Key Points

- The feminization of migration is an ongoing cross-border phenomenon that requires both attention and cooperation to minimize risk and increase protection for vulnerable populations. According to the International Organization for Migration’s (IOM’s) World Migration Report 2013, female migrants constituted approximately 50 percent of the share of the total migrant stock (IOM 2013b).
- With women amounting to half of the number of global migrants, migration and gender can no longer be seen as separate silos in policy. Therefore, gender mainstreaming must be injected into high-level dialogue to reduce vulnerability and enhance human rights.
- Using case studies from Italy and Moldova, this brief examines the problems associated with human trafficking, and identifies legislative and legal gaps in anti-trafficking policy through a compliance analysis of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- In order to facilitate gender mainstreaming efforts and assist the United Nations Entity for Gender Equality and the Empowerment of Women (known as UN Women), member states party to CEDAW are encouraged to ensure that national anti-trafficking policies comply with CEDAW and adopt a rights-based approach to combatting human trafficking through the entrenchment of CEDAW principles in national legislation. This will assure the protection and empowerment of migrant women.

Introduction

Advancements in transportation and technology have enabled greater opportunities for people to migrate across borders globally. Individuals migrate due to conflict and economic and social challenges; however, the ability to do so is impeded by the increasing restrictions on legal migration, particularly for low-skilled women workers. While all migrant workers face difficult challenges as they manoeuvre these legal pathways, women migrant workers face additional challenges in the process of migration. Due to limited legal mechanisms for women to migrate, they face an increased risk of exploitation, abuse and human trafficking. Many women migrate irregularly, or become undocumented, within the destination country in an effort to gain employment.1 While human trafficking is an issue of concern, especially for women migrant workers, women’s agency and human rights must not be lost in the discussion of grave exploitation. Legal mechanisms have established a framework for dealing with a form of exploitation that does not address the problem of human trafficking and may be exacerbating the issue.

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1 Irregular migration refers to travelling through unauthorized points of entry into a country that is not one’s country of origin.
Trafficking in the Global Context

Legal definitions of human trafficking fail to sufficiently focus on the individual (i.e., the trafficked person); rather, they mainly emphasize the actions that constitute trafficking. The rise in security regimes has left little flexibility when enacting the definition, leading to the neglect and violation of human rights. The inflexibility can lead to trafficking nuances being overlooked and fail to provide the appropriate protection for migrant women workers.

Protections that have been established to address human trafficking do not meet the actual needs of migrant women who face increased vulnerability in the migration process. Current policy mechanisms are weak, and migrant women workers often fall through gaps in legislation and other legal frameworks. Finally, there is no standard global application of anti-trafficking efforts, which contributes to the inability to accurately address the needs of those requiring support and protection.

Conflation of Terms and Definitional Problems

The discourse surrounding human trafficking can be rife with conflation and misrepresentation. While there may be cases where smuggling is part of a larger issue of trafficking, these terms are commonly used interchangeably without accurately assessing the context in which they are being applied. These terms are tied together through the discourses of governmental authorities, law enforcement and media discourses in ways that are harmful to the persons involved.

Human trafficking is manifested in various ways, but the two most common forms are forced labour and sex trafficking, with popular discussion primarily focusing on sex work.² There is moral panic,³ stigmatization and conflation that accompanies sex trafficking, which has resulted in a greater focus on policing sex workers rather than protecting their rights.

According the United Nations Office on Drugs and Crime’s (UNODC’s) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, known as the Palermo Protocol, human trafficking is defined as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person, for the

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² Forced labour is predominantly associated with work in construction, domestic, agricultural and service/sales work.

³ Moral panic can be understood as a state of social unrest due to issues that are perceived as a threat to social order. Sex work, when viewed within this framework, sees prostitution (the sale of sex for money) as reprehensible and a threat to societal morality. The sale of sex then becomes an issue that requires action to prevent, suppress and, ultimately, eradicate.
sex work is a conscious decision by an individual to undertake the sale of sexual services through prostitution (Berger 2012).

