

MIGRATION FLOWS AND THE PROTECTION OF
WOMEN'S RIGHTS

*FLUJOS MIGRATORIOS Y PROTECCIÓN DE LOS DERECHOS DE
LA MUJER*

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ABSTRACT: In the last decades, migrant women's organizations and civil society actors have mobilized to call for greater gender-responsiveness in international migration governance. Such voices have drawn attention to the growing "feminization of migration" – a term coined as a consequence of the massive numbers of women migrating as independent economic actors from the 1970s to the 1990s –, the contributions of migrant women to development, and the myriad ways in which gender influences migration routes and experiences, often with disproportionately deleterious outcomes for women (for example, heightened risks of exploitation, gender-based violence, harmful practices such as child, early and forced marriage). These efforts have produced positive outcomes also at the international level. Indeed, the role of gender in migration has increasingly become part of the interest of various international organizations – both at the universal and regional levels –, which have highlighted the importance of mainstreaming a gender perspective into all policies and programs and promoting full participation and empowerment of women. In addition, scholars have deeply investigated to what extent the broad variety and number of rules governing the movement of persons across borders is well-placed to respond to the gendered disadvantages faced by migrant women.

The present contribution aims at assessing the significance of gender in three specific areas of law relating to international migration, namely refugee law, migrant smuggling and migrant workers. The choice of the said areas is justified by the fact that, in the absence of a universally accepted definition of an international migrant, only some groups of non-nationals – refugees, smuggled migrants and migrant workers – fall under the protection of specific international legal frameworks. In addition, on a general level, international migration is a phenomenon governed by a vast network of general conventions that remain plainly relevant. Their continuing applicability underpins, enriches, and shapes the more specific conventional regimes. From this systemic angle, general treaties adopted in the broader field of international human rights provide a common legal framework that is applicable to all migrants regardless of race, sex, nationality, ethnicity, language, religion, or any other legal status.

In light of the above, this contribution will first provide a brief overview of the gendered drivers of female migration. Then, moving to the international legal dimension of the phenomenon, the analysis will focus on the relevance of gender in the regimes relating to refugee law, migrant smuggling and migrant workers. Finally, among the relevant treaties pertaining to international human rights law, particular attention will be devoted to the legal regime charged with eradicating discrimination against women, namely the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

KEY WORDS: Migrant women's rights; female migration; discrimination against women; gender sensitiveness; international human rights law.

RESUMEN: En las últimas décadas, las organizaciones de mujeres migrantes y los agentes de la sociedad civil se han movilizado para reclamar una mayor sensibilidad de género en la gobernanza de la migración internacional. Estas voces han llamado la atención sobre la creciente "feminización de la migración" – término acuñado como consecuencia del gran número de mujeres que emigraron como agentes económicos independientes entre los años setenta y noventa –, las contribuciones de las mujeres migrantes al desarrollo y las múltiples formas en que el género influye en las rutas y experiencias migratorias, a menudo con resultados desproporcionadamente perjudiciales para las mujeres (por ejemplo, mayor riesgo de explotación, violencia de género, prácticas nocivas como el matrimonio infantil, precoz y forzado). Estos esfuerzos han producido resultados positivos también a nivel internacional. De hecho, el papel del género en la migración se ha convertido cada vez más en parte del interés de diversas organizaciones internacionales – tanto a nivel universal como regional –, que han destacado la importancia de incorporar una perspectiva de género en todas las políticas y programas y de promover la plena participación y capacitación de las mujeres. Además, los estudiosos han investigado en profundidad hasta qué punto la gran variedad y número de normas que rigen la circulación de personas a través de las fronteras está bien situada para responder a las desventajas de género a las que se enfrentan las mujeres migrantes.

El presente trabajo tiene por objeto evaluar la importancia del género en tres ámbitos específicos del Derecho relativo a la migración internacional, a saber, el Derecho de los refugiados, el tráfico ilícito de migrantes y los trabajadores migrantes. La elección de dichos ámbitos se justifica por el hecho de que, a falta de una definición universalmente aceptada de migrante internacional, sólo algunos grupos de no nacionales – refugiados, migrantes, objeto de tráfico ilícito y trabajadores migrantes – quedan bajo la protección de marcos jurídicos internacionales específicos. Además, a nivel general, la migración internacional es un fenómeno regido por una amplia red de convenciones generales que siguen siendo claramente pertinentes. Su continua aplicabilidad sustenta, enriquece y da forma a los regímenes convencionales más específicos. Desde este ángulo sistémico, los tratados generales adoptados en el ámbito más amplio de los derechos humanos internacionales proporcionan un marco jurídico común que es aplicable a todos los migrantes independientemente de su raza, sexo, nacionalidad, etnia, lengua, religión o cualquier otra condición jurídica.

In light of the above, this contribution will first provide a brief overview of the gendered drivers of female migration. Then, moving to the international legal dimension of the phenomenon, the analysis will focus on the relevance of gender in the regimes relating to refugee law, migrant smuggling and migrant workers. Finally, among the relevant treaties pertaining to international human rights law, particular attention will be devoted to the legal regime charged with eradicating discrimination against women, namely the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

PALABRAS CLAVE: Derechos de las mujeres migrantes; migración femenina; discriminación contra la mujer; sensibilidad de género; legislación internacional sobre derechos humanos.

