



Written submission by the International Women's Rights Action Watch Asia Pacific (IRAW Asia Pacific) to the CEDAW Committee regarding the draft General recommendation on Trafficking in Women and Girls in the context of Global Migration

1. INTRODUCTION

This written submission is the outcome of a Global Convening on Trafficking in the context of Global Migration organized by IRAW Asia Pacific and the Global Alliance Against Traffic in Women (GAATW) in January 2019. Over 40 representatives from women's rights, labour rights and migrants' rights groups participated at the convening. They included migrant workers, domestic workers, sex workers, legal practitioners, service providers as well as CEDAW Committee members, UN Special Procedures and representatives from ILO and UN Women. The participants shared their analysis of the structural causes of trafficking, discussed positive and negative examples of anti-trafficking laws and policies and collectively developed recommendations for the CEDAW Committee as it prepares the General Recommendation on Trafficking in the context of Global Migration.

The convening launched a three-year programme of developing a feminist anti-trafficking manifesto that will aim to situate dialogues and discourse on trafficking that challenge the systems of oppression that fuel trafficking, and spotlight and proliferate rights-based measures to address trafficking within the women's rights movement. The recommendations to the CEDAW Committee are part of this broader advocacy.

2. CONTEXT

Human trafficking is a serious crime and gross violation of human rights. States have an obligation to prevent human trafficking and protect its victims under different international legal frameworks such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo protocol), the Convention on Elimination of All Forms of Discrimination Against Women, and other international instruments that address trafficking from a migrant and labour rights perspective, as well as regional and national legislation. The Special Procedures of the Human Rights Council including the Special Rapporteur on Trafficking in persons, especially women & children, the Special Rapporteur on contemporary forms of slavery, its causes and consequences, the Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteur on the Human rights of migrants have also have provided progressive analyses and recommendations to address trafficking. Despite these international standards and commitments from States, trafficking persists worldwide.

Among the contributing factors to the persistence of trafficking is the lack of attention paid to the structural causes driving trafficking, such as gender and economic inequality, the effects of the neo-liberal economic order- in particular, the precarisation of labour in global value

chains, restrictive migration policies, climate change and natural disasters, and conflict. The 2030 Agenda is the only international framework that currently addresses trafficking as part of these socio-economic and political challenges.

Additionally, in many countries around the world we are witnessing an unprecedented backlash against human rights and gender equality, racism and xenophobia towards migrants, erosion of labour rights, and climate change denialism. Within this, States have focused their anti-trafficking measures on discriminatory migration policies towards women, and securitisation and policing of marginalised populations. There has been scant recognition of the adverse human rights impact of such responses. Measures to prevent trafficking have led to restrictions on women's migration, ironically, pushing them into riskier migration options.

Women make up half of those who migrate worldwide. The circumstances and motivations for women to migrate vary according to social, economic and political contexts. CEDAW General recommendation 26 on women migrant workers recognizes the drivers of women's migration, including globalization, the wish to seek new opportunities, poverty, gendered cultural practices and gender-based violence, natural disasters or wars and internal military conflicts.¹ Many women migrate to seek better economic opportunities as they are the sole economic providers for their families. In Northern Myanmar for example, women living in the context of armed and communal conflict bear the burden of providing financial support to their families, so migrate internally and externally to seek economic opportunities.

For governments of many migrant sending countries such as Indonesia and the Philippines the labour export programme essentially has become a poverty alleviation programme. As a result, migrants including migrant women are put at higher risk of rights violation including through labour exploitation and trafficking. Instances also about of the wrongful imprisonment and death sentencing of migrant women trying to protect themselves from rights violations.

The channels that women choose to migrate also vary according to their different experiences of discrimination as it relates to class, sexual orientation and gender identity, race, ethnicity etc. Discriminatory practices against LGBTIQ individuals within recruitment agencies for example push LGBTIQ migrants to seek the assistance of human smugglers which leads to migration through illegal channels. Additionally, their marginalized and often undocumented status precludes them from accessing programmes and services for migrants or from organizing to ensure protection of their rights. Despite the fact that trans individuals and those who do not identify within the gender binary face increased risks of trafficking and exploitation, they are completely invisible within institutional responses.