Evaluating Compliance with CEDAW

An assessment of the compliance of selected national legislation within two case study countries, Moldova and Italy, was conducted in order to advance a rights-based approach to CEDAW implementation in national trafficking policies. Although Italy is party to many anti-trafficking conventions, it continues to have increasing instances of human trafficking. Moldova is a key source country for both migrant women workers and trafficked individuals. Due to the geographic location of Italy and Moldova, the European Union was included in the compliance analysis. The UN Palermo Protocol was selected due its ability to influence domestic legislation; it represents a largely agreed-upon global commitment to combat human trafficking.

Each relevant law was assessed according to a set of indicators, posed as questions, which were comprised of Articles 1, 6, 9, 11 and 15.4 of CEDAW, which relate directly to the prevention of trafficking and exploitation of women, the equal treatment of women regardless of status and non-discrimination in the workplace. CEDAW Recommendations No. 19 (1991) on trafficking and No. 26 (2008) on women migrant workers were consulted in order to develop the indicators. The assessment involved determining whether an indicator is present in a law or not by testing whether it is mentioned in that policy. A “yes,” “no” or “partial” to each applicable law was then assigned.

In addition to the selected articles, a miscellaneous category was included to determine whether the legislation in question attempted to address any progressive, gender-mainstreaming recommendations otherwise not addressed in the aforementioned CEDAW Articles. A template for the indicators was selected based on the instruction of the CEDAW Legislative Compliance Indicators, used within the context of nine Pacific countries (Jivan and Forster 2007). The principal analytical method, however, was drawn directly from the Handbook for CEDAW-Based Legal Reviews, which provides a step-by-step methodological approach to assessing compliance between CEDAW and national legislation (Chiongson 2012).

The complexity of assessing agency depends on the extent to which sex work may be voluntary. In turn, this is contingent upon the context in which they are “commodifying” sex or where sex is sold as a service. Furthermore, the control that the individuals have over their physical well-being and the financial resources that they earn contributes to the challenges associated with determining the voluntary nature of sex work. There are varying degrees of social protection and support for sex workers within different states and this also needs to be taken into consideration.
Table 1: CEDAW General Recommendation No. 26 Compliance Analysis

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<tr>
<th></th>
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<tbody>
<tr>
<td>Article 1: General</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Article 6: Trafficking</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Prosecute traffickers?</td>
<td>Yes: Art. 1, 2, 4 and 5</td>
<td>Yes: Art. 4, 11</td>
<td>Yes: Art. 9</td>
<td>Partial: Art. 4 &amp; Art 5</td>
</tr>
<tr>
<td>Adopt legislation to prevent labour trafficking?</td>
<td>Yes: Art. 14</td>
<td>Yes: Art. 10</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Article 9: Nationality</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<td>Article 11: Work</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<td>Article 15.4: Movement</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Ensure that women do not have to enter into a contract with a male relative in order to migrate for work?</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ensure that women can live in the country of destination without restrictions?</td>
<td>No</td>
<td>Partial: Art. 17</td>
<td>No</td>
<td>Partial: Art. 8</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>No</td>
<td>No</td>
<td>No</td>
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Source: Authors.
UNODC – Palermo Protocol

The Palermo Protocol, which is the UNODC’s supplement to its Convention Against Transnational Organized Crime, is the first modern universal instrument used to comprehensively address human trafficking (Office of the High Commissioner for Human Rights 2015). The global effort to combat human trafficking under the Palermo Protocol is not always complementary to efforts at the national level, where constitutions and legislation may be at odds with global realities. This disparity offers an opportunity for an analysis of the efficacy of efforts to address human trafficking, including its discursive effects. For example, the Palermo Protocol incorporates a gender stereotype that posits women as victims and men as the perpetrators of criminal acts.

