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SYMPOSIUM ON UNDOING DISCRIMINATORY BORDERS

WHEN DOES MIGRATION LAW DISCRIMINATE AGAINST WOMEN?

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It is possible to identify gendered disadvantage at almost every point in a migrant woman's journey, physical and legal, from country of origin to country of destination, from admission to naturalization. Rules which explicitly distribute migration opportunities differently on the grounds of sex/gender,[1] such as prohibitions on certain women's emigration,[2] may produce such disadvantage. Women may also, however, be disadvantaged by facially gender-neutral rules. Examples of indirectly disadvantageous provisions include those which classify certain forms of labor as either "low-" or "high-" skilled, using this categorization to distribute migration opportunities differentially. Such rules may disproportionately affect the mostly female workers whose labor in certain fields is considered "low-skilled" in comparison to that undertaken by their predominantly male, "high-skilled" counterparts.[3] Scholars have identified the diverse ways in which states' immigration and nationality laws continue to involve gendered and racialized exclusion, subordination, and violence.[4] Migration control practices, including those concerned with deterrence, detention, and deportation, have also been impugned on these bases.[5] This essay draws on this literature to examine whether rules that produce gendered disadvantage are open to challenge under the international legal regime charged with eradicating discrimination against women, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[6]

Gendered Disadvantage

The unfavorable or adverse treatment of women on the grounds of sex/gender is a pervasive feature of migration law.

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[1] I refer to "sex/gender" to encompass a range of different and sometimes divergent theoretical and legal approaches to "sex," "gender," and discrimination against women. CEDAW art. 1 explicitly refers to "sex," whilst arts. 2(f) and 5(a) indicate that the Convention also covers gender-based discrimination, including stereotyping. *See also*, Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 3(c), Apr. 7, 2011, C.E.T.S. No. 210.

[2] For one regional summary of such rules, see Deepa Bharathi & Smita Mitra, *Gender and International Migration, in* Situation Report on International Migration in South and South West Asia 195 (2012).

[3] Eleonore Kofman, *Towards a Gendered Evaluation of (Highly) Skilled Immigration Policies in Europe*, 52 Int'l Migration 116 (2014).

[4] In the British context, see, e.g., Victoria Canning, Gendered Harm and Structural Violence in the British Asylum System (2017); Nadine El-Enany, (B)ordering Britain: Law, Race and Empire (2020).

[5] Mary Bosworth et al., *Women and Border Policing at the Edges of Europe*, 44(13) J. Ethnic & Migration Stud. 2182 (2018).

[6] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 UNTS 13.

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Women who migrate regularly, who have received permission to enter and remain in another jurisdiction, tend to be disproportionately accorded migration statuses that limit their rights when compared to men. Migration status generally sets temporal and material limitations on the right to stay. It determines the duration of stay, and rights to work and to access social rights. Immigration law creates and distributes statuses of different value in a more complex way than is generally understood. Rather than engaging in a "yes, you are entitled to a migration status" or "no you are not" distribution, immigration law places migrants in a status-based hierarchy, stratified by duration and rights. Migrant women tend to find themselves at the bottom of this hierarchy, clustered within categories of family migrants and as certain types of labor migrants.[7] These migration statuses are often precarious, applicants being granted short-term permissions to remain, or permissions requiring regular renewal, without the prospect of naturalization. Such statuses frequently also enforce their holder's dependency on another, such as a partner or employer, with permissions being predicated on the continuance of certain family or employment relationships. In turn, this precarity and dependency increases women's risk of experiencing violence.[8] Some states and regions have legally recognized that certain migrant victims of violence should be able to secure an independent migration status on this basis, rather than having to either remain in an abusive relationship or return to their country of origin. However, many of these regimes fail to accomplish their aims, because they are interpreted restrictively, or replace one precarious and dependent status with another.[9]

Women who are unable to migrate regularly may seek to do so irregularly, in particular to seek refuge. Externalized border controls, which aim to prevent irregular migration, contain people in countries where grave human rights violations occur and may compel individuals to undertake ever more dangerous journeys. Such controls also produce gendered disadvantage. Externalized border controls have, for example, been implicated in the gender-based violence experienced by women in transit.[10] They may also increase women's risk of dying. Of those who make irregular maritime journeys, while more men than women tend to flee in this way, women seem to face a higher risk of drowning or dying at sea.[11]

Women continue to be at particular and heightened risk of experiencing violence even after arrival in a destination state, whether they travelled regularly or not. Within the European asylum system, a lack of appropriate reception facilities and financial support,[12] and the increased use of detention, have been linked to an increase in gender-based violence. Overall, women seeking international protection continue to face significant practical and legal barriers.[13]

[7] Catherine Briddick, *Precarious Workers and Probationary Wives: How Immigration Law Discriminates Against Women*, 29(2) Social & Legal Stud. 201 (2020).

