

Dutch CEDAW Network, comments on DRAFT General Recommendation on Trafficking in Women and Girls in the Context of Global Migration

I. Introduction

Para 1. The Network misses an explanation of the purpose of the GR, why it was developed, its history and how it is embedded in international law and other human rights instruments.

Para 2. The Network suggests deleting this para. According to our view the GR should focus on providing States with concrete guidelines for the interpretation and implementation of their obligations in the area of human trafficking under the Convention and other relevant international human rights instruments. We do not consider it to be the objective of a GR to provide an extensive analysis of trafficking and its root causes. The analysis currently offered throughout the GR is - moreover - fragmented, on certain points contradictory, and incomplete. We are also very concerned about the length of the GR, which may prove ineffective and unworkable for states parties in practice.

Para 3. The Network commends the Committees' emphasis on the need for evidence-led policies and measures. It suggests adding: *"Empowerment should be directed at enlarging rather than limiting their options and improving the protection of their labour, civil and human rights. Caution is needed as regards criminal law and other repressive anti-trafficking strategies which risk increasing vulnerability to exploitation and abuse rather than protecting women against such practices"*.

II. Objective and scope

Para 4. The Network is concerned about the lack of a holistic approach to trafficking in women under international human rights law. The majority of footnotes refers to the work of CEDAW and only occasionally to other human rights bodies. Moreover, several footnotes are misquoted and/or not referring to the text in the provision concerned. See for example footnotes 4, 10, 45, 173, 244. We are also concerned that country specific recommendations from Concluding Observations are presented as general recommendations for all states parties, e.g. the establishment of specialised tribunals in para 29 (h).

III. Legal framework

Para 8. The term "sexual exploitation" is not defined in the UN Protocol or in the GR and open to diverging and contradictory interpretations. As such it easily gives rise to the conflation of sex work and trafficking in the interpretation of the GR, and thereby risks to be used to combat prostitution rather than trafficking, contrary to the stated purpose of the GR and the UN Trafficking Protocol. The Network therefore suggests that the GR provides a definition of the concept of "sexual exploitation". We propose that sexual exploitation means *"the participation by a person in prostitution, sexual servitude, or other sexual services, including the production of pornographic materials, as a result of being subjected to threat, coercion, abduction, force, abuse of authority, debt bondage or fraud"*. The Network further suggests that the GR clarifies the (interpretation of the) definition of trafficking by explicitly stating that:

- 1) any recruitment, transport, et cetera, by use of coercive or deceptive means should be treated as trafficking. The fact that a victim consented to migrate, to carry false documents, to work illegally abroad, to do domestic work, or to do sex work, cannot be used to argue that the victim "consented" to work in conditions of forced labour, slavery or servitude. The nature of the labour or services provided, including those in the sex industry, are irrelevant to the question of whether or not the victim's human rights are violated.
- 2) the distinction made between sexual exploitation from forced labour does not imply that forced labour cannot exist in the sex industry or that *coercive sexual exploitation does not amount to forced labour or services*, consequently depriving sex workers of protection against the practice.¹

Para 9. In line with the 2002 and 2010 Recommended Principles and Guidelines of the OHCHR, the Network suggests including key human rights principles on which all anti-trafficking measures should be based and comply with, in particular the principles of "Do no harm", participation and non-discrimination.

We suggest the following text: "States should ensure

- 1) that anti-trafficking laws, policies and measures shall not violate or negatively impact on the health, safety and human rights of trafficked persons or other groups affected by trafficking and/or anti-trafficking policies;²
- 2) the active and meaningful involvement of relevant non-governmental organisations, in particular those of women migrant workers and other groups that are affected by trafficking and anti-trafficking measures, in the development, formulation, implementation, monitoring and evaluation of anti-trafficking laws, policies and measures. Failure to do so

¹ ILO, "Eradication of Forced Labour", ILO, 2007, p. 42.

