

Position Paper

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Executive Summary

The Dutch Association for Women and Law (VVR) request the Committee to consider the following when elaborating a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration:

1. Provide interpretive guidance on the Palermo Protocol definition of trafficking.
2. Acknowledge the agency of women and include in policy development trafficked women and other groups affected by trafficking and anti-trafficking policies.
3. Recommend that anti-trafficking measures not negatively impact the human rights of trafficked persons and other affected groups.
4. Frame discussions of root causes carefully to avert negative effects.
5. Encourage gender-sensitive anti-trafficking policies that take into account mixed exploitation and intersectional discrimination.
6. Demand protection for women's human rights in all (in)formal sectors where women work.
7. Call for gender-sensitive migration policies focused on empowering women and providing women with more safe options.
8. Promote a rights-based approach to anti-trafficking initiatives, widening options for women, rather than decreasing them.
9. Require evidence collection regarding the effects of anti-trafficking on the human rights of trafficked persons and other affected groups.

Introduction

The VVR submits the following position paper in response to the Concept Note prepared by the Committee on the Elimination of Discrimination Against Women (the 'Committee') on its elaboration of a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration (the 'Concept Note'). In the preparation of this position paper the VVR collaborated with the Dutch CEDAW Network, consulting a broad spectrum of Dutch NGOs. We appreciate the Committee's efforts to provide clarity to Article 6 of the Women's Convention and the particular attention the Concept Note draws to the need for 'long-term, comprehensive survivor-centred services' (para 34). As a network of non-profit providers working on the ground, we are nonetheless concerned that the human rights of women and girls—as victims of trafficking, as migrants, as wives, and as workers in precarious and typically female-designated labour sectors—are eclipsed in the Concept Note, or even undermined, by an over-riding anti-trafficking message that focuses on criminalisation and women's vulnerability. We are concerned that the Concept Note's focus could lead to further restriction on women's mobility and options in the name of protection, rather than increasing women's human rights protection and options for safe migration. We urge the Committee to firmly adopt a human rights approach as a leading principle in its General Recommendation, ensuring that measures to address trafficking do not negatively impact the health, safety and rights of trafficked women and girls or other groups affected by trafficking and anti-trafficking policies. Such an approach finds support in Principle 3 of the 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking and its 2010 Commentary of the

OHCHR.¹ We submit the following to outline our specific areas of concern and provide guidance on a gender-sensitive, rights-based and evidence-led response to trafficking.

1. Provide interpretive guidance on the Palermo Protocol definition of trafficking.

To define trafficking, the Concept Note cites to Art. 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the 'Palermo Protocol'). Due to the compromises that accompanied the Palermo Protocol drafting process, provisions of the resulting definition are ambiguous and subject to multiple interpretations, which has led to significant variation in enforcement policies.² Rather than attempting to redefine trafficking, the CEDAW's GR should provide clarifications consistent with the human rights enshrined in the Women's Convention. We offer the following specific suggestions:

Clarify that the core of the crime of trafficking is not the type of work or services performed, but the deceptive and coercive conditions of recruitment and work.

The Palermo Protocol makes an unnecessary distinction between, on the one hand, exploitation of prostitution and sexual exploitation, and on the other hand, forced labour, servitude and slavery-like practices. This distinction has led some states to exclude victims of trafficking from protection and assistance, thus shifting the focus from acts of the perpetrator to blaming the victim.³ As is happening to women that initially consented to work in the sex industry, but were misled about the conditions of work, or subject to unlawful force in the course of their work. The unnecessary distinction between exploitative sex work and exploitative labour is replicated in some paragraphs of the Concept Note (e.g. paras 18, 26). The Committee should focus instead on exploitation in **all** spheres of formal and informal labour, including in domestic and care work in private households, entertainment, and other growing sectors with respect to trafficking, such as agriculture, horticulture and garment industries. The focus of the General Recommendation should not be on the sex work industry alone, but on the violence, deception and coercion that define trafficking.

Draw attention to trafficking in women and girls for forced, early, and child marriages.

In addition to trafficking for exploitation of labour, the General Recommendation should highlight that the Palermo Protocol definition of trafficking includes trafficking for purposes of forced, early, and child marriage.⁴ Trafficking for various types of marriage is emerging as a more prevalent form, as identified by UNODC in its 2016 Global Report on Trafficking in Persons.⁵ This might even outnumber other forms of trafficking.