[8] Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8(3) Violence Against Women 367 (2002).

[9] Catherine Briddick, *Combatting or Enabling Domestic Violence? Evaluating the Residence Rights of Migrant Victims of Domestic Violence in Europe*, 69(4) Int'l & Comp. L.Q. 1013 (2020).

[10] Alison Gerard & Sharon Pickering, *Gender, Securitization and Transit: Refugee Women and the Journey to the EU*, 27(3) J Refugee Stud. 338 (2013).

[11] Sharon Pickering & Brandy Cochrane, *Irregular Border-Crossing Deaths and Gender: Where, How and Why Women Die Crossing Borders*, 17(1) Theoretical Criminology 27 (2013). On the data, see Kate Dearden & Marta Sánchez Dionis, *How a Lack of Data is Perpetuating the Invisibility of Migrant Women's Deaths*, Migration Data Portal (Mar. 8, 2018).

[12] Jane Freedman, *Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean 'Crisis'*, 29(4) J. Refugee Stud. 568 (2016).

[13] Adrienne Anderson & Michelle Foster, *A Feminist Appraisal of International Refugee Law*, *in* The Oxford Handbook of International Refugee Law (Cathryn Costello et al. eds., 2021).

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Discrimination Against Women

CEDAW is concerned with "discrimination against women," defined in Article 1 as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The definition encompasses both direct and indirect discrimination[14] and establishes adverse effect, whether or not intentional, as its "critical criterion."[15]

CEDAW seems well-placed to respond to the gendered disadvantage immigration law generates. First, Article 1 applies to CEDAW protected rights, as well as rights protected by other instruments and under customary international law.[16] This breadth enables CEDAW to reinforce and complement protections offered by two different regimes relevant to migration, the international protection and trafficking regimes, whose key instruments fail to explicitly prohibit sex/gender discrimination.[17] It also requires states to provide gender-sensitive interpretations of those instruments.[18]

Second, CEDAW does not provide nationals and non-nationals with different rights. The CEDAW Committee has also taken a broad, effects-based approach to jurisdiction, that enables it to hold states responsible, in certain circumstances, for their extra-territorial, discriminatory conduct. CEDAW's inclusive approach to its beneficiaries, and the CEDAW Committee's effects-based approach to jurisdiction ensures that, "[t]he obligations of States parties apply . . . without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory."[19]

Third, intersectionality is affirmed as a "basic concept"[20] for understanding states' obligations under the Convention, enabling CEDAW to remedy the multiple and intersecting forms of discrimination that migrant women are subject to.

Such discrimination includes the gender-based violence that migrant women experience as a result of some of the rules and practices described above, as Article 1 includes within its scope "gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately."[21]

From Disadvantage to Unlawful Discrimination

Here, I draw on CEDAW Committee General Recommendations to ascertain first, whether any of the above-mentioned examples of rules/practices that generate gendered disadvantage constitute discrimination against

[14] 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, UN Doc. CEDAW/C/2010/47/GC.2, para. 16 (Oct. 19, 2010) [hereinafter CEDAW's GR 28].

[15] Andrew Byrnes, *Article 1*, *in* The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary 60 (Marsha A Freeman et al. eds., 2012).

[16] CEDAW's GR 28, *supra* note 14, at para. 25.

[17] *See, e.g.*, Convention Relating to the Status of Refugees art. 3, July 28, 1951, 189 UNTS 137.

[18] Such obligations exist in parallel to those generated by the relevant instruments themselves.

[19] CEDAW's GR 28, *supra* note 14, at para. 12.

[20] *Id.* at para. 18.

[21] General Recommendation No. 19 Violence Against Women, UN Doc. A/47/38, para. 6 (1992).

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women, and second, how any such discrimination should be remedied.[22] Engaging in this exercise reveals that the Committee's reasoning on when and why certain rules/practices are either directly or indirectly discriminatory, is frequently partial, elliptical, or even absent.

