



Written submission by Outright Action International to the CEDAW Committee regarding the draft General Recommendation on Trafficking of Women and Girls in the context of Global Migration

1. Introduction

OutRight Action International is an ECOSOC accredited civil society organization working at the international, regional and national levels to research, document, defend, and advance human rights for lesbian, gay, transgender and intersex (LGBTI) people. This submission is a response to the draft General Recommendation (GR) on Trafficking in Women and Girls in the context of Global Migration and the urgent need to recognize that human rights violations of women and girls in human trafficking in the context of global migration not only affects LGBTI individuals, but that LGBTI individuals in addition face a host of discrimination and violence specific to their real or perceived sexual orientation, gender identity and expression, and sex characteristics (SOGIESC). Section 2 requests changing the focus from ‘women and girls’ to use more inclusive language. Section 3 discusses the ways in which LGBTI individuals are harmed by trafficking and suggests modifications to the current Draft Declaration. Finally, Section 4 requires a conceptual clarification to ensure that sex work is not conflated with trafficking.

2. The Committee should focus on ‘gender-related dimensions of trafficking’ rather than ‘women and girls’

‘This general recommendation sets out practical guidance on how to overcome this impasse using a gender transformative approach – characterized by anti-trafficking measures that are gender-sensitive, rights and needs-based, and evidence-led.’¹

The Draft correctly notes that interventions against trafficking are predicated around gender, and must be ‘gender transformative’ and ‘gender-sensitive’.² The CEDAW Committee has previously recognized that gender is a social construct, encompassing social beliefs about appropriate behaviors and qualities of individuals based on their perceived sex characteristics.³ As a mutable social category emanating from cultural norms, it is incorrect to assume that gender is universally and fundamentally binary. Multiple groups recognize genders outside the male/female binary, such as two-spirits, *muxe*, *fa'afafine*, among many others.⁴

However, in limiting the focus of intervention only to ‘women and girls’ in the GR and not once recognizing others who suffer gender-based discrimination, such as LGBTI persons, in the text, this GR risks perpetuating a normative binary notion of gender and marginalizing victims of trafficking outside the gender binary, as well as those who transgress prescribed gender roles. It furthermore risks constructing women and girls as fundamentally victims and

¹ Committee on the Elimination of Discrimination against Women, Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration (“Draft General Recommendation”), para 3.

² Ibid.

³ CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 5.

⁴ Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal*, 2012 HR/PUB/12/06.

males as perpetrators, thereby perpetuating gender stereotypes and obscuring the ways in which all individuals can be subject to gender-based forms of violence.⁵

We therefore recommend reframing the document to center on ‘gender-related dimensions to trafficking’ rather than ‘women and girls’. This includes the following deletions

To the **title of section IV**:

‘Trafficking in women and girls constitutes gender-based violence ~~against women~~.’⁶

Paragraph 28:

‘Take responsibility, in view of the Sustainable Development Goals, to address the root causes of trafficking, in particular: the acceptance and normalization of gender-based violence ~~against women~~’

Paragraph 77:

‘According to article 2(e) of the Convention, States parties will be held responsible should they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by both State and non-State actors, including private individuals or entities, that result in gender-based violence ~~against women~~, including trafficking in women.’

3. The Committee must recognize the vulnerability of LGBTI individuals to trafficking

a. ‘Women and girls are disproportionately affected by human trafficking.’⁷

It is crucial to recognize that LGBTI individuals are also disproportionately affected by human trafficking, despite being widely absent from human trafficking research.⁸ Paragraph 12 of the draft GR is supported by the United Nations Office on Drugs and Crime’s (“UNODC”) *Global Report on Trafficking in Persons 2018* to show the disproportionate extent to which women and girls face trafficking. However, the UNODC document is silent on LGBTI victims of trafficking. Disturbingly, another study supported by the UNODC and published on its website, *Mapping and Size Estimation of Most-At-Risk Population in Nepal* contrasts ‘female sex workers’ with ‘male sex workers, transgenders and their clients’. The conflation of the latter category suggests an incorrect and misguided understanding of gender and shows the urgency of establishing normative guidance for LGBTI individuals at the highest level.⁹

Despite this marked absence, a recent study showed that transgender people constituted over half of informants for a study on sex workers and victims of trafficking in the United States.¹⁰ Similarly, the Atlanta Youth Count 2018 community report showed that of the victims of trafficking among homeless youth, 56% were black LGBTI individuals, and of these, transgender and gender non-conforming youth were especially vulnerable. It states that 71 percent of transgender and gender non-conforming youth in the study experienced trafficking,

⁵ CEDAW article 5.

⁶ Draft General Recommendation, IV(b), paras 14.

⁷ GR Draft Declaration Section IV(a).

⁸ Fehrenbacher, A.E., Musto, J., Hoefinger, H., Mai, N., Macioti, P.G., Giametta, C. and Bennachie, C., 2020. Transgender people and human trafficking: intersectional exclusion of transgender migrants and people of color from anti-trafficking protection in the United States. *Journal of Human Trafficking*, pp.1-13.