Consistent with the positions elaborated in paragraphs 6, 7 and 8 of this paper, anti-trafficking responses in such cases should be focused on protecting and promoting the human rights of trafficked women and girls and not merely on restrictive government policies (e.g. Concept Note para 50).

Emphasise that 'human trafficking' and 'human smuggling' are not the same.

The Concept Note appropriately provides a separate definition for smuggling (para 6). We urge the Committee to emphasise further that women can consent to irregularly migrate (smuggling), but no person can consent to trafficking, forced labour, slavery or servitude because the deception and coercion involved negates the consent. That a woman consents to

¹ Human Rights Committee, '2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) E/2002/68/Add.1 para 1 (cited at Concept Note para. 8); Office of the High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking, Commentary' (2010) 83-93.

² Melissa Ditmore and Marjan Wijers, 'The Negotiations on the UN Protocol on Trafficking in Persons' (2003) 4 *Nemesis* 79-83, 87.

³ Marjan Wijers, 'Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol' [2015] *Anti-Trafficking Review* 56 (citing the Report of the European Expert group on Trafficking in Human Beings, 2004).

⁴ Trafficking in Women and Girls (2018) para 14,15; citing UN Office on Drugs and Crime, 'Global Report on Trafficking in Persons' (UNODC 2016).

⁵ UN Secretary General 'Report on Trafficking in Women and Girls' (2018) para 15.

smuggling hoping to make a living through domestic work or sex work, does not mean she consents to exploitation, dispossession of her passport etc.

Encourage State Parties to expand protection to all victims of trafficking/forced labour.

Protection afforded to victims of trafficking should be expanded to all victims of forced labour and services (including forced sexual services), slavery or practices similar to slavery (including forced and servile marriage and the exploitation of children) and servitude (including sexual servitude), no matter whether they arrived in that situation through trafficking or through other means. We note these responsibilities already flow from existing obligations under international law.⁶

Strike any reference to the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (the '1949 Convention').

The Concept Note's referral to the 1949 Convention, is troubling (para 9). The 1949 Convention calls upon states to criminalise prostitution, regardless of conditions of coercion or deceit and regardless of the will of the woman involved. It fails to make a distinction between prostitution and trafficking and presents them as synonyms,⁷ in contradiction with the plain language of the Palermo Protocol (2002) and Article 6 of the Women's Convention (1979), which refer to 'exploitation of prostitution'.⁸ The antiquated 1949 Convention promotes archaic constructions of women as passive victims and undermines women's agency.⁹ In that respect it is not surprising the 1949 Convention is only ratified by 82 countries, in contrast to the Palermo Protocol (173 ratifications) and the Women's Convention (189). The highly disputed 1949 Convention calls upon States to criminalise prostitution, whereas there is a steadily growing body of evidence that any full or partial criminalisation of voluntary adult prostitution, including of clients, negatively impacts the safety, health and rights of sex workers.¹⁰ Moreover, UN bodies, including the Committee, have acknowledged the positive effects of decriminalisation on the human rights of sex workers and have shown an increasing willingness to recognise sex work as labour.¹¹ The 1949 Convention is therefore fundamentally incompatible with the aims of the Women's Convention to uphold the human rights of women and end discrimination against women.

Clarify ambiguous terminology in the Palermo Protocol.

Though the meaning of 'exploitation of prostitution' has not yet been elaborated by the Committee, in its General Recommendation, the Committee should make clear that this term refers to exploitation in the context of trafficking and not all prostitution. Furthermore, where the Palermo Protocol at Art. 3(b) states that consent of any victim of trafficking is negated by, inter alia, abuse of power or deception, the General Recommendation must make

⁶ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956 para 1.

⁷ The 1949 Convention begins in the preamble with an acknowledgement of the harm of 'prostitution and the accompanying evil of the traffic in persons'.

⁸ Anand Grover, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover' (2010) A/HRC/14/20 para 30.

⁹ Wijers (2015) 60.

¹⁰ Lucy Platt and others, 'Associations between Sex Work Laws and Sex Workers' Health: A Systematic Review and Meta-Analysis of Quantitative and Qualitative Studies' (2018) 15 PLoS Med; Vanwesenbeeck I, 'Sex Work Criminalisation Is Barking Up the Wrong Tree.' (2017) 46 Archives of sexual behavior 1631; Kathleen N Deering and others, 'A Systematic Review of the Correlates of Violence Against Sex Workers' (2014) 104 American Journal of Public Health E42; Global Alliance Against Traffic in Women, 'Collateral Damage: The Impact of Anti-Trafficking Measures on Rights Around the World' (2007).