The CEDAW Committee has characterized as indirectly discriminatory rules that make naturalization dependent on language proficiency or economic self-sufficiency, such rules being harder for women to satisfy than men because of, for example, gendered inequalities in education.[23] Rules that impose minimum income requirements are also indirectly discriminatory, as women are more often employed in low-waged and insecure employment.[24] Women may also be discriminated against by having our/their work categorized as "low skilled" on the basis of sexed/gendered and racist stereotyping.[25] Finally, rules that enforce women's dependency on another, such as a spouse, partner, or employer, may discriminate by increasing women's risk of being subject to trafficking and other forms of gender-based violence.[26]

The CEDAW Committee has called on states to remedy these and other forms of discrimination against women experienced in the context of migration control. States should, for example, revise rules that disproportionately disadvantage women, like those that make spouses, partners, and particular types of labor migrants dependent on another.[27] States should ensure that their family reunification schemes do not directly or indirectly discriminate against women.[28] States should also ensure that migrant women can change employer and employment type.[29]

Migration control practices may also discriminate against women. The CEDAW Committee has found that pushbacks, expulsion, and detention may do so by increasing women's vulnerability to exploitation and other forms of gender-based violence.[30] Such treatment should be remedied by increasing regular migration pathways and women's access to them.[31]

In addition to characterizing particular rules and practices as discriminatory, the CEDAW Committee has also advanced a gender-sensitive approach to issues relating to international protection and trafficking. While CEDAW does not contain an explicit prohibition on refoulement, Article 2(d) has been interpreted to include an implicit prohibition. States must ensure that no woman is expelled or returned to another state where her life, physical integrity, liberty, or security would be threatened, or where she would risk suffering serious forms of discrimination, including gender-based violence.[32] The Committee has also provided a gender-sensitive interpretation of the right to asylum, including what constitutes persecution or serious harm, and how issues concerning credibility and internal relocation should be assessed.[33] The Committee has stated that trafficking is "unequivocally" rooted in

[22] The CEDAW Committee's interpretation of the Convention is correct when carried out pursuant to Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 UNTS 331.

[23] General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, UN Doc. CEDAW/C/GC/32, para. 55 (Nov. 14, 2014) [hereinafter CEDAW's GR 32].

[24] General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration, UN Doc. CEDAW/C/GC/38, para. 26 (Nov. 20, 2020) [hereinafter CEDAW's GR 38].

[25] *Id.* at para. 28.

[26] *Id.* at para. 27.

[27] General Recommendation No. 26 on Women Migrant Workers, UN Doc. CEDAW/C/2009/WP.1/R, para. 26 (Dec. 5, 2008) [hereinafter CEDAW's GR 26]; CEDAW's GR 38, *supra* note 24, at para. 58–60.

[28] CEDAW's GR 26, *supra* note 27, at para. 26(e).

[29] CEDAW's GR 38, *supra* note 24, at para. 58–60.

[30] *Id.* at para. 24.

[31] *Id.* at para. 56.

[32] CEDAW's GR 32, *supra* note 23, at para. 22–23.

[33] *Id.*

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structural sex/gender-based discrimination and is a form of gender-based violence.[34] Trafficking victims are to be afforded important rights and safeguards, including in relation to their identification and support. They are also to be protected from "forcible return," the definition of which is broader than CEDAW's general protection from refoulement.[35] States must take a gender-sensitive approach to women's asylum and trafficking claims, to eliminate discrimination in the determination of such claims and to ensure that women are provided with effective legal protection.[36]

Finally, states must ensure that migrant women can access remedies for discriminatory treatment, including by amending rules that prevent women from seeking redress because, for example, doing so would result in a loss of migration status and/or deportation.[37]

State Responsibility for Discrimination Against Women

In its General Recommendations, the CEDAW Committee has identified and required states to remedy a number of forms of discrimination against women. The Committee speaks in a distinctively less protective voice, however, in its Views on individual communications brought under CEDAW's Optional Protocol.[38] In a wider study, I reveal a striking disparity between the Committee's *interpretation* of the Convention's rights and protections and its *application* of these interpretations to states.[39] Charting the difference between how the Committee approaches migrant women's rights in the abstract, and how it responds when confronted with a particular rule or practice that is, on its face, discriminatory, reveals a particular kind of responsibility deficit. Here, I illustrate this deficit by reference to the Committee's work on trafficking. This argument draws on, and advances, a general critique of the Committee's jurisprudence.[40]