⁹ United Nations Office on Drugs and Crime, *Mapping and Size Estimation of Most-At-Risk Population in Nepal*, <https://www.unodc.org/southasia/en/Publications/mapping-and-size-estimation-of-most-at-risk-population-in-nepal.html>

¹⁰ Ibid.

of whom 65 percent had been homeless at the time. The study found that lesbian, gay and bisexual homeless youth were nearly ten percent more vulnerable to trafficking than their heterosexual counterparts, and that 64.5 of transgender homeless youth experienced trafficking compared to 34.4 percent of cisgender homeless youth.¹¹

The Committee correctly notes that victim identification and lack of gender-sensitive processes is a challenge for identifying female victims of trafficking.¹² However, this must also be applied to LGBTI victims of trafficking, especially transgender victims who often are at higher risk and face a multitude of intersectional discrimination. As argued in a study based in the United States, law enforcement fails to adequately protect and identify transgender victims of trafficking, who are perceived as “less exploitable” than cisgender women.¹³ The study further found that trans migrants and people of color in particular are criminalized or marginalized by law enforcement practices.¹⁴

Similarly, the GR expresses the need to ensure that women and girl victims of trafficking have access to justice, but should clarify that this extends to LGBTI individuals.¹⁵ Laws that directly or indirectly criminalize individuals based on their real or perceived SOGIESC not only make LGBTI individuals especially vulnerable to trafficking, but deny such individuals legal recourse and hence obstruct access to justice.¹⁶ LGBTI victims of trafficking may be denied legal services, be exposed to police brutality, or prosecuted where their sexual identities or vocations are negated by the State. Transgender and non-binary refugees have been forced to identify with the wrong gender during the process of application for asylum, which exposes them to a host of gender-based violence, discrimination and trauma.¹⁷

We therefore recommend the following additions and deletions:

Section IV(a)

‘Women, girls, and all who suffer gender-based discrimination and violence, are disproportionately affected by human trafficking’

25(a)

‘Enhancing the collection, analysis and dissemination of comprehensive data and using measurable indicators to assess trends on the situation of women, girls, particularly those who face compounding discrimination and progress achieved towards the realization of those mostly affected by trafficking ~~by women~~ of substantive equality in all areas covered by the Convention, in particular combating trafficking.

72(f).

‘Allocate adequate resources to establish sufficiently funded, well-equipped, separate shelters, or specialized units within existing shelters and crisis centres, with specially trained staff that focus on the provision of assistance specifically to women and other gender-based victims of trafficking ensuring they are treated with dignity and in a confidential manner.

Under **recommendations for Section V(b)** on Victim assistance and protection, add the following point:

‘Ensure that every step of the process is gender affirming and recognizes the pronouns and SOGI identity of the victim.’

¹¹ *Out*, “LGBTQ+ Youth at Increased Risk of Human Trafficking, New Survey Says”, 2 November 2019, <https://www.out.com/news/2019/11/02/lgbtq-youth-increased-risk-human-trafficking-new-survey-says>

¹² Draft General Recommendation, para 66.

¹³ Fehrenbacher et al op cit note 8.

¹⁴ Fehrenbacher et al ibid.

¹⁵ Draft GR, Section VI, Victim’s Access to Justice.

¹⁶ Ibid.

¹⁷ Camminga, B, 2019. *Transgender refugees and the imagined South Africa*. Springer International Publishing.

b. ‘Obligation to identify women and girls subjected to multiple forms and compounded discrimination as rights bearers’¹⁸

Like other victims of gender discrimination, LGBTI individuals suffer from gender-based violence and face human rights violations because of their real or perceived SOGIESC. Examples range for targeted killings to arbitrary detention to various forms of discrimination and denial of rights. In addition, those who are marginalized on account of their age, race, ethnicity, religion, language, migrant status, economic status, disability, health status or caste, among other marginalized identities, experience compounded discrimination and violence of all forms.¹⁹ On account of discrimination and rejection by their families, LGBTI individuals disproportionately experience homelessness, and hence are among the most vulnerable groups to trafficking.²⁰ Even where countries recognize persecution based on SOGIESC as grounds for granting asylum, LGBTI asylum seekers frequently experience discrimination and rights violations in the process, including “refoulement” to where they were being persecuted.²¹

The Committee has already recognized that discrimination is compounded, intersectional, and exacerbated by one's SOGIESC status in multiple General Recommendations, such as GR No. 32 and 33.²² We therefore request that the Committee in its 38th General Recommendation make the following adjustments to **paragraphs 12, 18 and 81**, respectively:

12. The Committee identifies the higher risk faced by women and girls subjected to multiple and intersecting forms of discrimination, particularly women and girls in poverty, living in remote areas, forcibly displaced women and girls, women and girl migrants, and those facing discrimination based on being lesbian, bisexual, transgender and intersex.

