overreliance on the Palermo Protocol, despite the Protocol's tendency to characterise human rights as an add-on; and given the Protocol's contribution to oppressive measures against sex workers and migrants in the name of combating trafficking.<sup>2</sup> Emphasis in the Draft Recommendation on addressing the 'demand side' and 'instituting penal legislation to sanction the users of good and services (para. 27) and identifying trafficked victims in brothels (para. 66) risks blurring the distinction between voluntary sex work and trafficking for sexual exploitation.<sup>3</sup> Instead, the CEDAW Committee must utilise this opportunity to provide progressive guidance on trafficking and place the criminal justice approach as secondary, reflecting scholarship and best international practice.

It should be noted too that while the CEDAW Committee has made the important decision to issue a General Recommendation on this topic, there is significant repetition within the current draft, which lacks a clear mandate to States Parties. It is recommended that the Committee follows the drafting of recent General Recommendations and provides its recommendations in two parts. Part 1 should focus on how trafficking should be understood by States from the perspective of the rights of women and girls. Part 2 should operationalise the mandate, with concrete

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<sup>1</sup> Ramona Vijayarasa, *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions about Trafficking and Its Victims* (New edition, Routledge 2015) 4.

<sup>2</sup> Marjan Wijers, 'Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol' [2015] *Anti-Trafficking Review* 56, 56.

<sup>3</sup> Vijayarasa, *Sex, Slavery and the Trafficked Woman* (n 1); M Ditmore, 'Trafficking in Lives: How Ideology Shapes Policy' in Kamala Kempadoo (ed), *Trafficking and Prostitution Reconsidered: New perspectives on migration* (1998) 43; Ramona Vijayarasa, 'A Move in the Right Direction? The Model Law against Trafficking in Persons and the ILO Operational Indicators' [2018] *International Migration* 177

<<http://onlinelibrary.wiley.com/doi/abs/10.1111/imig.12504>> accessed 9 November 2018.

recommendations to States Parties. This will make the draft lighter and the structure easier to follow.

With these overarching concerns in mind, this set of comments on the Draft Recommendation focuses on four issues:

- (a) Understanding trafficking within a spectrum of migration;
- (b) Calling for a more nuanced approach to sex and gender and its relationship to trafficking;
- (c) Calling for a gender responsive approach to understanding the role of corporations in supply chain exploitation; and
- (d) Giving even greater visibility to the risk of stigmatization of victims and the effects such stigma has on victim reintegration into the communities from where they come.

## **2. Feedback on draft General Recommendation**

### **(a) Situating trafficking on a spectrum of migration (para. 57 Promote a gender responsive safe migration framework and para. 58 Employment and Labour Framework)**

Reports from States Parties to the CEDAW Committee and extensive research in the field demonstrates the diversity of women's experiences of trafficking. It is therefore positive that the Draft Recommendation calls for the promotion of a gender-responsive safe migration framework and also an employment and labour framework.

Nonetheless, a general recommendation on this topic needs to explicitly acknowledge the spectrum of experiences of women who are victims of trafficking. While in some instances women victims may be accurately framed as vulnerable and non-autonomous agents, in other instances, a more accurate portrayal requires acknowledge that victims may exercise conscious, autonomous and active decision-making that leads to their migration abroad and results in their own exploitation.<sup>4</sup> This spectrum of migratory experiences reflects differing degrees of autonomy, consent, deception and exploitation.

By framing women as 'susceptible to being lured' (para 22), the draft General Recommendation paints an image of women as naïve and easily duped, as opposed to acknowledging the power and control exercised over victims in destination countries, including threats to families or regarding a victim's legal status that facilitates such trafficking. Wherever an individual is placed on the migration spectrum, common experiences include arduous journeys, low wages, hazardous working environments and unsanitary living.<sup>5</sup> In this respect, a host of useful indicators to more accurately identify instances of trafficking can be found in the ILO Operational Indicators on Trafficking in Human Beings<sup>6</sup> and numerous studies of human trafficking.<sup>7</sup>

Importantly, by fostering a focus on the coerced and non-autonomous victim, those victims who exercise any free choice or agency are often deemed culpable before the law. Such an approach either encourages victims to deny this voluntariness in order to be identified as 'victims of trafficking' and find some protections within the law's framework, or promotes a definition that excludes these particular victims of exploitation and leaves them without redress.<sup>8</sup> Importantly, this approach also requires accepting the reality that the consent of a victim may fluctuate

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<sup>4</sup> Vijayarasa, *Sex, Slavery and the Trafficked Woman* (n 1) 84–93.

<sup>5</sup> *ibid* 180.

<sup>6</sup> International Labour Organisation and European Commission, 'Operational Indicators of Trafficking in Human Beings':

<sup>7</sup> Vijayarasa, 'A Move in the Right Direction?' (n 3) 182.

