

Submission of the International Commission of Jurists in response to the “Call for input to the report of the Special Rapporteur on violence against women and girls to the Human Rights Council on prostitution and violence against women and girls”

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Introduction

The International Commission of Jurists (ICJ) welcomes the opportunity to provide information to the UN Special Rapporteur on violence against women and girls, its causes and consequences in response to her "Call for input to the report of the Special Rapporteur on violence against women and girls to the Human Rights Council on prostitution and violence against women and girls".¹

While the first preambular paragraph of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others states, *inter alia*, that "prostitution"² is "incompatible with the dignity and worth of the human person", as of today, only 82 States are bound by the 1949 Convention.³ States' aversion towards criminalizing "prostitution" *per se* was one of the main reasons for the limited number of States parties.⁴ Moreover, contemporary international human rights law draws a distinction between "non-coerced prostitution" (i.e., sex work), the "exploitation of prostitution" and "trafficking in persons". While under international criminal law States are obliged to criminalize trafficking in persons, there is no such a corresponding obligation under any branch of contemporary international law with respect to the criminalization of "prostitution" *per se*.

Subsequent international law treaties referenced by the Special Rapporteur's Call for input, such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol), expressly avoid repeating the claim that "prostitution is incompatible with the dignity and worth of the human person" or imposing an obligation on States to criminalize "prostitution" *per se*.

The country information (Lesotho and South Africa) and examples provided in this submission seek to respond to the sixth question posed in the Special Rapporteur's call for input.⁵ The ICJ notes that the international law and national law cited here reference the full range of persons who may engage in sex work and/or face trafficking even as the Special Rapporteur's mandate is limited in focus to all women and girls, which in the ICJ's opinion includes a diversity of women.

Question 6

In the words of Article 6 of the CEDAW Convention, States are called on to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."⁶

¹ Office of the High Commissioner for Human Rights, Call for input to the report of the Special Rapporteur on violence against women and girls to the Human Rights Council on prostitution and violence against women and girls, available at: <https://www.ohchr.org/en/calls-for-input/2024/call-input-report-special-rapporteur-violence-against-women-and-girls-human>.

² 'Prostitution' is not defined under international law. This submission distinguishes between the concepts of 'exploitation of prostitution' and 'trafficking' in accordance with how these terms are used in international human rights, criminal law agreements and other international documents. 'Non-coerced, adult prostitution' and 'sex work' are understood and addressed as consensual sexual-economic exchanges, absent of coercion, force, abuse of authority or fraud; see also WHO, HIV/AIDS Programme, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle Income Countries: Recommendations for a Public Health Approach* (2012), p. 12, defining sex workers as adults "who receive money or goods in exchange for [consensual] sexual services".

³ See, [Status as at 29-01-2024 10:15:59 EDT](#).

⁴ Moreover, for this reason, among others, the 1949 Convention is widely considered as outdated and, at least in part, superseded by the Palermo Protocol, consistent with the principle according to which "later law supersedes earlier law" (*lex posterior derogat legi priori*) enshrined in Article 30 of Vienna Convention on the Law of Treaties (VCLT).

⁵ Question six reads as follows. "Describe the linkages, if any, between prostitution and the violation of the human rights of women and girls."

⁶ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (opened for signature 21 March 1950, entered into force 3 September 1981) 1249 UNTS 13, Art. 6.

The terms "traffic" and "exploitation of prostitution" are not defined within the Convention, although subsequent international instruments have defined "trafficking in persons", including, but not limited to, for the purpose of sexual exploitation.

The meaning of "exploitation of prostitution" must thus be interpreted in accordance with the ordinary meaning of the terms, reflecting the context, object and purpose of CEDAW Convention.⁷ If in doubt, supplementary means of interpretation, including the *travaux préparatoires* of the Convention, may confirm the meaning of treaty terms.⁸

The ordinary meaning of "exploitation of" attaches a condition to the scope of States parties' human rights obligations. As the text makes clear, the Convention intends to suppress only the "exploitation of prostitution", rather than "prostitution of women" per se.