SUMMARY.- I. THE GENDERED DRIVERS OF FEMALE MIGRATION.- II. THE SIGNIFICANCE OF GENDER IN SPECIFIC AREAS OF LAW RELATING TO INTERNATIONAL MIGRATION.- I. Refugee Law.- 2. Migrant smuggling.- 3. Migrant workers.- A) *The ILO's Conventions on Migrant Workers.*- B) *The international Convention on the protection of the rights of all migrant workers and members of their families.*- III. THE SIGNIFICANCE OF GENDER IN INTERNATIONAL HUMAN RIGHTS LAW.- IV. FINAL REMARKS.

I. THE GENDERED DRIVERS OF FEMALE MIGRATION.

Massive numbers of women migrating as independent economic actors began from the 1970s to the 1990s. Indeed, women are increasingly migrating primarily for the purposes of work, with women migrant workers estimated by the International Labour Organization (ILO) to be 41.5 per cent of all international labour migrants worldwide,¹ and with migrant women having a higher labour force participation rate (59.8 per cent) than non-migrant women (at 46.7 per cent).² While the distribution of men and women migrant workers in some sectors is broadly similar (for example, service sector), 73.4 per cent of all migrant domestic and care workers are women.³

Migrant women face various gender inequalities in the shape of discriminatory legal, attitudinal and governing practices that restrict their full and equal participation in all aspects of social, political and economic life, and limit their autonomy and decision-making processes. Moreover, they face gendered risks of exploitation and abuse throughout migration, gendered conditions of work, pay inequity, poor levels of social protection and barriers to accessing labour and human rights – all of which have gender-specific consequences for their health and well-being, and hinder efforts to alleviate gender inequality and realize sustainable development. Such gendered realities and risks affect all the different phases of the migration process (for example, pre-departure, transit, employment, return and integration). Factors contributing to gendered risks can be traced to persistent structural issues in countries of origin, transit and destination, yet most efforts at addressing such issues have focused on tweaking migration policy and border security regimes (often resulting in heightening risks and curtailing rights), rather than addressing

1 As reported in ILO, *ILO Global Estimates on International Migrant Workers Results and Methodology*, 2021, p. 11, available at https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_808935.pdf.

2 *Ibidem*, p. 23.

3 *Ibidem*, p. 13.

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root causes within the system. Gender also influences the trajectories, rates and levels of migration, as well as the flows of financial remittances and their usage.⁴

Despite this reality, migration governance historically has been “gender-blind”, ignoring the ways in which gender shapes migration. Migration policies have captured neither a gender-based approach nor the specific experience relating to migrant women. When destination countries have paid attention to gender it usually has been with the aim of facilitating women’s migration into care jobs to address labour gaps. Countries of origin have been more likely to curtail women’s migration when their workers are faced with exploitation, gender discrimination or gender-based violence abroad.⁵ However, throughout the last thirty years, the role of gender in migration has increasingly become part of the interest of many countries, which have made gender mainstreaming their official policy.⁶ Gender is increasingly analysed for its role in power relations and also as a lens to examine institutions, social norms, policies, and identities throughout migration trajectories.⁷ This has provided new interpretations of many aspects of migrant experiences, such as the social organization of migration, transnationalism, assimilation and social integration, migration policy.⁸ What has also been foregrounded is the need for national governments and transnational networks to gender mainstream policies in origin, transit and destination countries.⁹

Many feminist scholars have argued for moving beyond the incorporation of women into the existing frameworks of institutions and policies without changing them, criticizing the so-called “add women and stir” approach.¹⁰ Rather,

4 On these aspects, see BENERIA, L., DEERE, C.D., KABEER, N.: “Gender and International Migration: Globalization, Development, and Governance”, *Feminist Economics*, 2012, vol. 18, n. 2, pp. 1-33; HENNEBRY, J., HOLIDAY, J., MONIRUZZAMAN, M.: *At What Cost? Women Migrant Workers Remittances and Development*, New York, 2017, available at <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2017/women-migrant-workers-remittances-and-development.pdf>; OROZZO, M., HENNEBRY, J.: *Migration, Remittances and Financial Inclusion: Challenges and Opportunities for Women’s Economic Empowerment*, Geneva, 2017, available at <https://www.empowerwomen.org/en/resources/documents/2017/08/migration-remittances-and-financial-inclusion-challenges-and-opportunities-for-see?lang=en>.

5 Particularly relevant is the case of Nepal, which has put numerous bans on emigration. On this case, see HARI, K.C., HENNEBRY, J.: “Gender, Labour Migration Governance, and the SDGs: Lessons from the Case of Nepal”, in *Achieving the Sustainable Development Goals: Global Governance Challenges* (edited by S. DALBY, S. HORTON, R. MAHON, D. THOMAZ), Routledge, London, 2019, pp. 71-84.

6 See the accurate reconstruction offered by ÇAĞLAR, G.: “Gender mainstreaming”, *Politics and Gender*, 2013, vol. 9, pp. 336-344.