¹¹ UNAIDS, 'The Legal Status of Sex Work: Key Human Rights and Public Health Considerations' (2014); World Health Organisation, 'Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries: Recommendations for a Public Health Approach.' (WHO 2012); ILO, 'Recommendation Concerning HIV and AIDS and the World of Work' (2010) para 200; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: The Netherlands' (2010) para 30-31; 'Report of the Committee on the Elimination of Discrimination against Women, Twentieth Session, 1999, Consideration of the Third and Fourth Periodic Reports of China' (1999) para 32. Amnesty International, Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of sex Workers'(2016) POL 30/4062/2016; Grover (2010).

explicitly clear that Art. 3(b) does not negate a sex worker's voluntary consent to work in the sex industry, nor an irregular migrant's consent to smuggling.¹²

2. Acknowledge the agency of women and include in policy development trafficked women and other groups affected by trafficking and anti-trafficking policies.

The Committee should ensure that the language of the General Recommendation does not undermine women's empowerment and agency by contributing to a narrative of women as helpless victims incapable of making decisions for themselves. For many women across the world migration is not only a way to improve their economic situation, but also to escape gender violence and other oppressive practices at home. The Committee should pay careful attention not to reproduce assumptions about women as passive and in constant need of protection. Such stereotypes can fuel repressive policies that restrict women's rights 'for their own good', for instance, exclusionary migration policies that limit women's freedom of movement under the guise of keeping women 'safe' at 'home'.¹³ Accordingly, the General Recommendation must avoid language that unnecessarily replicates negative stereotypes regarding women's agency. For example, women being 'lured' by traffickers (e.g. paras 25, 28, 32). Consider instead 'defrauded', 'coerced', or similar terms that acknowledge a competent adult has been subject to malfeasance.

It is concerning that nowhere in the Concept Note are women acknowledged as active agents of change and empowerment. The General Recommendation must acknowledge women as the authorities in their own lives and develop policies that help women to rebuild their lives and support women's choices. Resting on the human rights principles of participation and empowerment, we emphasise that women should be involved in the design, implementation, monitoring, and evaluation of policies that affect their lives.¹⁴ This includes trafficked women and other groups of women whose lives are affected by trafficking policies, as well as every stage of elaborating the General Recommendation.

3. Recommend that anti-trafficking measures must not negatively impact the human rights of trafficked persons and other affected groups.

Since the passage of the Palermo Protocol, anti-trafficking policies of State Parties have often focused their efforts on criminalisation (of trafficking or sex work) and restrictive migration policies, instead of focusing on the provision of protection, support and compensation to trafficked persons.¹⁵ There is a growing awareness that restrictive migration law and prohibition of prostitution can lead to increased risk of trafficking and negatively impact the human rights of trafficked women and girls.¹⁶ Therefore the Committee should exercise caution not to replicate or foster restrictive tendencies of state practice when discussing anti-trafficking policies in its General Recommendation. Efforts to address trafficking should not negatively impact the human rights of trafficked persons or other groups affected by trafficking or anti-trafficking efforts, in particular female migrants and sex workers.¹⁷

As noted by the UN Secretary General, though restrictive migration policies are often introduced to prevent trafficking, they can in fact increase the risk of trafficking by further restricting the already limited legal options for women to migrate.¹⁸ In the Concept Note, the whole paragraph referencing 'unprecedented global migration flows' (para 12) could have the unintended effect of feeding repressive government policies to restrict migration, rather than developing migration policies that assist in safe migration.¹⁹ Further, references in the Concept Note to address the 'demand side' of the commercial sex industry (para 27) can

¹² Grover (2010) 30, 32.

¹³ Global Alliance Against Traffic in Women (2007) 17.

¹⁴ CEDAW, 'General Recommendation No. 26 on Women Migrant Workers' (2008) para 23.

¹⁵ Global Alliance Against Traffic in Women (2007) 12, 16.

¹⁶ See references footnote 9; Trafficking in Women and Girls (2018) para 24.

¹⁷ Human Rights Committee (2002) Principle 3.

¹⁸ Trafficking in Women and Girls (2018) para 24.