<sup>8</sup> Vijayarasa, *Sex, Slavery and the Trafficked Woman* (n 1) 15.

throughout their time in the destination. In turn, it is essential to highlight this interlinked nature of migration and exploitation resulting from trafficking is essential.

*It is **highly recommended** that the General Recommendation guides states to enact legislation that accepts the presence of a woman's consent, to different degrees and that the exercise of such agency should not be used against exploited women when seeking redress.*

**(b) Calling for a more nuanced approach to sex and gender and its relationship to trafficking (para. 12: Women and girls are disproportionately affected by human trafficking)**

The Draft General Recommendation speaks to the disproportionate effect of trafficking on women and girls. Yet, we know that there is a significant struggle in identifying victims. Whether or not you can quantify phenomena like trafficking is indeed the subject of great debate.<sup>9</sup> Importantly, for the purpose of advancing women's rights, it is essential that the Committee acknowledges this challenging in data collection and how it undermines our ability to provide a nuanced account of those most affected.

To suggest that women and girls are the primary victims of trafficking may seemingly give greater visibility to the plight of female victims. However, it also risks diverting attention away from experiences that go beyond sexual exploitation. Moreover, this claim may act to further stereotypes of women as agency-less victims, perpetuating imagery that scholars and activists have long sought to discard. Finally, it is indeed likely to create barriers for male victims to identify as a result of the heteronormative picture being created<sup>10</sup> – women as victims, men as perpetrators – rather than a more nuanced understanding of how sex and gender play out when it comes to victims, perpetrators, labour and 'drivers' such as domestic labour markets and poverty. For example, it can be acknowledged that male victims dominate the fishing sector, while women are predominantly victims in the area of domestic work, without reverting to the traditional and excessive focus on trafficking for commercial sexual exploitation.

*It is **highly recommended** that this sub-section is redrafted to acknowledge the limitations of data collection in this space; that trafficking and its victims are a challenging issue to quantify; and that a more nuanced approach to data collection in this space by States Parties is essential to aid this gap and understand the ways in which men and women are differentially affected by trafficking.*

**(c) A gender-responsive approach to exploitation in the supply chain (Para 62. Address trafficking in corporate supply chains)**

There is increasing global attention to enacting legislation to ensure medium and large-scale corporations do not benefit from trafficked labour. It is pleasing to see the Draft Recommendation also address this issue. Para 62(a) of the Draft Recommendation calls for States Parties to 'Establish laws governing mandatory due diligence in companies' supply chains, including supply chain transparency'.

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<sup>9</sup> Sally Engle Merry, *The Seductions of Quantification* (The University of Chicago Press 2016) <<http://www.press.uchicago.edu/ucp/books/book/chicago/S/bo23044232.html>> accessed 10 July 2017; Jose Miguel Bello y Villarino and Ramona Vijayarasa, 'The Indicator Fad: How Quantifiable Measurement Can Work Hand-in-Hand with Human Rights — A Response to Sally Engle Merry's *The Seductions of Quantification*' (2018) 50 *NYU Journal of International Law and Politics* 985, 1007–1008.

<sup>10</sup> Ramona Vijayarasa, 'Stigma, Stereotypes and Brazilian Soap Operas: Road-Blocks to Ending Human Trafficking in Vietnam, Ghana and Ukraine' (2013) 20 *Gender, Place & Culture* 1015, 1023.

The draft General Recommendation, however, falls short in not explicitly calling for gender-responsive due diligence. Such gender-responsive due diligence requires, as a starting point, recognising embedded gender norms, complex cultural biases and power imbalances – which differ in each context even if common aspects can be detected across industries, sectors and countries.<sup>11</sup> Meaningful stakeholder engagement is key. Essentially, while acknowledging the reality that there are limitations of what corporations can do to challenge systemic inequality on their own, such businesses must still recognise the existence of such situations and be accountable for ensuring they do not perpetuate gender inequalities or benefit from them.<sup>12</sup>

Several examples illustrate why this is essential. Female workers are dominant in home-based work, for example, that is less monitored and often involves piece-rate pay. While more flexible – especially for women who prefer to work at home or who face cultural or religious obstacles to work outside the home – such workers are at risk of lower pay, poor working conditions and an inability to organise.<sup>13</sup> Gender-sensitive due-diligence is often needed to identify these differences in the risks and vulnerabilities facing different workers. We know that women are overrepresented in certain workforces like the (ready-made) garment sector or agriculture, in places like India.<sup>14</sup> In fact, it is far from a new phenomenon that women remain over-represented in labour-intensive industries, particularly those giving rise to precarious workplace conditions,<sup>15</sup> and gender-sensitive due diligence in these sectors would acknowledge this reality at the outset.