7 In this sense, see TRUE, J.: “Mainstreaming Gender in Global Public Policy”, *International Feminist Journal of Politics*, 2003, vol. 5, pp. 368-396; PIPER, N.: “International Migration and Gendered Axes of Stratification”, in *New Perspectives on Gender and Migration: Livelihoods, Rights and Entitlements* (edited by N. PIPER), Routledge, New York, 2009, pp. 1-18.

8 PETROZZIELLO, A.: *Gender on the Move: Working on the Migration-Development Nexus from a Gender Perspective*, Santo Domingo, 2013, pp. 78-79.

9 In this sense, see PIPER, N.: “Gendering the Politics of Migration”, *International Migration Review*, 2006, vol. 40, n. 1, pp. 133-164.

10 In this sense, see, among others, CORNWALL, A., RIVAS, A.: “From ‘Gender Equality and ‘Women’s Empowerment’ to Global Justice: Reclaiming a Transformative Agenda for Gender and Development”, *Third World Quarterly*, 2015, vol. 35, pp. 396-415.

adopting a gender-responsive approach means transforming the broader social and institutional contexts that produce gender injustices and unequal outcomes.¹¹ Others focused on locating the fault-line of policies within the social power base in order to transform the very foundation upon which policies and institutions were structured.¹²

In this period, civil society has played an important role in foregrounding gender and migration at global fora. The move toward gender mainstreaming in migration governance and development has been primarily due to the concerted and networked advocacy and activism of civil society organizations.¹³ By engaging in transnational politics as “migrant organizations” often run by former migrants and their compatriots, these organizations were key actors that led to change at the international level. Civil society organisations of different kinds have played a crucial role in shaping and transforming the governance of labour migration at all levels, particularly through advocating for gender mainstreaming.¹⁴ Indeed, it is ultimately because of their efforts that migrants were specifically included in the 2030 Agenda for Sustainable Development, adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity. In particular, Goal 5 puts an emphasis on the access to rights and the elimination of trafficking and violence against women. Achieving Goal 5, that is, achieving gender equality, will make a crucial contribution to progress across all the Goals and their targets, including Goal 8 to promote economic growth and decent work for all, and Goal 10 to reduce inequality within and among countries, and particularly target 10.7 to facilitate orderly, safe, regular and responsible migration and mobility of people.

II. THE SIGNIFICANCE OF GENDER IN SPECIFIC AREAS OF LAW RELATING TO INTERNATIONAL MIGRATION.

I. Refugee Law.

As is well known, neither the Convention relating to the Status of Refugees¹⁵ nor its Additional Protocol¹⁶ contain any reference to sex and gender. The specific vulnerability of females as a root cause of flight and of female refugees during flight

11 See TRUE, J.: “Mainstreaming Gender”, cit., note 7, p. 370.

12 In this sense, see DALY, M.: “Gender Mainstreaming in Theory and Practice”, *Social Politics: International Studies in Gender, State & Society*, 2005, vol. 12, pp. 433-450; VERLOO, M.: “Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender”, *Social Politics: International Studies in Gender, State & Society*, 2005, vol. 12, pp. 344-365.

13 HENNEBRY, J., HARI, K.C., PIPER, N.: “Not Without Them: Realising the Sustainable Development Goals for Women Migrant Workers”, *Journal of Ethnic and Migration Studies*, 2019, vol. 45, pp. 2621-2637.

14 *Ibidem*.

15 Geneva, 28 July 1951, entered into force on 22 April 1954.

16 New York, 31 January 1967, entered into force on 4 October 1967.

and after reception was simply ignored. This is clearly highlighted by the definition of “refugee” in Art. 1 A, para. 2 of the Convention, which refers to any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”. The main consequence of the choice of the drafters of the Convention relating to the Status of Refugees not to explicitly list gender among the grounds of persecution is that today, in order to grant refugee status to affected women and girls, gender-based persecution is qualified as persecution based on membership of a particular social group or on another of the relevant grounds exhaustively set forth in Art. 1 A, para. 2 of the Convention.¹⁷

In addition to the problems for women and girls to obtain recognition as refugees for gender-related persecution, also the legal status of female refugees after recognition raises much concern. The formulation of the non-discrimination provision set out in Art. 3 of the Convention relating to the Status of Refugees is particularly daunting from a gender perspective, as discrimination as to sex is once again ignored: “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”.¹⁸

Over time, the gender-blindness of the Convention relating to the Status of Refugees and its Additional Protocol has been mitigated through the adoption of a set of soft law instruments. In 2002, the United Nations High Commissioner for Refugees issued the “Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”,¹⁹ which notes how the analysis

17 For further discussion about this topical issue, see notably CRAWLEY, H.: *Refugees and Gender: Law and Process*, Jordan Publishing Limited, Bristol, 2001; ANKER, D.E.: “Refugee Law, Gender, and the Human Rights Paradigm”, *Harvard Human Rights Journal*, 2002, vol. 15, pp. 133-154; KÄLIN, W.: “Gender-Related Persecution”, in *Switzerland and the International Protection of Refugees* (edited by V. CHETAIL, V. GOWLLAND-DEBBAS), Brill|Nijhoff, The Hague, 2002, pp. 111-128; QIC, R.: “Gender-Related Persecution”, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (edited by E. FELLER, V. TÜRK, F. NICHOLSON), Cambridge University Press, Cambridge, 2003, pp. 319-350; ANDERSON, A., FOSTER, M.: “A Feminist Appraisal of International Refugee Law”, in *Oxford Handbook of International Refugee Law* (edited by C. COSTELLO, M. FOSTER, J. McADAM), Oxford University Press, Oxford, 2021, pp. 60-77.