This interpretation is confirmed by the Convention's *travaux préparatoires*. During the Convention's drafting process, several delegations attempted to expand the provision's scope to encompass all "prostitution" per se.⁹ An amendment to include "prostitution",¹⁰ as such, was rejected, with delegations expressing concern that the term introduced a new element to the provision inconsistent with the 1949 Convention, which refers only to the "exploitation of prostitution."¹¹

The CEDAW Committee's interpretation of the scope of Article 6 has been inconsistent at times, blurring the distinctions between trafficking, exploitation of prostitution, sexual exploitation, and sex work.¹² The ICJ urges that this inconsistency be considered and tempered in light of the opinion of the former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health who cautioned against misinterpretation of Article 6, as "the conflation of consensual sex work and sex trafficking [...] leads to, at best, the implementation of inappropriate responses that fail to assist either of these groups in realizing their rights, and, at worst, to violence and oppression."¹³

The Palermo Protocol

The Palermo Protocol established a definition of "trafficking in persons". "Prostitution" involving adults¹⁴ falls within the definition of trafficking only when an implicated individual's "action" (e.g., recruitment, transport), is undertaken by prohibited "means" (e.g., coercion, force), for the "purpose" of "exploitation of the prostitution of others" or "other forms of sexual exploitation."¹⁵ It is only in those circumstances that, under the Protocol, the "consent" of the victim to the intended exploitation is irrelevant (i.e., cannot be raised as a defence) upon establishment of prohibited means.¹⁶

⁷ VCLT, *supra*, Art. 31, General rule of interpretation.

⁸ *Id.*, Art. 32, Supplementary means of interpretation.

⁹ See (1976) UN Doc E/CN.6/591, pgs. 19, 61; (1976) UN Doc E/CN.6/SR.638 paras. 40-49.

¹⁰ See (1979) UN Doc A/C.3/34/SR.72, para. 17-32, proposing the following oral amendment: "to suppress *prostitution*, traffic in women, and exploitation of prostitution of women in all its forms" (emphasis added).

¹¹ See "Article 6", pp. 256-302, in *The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, A Commentary*, Second Edition, Edited by Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf, and Marsha A. Freeman, Oxford University Press.

¹² See GR No 38 (2020) CEDAW/C/GC/38, paras 8, 14, 18, 30, 31 and 76. Also, see "Article 6", pp. 256-302, in *The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, A Commentary*, *supra*.

¹³ See *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (2010) UN Doc A/HRC/14/20, para. 27.

¹⁴ Trafficking in children of whatever gender is established by the fact of an 'act' and exploitative 'purpose', without the requirement of 'means'. The Protocol emphatically rejects the relevance of consent in child trafficking in any sector.

¹⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol) (adopted 15 November 2000, entered into force 25 December 2003), Art. 3(a)-(b).

¹⁶ *Id.*, Art. 3(b).

Thus, the Protocol does not equate “prostitution” with trafficking. A key element of trafficking in persons for the purpose of sexual exploitation is exploitation, not prostitution.¹⁷

A contextual analysis of the Protocol confirms that the States did not intend for the terms “exploitation of the prostitution of others” and “sexual exploitation” to be applied to “prostitution” generally.¹⁸ Instead, these terms were intentionally left undefined, ensuring the Protocol “is therefore without prejudice to how States parties address prostitution in their respective domestic laws.”¹⁹ Thus, legal treatment of sex work is left to individual States’ discretion.

The International Commission of Jurists’ 8 March Principles

The 8 March Principles are drawn from, and restate, existing general principles of criminal law and international human rights law.²⁰ The 8 March Principles reflect the criteria that must be met under:

- general principles of criminal law;
- international human rights law, including customary and treaty law;
- judicial decisions;
- national law and practice; and
- legal scholarship in accordance with accepted practice and article 38 of the Statute of the International Court of Justice,

to proscribe certain conduct in a non-discriminatory way, respecting the rule of law.

Principle 17 of the 8 March Principles, entitled “Sex Work”, reflects and has been elaborated by applying the general principles and legal standards of international law to the criminalization of conduct associated with “prostitution”.²¹ Principle 17 reads as follows:

“The exchange of sexual services between *consenting* adults for money, goods or services and communication with another about, advertising an offer for, or sharing premises with another for the purpose of exchanging sexual services between *consenting* adults for money, goods or services, whether in a public or private place, may not be criminalized, *absent coercion, force, abuse of authority or fraud.*

Criminal law may not proscribe the conduct of third parties who, directly or indirectly, for receipt of a financial or material benefit, *under fair conditions – without coercion, force,*

¹⁷ Trafficking is a crime of specific intent. There is no requirement for exploitation (e.g., prostitution of another person) to have occurred: the crime of trafficking is established once the relevant elements of action and purpose are made out along with an *intention* to exploit; see also UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (2009), Module 1, pp. 4–5. UNODC further notes that domestic law could enable establishment of “intent” by recklessness, willful blindness or criminal negligence.

¹⁸ See *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 340, note 3, expressing the view that victims of prostitution must be distinguished from those that chose to engage in prostitution.

¹⁹ See Interpretative Notes for the Official Records (*travaux préparatoires*) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, UN Doc A/55/383/Add.1, para. 64, clarifying the Protocol addresses these terms “only in the context of trafficking in persons.”