² Principle 3 of the 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking and the 2010 Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the OHCHR.

may mean that even well-intended national and international efforts to address trafficking do not contribute to solving the problem or may even have negative effects;

3) ensure that anti-trafficking laws, policies and measures do not discriminate specific groups of women, including on grounds of race or colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, incl. the nature of work or services they provide, or lead to, facilitate or justify such discrimination"

Para 11. In order to be able to effectively combat trafficking, the Network suggests to add: "*The GR in particular calls on States to extend the right to protection, assistance and compensation to all victims of exploitation under forced labour or slavery-like conditions, in accordance with the obligation of States under Art. 8 of the Covenant on Civil and Political Rights and the Forced Labour conventions*".

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

Para 12. Given the limitations and notorious unreliability of the current figures, the Network expresses its concern about the conclusions drawn in the GR on the basis of the presented figures. There is, e.g., only relatively recent attention for other labour sectors than the sex industry into which girls and women are trafficked.

The Network is also concerned about the over-emphasis of the GR on sexual exploitation (see also para 25), at the risk that other and/or mixed forms of trafficking of girls and women will remain underexposed.

Para 17. Contrary to rules of international (human rights) law, the GR suggests that states bear responsibility not only for acts and omissions that occur within their territories and subject to their jurisdiction, but also extra-territorially. Although international law has recognised such an extraterritorial scope in a number of specific situations, this is an exception rather than a general rule (see in this respect also para. 95 which offers a misinterpretation of international law). We suggest that the GR - in line with the practice of the HRC and the CESCR in this respect - rephrases the wording to "*A state party must respect and ensure the rights laid down in the Convention to anyone within the power or effective control of that state party, even if not situated within the territory of the state party.*" (HRC, GC 31, para. 10). Moreover, the GR could mention that "*States parties must refrain from actions which harm those rights abroad.*"

Para 18. The Network suggests using the term "intersectional discrimination" rather than "compounded discrimination". We also suggest that the Committee explicitly acknowledges, as it does in GR 28, *inter alia* that LGBTIQ+³ people and persons with a disability⁴ are likely to experience multiple and intersecting forms of discrimination. We miss an explicit reference to GR 28 para 18.

The Network also suggest deleting the first sentence ("The Committee women face.") as it does not address girls and women as right bearers, but purely as passive victims facing disadvantage and inequality. We suggest that the GR focuses on language that acknowledges women as rights-bearers and avoids victimising and stereotyping language such as women being "susceptible to being lured" (para 22), "undertake risky migration" (para 64) or "lacking awareness" (para 66).

Para 19. The Network is concerned about the use of the opaque and multi-interpretable "discouraging the demand that fosters the exploitation of women and girls, which leads to trafficking" throughout the GR. This is susceptible to being interpreted as fostering especially repressive sex work policies and endangering the safety, health and rights of women in prostitution. In this context we also refer to the lack of definition of the concept of "sexual exploitation" (see para 8).

Para 20. The GR also implies that women are mainly victim of trafficking for the purpose of sexual exploitation. We suggest that the GR abstains from drawing this type of conclusions, given the fragmented and unreliable character of the current available data. (See also para 12.) It might, e.g., be very well possible that with improved data collection trafficking for domestic labour appears to be the dominant form. Also, patterns and forms of trafficking are not static but subject to change and may vary over time and geographical areas.

Secondly: throughout the GR there are many references to "demand": e.g. "demand for cheap and forced labour", "demand for trafficked goods and services", "demand for trafficked persons", "demand for sexual exploitation", "demand for gender-stereotyped exploitation of trafficked victims". We suggest that the GR consistently uses "*demand for cheap, exploitable and disenfranchised labour and services*", as there is no research substantiating that there would exist a specific demand for trafficked persons or goods, sexual or forced labour. We also suggest replacing "rooted in" by "*affected by*" in the first sentence. Although trafficking is affected by gender-based factors, it is rooted in many more factors.

Para 22. The Network opposes the use of victimising and stereotyping language in this paragraph which portrays women as passive and naive victims who are "subject to" and "susceptible to being lured". (See also para 18.) This reinforces the stereotype that men "act", are active actors who migrate to improve their situation and that of their

³ See Yogyakarta Principles.