18 A proposal to specifically include distinctions as to sex in the text of Art. 3 of the Convention relating to the Status of Refugees was rejected during the drafting process. On this aspect, see MARX, R., STAFF, W.: “Article 3 1951 Convention”, in AA.VV.: *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary* (edited by A. ZIMMERMANN), Oxford University Press, Oxford, 2011, p. 653, note 51.

19 United Nations High Commissioner for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/02/01, 7 May 2002. Text available at [https://www.unhcr.org/3d58ddef4.pdf%20\(2\)](https://www.unhcr.org/3d58ddef4.pdf%20(2)).

of sex and gender in the context of refugee law has been expanded through the practice of States, the case law of domestic courts, and academic literature,²⁰ thus encouraging “a gender-sensitive interpretation of the 1951 Convention”.²¹ This may be linked to the fact that, even though the refugee definition, “properly interpreted”, encompasses gender-related claims and excludes further amendment in order to recognize the gender dimension of persecution,²² women continue to face difficulty in bringing gender-related claims within the scope of refugee law.

The approach expressed in the “Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” has been further enhanced in 2018 through the adoption of the “UNHCR Policy on Age, Gender and Diversity”.²³ This Policy guides the agency’s orientation and addresses gender equality as being fundamental to the well-being and rights of all persons, central to the UNHCR’s approach and relevant to every aspect of UNHCR’s work.²⁴

Finally, in 2020, the “UNHCR Policy on the Prevention of, Risk Mitigation, and Response to Gender Based Violence”²⁵ was issued. In the said Policy, the UNHCR recognises that gender-based violence “can be the impetus that compels people to flee; it also occurs during flight and refuge. Regardless of the reason for displacement, the risk of gender-based violence is heightened, especially for women and girls”.²⁶

2. Migrant smuggling.

The United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol),²⁷ supplementing the United Nations Convention on Transnational Organised Crime,²⁸ frames the conception of who “smuggled migrants” are on the basis of Art. 3(a). According to the said provision, smuggling of migrants shall mean as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into

20 *Ibidem*, para. 5.

21 *Ibidem*, para. 4.

22 *Ibidem*, para. 6.

23 United Nations High Commissioner for Refugees, UNHCR Policy on Age, Gender and Diversity, March 2018. Text available at [https://www.unhcr.org/5aa13c0c7.pdf%20\(3\)](https://www.unhcr.org/5aa13c0c7.pdf%20(3)).

24 *Ibidem*, para. 12.

25 United Nations High Commissioner for Refugees, UNHCR Policy on the Prevention of, Risk Mitigation, and Response to Gender Based Violence UN Doc. UNHCR/HCP/2020/01, 2 October 2020. Text available at [https://www.unhcr.org/5fa018914/unhcr-policy-prevention-risk-mitigation-response-gender-based-violence%20\(3\)](https://www.unhcr.org/5fa018914/unhcr-policy-prevention-risk-mitigation-response-gender-based-violence%20(3)).

26 *Ibidem*, p. 5.

27 Palermo, 15 November 2000, entered into force on 28 January 2004.

28 Palermo, 15 November 2000, entered into force on 25 December 2003.

a State Party of which the person is not a national or a permanent resident'. In so doing, on the one side, the Smuggling Protocol identifies three constitutive elements (exploitation; consent; source of profit) which characterises the notion of smuggling of migrants. On the other side, it implicitly provides a definition of "smuggled migrants" which does not incorporate a gender-sensitive language, as any reference to sex and gender is completely absent.

Such an approach is probably based on the assumption that, from a strictly numerical perspective, those who are smuggled are mostly assumed to be men.²⁹ However, though women remain the minority, especially when coming to smuggling at sea, gender has a significant role to play throughout the voyage. For example, as the extant literature on women's irregular border crossing evidences, among the significant issues not commonly considered there are qualitative and notable anecdotal reports indicating that women are more likely to die because during sea voyages they are often located in the area of the vessel below deck where exposure to fumes, leaking water, and other hazards is likely.³⁰ In other cases, it has been reported that the manner in which death by drowning occurs is also affected by pregnancy.³¹

The Smuggling Protocol raises much concern also in terms of gender-responsive commitments. Preliminary, it is important to bear in mind that smuggled migrants are assumed to be acting voluntarily and, therefore, in less need of protection. Accordingly, the primary emphasis of the Smuggling Protocol as set out in Art. 2 is on combating the smuggling of migrants, as well as on promoting cooperation among States parties to that end, while protecting the rights of smuggled migrants. In this regard, States parties are required to criminalize the smuggling of migrants as well as related offenses including the production, provision, and possession of fraudulent travel or identity documents.³²

The Smuggling Protocol does also include a number of additional provisions aimed at protecting the basic rights of smuggled migrants and preventing the worst forms of exploitation which often accompany the smuggling process, however without paying particular attention to the specific vulnerability of women. Indeed, when criminalizing smuggling and related offenses, States parties are required to establish, as aggravating circumstances, situations which endanger the lives or safety of migrants or entail inhuman or degrading treatment, including for exploitation.³³

29 In this sense, see BHABHA, J.: *Trafficking, Smuggling, and Human Rights*, March 1, 2005, available at <https://www.migrationpolicy.org/article/trafficking-smuggling-and-human-rights>.

