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Trafficking and Torture in the context of global migration: OMCT comments to CEDAW's new General Recommendation

CEDAW Committee Call for Comments: Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration

1. About the organisation

The World Organisation against Torture (OMCT) is the main international coalition of non-governmental organisations fighting against torture, summary executions, enforced disappearances, arbitrary detentions and all other cruel, inhuman and degrading treatment or punishment. The strength of the OMCT lies in its SOS-Torture Network composed of 200 NGOs from around the world.

2. Suggested scope of the General Recommendation

- An anti-torture protection and gender perspective on migration routes (paragraphs 4-6, 23, 39)

There is a clear opportunity for this General Recommendation (GR) to bring a much-needed perspective on the protection from the widespread risks of torture across migration routes. Torture is one of the main root causes for people leaving their home countries and the support and treatment for torture survivors are key to both migration and integration policies when they reach safety. States have proven largely unwilling or incapable to establish minimum protection for those on the move, especially those migrants in transit that cannot be included under the migration or refugee laws of the country they are passing through, leaving them legally helpless.

The current Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (hereinafter SR on Torture) has established the relation between torture and migration. The SR on Torture acknowledges that "increasingly restrictive and obstructive migration laws, policies and practices of States have pushed growing numbers of migrants outside official immigration and admission procedures and towards irregular routes and methods marked by a lack of transparency and oversight, corruption, violence and abuse. As a consequence, throughout their journey and even upon arrival at their country of destination, irregular migrants experience increasing uncertainty, danger, violence and abuse, including an escalating prevalence of torture and ill-treatment at the hands of both State officials and non-State actors"[\[1\]](#).

Today, migrant women make up almost half of all migrants worldwide and are migrating more often as individuals than as dependents of other family members[\[2\]](#). Migration can be an empowering experience for women, as it can provide economic independence or allow them to avoid discrimination or gender-based violence in their home countries[\[3\]](#). At the same time, women and girls on the move are more at risk of dangers than men due to sustained reproduction and exploitation of gender inequalities rendering them more vulnerable to physical, sexual and verbal abuse. Migration due to forced displacement is not only conflict related as it may appear in section *f* of the draft GR. Harmful practices based on tradition, culture, religion or superstition is both a trigger and a vehicle of forced migration of girls and women.

One of those dangers faced by migrant women and girls is to fall into trafficking networks. And it may not come as a surprise that trafficking in women is particularly widespread and cruel in the context of irregular migration and affects millions worldwide[\[4\]](#). For example, patriarchal norms encourage cross border trafficking of girls and women mainly for child or early forced marriage

covered up by cultural pretexts. This cross-border dimension of girls trafficking is, unfortunately, most of the time overlooked^[5]. The Committee should then note that the use of patriarchal norms to encourage trafficking of girls across borders using family and cultural pretext should be qualified as torture and slavery.

- From criminal law to human rights (paragraphs 7 to 11)

The international community's interest in the reality of trafficking is usually stems from a clearly legal-criminal perspective. The United Nations Office on Drugs and Crime (UNODC) has created policies to combat trafficking as a crime under international law. The definition that has thereby been put forward focuses on the conceptualization of the elements of this type of crime^[6] with the aim of being used in the penal systems of signatory countries.

However, trafficking goes far beyond this criminal approach. It violates many of the human rights of those who are trafficked. Trafficked women and girls are “routinely subjected to confinement, severe physical and sexual abuse, humiliation and threats for the purposes of sexual exploitation including in the context of forced and early marriages, domestic servitude, forced labour and organ removal”^[7].

Over the past years, we have seen that international law has started to recognise that human trafficking is a form of gender-based violence that constitutes discrimination against women and girls. Moreover, it has also increasingly developed to recognize that trafficking can amount to torture.

3. Trafficking as a form of torture (paragraphs 14-16, 66 and 93-95)

Anti-torture standards can bring strong protection to trafficked people, especially with regard to the right to dignity and personal integrity. It would imply focusing on the State's obligations to prevent, protect, investigate and prosecute such acts and to provide reparations for victims. The *ius cogens* status of the prohibition of torture and other ill-treatment gives further added value to the assertion that trafficking in women and girls is prohibited in absolute terms under international law. Over the past years, the Committee against Torture has increasingly recognised the need for a gender perspective on torture and other ill-treatment. In its concluding observations and general comments, the Committee started to address violence against women and girls at the hands of private individuals, including human trafficking. Concern about trafficking was reflected for the first time in 2001 in the Committee's concluding observations and recommendations to Georgia and Greece.^[8] Since then the Committee's concern about the relationship between trafficking and torture has been the subject of analysis in countless reviews of States parties' reports under the reporting cycles.^[9]