¹⁹ CEDAW GR 26 para 5.

foster repressive sex-work policies, which have been shown to disrupt sex workers' safety, access to health services and access to justice.²⁰ Furthermore, measuring the effect of criminalisation on demand for sex work poses serious methodological problems. In a review of the effects of the 1999 Swedish ban on purchasing sex, researchers noted the 'difficulty of accurately assessing whether prohibition has affected the extent of prostitution'.²¹ Also troubling is the Concept Note's repeated reference to 'impunity' of perpetrators (paras 15, 25, 32, 34, 52, 54) despite the current prevailing approach to anti-trafficking that already emphasises criminalisation of perpetrators. The General Recommendation should provide a framework for policies that uphold and protect the human rights of women, increase women's options and opportunities, rather than restrict, repress, or criminalise the limited options they have.

4. Frame discussions of root causes carefully to avert negative effects.

In order to effectively address the problem of trafficking, the General Recommendation needs to provide a clear and accurate conception of the root causes of trafficking. It is important that the discussion of root causes is not conflated with increased flow of migrant labour (para. 12) and demand for sex work (para. 15). Framing root causes in these terms is highly problematic in that they can lead to counter-productive solutions, which harm the human rights of women.²² Further, they do not address the human rights violations that undergird the exploitation of women's labour and increased migration, nor those of women and girls that are trafficked into a marriage they do not freely consent to. As such, we encourage the Committee to focus on the following root causes: (1) anti-trafficking policies, including migration restrictions, that increase risk of trafficking; (2) impoverishment, gender violence and oppressive gender practices in countries of origin of trafficked women and girls, and other groups affected by trafficking and anti-trafficking policies; (3) the lack of regulation and labour legislation in informal sectors of female labour, where the human rights of women workers are unprotected; (4) patriarchal norms and values, sometimes formalised in family legislation, leading to child, early and forced marriages of girls and women and to marital captivity.

First, as discussed in paragraph 3 above, anti-migration policies can increase risk of trafficking. Particularly, when a state enacts legal barriers between a demand for labour and supply of individuals seeking employment globally, the effects will be an unregulated market to match the supply with the demand.²³ In this way, if governments restrict regular migration channels, they can inadvertently act as a root cause of trafficking. Second, the Concept Note appropriately calls for increased attention to women's impoverishment (paras 17, 51) as a root cause of trafficking. Addressing root causes through development initiatives aimed at employing, educating and empowering women in their countries of origin is one important approach to an anti-trafficking strategy. Third, we suggest that the lack of human rights protection of informal female labour markets is a root cause of trafficking. Conscious of the link between migration and demand for exploitable labour, counter-trafficking strategies must offer protection in migration law (discussed herein, para 7), but also in human rights law, particularly in spheres of migrant women's labour (discussed herein, para 8), bolstering their ability to resist exploitation and escape the violence of trafficking.²⁴ Fourth, unfortunately the Concept Note hardly elaborates on the growing incidence of family and marriage-related trafficking. The Committee has an impressive knowledge on the subject of inequality in the family that underlies many aspects of discrimination against women that are justified in the name of ideology, tradition and culture. We encourage the Committee to elaborate on this

²⁰ Platt and others (2018); GAATW, 'Moving Beyond Supply and Demand Catch-Phrases: Assessing the Uses and Limitations of Demand-Based Approaches in Anti-Trafficking' (2011).

²¹ Charlotta Holmström and May-Len Skilbrei, 'The Swedish Sex Purchase Act: Where Does It Stand?' (2017) 1 *Oslo Law Review* 82, 100.

²² See discussion in para 3 above.

²³ Bridget Anderson and Julia O'Connell Davidson, 'Trafficking - a Demand Led Problem?' (Save the Children 2002) 22.

²⁴ Jacqui True, *The Political Economy of Violence against Women* (Oxford University Press 2012) 54 and 63.

root cause and staunchly commit its General Recommendation to the human rights agenda that it embodies.

5. Encourage gender-sensitive anti-trafficking policies that take into account mixed exploitation and intersectional discrimination.

Trafficking is a crime and human rights violation that is not gender-neutral. The violence trafficked women and girls suffer can be plural and intersectional.²⁵ The General Recommendation must clearly address this. A situation of trafficking will not always fit into text-book definitions, but can be a combination of mixed exploitations.²⁶ For example, domestic workers in private households may be assaulted by the employer, or women in forced marriages may be exploited for their labour or wages.²⁷ In order to ensure proper identification and service provision for trafficked women and girls, the General Recommendation must refute easy categorization, instead encouraging governments to form policies that acknowledge the overlapping exploitation of women and girls, and create a legal environment where women are given more options, more rights, and safety to leave situations of exploitation and dependency.