30 See PICKERING, S., COCHRANE, B.: "Irregular Border-Crossing Deaths and Gender: Where, How and Why Women Die Crossing Borders", *Theoretical Criminology*, 2012, vol. 17, p. 33.

31 See PICKERING, S.: *Women, Borders, and Violence. Current Issues in Asylum, Forced Migration, and Trafficking*, New York, Springer, New York, 2011, p. 145.

32 Smuggling Protocol, Art. 6.

33 Smuggling Protocol, Art. 4, para. 4

Migrants themselves are not to become liable to criminal prosecution under the Smuggling Protocol for the fact of having been smuggled.³⁴ States parties are required to take all appropriate measures to preserve the internationally recognized rights of smuggled migrants, in particular, the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment.³⁵ They are also required to protect migrants from violence³⁶ and afford due assistance, as far as possible, to migrants whose life or safety has been endangered by reason of having being smuggled.³⁷

Despite its overall gender-blind character, it is interesting to note that the Smuggling Protocol contains one single provision which refers to “women and children”. Indeed, according to Art. 16, para. 4, in implementing the Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct of smuggling of migrants taking into account the special needs of women and children.

3. Migrant workers.

Differently from the notions of refugees and smuggled migrants, the concept of migrant workers is governed by three specialized treaties at the universal level. Two of them – the Migration for Employment Convention (Revised) No 97³⁸ and the Migrant Workers (Supplementary Provisions) Convention No 143³⁹ – have been concluded under the auspices of the ILO in 1949 and 1975, whereas the most recent and comprehensive one, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁴⁰ (ICRMW), was adopted within the United Nations in 1990. Although each of them has been conceived as a distinct treaty, their respective content provides a complementary and mutually reinforcing legal framework. When taken together, the two ILO Conventions and the ICRMW can be viewed as establishing an international charter of migrant workers that lays down a comprehensive normative framework on a broad variety of issues, including, most notably, the definition and rights of migrant workers. In order to better appraise the gender relevance in light of their specific characteristics and common features, the ILO Conventions and the ICRMW will be analysed separately through the same basic structure addressing respectively the definition of migrant workers and their rights.

34 Smuggling Protocol, Art. 5

35 Smuggling Protocol, Art. 16, para. 1

36 Smuggling Protocol, Art. 16, para. 2

37 Smuggling Protocol, Art. 16, para. 3.

38 Geneva, 1 July 1949, entered into force on 22 January 1952.

39 Geneva, 24 June 1975, entered into force on 9 December 1978.

40 New York, 18 December 1990, entered into force on 1 July 2003.

A) The ILO's Conventions on Migrant Workers.

The ILO has been involved in the protection of migrant workers since its foundation in 1919. Today, besides the general labour conventions that apply to both nationals and nonnationals, there exist two specialized treaties: the Migration for Employment Convention (Revised) No 97 and the Migrant Workers (Supplementary Provisions) Convention No 143. These two specialized treaties contain a common legal definition of migrant workers, which does not include any reference to gender or sex. Indeed, according to Art. 11, para. 1 of the two instruments, “the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his (sic) own account and includes any person regularly admitted as a migrant for employment”.⁴¹

As regards the protection of migrant workers, ILO treaties set out a core content of basic rights applicable to all migrant workers, including undocumented ones, whereas more specific guarantees are reserved for documented workers only. More precisely, Convention No 143 is the first treaty which specifically addresses the rights of undocumented migrant workers. According to its Art. 1, “each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers”. The personal scope of this provision is particularly broad and inclusive – it applies to all migrant workers irrespective of their legal status in host States –, even though it does not specify the very notion of “basic rights”. Particularly relevant for the purposes of the present analysis is that any reference to women or gender is once again missing. In comparison to undocumented migrant workers, those who are lawfully within the territory of States parties benefit from a broader and more detailed set of rights, mainly related to equality of treatment with nationals. According to Art. 6, para. 1 of Convention No 97, documented migrant workers shall benefit from no less favourable treatment than the one applicable to nationals in respect of working and living conditions (such as remuneration, membership of trade unions, and enjoyment of benefits of collective bargaining as well as accommodation), social security (including employment injury, maternity, sickness, invalidity, death, unemployment, and family responsibilities), employment taxes, and access to justice.