²⁰ The UN Office of the High Commissioner for Human Rights, UNAIDS, WHO and UNDP supported the development of the 8 March Principles. See, Office of the High Commissioner for Human Rights, Statement during the thirty-second session of the Commission on Crime Prevention and Criminal Justice (22 May 2023), available at: https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_32/Statements/Item_3_-_OHCHR.pdf and UNAIDS, New legal principles launched on International Women’s Day to advance decriminalization efforts (8 March 2023), available at: https://www.unaids.org/en/resources/presscentre/featurestories/2023/march/20230308_new-legal-principles-decriminalization.

²¹ International Commission of Jurists, *The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty* (8 March 2023), available at: https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report_final_print-version.pdf

abuse of authority or fraud – facilitate, manage, organize, communicate with another, advertise, provide information about, provide or rent premises for the purpose of the exchange of sexual services between *consenting* adults for money, goods or services.”

Certain individuals and groups, particularly “women and girls living in rural and remote areas, indigenous and ethnic minority communities, those with disabilities, with an irregular migration status, as well as those who are displaced, stateless or at risk of statelessness, refugees, asylum-seekers (including those whose claims have been rejected), living in or coming from conflict or post-conflict settings; and, for girls, without care or in alternative care,”²² are disproportionately impacted by the criminalization of certain conducts associated with prostitution.

Generally, criminalization of “prostitution” does not further the stated goals of the criminal law. It does not protect third parties physically, psychologically or financially from direct harm. Instead, it typically clamps down on consensual conduct, stigmatized identities and personal status. The existence and enforcement of criminal law proscribing sex work to punish, stigmatize, and deny services and rights to individuals – with gender-specific effects on women – for exercising rights guaranteed under international human rights law.

The ICJ submits that the proliferation of arbitrary criminal laws proscribing conduct associated with women in “prostitution” have led to human rights violations by perpetuating stigma, harmful gender stereotypes and discrimination based on grounds such as sex, sexual orientation, gender identity and other protected characteristics. Unless criminal laws proscribing “prostitution” are directed at coercion or force or otherwise at the absence of consent, their existence and enforcement violates human rights.²³

Moreover, the ICJ cautions against privileging instruments such as the 1949 Convention and the Palermo Protocol, over international human rights law and standards, to frame and consider the relationship between sex work and human rights. As instruments whose stated aim is multinational crime control, they are not well suited to enhance human rights protection and promotion of all human beings, including women and girls.

Lesotho

The Lesotho Penal Code Act of 2012 repealed the common law offences related to “prostitution” and created a statutory prohibition on “prostitution” as a first schedule offence.²⁴ Section 55 of the Code criminalizes and addresses various aspects of “prostitution”-related offences.²⁵ Section 55(1) defines a “prostitute” as a “person who engages in sexual

²² See GR 38, *supra*, para. 20.

²³ See also, “Eliminating discrimination against sex workers and securing their human rights, Guidance document of the Working Group on discrimination against women and girls”, A/HRC/WG.11/39/1 7 December 2023, in particular, para. 31, which reads as follows: “31. The Working Group considers that there is now sufficient evidence of the harms of any form of criminalization of sex work, including the criminalization of clients and activities by third parties. It notes the growing consensus by international human rights and other bodies on the full decriminalization of adult voluntary sex work, as well as the advocacy of sex workers’ rights movements for such an approach. While not finding it necessary to define sex work and noting the different experiences of diverse women and persons, the Working Group proposes the full decriminalization of adult voluntary sex work from a human rights perspective, as it holds the greatest promise to address systemic discrimination and violence and impunity for violations of sex workers’ rights. It also constitutes the approach best suited to enhancing sex workers’ rights to health and other socioeconomic rights, freedom from torture, inhuman or degrading treatment, right to private life and freedom from discrimination. Further, a decriminalized framework is the most conducive to the protection of the right of sex workers to participate in public and political life.”

²⁴ Penal Code Act No. 6 of 2012, available at: <https://media.lesotholii.org/files/legislation/akn-ls-act-2012-6-eng-2012-03-09.pdf>; Ministry of Law and Justice with support from UNDP Lesotho, report compiled by Libakiso Matlho, *REPORT ON ASSESSMENT OF THE LEGAL ENVIRONMENT FOR HIV AND AIDS IN LESOTHO* (2016), <https://hivlawcommission.org/wp-content/uploads/2017/06/report-on-lea-for-hiv-aids-lesotho.pdf> 64.