Regional and international human rights bodies rely on the Committee for gendered interpretations of human rights norms, especially regarding systemic and structural discrimination,²⁸ which, in the lives of trafficked women and girls, is often multiple and intersecting.²⁹ To fully address the impact of discrimination, the General Recommendation must broaden its recommendations for addressing intersecting discrimination in countries of destination. Migrant women and girls may suffer not only from gender-based discrimination, but also from racism and xenophobia.³⁰ Transgender women likewise experience unique intersectional discrimination. The Concept Note discusses discrimination largely as a phenomenon of countries of origin (e.g. paras 17, 25, 31, 34, 40, 48). Though the Concept Note accurately addresses discrimination in the context of migration policy (para 28) and health care (para 46) in countries of destination, this discussion could be expanded to include, for example, the stigma attached to sex workers and irregular migrants and how these stigmas are detrimental to enjoyment of their human rights. The General Recommendation should reiterate the obligation of State Parties to tackle these stigmas, under Women's Convention Art. 5(a) for example, and ensure that their laws and policies do not reproduce or reinforce them. The Committee should safeguard that any links made between specific cultural practices and women's oppression do not have the inadvertent effect of discriminating on the basis of race, religion, or national origin (e.g. para 40). Similarly, the Committee should note that criminalisation of sex work has been shown to cause negative stigma against sex workers.³¹

6. Demand protection for women's human rights, including labour rights, in all (in)formal sectors where women work.

²⁵ Dutch CEDAW Network, 'Joining Forces to Break the Circle of Violence Against Women: Dutch NGO Shadow Report on the Implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)' (2018) para 4.

²⁶ Carolina Villacampa and Núria Torres, 'Human Trafficking for Criminal Exploitation: The Failure to Identify Victims' (2017) 23 *European Journal on Criminal Policy and Research* 393, 401 (illustrating how failure to understand that trafficking victims experience multiple exploitations can lead to a failure to identify victims of trafficking).

²⁷ CEDAW GR 26 paras 14, 15, 20.

²⁸ *Opuz v Turkey* [2009] European Court of Human Rights 33401/02 [76, 77, 189] (Citing CEDAW determinations *A.T. v. Hungary* [decision of 26 January 2005]; and *Fatma Yıldırım v. Austria* [decision of 1 October 2007]).

²⁹ Latrice Annette Drain, 'An Organizational Systems View of Sex Trafficking' in Lenore Walker, Giselle Gavia and Kalyani Gopal (eds), *Handbook of Sex Trafficking: Feminist Transnational Perspectives* (Springer International Publishing 2018) 52.

³⁰ CEDAW GR 26 para 14.

³¹ Holmström and Skilbrei (n 28); 'Sex Purchase Act Has Altered Swedes' Attitudes towards Prostitution' (*sciencenordic.com*) <<http://sciencenordic.com/sex-purchase-act-has-altered-swedes%E2%80%99-attitudes-towards-prostitution>> accessed 9 February 2019.

Trafficking is a sequence of processes of violence and exploitation, in which governments can play a complicit role. Female labour sectors populated by migrant labour, such as domestic and care work in private households, entertainment and sex work, are rarely fully recognised as work, and as such, do not, or only marginally, benefit from protection of labour law, nor do they provide legal migration channels.³² The lack of regulation in these sectors and the illegal or semi-legal character of women's work is also tied to women's vulnerability under migration law and can increase risk of exploitation and trafficking.³³ Migrant women working in these sectors need to be able to organise to protect their human rights without fear of losing the right of continued residency, just as sex workers need to be able to organise without fear of arrest and detention.³⁴ Governments must remove obstacles for those women workers to exercise their right to freedom of association.³⁵ The Committee must demand that States Parties promote and protect the human rights of women working in female labour sectors, including, abiding by their requirements under international law to implement gender-sensitive labour policies to provide safety in their workplaces, such as under ILO Convention 189 promoting decent work for domestic workers.³⁶ The General Recommendation should also emphasise the importance of acknowledging the informal sectors of domestic and care work in private households, entertainment, sex work and other types of 'women's work' as 'work' in order to decrease further marginalisation and precarity.³⁷