41 As it has been rightly pointed out, this definition is broad and narrow at the same time. On the one hand, it is broad because of its prospective nature which includes the vast majority of migrants who are leaving their own countries in order to find a job abroad. Indeed, as evidenced by the wording of common Art. 11, para. 1, the prospect of being employed – and not the fact of already having been recruited before departure – represents the triggering factor of this definition. On the other hand, and despite its broad scope, the legal definition of migrant workers is restricted by several substantial qualifications. In particular, Art. 11, para. 1 is limited to “any person regularly admitted as a migrant for employment”, thus excluding undocumented migrant workers. In this sense, see CHETAIL, V.: *International Migration Law*, Oxford University Press, Oxford, 2019, pp. 200-201.

Despite its broad scope, the Committee of Experts on the Application of Conventions and Recommendations, which represents the monitoring body in charge of providing an impartial and technical evaluation of the application of international labour standards in ILO Member States, has emphasized that the wording of Art. 6, para. 1, according to which States shall apply a “treatment no less favourable than that which it applies to its own nationals”, “allows the application of treatment which, although not identical, would be equivalent in its effects to that enjoyed by nationals”.⁴² The ILO Committee of Experts has not specified what such equality of treatment actually entails, thus leaving States parties a broad margin of appreciation. At the minimum, however, Art. 6, para. 1 prohibits any form of discrimination based on nationality, race, religion, or sex.⁴³

B) The international Convention on the protection of the rights of all migrant workers and members of their families.

Compared to any other international treaties, the ICRMW offers the most comprehensive definition of migrant workers.⁴⁴ The drafters' intention was to adopt “a broader concept of migrant workers for the purpose of including certain categories of workers that have not been covered by ILO Conventions”.⁴⁵ Under the combined provisions of Art. 1, para. 1 and Art. 2, para. 1, the ICRMW “is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”, the term “migrant worker” referring “to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”. As noted by scholars,⁴⁶ the concise and factual definition

42 International Labour Conference, *Migrant Workers: General Survey on the Reports of the Migration for Employment Convention (Revised) (No 97), and Recommendation (Revised) (No 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No 143), and Recommendation (No 151), 1975* (Geneva June 1999) ILC.87/III(1B), pp. 145-146. See also International Labour Conference, *Promoting Fair Migration: General Survey concerning the Migrant Workers Instruments* (Geneva 22 January 2016) ILC.105/III(1B), p. 111; Algeria (2014) Direct Request (CEACR) on the application of Migration for Employment Convention (Revised) (No 97), 1949 (adopted 2013, published 103rd ILC session 2014).

43 In this sense, see CHETAIL, V.: *International Migration*, cit., note 41, p. 211.

44 For a similar account and further comments, see especially CHOLEWINSKI, R.: *Migrant Workers in International Human Rights Law – Their Protection in Countries of Employment*, Clarendon Press Oxford, Oxford, 1997, pp. 149-154.

45 See the statement by the representative of Finland in United Nations General Assembly, Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families on its inter-sessional meetings from 10 to 21 May 1982, UN Doc. A/C.3/37/1, 11 June 1982, para. 67. See also the statement of the representative of Sweden in United Nations General Assembly, Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, UN Doc. A/C.3/38/5, 11 October 1983, para. 75. The statements of the representatives of Norway and Greece can be found in United Nations General Assembly, Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, UN Doc. A/C.3/40/1, 20 June 1985, paras. 29 and 38.

46 See, among others, CHETAIL, V.: *International Migration*, cit., note 41, p. 220.

of “migrant worker” under the ICRMW is much more comprehensive than the ones laid down in the ILO Conventions Nos 97 and 143, as it encompasses both documented and undocumented migrant workers. For the purposes of the present analysis, it is important to highlight that the notion of migrant workers set out by the ICRMW not only makes use of gender-sensitive language – as revealed by the word “she” in Art. 2, para. 1 – but also, from a more substantial point of view, addresses gender dynamics in migration with reference to sex (as category of protection).

As far as the protection of migrant workers is concerned, similarly to other specialized treaties of international migration law,⁴⁷ the ICRMW attempts to reconcile the universality of human rights with the concerns of States regarding irregular migration. This internal tension is at the heart of the whole Convention. Indeed, on the one hand, the ICRMW represents the most comprehensive treaty specifically devoted to the rights of migrant workers. On the other hand, the scope of their protection is still contingent on their immigration status and accordingly depends on whether migrant workers are documented. Following this dual approach,⁴⁸ Part III of the ICRMW restates a broad range of civil, social, and labour rights for all migrant workers and members of their families (including undocumented ones), whereas Part IV identifies additional rights that are granted only to those in a regular situation. However, when it comes to gender-responsiveness in migration in the context of labour, in both Parts there seem to be no provisions truly specific to the protection of women migrant workers, being gender identity and gender expression not even mentioned. The only exception is represented by the principle of non-discrimination in Art. 7, which contains an extensive list of prohibited grounds that explicitly includes sex. If this is undoubtedly relevant, one should not overestimate the value of the said prohibited ground of discrimination, as most of ICRMW’s provisions restate or specify rights or prohibition already enshrined in other international human rights treaties.⁴⁹ In light of the above, it is no surprise that the most significant contribution to the fulfilment of the obligations of States parties to respect, protect and fulfil the human rights of women migrant workers does not come from the ICRMW and the practice of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families – the body of independent experts that monitors

47 The ongoing tension between human rights and immigration status represents a defining feature also of the ILO Conventions Nos 97 and 143, as well as the Convention relating to the Status of Refugees, where the allocation of rights is largely conditioned by the distinction based on the regular or irregular status of their beneficiaries.