⁴ See the Convention on the Rights of Persons with Disabilities.

families, while women are “acted upon”, are passive victims who are susceptible to lies and false promises. This not only reinforces stereotypes but also borders on blame-the-victim mechanisms. The same problem applies inter alia to para 64 and 66. Secondly, the Network misses a reference to the precarious status of women’s work, in particular a gendered labour market, the lack of recognition of women’s work, including in the care, domestic, entertainment and sex sector, and the ensuing lack of labour rights and -protections and the lack of legal labour migration opportunities. The last sentence of this para is incomprehensible and reads, e.g., as coercion and control that drives the demand for the exploitation of trafficked victims”.

Para 23. We suggest adding “servile marriage”: “Forced *and servile* marriage”.

Para 24. The Network suggests replacing sentence 3 (“Stateless ... diplomatic protection”) with: “*The lack of legal migration pathways forces women, including stateless women, to use irregular channels of migration and consequently are denied access to legal residence, labour and legal protection.*”

Para 25. Multiple paras refer to the obligation of states parties in regard to data collection. We suggest bringing these together in one paragraph. We also suggest limiting the list of topics on which states should collect data to keep it feasible and provide states with a set of measurable and concrete criteria. In addition, we suggest adding the following:

c) ix: “were granted asylum or residence on humanitarian grounds”

d) “... stakeholders”: “*including community based organisations of groups affected by trafficking and/or anti trafficking measures*”

e) “respect to data protection law and confidentiality with the consent of the trafficked person”.

f) i: We suggest” rephrasing this into “demand for *cheap, exploitable and disenfranchised* labour and/or services”.

Para 26. a) The Network suggests adding: (...) facing *various forms of multiple and intersecting* discrimination.

Para 27. We suggest deleting the entire paragraph. See also our comments in regard to paras 19 and 20. Experience learns that phrases like “targeting potential users of trafficked goods or services” will exclusively be used to justify the criminalisation of clients of sex work and not the buyers and/or sellers of for instance strawberries. There is an increasing body of evidence, including scientifically rigorous research, which shows that any criminalisation of sex work, including of clients, has a negative impact on the safety, health, access to services and rights of sex workers.⁵ Not the type of the work should be leading in anti-trafficking policies, but the use of coercion and deceit. The Network is also worried about phrases like “removal of trafficked goods or services”, as this may easily lead to the removal of persons.

As to d): it is unclear what is meant by penalizing those on the demand site: buyers of cheap t-shirts? Mobile phones? Guests of families employing trafficked domestic workers? Again, practice learns that this kind of provisions will be exclusively used to penalize clients of sex workers with all the negative effects involved.

Para 29. We suggest adding under e): “*including compensation and redress*”; under k): “*evaluation and monitoring*”; replacing under h) “sets ... tribunals” with: “*ensure that the criminal justice system is equipped to effectively etc.*”

Para 30. The Network suggests adding under a) “civil society: especially *organisations of groups affected by trafficking and/or anti-trafficking measures.*” The Network also suggests rephrasing “migration management” in this para and para 52 to “*migration governance*”.

Para 31. We suggest adding to the heading: “*and assist its victims ensuring, (...).*” We also suggest:

- Under d): We oppose terms like “rescue, repatriation and reintegration” as it depicts women as passive victims who need to be rescued by others and send back to where they came from. We suggest replacing this with: “*identification, assistance & support, compensation, and voluntary repatriation*”

- Under h): We suggest adding: “*and to ensure that anti-trafficking measures do not have negative effects on the human rights of those affected by trafficking or anti-trafficking measures*”.

Para 32. The Network suggests adding to “women’s meaningful participation”, “*especially of those communities affected by trafficking and/or anti-trafficking measures*”. Under b) we suggest adding after “non-governmental organisations”: “*especially organisations of communities affected by trafficking and/or anti-trafficking measures*”.

Para 34. We suggest replacing “war related demand...conflict” with: “*In situations of conflict women run an increased risk of abuse for sexual, economic and military purposes*”. See also previous remarks on “demand”.