To this end, the Committee should establish in the General Recommendation reporting requirements for State Parties regarding the human rights of women working in marginalised and precarious female labour sectors. The Committee should require State Parties to: (1) elaborate on their laws and policies towards, for example, sex workers and how such policies affect the enjoyment of human rights; (2) elaborate on how they ensure that the human rights of irregular migrants and trafficked women and girls are promoted and protected; (3) provide data on the numbers of domestic and care workers in private households, sex workers, entertainers and other women operating in the informal labour market. The Committee should question States as to how they ensure that their policies regarding these sectors do not harm the women who work there, particularly, that such policies do not create a greater risk of trafficking. An example of this questioning can be found in the Committee's 2010 Recommendations to the Netherlands, in which the Committee expresses concern over new legislation in the Netherlands requiring sex workers to register, but which disallowed migrant sex workers from registering. The Committee noted that such legislation could 'undermine efforts to combat the sexual exploitation of women and increase the vulnerability of prostitutes who are not able or not willing to register by worsening their working conditions and exacerbating their social exclusion'. The Committee further encouraged the Netherlands to conduct a risk assessment of the law and include in its next report on measures taken to 'improve the working conditions of prostitutes and to enhance their autonomy, privacy and safety'.³⁸

7. Call for gender-sensitive migration policies focused on providing women with more safe options.

As clearly stated by the Committee in its General Recommendation 26, states must enact migration laws that are compliant with their human rights obligations, including, promoting safe and regular migration channels. To avoid causing harm to the human rights of women, states should promulgate gender-sensitive migration policies for all stages of the migration process: from traveling to the host country; to being present in the host country with valid

³² CEDAW GR 26 paras 13–15; Benoit C and others, "'The Prostitution Problem': Claims, Evidence, and Policy Outcomes." [2018] Archives of Sexual Behavior.

³³ Anderson and O'Connell Davidson (n 30) 11.

³⁴ ILO, 'Convention No. 189 and Recommendation No. 201 Concerning Decent Work for Domestic Workers' (2011) para 3.

³⁵ CEDAW GR 26 para 26(b); Amnesty International 2016 14.

³⁶ Ine Vanwesenbeeck, 'The Making of "The Trafficking Problem"' [2018] Archives of Sexual Behavior.

³⁷ CEDAW GR 26 para 14.

³⁸ CEDAW 2010 paras 30-31.

immigration status; to seeking protection, assistance and access to justice to end exploitation and acquire compensation as a victim of trafficking or other irregular migrant.³⁹ A gender-sensitive approach needs to be attuned to the way various migration statuses can enable human rights abuses, and focus on providing women with increased migration options rather than restricting their already limited options.

To begin with, before entry into the host state, there is currently a lack of viable migration pathways for women migrating from impoverished areas.⁴⁰ As discussed above placing barriers in the form of migration restrictions between a large international supply of labour and demand for low-wage labour leads to a rise in trafficking. However, as noted in CEDAW GR 26, visas that trap women in a dependent relationship with her sponsor, whether that sponsor is an employer or spouse, can also facilitate and maintain trafficking.⁴¹ As such, though states must offer more regular migration pathways to allow regular migration into female labour sectors, a gender-sensitive approach also requires ensuring the human rights of women in those sectors, and giving them flexibility to leave exploitative employment and marriage relationships. This could be facilitated through an autonomous residency permit scheme, providing women with a period of valid residency to rebuild their lives after leaving an exploitative or abusive relationship.⁴²

Due to the dependency of a migrant on an immigration sponsor, women and girls can be trafficked using a valid immigration status. In cases of forced, early, and child-marriages, a foreign spouse can be granted a residency permit that is dependent on her continued relationship. Such immigration schemes tie women and girls to abusive or exploitative relationships. It is essential that women and girls be enabled to leave those marriages without fear of losing the right of continued residency. The General Recommendation should encourage autonomous residency permit schemes that have a low evidentiary burden to prove trafficking; no fees; no minimum residency requirement; and further, not require the trafficked woman or girl to participate in prosecution as a pre-condition.⁴³ In this way, rather than restricting migration law to prevent dependent spouses from migrating, states need to create options for women to escape migration dependency. Similar autonomous residency permit schemes should be available for trafficked women whose immigration status is dependent on a single employer. In such a situation, leaving the underlying employment contract can lead to a demand to pay recruitment and travel, and cancelation of immigration status.⁴⁴ The General Recommendation must highlight that the fear of losing the right of continued residency caused by dependency on an immigration sponsor traps women and girls in exploitation and is counter-productive to anti-trafficking initiatives.