It is positive that the General Recommendation calls for the establishment of Codes of Conduct (para. 62 (c)) and audit mechanisms (para. 62(d)). However, such auditors must have the capacity to understand deep-rooted inequality and apply gender-sensitive approaches to such audits. Such Codes of Conduct also need to incorporate capacity-building to raise awareness about gender issues, including to build the capacity of auditors to conduct gender-sensitive due diligence and investigations, to implement gender-sensitive grievance mechanisms and to collect gender-disaggregated data.<sup>16</sup>

Without asking these questions from a gender-perspective at the outset – which is effectively what gender-sensitive due diligence facilitates – we will be less likely to identify the gendered impacts of corporate practices. A law that requires gender-sensitive due diligence would send a mandate to business that when they investigate harms, failure to consider a gender perspective means that such due diligence will prove inadequate and fall short of regulatory requirements.

*Hence, it is **highly recommended** that the General Recommendation refers specifically to ‘gender-sensitive due diligence’ or ‘gender-sensitive human rights due diligence’. The concept is underpinned by the right to gender equality and considers both the positive potential of business as well as the negative impacts of business practices on human rights related to sex, gender, gender identity and sexual orientation. As defined by a working group of the 7<sup>th</sup> UN Forum on Business and Human Rights, the approach places a particular emphasis on the experiences of*

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<sup>11</sup> Joanna Bourke-Martignoni and Elizabeth Umlas, ‘Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches’ (The Geneva Academy of International Humanitarian Law and Human Rights 2018) Academy Briefing No. 12.

<sup>12</sup> *ibid* 8.

<sup>13</sup> *ibid* 33.

<sup>14</sup> Maria Pontes and Magali Barraja, ‘Gender Equality in Codes of Conduct Guidance’ 5 <[https://www.bsr.org/reports/BSR\\_Gender\\_Equality\\_in\\_Codes\\_of\\_Conduct\\_Guidance.pdf](https://www.bsr.org/reports/BSR_Gender_Equality_in_Codes_of_Conduct_Guidance.pdf)>.

<sup>15</sup> Erinch Sahan, ‘Women in Global Supply Chains: Campaigning for Change’ in Kate Grosser, Maureen A Kilgour and Lauren McCarthy (eds), *Gender Equality and Responsible Business: Expanding CSR Horizons* (First edition, Taylor and Francis 2017) 111–113.

<sup>16</sup> Pontes and Barraja (n 14).

women and girls, and the multiple intersecting forms of discrimination that influence the realisation of equal rights.<sup>17</sup>

**(d) Acknowledging the significance impact of stigma against women victims (para. 92 Adverse collateral effects of anti-trafficking efforts)**

The General Recommendation acknowledges the risk of stigmatization of victims (paras. 80-81). It also requires that no groups of women are targeted for, among other things, investigation, prosecution, criminalization or stigmatization (para. 92 (c)).

These are important inclusions. However, the draft General Recommendation falls short of recognizing the extent to which victims of trafficking suffer stigmatization and the consequences of such stigma which has been a documented obstacle in the reintegration process when victims return to source countries.<sup>18</sup> Such stigma is exacerbated by the power relationship between those who have been trafficked and interested stakeholders – who often yield greater influence and power – including government agencies, civil society service providers and the families of victims.

In countries where the domestic laws focus on the criminalisation of both ‘prostitution’ and trafficking and there is a lack of attention to the distinctions between voluntary sex work and forced sexual exploitation, both sex workers and victims of trafficking suffer such stigma, including upon their return to their source country in instances when they have been abroad. This is exacerbated where sex workers and trafficked persons are found to be HIV-positive.<sup>19</sup> Underlying this nexus between trafficking, sex work and HIV-related stigma is gender inequality. Women naturally bear the greater weight of these forms of stigma.<sup>20</sup> The Draft General Recommendation risks reinforcing such stigma, too, where it refers to ‘sexually transmitted diseases’, as opposed to infections (para 61(e) and para. 67), language dropped from the development-sector lexicon.

*It is **highly recommended** that the Draft Recommendation pay greater attention to the stigma suffered by victims. At a minimum, it should be explicitly named as a barrier to access to justice and other services, alongside restrictive migration policies and an over-reliance on the criminal justice system, at the end of para 2.*

### **3. Conclusion**

I look forward to engaging with the final draft recommendation and utilising to its full potential to advance women’s rights to migration, labour and non-coerced decision-making in relation to both. I would be honoured to provide further comments and recommendations for drafting should the Committee wish to engage in further discussions.

Kind regards,

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<sup>17</sup> Office of the High Commissioner for Human Rights, ‘Working Paper - Gender-Sensitive Human Rights Due Diligence’ (7th UN Forum on Business and Human Rights 2018).

<sup>18</sup> Vijeyarasa, ‘Stigma, Stereotypes and Brazilian Soap Operas’ (n 10).

<sup>19</sup> Ramona Vijeyarasa, ‘The State, the Family and Language of “Social Evils”: Re-Stigmatising Victims of Trafficking in Vietnam’ (2010) 12 Suppl 1 Culture, Health & Sexuality S89, 92.

<sup>20</sup> *ibid.*

## Annex – References

### *International legal instruments*

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