Para 35. The Network recommends replacing “for purposes of sexual or labour exploitation... servitude” at the end of the paragraph by: “*forced labour and services, including sexual services, slavery or practices similar to slavery, including forced and servile marriage, and servitude, including sexual servitude*”. In general, the Network recommends to be

⁵ See e.g. Platt and others (2018). Associations between sex work laws and sex workers’ health: A systematic review and meta-analysis of quantitative and qualitative studies. *PLoS Medicine* 15: e1002680. [CrossRef] [PubMed]; GAATW, “*Moving Beyond Supply and Demand Catch-Phrases: Assessing the Uses and Limitations of Demand-Based Approaches in Anti-Trafficking*” (2011).

consistent in the description of the purposes of trafficking, rather than randomly mentioning some purposes of trafficking in one paragraph and other purposes in another paragraph.

Para 39. The Network suggests adding after "asylum": *"and/or residence on humanitarian grounds"*.

Para 41. The Network suggests adding after "particularly victims of trafficking": *"and organisations of communities affected by trafficking and/or anti-trafficking measures"*.

Para 42. The Network suggests adding to j): *"and ensuring adequate complaint procedures and redress mechanisms in case of abuses"*.

Para 45. The Network suggests adding an extra paragraph after paragraph a: *"Ensure that victims of trafficking in asylum procedures are entitled to all rights and protections general to victims of trafficking"*.

Para 46: The network suggests adding: *"Ensure that risk-assessments are made by multidisciplinary teams."*

Para 48. As in paragraph 20, we miss reference to the precarious status of women's work, i.e. a gendered labour market, the lack of recognition of the work of women, including in the care, domestic, entertainment and sex sector, the lack of labour rights and protections attached to work in female-designated labour sectors, and the lack of legal labour migration opportunities for women. In addition, the Network wishes to stress that attention should be paid to the fact that measures taken in regard to border control and the regulation of migration by states parties should be non-discriminatory in nature and effect.

Para 50. The Network suggests replacing "male-centered ..." with: *"the entertainment and sex sector"*.

Para 57. The Network suggests adding under paragraph d) "facilitating independent attainment"; under paragraph e sub b) *"and/or illegal labour"*. It furthermore suggests adding under paragraph e) an additional paragraph, holding that states need to *ensure that anti-trafficking measures do not negatively impact on the human rights of women migrants or other particular groups of women*.

Para 58. The Network suggests adding under paragraph b) *"and the entertainment and sex sector"*; under paragraph f) *"in all unregulated or unmonitored labour sectors"*.

Para 59. The Network suggests replacing the term 'illegal' in subparagraph b with *"deceptive and/or coercive"*. The problem is not recruitment as such but deceptive and coercive forms of recruitment. Recruitment for many forms of women's work is often 'illegal', due to the lack of recognition of women's work in the informal sector and the ensuing lack of legal migration channels. Prosecuting and punishing illegal recruitment will therefore risk to just drive up prices and make women's migration even more precarious.

Para 62. Given the lack of a definition of "sexual exploitation" we suggest to either delete this paragraph or define the concept of "sexual exploitation". See also paragraph 8. As it stands now the paragraph can be used to further marginalize and punish women who as a side job do sex work due to non-living wages.

Para 64. The Network opposes the victimising and stereotyping language used in this paragraph which portrays women as passive and naïve victims who "undertake risky migrations". See also paragraph 18 and 22.

V. Victim identification, assistance and protection

Para 66. The Network suggests deleting "and private apartment ... exploitation". It also suggests adding after this sentence: *"Other factors that impede the identification of trafficked women are the criminalisation of irregular migrants and/or labour sectors in which migrant women work, such as the sex sector"*. In addition, it suggests adding after "irregular immigration status": *"Another factor that stops women from coming forward is lack of trust in the police and fear of being prosecuted and punished themselves"*. For many marginalised groups the police is not a symbol of protection, but a real manifestation of punishment and control. This is especially so for sex workers, given the fact that worldwide the police is the main source of violence against sex workers.