Finally, trafficked women and girls who were not brought through a regular status, and thus hold an irregular status in the host country, should be able to seek help without fear of losing the right of continued residency. Victims of trafficking ought to be offered a residency status at the first signs of trafficking. Such a gender-sensitive immigration benefit should include work authorization, low evidentiary standards for proving that someone has been trafficked, and not condition residency status on participation in criminal prosecution.

8. Promote a rights-based approach to anti-trafficking initiatives, widening options for women, rather than decreasing them.

'Trafficking' should first and foremost be defined by the interests and perspectives of the women and girls involved. While many states approach trafficking as a criminal law issue, the

³⁹ CEDAW GR 26 para 3.

⁴⁰ 'Concept Note' (n 1) para 28.

⁴¹ Trafficking in Women and Girls (2018) 24.

⁴² CEDAW GR 26 para 26(f).

⁴³ This discussion is informed by studies on the effectiveness of the Dutch autonomous residency permit scheme. Dutch CEDAW Network (2018) para 17; Elles Besselsen and Betty de Hart, *Verblijfsrechtelijke consequenties van de Wet inburgering: een onderzoek naar de ervaringen van migranten in Amsterdam* (Wolf Legal Publishers (WLP) 2014).

⁴⁴ Anderson and O'Connell Davidson (n 30) 11.

Women's Convention is a human rights instrument, and as such, the Committee must approach being trafficked as a human rights issue, providing guidance and solutions that address the violation of human rights. It is thus concerning that of the ten sub-themes suggested in para 54 of the Concept Note, only one of those sub-themes deals directly with protecting the human rights of women.⁴⁵ The General Recommendation is an opportunity for the Committee to outline the practical requirements of implementing a human rights-centred approach. As a general foundation, a rights-centred approach to trafficking requires states to provide assistance, protection and compensation to victims of trafficking, and not to penalise them, even when they have violated migration or anti-prostitution laws.⁴⁶ Likewise, states should use great caution that the provision of assistance and protection does not inadvertently infringe upon the human rights of trafficked persons. Each proposed solution has to be examined in terms of its effects on the women and girls concerned, the interests which are being served, whose problems are addressed and whether or not the solution might produce more problems for the women concerned, rather than solve them. We offer the following concrete suggestions:

Protection should not be conditioned on participation in prosecution.

Migration status for trafficked persons is often conditioned on cooperation with the criminal justice system. This focus on short-term needs rather than long-term support does not serve the human rights of the victims, but rather, it serves the interest of the state in the prosecution of perpetrators. Trafficked persons who choose not to go through the criminal justice process must not be denied support services to help them to recover.⁴⁷

Women who come forward should have long-term migration status options.

State Parties should offer trafficked persons long-term residency permits that enable them to rebuild their lives.⁴⁸

Temporary visas should allow women to work and attend school.

Temporary visas for victims of trafficking often restrict work authorization. The right to work is essential for trafficked persons' recovery and reintegration.⁴⁹ Similarly, provision of educational opportunities is vital for women and girls to rebuild their lives. We support the Concept Note's focus on the right to education at para. 44.

Trafficked persons need access to justice, free legal assistance and interpretation services.

Trafficked persons must have access to legal aid and language interpretation services from the time of their first contact with police.⁵⁰ These services will help inform trafficked persons of their rights and various legal procedures that they can initiate, such as immigration benefits and compensation claims. Lawyers also help to ensure that trafficked persons are treated with respect and sensitivity, protecting their privacy and identity, thus safeguarding against re-victimization.⁵¹

States must provide specialised short-term shelter and long-term housing options.

Shelter should be available to both citizens and foreign nationals and be specialised to provide services to victims of trafficking, including psychological and health services.⁵² Shelter and other support services should be provided regardless of where the exploitation has occurred. The provision of shelter must not unduly restrict the freedom of movement.

⁴⁵ 'The provision of appropriate assistance and services to victims of trafficking, including both short term as well as comprehensive, survivor-centred, long term services.'