Then in 2008, in its General Comment No. 2 on Article 2, it clarifies in paragraph 18 that where State authorities fail to exercise due diligence to prevent, investigate, prosecute and punish non-State actors, “its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.” In the same paragraph, the Comment goes on explaining that “the State's indifference or inaction provides a form of encouragement and/or de facto permission” to non-State actors. Significantly, the CAT concludes the paragraph by noting the applicability of this principle “to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”

In the case of *Njamba and Balikosa v. Sweden*, the Committee against Torture also highlighted the State's due diligence obligation to prevent rape and sexual violence perpetrated by private actors. In this regard, the Committee established that when the State fails to comply with its due diligence

obligation to arrest and punish the perpetrators and offer redress to victims of torture committed by private actors, the State is responsible under the Convention for authorizing or inciting these acts.^[10] The definition of torture under article 1 and article 16 of the Convention requires that pain and suffering “is inflicted by or at the instigation of or with the consent or acquiescence of a public official”. Failure to exercise due diligence to prevent, investigate, prosecute, and punish violence against women by non-State actors equals the definition’s “acquiescence”.

Recognizing that human trafficking may amount to torture and other ill-treatment could facilitate access to justice and redress for trafficking victims. Anti-torture redress standards are uniquely positioned to strengthen effective means for victims to access reparations.

The Committee has affirmed in its General Comment No. 3^[11] that “redress includes the following five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. [It] must be adequate, effective and comprehensive. State parties are reminded that, in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them. The Committee emphasizes that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations” (CAT G.C. 3 para. 6).

In its procedural side, “State parties shall enact legislation specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full rehabilitation as possible” (CAT G.C. 3 para. 20). This includes, applying “gender-sensitive procedures which avoid re-victimization and stigmatization of victims of torture or ill-treatment. (...) The Committee considers that complaints mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress” (CAT G.C. 3 para 33).

It is also important to note that the Committee against Torture emphasizes a victim-centred approach in terms of reparations. Specifically, the Committee states that “the importance of victim participation in the redress process, and that the restoration of the dignity of the victim is the ultimate objective in the provision of redress” (CAT G.C. 3 para 2). Understanding that the migrant and trafficked women need to play a role in the decisions affecting their lives, as autonomous subjects, is central to a gender-sensitive response to the matter. Trafficked women must be considered as subjects and holders of rights and therefore women must be the decision-makers in their own situation. States need to take non-paternalistic assistance measures where each woman can develop her own life project.

4. Trafficking and the principle of *non-refoulement* (paragraphs 46 b and 57 e)

Given the inequity and stereotypes prevailing in our societies, women have traditionally experienced problems in convincing relevant authorities that violent acts committed against them are criminal acts, that violations of their rights are human rights violations or that the persecution they suffer on the basis of their gender makes it legitimate for them to apply for asylum and be recognized as refugees or beneficiaries of subsidiary protection.

However, and “while refugee law limits *non-refoulement* protection to persons entitled to refugee status and allows for exceptions based on considerations of national or public security, no limitation or exception whatsoever is permissible where deportation would expose a person to a real risk of torture or ill-treatment”^[12].

Article 3 of the Convention against Torture states “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” and that “for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. Likewise, **General Comment No. 4** of the CAT affirms that “States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities.” (CAT G.C 4, para 30)^[13]

In paragraph 29 the Committee explicitly mentions that States should give particular consideration to “human rights situations that may constitute an indication of risk of torture” [...] in their decisions on the removal of a person from their territory and take into account when applying the principle of “non-refoulement [...] (n) [w]hether the person concerned would be deported to a State where the person was subjected to or would run the risk of being subjected to slavery and forced labor or trafficking in human beings”.^[14]

Thus, according to the jurisprudence of the Committee against Torture, women cannot be returned to a country where they would face a real and personal risk of violence by State or non-State actors amounting to torture or other ill-treatment, such as different forms of gender-based violence including trafficking. Trafficked women who have been exploited in a country where they are undocumented face a real risk of being sent back to their countries or to a third country where they might have a high risk of being tortured or receiving ill-treatment due to re-trafficking, retaliation, stigmatization, or rejection by their families or communities.

At this point, it is very important to remember that the identification process must also comply with the duty of due diligence. Thus, the authorities must not fall into stereotypes or narrowly migratory approaches that prioritize the condition of irregular migrant and thus prevent a serious assessment of their situation and context and a proper examination of the signs of trafficking.