The analysis of the global efforts finds that, despite the clear reference to women, the Palermo Protocol fails to align with the principles outlined within CEDAW. Specifically, it fails to formulate gender-specific measures of empowerment and assistance for trafficked women, which, if implemented, could mitigate the challenges and reduce vulnerabilities faced by trafficked women. Moreover, this could alter the discourse from being security-based to a more rights-based discourse. Palermo limits the scope of female involvement in trafficking by portraying them as victims, consequently impeding the provision of measures that would benefit women in a post-trafficked context. It provides a problematic focus on human trafficking as being explicitly rooted in the criminality and security discourse rather than adopting a rights-based approach. Furthermore, the convention fails to acknowledge causal factors of vulnerability stemming from economic inequality and state efforts to limit the mobility for low-skilled workers, which has exacerbated the difficulty and vulnerability experienced by migrant women.

European Union – Directive 2011/36/EU: Preventing and Combating Trafficking in Human Beings and Protecting its Victims

In 2011, Directive 2011/36/EU adopted a broader concept of trafficking in human beings. Specifically, it was expanded to include additional forms of exploitation, such as the forced begging of trafficked dependent persons, including children and the infirm. In light of the attempt by the European Council to provide a comprehensive approach to human trafficking, the directive was included to the compliance analysis. It was concluded that although paragraph 3 of the Preamble encourages member states to adopt either a “gender perspective” or acknowledge the “gender-specific phenomena” of trafficking, the directive fails to sufficiently comply with CEDAW standards (Official Journal of European Union 2011). The directive not only places trafficked individuals, with the exception of children, under the broad category of victims of trafficking, but also the mention of gender or gender perspectives is limited to member state use in victim identification and trafficking prevention policy. That is, the perspective adopted by the directive restricts the use of gender as solely an instrument of state use, rather than a means of improving the status of trafficked female individuals.

Italy – Law No. 288 (2003): “Measures Against Trafficking in Persons”

Due to Italy’s geographic location, it has become both an easily accessible destination and transit country for victims of human trafficking, the majority being women trafficked for the purpose of sexual exploitation (Group of Experts on Action against Trafficking of Human Beings 2014). Although Italy lacks a coordinated national strategy to address trafficking in human beings, legislation has been passed to help prevent and protect the victims of trafficking. Due to the relevance to the issue of trafficking, the focus of the CEDAW compliance analysis examined Italian Law No. 288 (2003). Focusing on Articles 12, 13 and 14, all of which are concerned with combatting human trafficking through protection and prevention, Law No. 288 displays little compliance with CEDAW principles. Specifically, Law No. 288 has a compelling penal undertone wherein many of the Articles are instrumentalized as a means to determine penalties for trafficking offences with, simultaneously, no reference to gender (Parlamento Italiano 2003). Furthermore, Articles 12 and 13, discussing the “Anti-Trafficking Measures Fund” and “Provision of Protection,” respectively, follow a similar trend with reference only to the broad category of “trafficking victims.” Moreover, Article 13 refers back to Article 601 of the Italian penal code to classify trafficked individuals. This is problematic due to the explicit gender neutrality and limited incorporation of a “gender perspective” through liaisons with Italy’s minister of gender equality. Lastly, Article 14 on preventative measures places great focus on international collaboration and neglects gender and gender-specific prevention initiatives (ibid.).


Since Moldova became independent in 1992, there has been an increase in outward migration from the country (Ganta 2013). The increase in human trafficking in the state and region has become a serious issue that has challenged the ability of the government to effectively respond. Increasingly restrictive border policy serves to heighten the risk associated with migration. Moldova’s transition from communism led to an increase in poverty across the state, with the country experiencing one of the deepest economic recessions of post-Soviet countries (Bryson-Clark and McArthur 2014). Human trafficking in Moldova primarily centres on sex trafficking, but there have been increasing instances of labour trafficking.
Current Moldovan legislation, namely Law 241-XVI, fails to appropriately address gender within the CEDAW analysis framework. The primary focus of Moldovan anti-trafficking efforts has been directed at the criminality associated with trafficking and approaches the issue from a security perspective, rather than incorporating a rights-based framework. While attempting to have a strong response to human trafficking, Moldovan anti-trafficking legislation fails to accurately address the issue.