⁴⁶ Marjolein van den Brink and Marjan Wijers, "'Because to Me, a Woman Who Speaks in Public Is a Public Woman'" 30 Years Women's Convention and the Struggle to Eliminate Discrimination of Women in the Field of Trafficking and Prostitution' in Ingrid Westendorp (ed), *The Women's Convention Turned 30* (Maastricht Centre for Human Rights: Intersentia 2012) 12.

⁴⁷ Trafficking in Women and Girls (2002) para 52.

⁴⁸ François Crépeau, 'Report of the Special Rapporteur on the Human Rights of Migrants' (2014) A/HRC/26/35.

⁴⁹ Trafficking in Women and Girls (2002) para 52.

⁵⁰ UN Trafficking Protocol Art. 6(1); ICCPR Art. 17; OHCHR Guidelines no. 6 & 5.8

⁵¹ Marjan Wijers, 'Improving Access to Justice for Trafficked Persons' (Council of Europe, Netherlands Helsinki Committee 2016) 7.

⁵² Dutch CEDAW Network (2018) para 35.

Trafficked persons should not be held in immigration detention centres or other forms of custody. They should never be detained for reasons of collecting evidence or statements.⁵³

Low-evidentiary standard to trigger protection of the non-punishment principle.

The non-punishment principle is an essential piece of human rights protection for victims of trafficking.⁵⁴ Prosecution and detention of victims of trafficking is re-victimising and re-traumatising. Through proper implementation of the non-punishment principle, women and girls will not be prosecuted for crimes or offenses committed as a consequence of their trafficking situation. However, when a state fails to recognise that a trafficked person has been a victim of the crime of trafficking, the non-punishment principle cannot be applied.⁵⁵ A woman recently emerging from a trafficking situation will likely have difficulty presenting evidence in a linear or coherent manner due to the trauma she has endured.⁵⁶ As such, the evidentiary burden to prove that she is a victim of trafficking should be a low standard.

9. Require evidence collection regarding the effects of anti-trafficking on the human rights of trafficked persons and other affected groups.

When developing and implementing anti-trafficking policies it is imperative to look at their concrete effects on the safety, health and rights of the groups affected by these policies. The actual impact of anti-trafficking policies on trafficked women and girls and other affected groups, who are often already in a marginalised position, should be the indicator of success or failure of an anti-trafficking policy. Only by collecting data on the effects of such policies on trafficked women and girls and other affected groups can State Parties safeguard their human rights and adequately address any infringement thereto.⁵⁷ In order to ensure that anti-trafficking policies do not negatively impact human rights, it is essential that women affected by anti-trafficking policies are involved in policy development and monitoring and evaluation of those policies. The General Recommendation should operationalise monitoring and evaluation, requiring State Parties to provide evidence to demonstrate that anti-trafficking, migration, and sex industry policies do not have a detrimental effect on the enjoyment of human rights by women and girls affected by those policies.⁵⁸

Conclusion

The Committee is the international body charged with promoting and protecting the human rights of women and girls. We trust that with its General Recommendation on trafficking in the context of global migration, the Committee will continue its role as a bastion for the promotion and protection of the human rights of women and girls. In sum, the General Recommendation is an opportunity to promote women's human rights by (1) insisting on the protection of the human rights of women and girls in all spheres of women's work; (2) encouraging migration policies that are rights-based, evidence-led and gender-sensitive; and (3) sending a clear message that measures to address trafficking should not negatively impact the human rights of women and girls, in particular, trafficked women, female migrants and sex workers.

⁵³ International Convention on Civil and Political Rights (ICCPR), Art. 9 & 12; OHCHR Guidelines 2.6 and 6.1; Convention on the Rights of the Child (CRC), art. 255 and 37 (b).

⁵⁴ Ryszard W Piotrowicz and Liliana Sorrentino, 'The Non-Punishment Provision with Regard to Victims of Trafficking: A Human Rights Approach' in Ryszard W Piotrowicz, Conny Rijken and Baerbel Heide Uhl (eds), *Routledge handbook of human trafficking* (Routledge 2018).

⁵⁵ Villacampa and Torres (2017).

⁵⁶ Piotrowicz and Sorrentino (2018).

⁵⁷ Trafficking in Women and Girls (2018) 52.

⁵⁸ For a discussion of similar reporting requirements by the HRC and CESCR, see Fleur Van Leeuwen, *Women's Rights Are Human Rights: The Practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights* (Intersentia 2009) 115–121, 198–205.