48 In the same vein, see CHOLEWINSKI, R.: *Migrant Workers*, cit., note 44, p. 138, who observes that “this division is the clearest illustration of the schism between the protection of migrants’ rights and the principle of state sovereignty underlying the whole text”.

49 Art. 7 of the ICRMW further confirms in this sense that the prohibition of discrimination restated in this provision is “in accordance with the international instruments concerning human rights”.

implementation of the Convention—⁵⁰ but rather from the entire range of existing human rights treaties,⁵¹ and in particular the CEDAW. Indeed, the Committee on the Elimination of Discrimination against Women, which represents the body of independent experts which monitors implementation of the CEDAW, has consistently recognized the applicability of the Convention to women migrant workers,⁵² and in its concluding comments and recommendations to States parties that have submitted reports, it has frequently expressed concern for their rights.⁵³ Additionally, in 2008, the Committee on the Elimination of Discrimination against Women issued a general recommendation on women migrant workers who travel independently, those who migrate as dependants of their spouses and those in irregular situations.⁵⁴ It outlines a set of responsibilities that should be assumed by States, including implementing gender-responsive and rights-based migration policies, involving women in policymaking, safeguarding remittances sent by women migrant workers, collecting data disaggregated by gender, and lifting discriminatory bans on women's freedom of movement.

III. THE SIGNIFICANCE OF GENDER IN INTERNATIONAL HUMAN RIGHTS LAW.

While some groups of non-nationals fall under the protection of the specific international legal frameworks analysed in the previous sections, all international migrants are protected under international human rights law. As is well known, human rights are inherent to all human beings, regardless of race, nationality, ethnicity, language, religion, or any other status and are universal, inalienable, indivisible, interdependent and of equal importance. In addition, almost every

50 A notable exception is however represented by the General Comment No. 1 on Migrant Domestic Workers, UN Doc. CMWC/GC/I (2011), 23 February 2011.

51 In this sense, see SATTERTHWAITTE, M.L.: "Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers", *Yale Human Rights & Development Law Journal*, 2005, vol. 8, pp. 1-66. The Author argues that by using intersectionality, advocates for the rights of migrant workers can invoke other human rights treaties, and then articulating a treaty by treaty argument for how each treaty can be applied to migrant women. Similarly, see also HAINFURTHER, J.S.: "A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers", *American University International Law Review*, 2009, vol. 25, pp. 843-895.

52 Committee on the Elimination of Discrimination Against Women, United Nations Report of the Committee on the Elimination of Discrimination Against Women, UN Doc. A/51/38, 2 February 1996, para. 186, noting with regard to Belgium, for example, that "[i]nterest and concern were expressed by the Committee as regards efforts to address the needs of minority groups such as migrant women".

53 See, among others, Concluding Comments of the Committee on the Elimination of Discrimination Against Women on the Elimination of Discrimination Against Women: Ireland, UN Doc. CEDAW/C/IRL/CO/4-5, 22 July 2005, para. 37; Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cambodia, UN Doc. CEDAW/C/KHM/CO/3, 25 January 2006, para. 22; Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Australia, UN Doc. CEDAW/C/AUL/CO/5, 3 February 2006, para. 29; Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cyprus, UN Doc. CEDAW/C/CYP/CO/5, 30 May 2006, para. 30.

54 Committee for the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers, UN Doc. CEDAW/C/2009/WP.1/R (2008), 5 December 2008.

international human rights treaty requires that every person enjoy his or her rights without discrimination, including on the basis of sex. In this sense, the International Covenant on Civil and Political Rights⁵⁵ and the International Covenant on Economic, Social, and Cultural Rights⁵⁶ under their common Art. 3 provide for the rights to equality between men and women in the enjoyment of all rights.

This notwithstanding, extensive discrimination against women continue to exist, as acknowledged in the preamble of the CEDAW, which represents the international bill of rights for women. The CEDAW contains a broad definition of discrimination against women,⁵⁷ and describes a number of measures that States must undertake to eliminate this discrimination.⁵⁸ Further evidencing the Convention's goal of advancing the treatment of women around the world, the CEDAW permits – and even encourages – States to adopt temporary special measures that treat men and women differently in order to accelerate the achievement of equality between men and women.⁵⁹ Arts. 7 through 16 contain substantive provisions relating to certain areas such as participation in politics and public life at both national and international levels, changing or retaining nationality, education, employment, health care, economic and social life, rural women, and family relations. In each area, the State agrees to undertake measures to eliminate discrimination against women, and ensure the fulfilment of certain human rights on an equal basis with men.⁶⁰

Because the CEDAW is one of the most widely ratified international human rights treaties, it has the potential to be a potent tool for empowering migrant women. Although the Convention does not specifically mention migrant women, the text of the CEDAW supports an argument in favor of the treaty's broad applicability. First, the broad definition of discrimination against women of Art. 1 applies to the CEDAW protected rights, as well as rights protected by other instruments and under customary international law⁶¹, thus reinforcing and complementing protections offered by the different regimes relevant to migration discussed in the previous sections. Second, Art. 2 condemns discrimination against women “in all forms,” and Art. 3 obliges States to take appropriate measures “in all

55 New York, 16 December 1966, entered into force on 23 March 1976.

56 New York, 16 December 1966, entered into force on 3 January 1976.

57 CEDAW, art. 1: “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean 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”.