CEDAW's General Recommendation on Trafficking provides that victims are to be identified by states using multidisciplinary teams which integrate "rights-based, victim-centered . . . gender-sensitive and trauma-informed" approaches to trafficking.[41] In *ARBM v. Spain,*[42] ARBM, the author of the communication was, however, found not to have been trafficked by an identification process that involved her being interviewed in detention, without legal advice or specialist assistance, by officers involved in controlling irregular migration.[43] The identification process ARBM was subject to appears to contravene standards set by the CEDAW Committee,[44] yet the Committee did not apply these standards when deciding ARBM's communication.

Of particular concern is how the Committee responded to ARBM's complaint that rather than investigating her situation, the state placed the burden of proving that she was trafficked on her.[45] The Committee's response was that ARBM was not "able to present sufficient arguments, either to the courts of the State party or to the

[34] CEDAW's GR 38, *supra* note 24, at para. 10.

[35] *Id.* at para. 89.

[36] CEDAW's GR 32, *supra* note 23 and CEDAW's GR 38, *supra* note 24.

[37] CEDAW's GR 26, *supra* note 27, at para. 26(c). General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, UN Doc. CEDAW/C/GC/35, para. 29(c)(iii) (July 26, 2017).

[38] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 UNTS 83.

[39] Catherine Briddick, *Unprincipled and Unrealised: CEDAW and Discrimination Experienced in the Context of Migration Control* (forthcoming).

[40] Loveday Hodson, *Women's Rights and the Periphery: CEDAW's Optional Protocol*, 25(2) EJIL (2014).

[41] CEDAW's GR 38, *supra* note 24, at para. 77.

[42] ARBM v. Spain, UN Doc. CEDAW/C/78/D/120/2017 (Feb. 18, 2021).

[43] *Id.* at para. 3.4.

[44] CEDAW's GR 38, *supra* note 24, at para. 76–83.

[45] ARBM v. Spain, *supra* note 42, at para. 3.6.

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Committee, to reverse the burden of proof."[46] This endorsement of the placing of the burden of proving trafficking on a potential victim appears, at the very least, to contradict the Committee's own recommendations.[47] It also sits uneasily with the obligations set out in the trafficking-specific instruments that those recommendations purport to both complement and supplement.[48]

The Committee concluded its evaluation of ARBM's treatment by stating that it had found nothing that would require it "to depart from the State party's assessment of the facts and conclusion" and that, therefore, "the facts in this case do not constitute evidence of any violation of the Convention."[49] ARBM was placed in a catch-22. The Committee found no violation based on facts established by a process that the author claimed was deficient, those unscrutinized deficiencies having precluded her from being able to do so. The Committee's failure to follow its own recommendations in *ARBM v. Spain* is, unfortunately, not anomalous, but representative of a broader pattern of deference to states' migration control prerogatives.[50]

Conclusion

The CEDAW Committee has characterized as unlawfully discriminatory, and required states to remedy, rules, and practices that disproportionately disadvantage women. Such rules and practices may, in and of themselves, breach CEDAW's general prohibition of discrimination and particular Convention rights. They may also be impugned for increasing women's vulnerability to violence.

Through its General Recommendations, the CEDAW Committee has interpreted the Convention robustly, requiring states to root out discrimination in migration control. This includes reforming indirectly discriminatory rules, abandoning discriminatory practices, providing gender-sensitive determination procedures that apply gender-sensitive interpretations of relevant international protection obligations, and increasing women's access to safe and regular migration pathways. In contrast, when dealing with individual communications, the Committee is less willing to hold states responsible for violating the discrimination law-based obligations it has itself identified. It is not enough to know which laws and practices discriminate against women. Such discrimination, when challenged, must be remedied.

[46] *Id.* at para. 11.8.

[47] CEDAW's GR 38, *supra* note 24, para. 38. This is actually quoted in *ARBM v. Spain*, *supra* note 42, at para. 11.2.

[48] Drawing on Vladislava Stoyanova, Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law 100 (2017).

[49] *ARBM v. Spain*, *supra* note 42, at para. 11.8.

[50] Başak Çalı, et al., *Hard Protection through Soft Courts? Non-Refoulement Before the United Nations Treaty Bodies*, 21(3) German L.J. 355 (2020).

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