Measures to assist trafficked or at-risk women have led to their forced confinement in institutions, amounting to arbitrary detention. Programmes to assist women in achieving economic independence and prevent re-trafficking have practically condemned them to a lifetime of low-wage labour. All too often, anti-trafficking measures have been implemented in a top-down, one-size-fits-all manner, and calls for meaningful consultations with those affected have fallen on deaf ears.

¹ Committee on the Elimination of All Forms of Discrimination Against Women, General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R

The exploitation that is embedded into the globally dominant neoliberal economic model, fuels the demand for cheap labour with poor wages and working conditions so that production is competitive and consumer prices are kept low. In this model, groups facing structural and systemic discrimination are at increased risk of labour exploitation. We have witnessed the emergence of 'feminised' labour markets. Women all over the world continue to bear the brunt of economic injustice being over-represented in low wage jobs when in the formal sector or employment, or in the informal economy, that operates with little or no labour protection. Women additionally, continue to bear the disproportionate burden of unpaid care work.

Under the pressure of multinational corporations and business lobbies, states continue to relax regulations governing health and safety, minimum wage and overtime pay, leading to increased decent work deficits within these labour markets. They have failed to safeguard the rights of women workers and under the guise of development, often engage in or condone violent practices, such as land-grabbing and destruction of natural resources that ultimately reduce livelihood opportunities for groups of women who depend on the environment for income, thus increasing their vulnerability to trafficking. The mass out-sourcing of care-work and its undervaluation as a form of labour has translated to the absence of legal protections for migrant domestic workers' rights.²

These economic factors cannot be seen in isolation from worldwide political and legal developments that aim to keep 'the other' at bay, and which, alongside the increased securitisation of borders put migrant women at greater risk of trafficking. Examples abound - from the toxic rhetoric against the so-called 'migrant caravan' of people fleeing violence in Central America, to the criminalization of NGOs assisting migrants in Hungary, to systematic disenfranchisement of Muslims through the Citizenship Bill in Northeast India.

The sentiments of ethno-nationalism and xenophobia have fuelled the political narrative surrounding global migration as an exceptional and recent phenomenon, and have manifested in exclusionary immigration laws and policies that privilege migration for particular forms of labour and by particular groups of people. As global politics increasingly tend towards populism and authoritarian governments, anti-immigrant discourse has also been normalized and ingrained in laws, policies and institutional responses to migration of vulnerable groups affected by climate change and conflict.

The CEDAW Committee's proposed General Recommendation has the potential to radically shift the harmful dominant narratives on migration and trafficking by deconstructing the historical and racialised factors that underpin them, by challenging head on the negative outcomes of the neo-liberal economic paradigm on women's human rights in general, and women workers in particular, by recognising that the over-reliance on criminal laws to address trafficking is counter-productive, by proposing alternative, community led responses and by demanding that States provide for effective protection of human rights of trafficked persons.

² In Hong Kong, laws and policies have failed to adequately protect domestic migrant workers from unlawful practices of agencies that charge exorbitant fees to seek employment. Further, employers are permitted to terminate a contract at any given time, requiring the worker to leave the country within only 2 weeks' notice.

In the next sections we will detail some of the gaps in current responses to trafficking and then present our recommendations, based on the lived experiences and work of the participants at the Global Convening, on how the GR could best understand and respond to trafficking as a women's human rights concern, as a women's labour rights concern and as a women migrants' rights concern. Within this we emphasize the significance of community centered and community driven approaches to preventing and combating trafficking which was a key area of focus at the Global Convening.

3. GAPS AND CHALLENGES IN CURRENT RESPONSES CONCERNING TRAFFICKING

a) Data collection and analysis

There is a global trend towards using quantitative data as the basis for producing measurements and indices to gauge trends, causes and forms of human rights violations, including in the context of trafficking.³ However, this trend has several limitations.