58 CEDAW, art. 2.

59 CEDAW, art. 4.

60 CEDAW, art. 3.

61 See Committee on the Elimination of Discrimination against Women, 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, 19 October 2010, para. 16.

fields” to guarantee that women enjoy their human rights. Furthermore, in contrast to several other human rights treaties, the CEDAW does not explicitly distinguish between the rights of citizens and non-citizens. For its part, the Committee on the Elimination of Discrimination against Women reads the CEDAW as encompassing more than its text.⁶² For example, although violence against women is not explicitly mentioned in the text of the CEDAW, the Committee has determined that gender-based violence is “discrimination” within the meaning of Art. 1 CEDAW, thus obliging States parties to take measures to combat violence against women.⁶³ Although the Committee’s general recommendations are not legally binding, States parties are expected to implement general recommendations in order to fulfil their obligations under the Convention. The Committee on the Elimination of Discrimination against Women has consistently recognized the applicability of the Convention to migrant women.⁶⁴ In its concluding comments and recommendations to States parties that have submitted reports, the Committee has frequently expressed concern for their rights.⁶⁵ Additionally, in its General Recommendation on women and health, the Committee noted that “special attention should be given to the health needs and rights of migrant women and other especially vulnerable groups”.⁶⁶ Thus, the Convention’s applicability to migrant women is clear.⁶⁷

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- 62 See International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/II/Rev.7, 12 May 2004, para. 3: “The Convention is a dynamic instrument. Since the adoption of the Convention in 1979, the Committee, as well as other actors at the national and international levels, have contributed through progressive thinking to the clarification and understanding of the substantive content of the Convention’s articles and the specific nature of discrimination against women and the instruments for combating such discrimination”.
 - 63 Office of the High Commissioner for Human Rights, CEDAW General Recommendation 19: Violence Against Women, UN Doc. A/47/38, 29 January 1992, para. 6.
 - 64 See Committee on the Elimination of Discrimination Against Women, United Nations Report of the Committee on the Elimination of Discrimination Against Women, Fifteenth Session, UN Doc. A/51/38, 10 December 1996, para. 186, noting with regard to Belgium, for example, that “[I]nterest and concern were expressed by the Committee as regards efforts to address the needs of minority groups such as migrant women”.
 - 65 See Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cambodia, UN Doc. CEDAW/C/KHM/CO/3, 25 January 2006, para. 22: “The Committee calls on the State party to focus on the causes of women’s migration and to develop policies and measures to protect migrant women against exploitation and abuse”; Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Australia, UN Doc. CEDAW/C/AUL/CO/5, 3 February 2006, para. 29: “The Committee urges the State party to take more effective measures to eliminate discrimination against refugee, migrant and minority women and girls”.
 - 66 Office of the High Commissioner for Human Rights, CEDAW General Recommendation 24: Women and Health, Doc. A/54/38/Rev.1, 2 February 1999, para. 6.
 - 67 CEDAW, General Recommendation No. 26 on Women Migrant Workers, UN Doc. CEDAW/C/2009/WP.I/R, 5 December 2008, para. 2: “[T]he Convention on the Elimination of All Forms of Discrimination against Women protects all women, including migrant women, against sex- and gender-based discrimination”.

IV. FINAL REMARKS.

After providing a brief overview of the gendered drivers of female migration, the present contribution has assessed the relevance of gender in three specific areas of law relating to international migration, namely refugee law, migrant smuggling and migrant workers. The analysis undertaken has shown that, when it comes to the protection of migrant women rights, none of the considered international legal frameworks seems to be particularly gender-sensitive. This is all the more true with regard to the Smuggling Protocol. On the one side, it implicitly provides a definition of “smuggled migrants” including no reference to sex and gender. On the other side, the Smuggling Protocol raises concern also in terms of gender-responsive commitments, as it only includes a single provision – Art. 16, para. 4 – referring to “women and children”. On the contrary, at least to a limited extent, gender sensitivity has been gradually extended to international refugee law. It is true that neither the Convention relating to the Status of Refugees nor its Additional Protocol contain any reference to sex and gender, but over time their gender-blindness has been mitigating through a series of soft law instruments adopted by the UNHCR. The same can be said with regard to the legal regime applicable to migrant workers, whose key instruments have progressively developed a notion of “migrant worker” which makes use of gender-sensitive language and include sex among the prohibited ground of discrimination.

In light of the minimal relevance of gender in the above-analysed international legal frameworks applicable to migration, a strong instrument to ensure the protection of migrant women's rights is represented by the CEDAW. Although it does not specifically mention migrant women, several elements in the text and the interpretative activity of the Committee on the Elimination of Discrimination against Women clearly support the applicability of the CEDAW to migrant women.

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