**Recommendations**

To aid UN Women’s efforts in encouraging the compliance of national trafficking policies with CEDAW, member states party to the convention are encouraged to adopt a rights-based approach to combat human trafficking through the entrenchment of CEDAW principles in subsequent national policies to ensure the protection and empowerment of migrant women.

The member states should support national governments, civil society organizations (CSOs) and international organizations in their efforts to promote increased gender mainstreaming in policies, and encourage support and increased engagement from CSOs in anti-trafficking discourse. It is recommended that these states promote increased gender mainstreaming in bilateral labour agreements and anti-trafficking policy. While the preferred route is to uphold and ratify current conventions, the upsurge in labour agreements renders this trend as a viable alternative to achieving a rights-based approach to combatting human trafficking.

It is recommended that there be increased engagement from CSOs in anti-trafficking discourse at the national level. CSOs possess qualities that better equip them to assist trafficked individuals and others affected by trafficking, and therefore should be consulted as critical stakeholders within the anti-trafficking arena. In particular, governments should support CSOs, as well as other migrant worker organizations in shadow reporting for CEDAW. Shadow reports are useful instruments for exposing realities faced by many women migrant workers and disseminating facts on current issues.

Member states should provide support and capacity to national governments in their efforts to establish open access work permits, the removal of conditionality and the improvement of the regulation of employment services and recruitment agencies. Governments should consider pursuing an “open access work permit” for migrant women workers to promote a greater number of opportunities for legal access to the state to increase transparency in mobility, migration and monitoring. The open access work permit would be available to all workers and not require that the individual be bound to their employer to maintain legal status within the state. It would have no time restriction on their stay, allowing for an open-ended opportunity to work within the state. The permit should allow for legal residency opportunities to be accessed by the individuals following a three-year stay within the state and have access to the social protections provided by the state.

Removing the condition on the length of stay for trafficking victims is a necessary measure to ensure the protection of the rights of migrant women. Removing conditionality on temporary residence for victims of human trafficking would allow for a greater time period of residency and also offer the opportunity for permanent residency within the host state. Furthermore, the removal of the requirement that the trafficked individual is to testify against their traffickers, in order to retain their residency, is also a necessary move to ensure the protection of rights for migrant workers.

Promoting the regulation of employment services creates an avenue for more transparency and decreases the likelihood of exploitative behaviour by employers. Regulation mechanisms should inform both migrant workers and the public, as well as incorporate conditions and procedures for the employment, recruitment and protection of migrant workers into binding bilateral agreements (IOM 2013a). National governments should also be encouraged to establish a regulated labour migration reporting system used in conjunction with pre-existing labour agreements. International governmental organizations, such as UN Women or the IOM, should consider endorsing or creating a “migrant-employment” database that provides valuable information regarding legitimate employment opportunities. Working in conjunction with the International Labour Organization as a partner agency can be an integral component to the regulation of employment services and recruitment agencies.

Member states should encourage CEDAW-based legal reviews of national legislation. Encouraging the use of CEDAW-based legal reviews ensures accountability on the part of the state or institution to the convention or laws that they are party to, so that they are following the CEDAW framework in the generation of legislation and ensuring their compliance with CEDAW. Ensuring a gendered perspective is incorporated into the formulation of migration and labour governance initiatives is imperative in shifting toward a rights-based approach to legislation.

**Conclusion**

Fulfilling these recommendations will both facilitate the shift in discourse surrounding human trafficking and depoliticize the discussion around migration. Shifting the discourse, while encouraging the inclusion of gender-sensitive, rights-based language, ensures that the nuances of the discussion surrounding human trafficking are not lost in conflation and misrepresentation.
Providing a clear understanding of the discourse surrounding human trafficking allows for more appropriate policy responses, as well as the incorporation of a rights-based approach for the protection of migrant women workers.

The current discursive efforts surrounding migration approach the issue with a security-based rhetoric and perpetuate the view of migrants as securitized threats. In doing so, migrants are made increasingly vulnerable, with their safety being put into jeopardy. Depoliticizing the discourse around migration can serve to shift the discussion from one that is centred on state security to being focused on the safety, security and the rights protection of migrant women workers.

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Works Cited


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