First, the data is derived from information collected by States and is dependent on how national institutions and legal frameworks characterise reported cases. State reports are therefore limited in their ability to identify the true scale of trafficking and the different sectors in which it occurs. This is further exacerbated by essentialized and sensationalized narratives around trafficking disseminated by mainstream media that play into hierarchies of violence. National data on trafficking tend to mirror these stereotypes, giving a misleading impression of the level or types of trafficking in persons and making comparison impossible.

This has caused a disproportionate focus on trafficking for sexual exploitation and much less attention to trafficking for labour exploitation leading to similarly disproportionate number of victims identified in the sex industry. Legal practitioners have pointed to the relatively greater difficulty involved in investigating and prosecuting other forms of labour exploitation as the principal reason for this discrepancy.⁴

It is also important to recognize the interplay between the push for quantitative data collection and the emphasis on criminal justice responses to trafficking. Statistical methodologies, and conceptual frameworks related to data collection need to be rigorously reviewed to include indicators that reflect States' systemic responses to trafficking, and not just levels of prosecution.

b) Law and policy frameworks

The over-reliance on criminal laws to address trafficking is a key concern. Responses to trafficking based solely in the criminal justice framework do not have the potential to deliver transformative social change. On the other hand, they may very well undermine women's rights by replicating patriarchal notions and gender stereotypes prevalent in society.

Conflation between sex work, exploitation and trafficking

³ UNODC, Global Report on Trafficking in Persons, 2014, p. 16. In Amnesty International, Explanatory Note on Amnesty International's Policy on State Obligation to Respect, Protect and Fulfill the Human Rights of Sex Workers, Index: POL 30/4063/2016 26 May 2016, Available at: <https://www.amnesty.org/download/Documents/POL3040632016ENGLISH.PDF>

⁴ United Nations Office on Drugs & Crime, Issue Paper on The International Legal Definition of Trafficking in Persons, January 2019, Available at: <http://www.unodc.org/unodc/en/human-trafficking/webstories2018/new-issue-paper-on-the-international-legal-definition-of-trafficking-in-persons.html>

Dominant narratives surrounding migrant women often assume a lack of autonomy and agency in their decision-making as compared to migrant men. These are based on gender stereotypes and regard women as inherently vulnerable, positioning them as victims in need of 'saving'. In law and in practice, these narratives take the form of restrictions on women's rights and mobility, often in the guise of anti-trafficking efforts. This is particularly evident in institutional responses that conflate sex work with trafficking.

In the USA, the passing of two anti-trafficking laws, FOSTA and SESTA⁵ has made online platforms liable for their users' speech, forcing technology companies to push all talk of sex work off their platforms. The laws see information exchange related to sex work as facilitating trafficking and have had a devastating impact on sex work communities online and their ability to share information on safety and protection. Instead of protecting actual victims of trafficking, these legal provisions have forced sex workers to engage in street-based work, leading to increased violence, economic and housing instability, as well as reliance on middlemen, putting them at an increased risk of exploitation and trafficking

In Mexico, while sex work itself is not criminalised, the law on trafficking provides a broad definition of exploitation. This has led to the prosecution of the very sex workers and migrants that the law is supposed to protect. Article 41 of the Mexican Anti-Trafficking laws not only prohibits an individual of obtaining "economic benefit" from the prostitution of another person, it also forbids anyone from facilitating or collaborating with someone to do sex work. This puts sex workers at risk of prosecution for any form of information exchange with each other, as well as from unionizing and organizing to protect their rights.