18. States parties are required to proactively identify as rights-bearers women and girls within the jurisdiction of the State party who are marginalized, being subjected to multiple forms of discrimination, including non-citizen, migrant, refugee, asylum-seeking and stateless women and girls, women and girls with an irregular migration status, and being lesbian, bisexual, transgender and intersex.

81. The Committee has documented many examples of the negative impact of intersecting forms of discrimination on access to justice, including ineffective remedies, for specific groups of women including for trafficking victims, forcibly displaced, stateless, migrant women and lesbian, bisexual, transgender and intersex persons.

4. Sex Work and Trafficking

The Committee correctly identifies the internationally accepted legal definition of trafficking in paragraph 7. This definition makes it clear that it is not “prostitution” or voluntary and consensual sex work that is to be addressed by anti-trafficking efforts, but rather exploitation. Despite the fact that there is currently no international definition of exploitation, there is a consensus that exploitation includes lack of consent. International bodies, including the UN, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and CEDAW,

¹⁸ Draft General Recommendation, IV(d), paras 18-24

¹⁹ *LBTI Caucus Manifesto on the Generation Equality Action Coalitions*, available <https://outrightinternational.org/content/lbti-caucus-manifesto-generation-equality-action-coalitions>

²⁰ Tomasiwicz, Meaghan. 2018. “Sex Trafficking of Transgender and Gender Nonconforming Youth in the United States Sex Trafficking of Transgender and Gender Nonconforming Youth in the United States,” 5

²¹ American Psychological Association, “LGBTQ Asylum Seekers: How Clinicians Can Help”, available <https://www.apa.org/pi/lgbt/resources/lgbtq-asylum-seekers.pdf>; UNHCR, The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees, 22 September 2010, available <https://www.refworld.org/pdfid/4cff9a8f2.pdf>.

²² UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, para 6. UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 33 on women's access to justice*, 3 August 2015, CEDAW/C/GC/33, para 8.

recognize the “right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”.²³ This right to work does not halt when the work is sex work, and sex work should not be conflated with trafficking which inherently involves the exploitation of individuals, especially those already at risk.

The conflation of sex work and human trafficking is both inaccurate to the lived realities of many global citizens, as well as inherently dangerous for all who choose to engage in sex work. Data and lived experiences²⁴ have shown that when sex work is criminalized, it forces women and other marginalized peoples into situations of increased violence and into great risk of trafficking.

In order to protect all women and those affected by trafficking, any and all recommendations, discussions, and decisions regarding trafficking must understand the distinction between sex work and trafficking, and sustainable methods of fighting against trafficking that do not rely purely on criminalization that can harm all those already suffering in and around trafficking.²⁵

To achieve this improved method of battling trafficking, the Committee must include a survivor-centered approach to combat current harmful frameworks around trafficking solutions, raising up survivor’s voices in addition to marginalized and at-risk populations.

As detailed in earlier sections, the LGBTI community are disproportionately affected by trafficking, and any efforts to address the serious issue of trafficking must be careful to not harm already vulnerable populations, such as the LGBTI community, women, migrants and refugees. Within the LGBTI community transgender individuals, especially transgender youth, are especially vulnerable to trafficking due to a variety of root factors, including their disproportionate representation of homeless youth and increased risk of violence.²⁶ Transgender identities must be considered, and transgender voices must be heard when working to address the matter of human trafficking, to ensure that the most vulnerable populations are not harmed by the decisions made by the Committee.

It is universally recognized that all human beings, no matter their station, status, gender, sexuality, or any other factor, hold the same inherent rights as any other person.²⁷ Just as the fight against trafficking upholds these ideals, decisions, declarations, and discussions around trafficking must not take these rights away from others - specifically voluntary sex workers in this case. Trafficking must be addressed with a unified voice - but we urge the Committee not to leave behind those most vulnerable as the Committee strives to reach their admirable goal.

We therefore recommend clarifying the language used in **Section III**, as well as **paragraphs 20 and 21** to ensure that it is exploitation and not sex work that is targeted by measures introduced by the Committee²⁸

²³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

²⁴ As noted in Written Submission to the CEDAW Committee on its draft General recommendation on Trafficking in Women and Girls in the context of Global Migration, paragraph 5

²⁵ IWRAP, *Feminist Approaches to Counter Trafficking: A Manifesto*, April 2020 : Anti-trafficking measures contribute to creating an increasingly hostile environment for sex workers, migrants and refugees. They not only result in human rights abuses; they fail to address structural barriers (e.g. lack of labour protections, lack of access to justice and social protection) that create vulnerability.

²⁶ Grossman, A. H. & D’augelli, A. R. (2006). “Transgender youth.” *Journal of Homosexuality*, 51(1).

²⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 1.

²⁸ GR Draft Declaration Section III and Paragraphs 20 and 21