It should be borne in mind that if a State fails to screen migrants and refugees to identify victims of torture and afford them international protection or appropriate assistance and support and instead returns them back to their country of origin, that State would bear responsibility under the Convention Against Torture for consenting or acquiescing to violence and violating the principle of *non-refoulement*.

We would like to invite the CEDAW Committee to consider CAT’s jurisprudence and general comments in the present draft to help set clear, common standards of protection for trafficked women in the migration context.

5. Women as agents of their migration project (paragraphs 2, 56 a, 66-67, 71 and 72)

Finally, we would like to note that all the measures recommended by the CEDAW Committee should be careful not to reinforce another type of stereotypes: the idea that autonomous female migration necessarily implies serious dangers for migrant women, that is, the consideration of women solely as vulnerable and powerless victims and at imminent risk of being exploited (generally sexually). This is a risk that this Committee will have to face in order to ensure that good practices are adopted without creating victim profiles that end up discriminating against every migrant woman.

^[1] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Migration-Related Torture and Ill-Treatment, Un. Doc. A/HRC/37/50, para 14, 2018. Available at: https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf

[2] See recent figures in: https://www.un.org/development...un_2019_internationalmigration_wallchart.pdf

[3] UN 2004 World Survey on the Role of Women in Development Women and International Migration, Un. Doc: A/59/287/Add.1 ST/ESA/294, 2004. Available at: <https://www.un.org/womenwatch/daw/public/WorldSurvey2004-Women&Migration.pdf>

[4] See recent figures in: <https://migrationdataportal.org/themes/human-traffickinghttps://migrationdataportal.or...>

[5] Child slavery for traditional marriage known as *wahaya*, also called *sadaka*, occupies an important place in the trafficking of young girls in west Africa mainly between Niger and Nigeria. This practice, which is considered by the ECOWAS Court of Justice to constitute a form of slavery. CEDAW, Cour de justice, 27 octobre 2008, ECW/CCJ/JUD/06/08, HADIJATOU MANI KORAOU contre LA REPUBLIQUE DU NIGER, <https://juricaf.org/arret/CEDEAO-COURDEJUSTICE-20081027-ECWCCJJUD0608> involves the trafficking of one or more girls as a fifth spouse. *Wahayas* must not only endure regular rape and physical abuse by their masters but are constantly mistreated by the legitimate spouses. Anti-Slavery International and Timidria, Alternative report on Niger's implementation of the Convention on the Rights of the Child (3rd, 4th and 5th combined periodic reports). Children in slavery: Stigma and discrimination against children of slave descent; Access to education by children of slave descent; Forced child begging of *talibés*; Child domestic work; The *wahaya* (5th wife) practice. The Committee on the Rights of the Child 79th Pre-Sessional Working Group (February 2018), <https://tbinternet.ohchr.org/T...>, p. 17, October 2017

[6] C. Miguel, T. Fernández, "La judicatura como garantía de protección de los derechos de las víctimas de trata en Elementos para una Teoría Crítica del Sistema Prostitucional" Ed. Comares, December 2017

[7] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Gender perspectives on torture and other cruel, inhuman and degrading treatment or punishment, UN. Doc. A/HRC/31/57, p. 11, 2016.

[8] UN Doc A/56/44.

[9] Concluding observations of Azerbaijan, CAT/C/AZE/CO/3 (2009), para. 20; Concluding observations of Belgium, CAT/C/BEL/CO/" (2008), para. 25; Concluding observations of Austria, CAT/C/AUT/CO/4-5 (2010), para. 23; Concluding observations of the Committee against Torture, Austria, CAT/C/AUT/CO/3 (2005), para. 4f. Concluding observations of Syrian Arab Republic, CAT/C/SYR/CO/1 (2010), para. 28; Concluding observations of Jordan, CAT/C/JOR/CO/2 (2010), para. 22.

[10] CAT, *Njamba and Balikosa vs. Sweden*, no. 322/2007 §§ 2.1, 2.2 y 3.1.

[11] UN Committee Against Torture (CAT), *General comment no. 3, 2012 : Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : implementation of article 14 by States parties*, 13 December 2012, available at: <https://www.refworld.org/docid...> [accessed 12 May 2020]

[12] SR Torture, 2018, para 39, see also para 38: "In both customary and treaty law, the prohibition of torture and ill-treatment is further concretized by the principle of non-refoulement, which prohibits States from "deporting" any person to another State's jurisdiction or any other territory where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or ill-treatment"

[13] UN Committee Against Torture (CAT), General Comment No. 4 (2017) on the implementation of article of the Convention in the context of article 22, 9 February 2018, para. 30 available at: <https://www.refworld.org/docid...> [accessed 12 May 2020]

[14] UN Doc, CAT/C/GC/4.