Negative human rights impact of end demand laws

A recent trend in State responses to trafficking, specifically in the context of sex work, is the focus on 'ending demand' for trafficking through criminalizing the purchase of sex. This approach is based on a number of fallacious and patently harmful assumptions including understanding trafficking only as 'sex trafficking', applying instrumental notions of demand and supply to humans, not taking into account the structural and systemic discrimination against women pervading all facets of their life, including in the context of migration. In practice, these protectionist measures have made sex workers more vulnerable to violence, increased their economic instability and rendered them susceptible to trafficking. These laws are disproportionately enforced in the spaces occupied by women sex workers – homes, neighbourhoods, working establishments and other work spaces. As a result, women sex workers, not male clients, incur the majority of profiling, surveillance and policing, not only while working but also in their day-to-day lives.⁶

These 'end demand' laws highlight the protectionist underpinnings of a legal approach that aims to ensure gender equality by treating certain forms of labour exceptionally. Aside from the conceptual limitations, in practice it is unclear how 'end demand' laws would apply, for example, to other labour sectors where women are disproportionately represented such as

⁵ The Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) are the U.S. Senate and House bills that as the FOSTA-SESTA package became law on April 11, 2018

⁶ Global Network of Sex Work Projects, Policy Brief: The Impact of 'End Demand' Legislation on Women Sex Workers, 2018. Available at: <https://www.nswp.org/resource/policy-brief-the-impact-end-demand-legislation-women-sex-workers>

the garment or domestic work industry. In the case of garment factory workers, and domestic workers this could mean the ostensible criminalization of consumers of clothes and families that employ domestic workers.

The lived realities of women, particularly women migrant workers, and marginalised groups of women highlight the dangers of adopting a protectionist approach in addressing trafficking. Instead, states must consider their obligations under the CEDAW framework in its totality by focusing on eliminating barriers and discrimination women face in realizing their rights. This means addressing the whole spectrum of rights violations and inequality to ensure that women are able to access decent working conditions, and migrate safely.

c) Implementation of law and policy frameworks concerning trafficking

Identification

Law enforcement officers are often not sufficiently trained or provided with guidelines to identify victims of trafficking across all labour sectors. Migrant and trafficked women point out that in their experience law enforcement officers often engage in discriminatory practices that violate their rights, such as forced HIV and bone testing, based on the stigma and stereotypes of gender, class, race etc.

Victim protection

Many countries do not have adequate trafficking victim protection policies and frameworks. In some, victims may be prosecuted for criminal acts they were forced to commit, such as irregular entry or stay in the country, or engaging in sex work. Victims/survivors may also be revictimized during the investigation or prosecution process by having to repeat their story multiple times, including in front of their traffickers.

Assistance

There is a relative absence of adequate shelters, and access to medical, legal and psychological services to ensure the recovery of survivors. The practice of forced confining of victims to shelters constitutes a violation of women's rights to liberty, and self-determination. In Jordan, the legal status of victims is tied to their accommodation in a shelter. Victims are only able to stay for up to 3 months in a shelter, and because their cases take much longer to process in court, they lose their victim status and their ability to provide testimony in trial. This has led to high rates of failed cases.

Remedies

Many practitioners have highlighted difficulties in accessing compensation for victims of trafficking because of legal barriers and the availability of funds for compensation. Where compensation is awarded within court proceedings and funds are available, victims rarely see the money in their pockets at the end. For example, compensation funds have been established in Serbia in the past but faced a pushback from the government because they claimed it was too expensive. The Thai government managed to seize USD 100 million in the case of trafficking of victims in the Rohingya conflict, but not a cent went to trafficked victims. States must not only take measures to obtain funds, but must ensure that mechanisms are established to distribute funds effectively to the survivors.

Operational grievance mechanisms available have also been inaccessible by women and their children due to governance structures that are largely patriarchal. The mechanisms do not meaningfully involve women and migrant workers in their design and decision-making process. They are often incapable of responding to the specific needs of trafficking victims and women migrant workers.

4. SIGNIFICANCE OF COMMUNITY CENTERED RESPONSES TO ADDRESSING TRAFFICKING

While involving social actors (e.g. trade unions) as players in the fight against trafficking and exploitation is key to anti-trafficking responses, evidence points that solutions are most effective through cross-movement organizing, where grassroots and institutional women's rights and labour rights organizations work jointly.