Para 67. We recommend adding after "immigration status": *"States should ensure safe access to health services for all migrant women, independent of their immigration status and sector of work. Health workers should be sufficiently trained to identify and support migrant women victims of trafficking."*

Para 68. The Network suggests listing here the international standards in regard to victim assistance and protection to which states need to comply and use this paragraph to provide state parties with a concrete list of these obligations. We also strongly suggest adding a paragraph which stresses the obligation of states to *"take all measures necessary to ensure that (possible) victims of trafficking can safely go to the authorities, without fear for negative consequences, such as prosecution, punishment, detention or deportation for immigration, labour or other offences related to their being victim of trafficking"*. Furthermore, the Network suggests adding the following:

- f): *"and/or criminal law enforcement for illegal labour"*
- i): *"organisations, especially organisations of communities affected by trafficking or anti-trafficking measures"*
- j): replace *"including faith-based actors"* with: *"including actors rooted in the affected communities"*; replace *"information about"* with: *"to trafficked women"*.
- k): replace *"sexual exploitation and abuse"* with: *"and its related phenomena of forced labour, slavery, slavery-like practices and servitude"*.

Para 72: The Network suggests the following amendments:

- a): replace *"understand"* with: *"are informed"*
- g): add after *"civil society organisations"*: *"in particular the meaningful participation of communities affected by trafficking or anti-trafficking measures."*
- h) add *"free legal aid and representation"*
- i) replace *"few if any limitations"* with: *"no limitations"*. Replace *"and be limited ... considerations"* with: *"In the exceptional case that limitations are placed for security considerations, such limitations should be restricted to the shortest period possible and only with the consent of the women concerned."*
- k) add after *"groups of trafficked women"*: *"and/or the affected communities"*
- m) add after *"trafficked women"*: *"and the affected communities"*.
- p) add: *"including funds for women to participate in education and professional training"*.

VI. Victims' access to justice

Para 79: There are no grounds to assume that criminal law is particularly important for women to ensure their access to justice. On the contrary, as mentioned before, the criminal system too often is used to arrest, prosecute and punish marginalised and stigmatized groups of women, including undocumented women and women in prostitution. In many cases labour and civil law are better and more effective instruments to provide redress for abusive and exploitative practices. We therefore suggest replacing the first sentence with: *"The domestic legal framework should ensure that trafficked women have access to justice on the basis of equality"*, and adding in the second sentence after *"remedies offered through"*: *"labour, civil, administrative and criminal law"*. We furthermore suggest deleting *"either as victims or as preparators of criminal acts"*. It is not clear why this para refers to trafficked women as perpetrators.

Para 80: The Network suggests adding after *"legal aid"*: *"and representation"*. Experience learns that access to legal aid and representation is key for trafficked persons to realize their rights, including compensation and redress. The Network furthermore suggests replacing *"prosecution for acts ... their exploitation"* with: *"prosecution and/or punishment for crimes they committed as a consequence of their being trafficked"*. The use of the word *"forced"* allows states a too limited interpretation, for example the application of this clause only in the case of physical force. This should also be rephrased in para in 83, 96b and other paragraphs where applicable.

Para 84: The Network wonders what is meant by *"legal information sharing systems for trafficked women"* (para b). It would like to stress the importance of the confidentiality of legal aid and representation.

Para 86: The Network commends the Committee for its clear stand against so-called *"raid & rescue operations"*.

Para 93: The Network suggests replacing *"the provision of reparation"* with: *"the provision of an effective remedy, including restitution, recovery, compensation, satisfaction and guarantees of non-repetition"*.⁶ Furthermore to add: *"The right to an effective remedy contains both substantive elements and procedural rights needed to be able to access remedies. Procedural rights include: Access to information about available remedies in a language the victim understands; The right to legal assistance, including to pursue compensation; The right to remain in the country during legal proceedings, including those for claiming compensation; Protection against unlawful interference with the victim's privacy and safety from intimidation and retaliation before, during and after proceedings; The right to play a meaningful role in legal proceedings, to being heard and to act (in the case of children this implies the appointment of a guardian); medical, psychological, social, administrative and any other assistance that they may require in order to exercise the right to an effective remedy in a meaningful manner."*⁷

Para 94: The Network suggests adding: *"or where victims do not have access to legal aid and representation"*.

VIII. Treaty ratification or accession

Para 103: The Network suggests adding in the text (and not only in the footnote) *the ILO Domestic Workers Convention (C 189) and the ILO Forced Labour Conventions (no. 29 and 105) and the 2014 Forced Labour Protocol*.

⁶ See footnote 6.

⁷ See footnote 6.