Where legal frameworks and discrimination act as barriers to seek recourse to human rights violations within state institutions and access educational institutions, sex workers in West Bengal have organized and developed structures to protect sex workers from violent clients, as well as build capacity of the community on HIV prevention. The organization also acts as a self-regulatory body to prevent entry of minor girls and unwilling women into the sex trade. The board of the organizations consists of 10 members: 5 representatives of sex workers, and their children, while remaining members consists of members of parliament, doctors, advocates and representatives from social welfare boards.

This model of self-regulation has been recognized by sex worker communities world-wide as a progressive model for protection of their rights which focuses on their agency and takes a rights-based approach. However, restrictive trafficking laws such as that of Mexico prevent groups and, particularly marginalized groups, from organizing and unionizing. State must protect the rights of all women in its totality, and frameworks purportedly aimed at protecting women must consider their capacity to realize their own rights as well as their freedom of speech by allowing workers to organize, collectively bargain and unionize. Evidence has indicated that trafficking flourishes in sectors where workers are not able to organize and where there are few labour protections or aren't considered work.

5. RECOMMENDATIONS FOR THE DRAFT GENERAL RECOMMENDATION ON TRAFFICKING IN WOMEN & GIRLS IN THE CONTEXT OF GLOBAL MIGRATION

Based on the above analyses, any law, policy or institutional response to trafficking including the CEDAW General Recommendation must address trafficking foremost, as a **women's human rights concern**. Accordingly, the general recommendation must urge States to:

1. Make a clear departure from the colonized and racialized history of the international anti-trafficking framework. The general recommendation itself must not include any references to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.
2. Refrain from addressing trafficking solely as a criminal law issue. States must ensure that any measures adopted to address trafficking follow a human rights-based approach, and respects the agency and autonomy of women.
3. Create and implement measures to address trafficking that acknowledge and respond to the diversity of women, including gender non-conforming women. States must take

- into account factors such as race, caste, class, ethnicity, sexual orientation and gender identity and expression in developing anti-trafficking responses.
4. Refrain from conflating sex work and trafficking either in law and policy frameworks or in the implementation of such frameworks including by non-State actors.
 5. Refrain from enacting laws and policies that criminalize sex work, including 'end demand' laws in particular.
 6. Enact and implement anti-trafficking responses that incorporate an expansive understanding of justice- conceptually, such as by ensuring private sector accountability and practically, such as by providing for alternative dispute resolution mechanisms.
 7. Recognize and address the biases in current systems and analysis of data collected on trafficking.
 8. Refrain from closing down online platforms where workers, especially migrant workers may exchange information.
 9. Refrain from undertaking unlawful practices such as entrapment under the guise of anti-trafficking responses.
 10. Monitor and regulate financial flows and create mechanisms to confiscate the proceeds of trafficking. However, States must guard against the pitfalls that can come with the over criminalization of this process, and to shape this up in a way that does protect and respect human rights.
 11. Respect, protect and fulfil the rights of trafficked persons at all times, including through:
 - a. establishing an inclusive and comprehensive system of identification, protection, and assistance for trafficked persons
 - b. establishing monitoring and accountability mechanisms within labour, law enforcement and migration agencies so that members of such agencies do not engage in discriminatory practices such as forced HIV/ STI testing or bone testing
 - c. training all State agencies and institutions engaged in implementing laws and policies addressing trafficking through a human rights-based approach
 - d. carrying out risk assessments in line with their due diligence obligation to ensure that victims of trafficking are protected unconditionally from the beginning to the end of judicial proceedings, and not just during trial.
 - e. ensuring that trafficked persons are involved in the design, implementation and monitoring of victim protection policies and services
 - f. guarantees of non-criminalisation for trafficked persons to ensure that they are not revictimized within the criminal justice system.
 - g. provision of shelters, medical aid, long-term psychosocial counselling and measures for social inclusion of trafficked persons.
 - h. establishing procedures to ensure stays of deportation and providing an opportunity to apply for permanent residency, witness protection and relocation assistance for trafficked persons.
 - i. prohibiting the use of protective detention and forced confinement in shelters as this constitutes a violation of women's rights to liberty and bodily integrity.
 - j. implementing schemes for assessed forfeiture from criminal operations that profit from trafficking, and setting aside funds to provide compensation to trafficked persons.

- k. ensuring access of trafficked persons to operational grievance mechanisms, including through the meaningful involvement of persons impacted by trafficking such as women and migrant workers in their design and decision-making process.
- l. creating networks of survivors as a means of information sharing to prevent trafficking.

Further, trafficking must be understood and responded to as a **labour rights concern**. Accordingly, the CEDAW General Recommendation must urge States to:

1. Address the structural causes of trafficking by addressing the feminisation/segregation/globalization of labour markets. States must establish institutionalised methods of counting women's unpaid care work as the undervaluation and non-valuation of women's work is intrinsically linked to their vulnerability to labour exploitation and trafficking.
2. Ensure responses to trafficking view labour intersectionally and across all industries and that they do not place an exceptional focus on the sex industry.
3. Strengthen labour rights protections, especially in sectors relying on the labour of migrants and women, such as domestic work.
4. Develop economic policies that lead to job creation domestically.
5. Regulate corporations so that transparency in supply chains is established, especially where they rely on migrant labour.
6. Recognize transparent and accountable community approaches of self-regulation to identify trafficked persons as alternative, human rights-based responses to trafficking.
7. Enact and implement laws and policies, including anti-trafficking frameworks that do not prevent unionizing and community organizing regardless of immigration status and legal status of work.

Last, trafficking must be understood and responded to as a **migrant rights concern**. Accordingly, the CEDAW General Recommendation must urge States to:

1. Safeguard migrant workers' right to Decent Work⁷ and open (more) regular pathways for labour migration.
2. Put in place laws, policies and measures that ensure safe, fair and free migration for all women
3. Remove all discriminatory barriers to women's migration, including elimination of recruitment fees.
4. Strengthen legal frameworks for the rights of migrant workers, including through the terms of bilateral agreements between labour sending and receiving countries that should include provisions that protect migrant workers, not just investors and businesses
5. Stop the arbitrary detention of migrant workers and that migrant workers have access to legal counsel specializing in trafficking, and are able to access legal aid
6. Do not deport migrant workers when they seek remedies in cases of labour exploitation and trafficking.

⁷ International Labour Organization, ILO's Decent Work Agenda. More information available at: <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm>

7. Take measure to regularize irregular migrant status of workers and take steps towards ensuring formal rights protections for workers in the informal economy.
8. Organize and empower domestic workers, migrants and their families.

Explanatory Note

This written submission is the outcome of a Global Convening on Trafficking in Women & Girls in the context of Global Migration, organized from 26-27 January 2019 in Bangkok, Thailand. The Global Convening was attended by the following NGO representatives, whose contributions at the convening were collected into this written submission:

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2. Borislav Gerasimov, Global Alliance Against Traffic in Women (GAATW)
3. Brahm Press, MAP Foundation
4. Cherry Clemente, Asia Pacific Forum for Women, Law & Development (APWLD)
5. Cynthia Navarrete Gil, APROASE
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10. Kate D'adamo, Sex Workers Outreach Project (SWOP)
11. Kay Thi Win, Asia Pacific Network of Sex Workers (APNSW)
12. Leah Sullivan, Global Alliance Against Traffic in Women (GAATW)
13. Liz Hilton, Empower Foundation
14. Marija Andjelkovic, ASTRA
15. Marika McAdam, Academic
16. May Sabe Phyu, Gender Equality Network (GEN)
17. Melissa Wainana, CREA
18. Mousumi Chowdhury Dam, Durbar Mahila Samanwaya Committee (DMSC)
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27. Ruchira Gunasekara, Lawyers Without Borders
28. Ruth Morgan Thomas, Global Network of Sex Work Projects (NSWP)
29. Sebastian Kohn, Open Society Foundations (OSF)
30. Sehnaz Kiyamaz Bahceci, Women for Women's Human Rights (WWHR)
31. Sr. Lissy Joseph, National Workers Welfare Trust
32. Susana Fried, CREA
33. Thanta Laovilawanyakul, Empower Foundation
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