²⁵ Penal Code Act, sec 55(2): A person who incites, instigates or engages or procures another to engage, either in Lesotho or elsewhere, in prostitution, commits an offence. (3) A person who persistently importunes others in a public place with the intention of engaging in sexual intercourse or with the intention of facilitating their sexual intercourse with another person commits an offence. (4) A person who lives or habitually associates with a prostitute or is proved to have exercised control, direction or

activity for payment” but being a “prostitute”, in and of itself, does not appear to be an offence under the Penal Code.²⁶ The Anti-Trafficking in Persons (Amendment) Act of 2021 criminalizes “labour trafficking” and “sex trafficking” and includes “exploitation of prostitution” in its definition of “exploitation”.²⁷

Lesotho's legal framework has many gaps that create confusion on protections from violence against persons, including women consensually engaged in sex work, hindering, in turn, effective responses to violence against women sex workers.

The failure to fully decriminalize sex work, the lack of legal recognition of sex work as work, the criminalization of certain aspects of “prostitution” and non-existent regulation of consensual adult sex work, put the safety of any person, including women engaged in this work at risk. Such women cannot benefit from labour protections and are often deterred from seeking redress for acts of violence committed against them due to fears of secondary victimization.²⁸ Clients, “pimps” and law enforcement officers blackmail and perpetrate acts of violence against sex workers, including rape and other forms of sexual assaults, often with impunity, amplifying, in turn, the risks of sexual and other forms of violence.²⁹

South Africa

The ICJ welcomed South Africa’s introduction of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill in 2022, which marks a significant departure from historical legislation that criminalized sex work.³⁰

The bill adopts a two-step approach starting with the decriminalization of the sale and purchase of adult sexual services, with appropriate regulation to follow at a later stage,

influence over the movement of the prostitute, in such a manner as to show aiding or compelling prostitution for commercial gain, commits an offence. (5) A person who detains another person against his or her will in premises which are used for prostitution or in any other place with the intent that such person should engage in sexual intercourse with another person, commits an offence.

²⁶ Being a “prostitute” is not explicitly referred to as an offence unlike the other related activities, such as public solicitation, outlined under sub-sections 55(2),(3),(4) and (5) which are explicitly mentioned to be offences. In an October 2023 workshop organized by the International Commission of Jurists on the impact of unjustified over-criminalization on the human rights of marginalized groups, sex worker-led organization KAPAL noted that there have been numerous instances of arbitrary arrests and detentions of sex workers that have been carried out by law enforcement officials. The organization’s representative further noted in their presentation that sex workers have not been prosecuted under these provisions. Find the presentation here: <https://docs.google.com/presentation/d/1PyD7lciLV51nAqAyeK47P8r4pILjzf7n/edit?usp=sharing&oid=104250746130351246691&rtpof=true&sd=true>. See also International Commission of Jurists, “Lesotho: Magistrates and judges unpack their role in protecting and promoting the human rights of marginalized individuals and groups” 23 October 2023, available at: <https://www.icj.org/lesotho-magistrates-and-judges-unpack-their-role-in-protecting-and-promoting-the-human-rights-of-marginalized-individuals-and-groups/>.

²⁷ Under section 2, “exploitation” is defined to include “exploitation of prostitution or other forms of sexual exploitation, forced labour or service, slavery or practices similar to slavery, servitude or the removal of organs.”

²⁸ Ministry of Law and Justice with support from UNDP Lesotho, report compiled by Libakiso Matlho, *REPORT ON ASSESSMENT OF THE LEGAL ENVIRONMENT FOR HIV AND AIDS IN LESOTHO* (2016) 63 and 66; Global Network of Sex Work Projects, “Key Affected Populations Alliance of Lesotho (KAPAL)” (2020), available at: <https://www.nswp.org/featured/key-affected-populations-alliance-lesotho-kapal/>; African Sex Worker Alliance *Violence against sex workers in Africa* (2019) available at: https://www.nswp.org/sites/default/files/aswa_report_final_low_res-2.pdf.

²⁹ As above; UN Human Rights Committee, Concluding observations on the second periodic report of Lesotho, 26 July 2023, CCPR/C/LSO/CO/2; see also Lesotho Times, Sex work is “work like any other”, 21 December 2023 <https://lestimes.com/sex-work-is-work-like-any-other/>.

³⁰ Find the draft bill here: <https://static.pmg.org.za/20221208-CriminalLawSexualOffences-AmendmentBill.pdf>; International Commission of Jurists, “ICJ supports the Bill decriminalizing adult sex work in South Africa”, 31 January 2023, available at: <https://www.icj.org/icj-supports-the-bill-decriminalizing-adult-sex-work-in-south-africa/>; The Bill seeks to repeal the Sexual Offences Act No. 23 of 1957, which declared sex work, as well as the construction and operation of brothels as unlawful. The Sexual Offences Act of 1957 had originally replaced the Immorality Act No. 5 of 1927 which prohibited “illicit carnal intercourse” between different races.

recognizing the human rights of sex workers by removing the criminal sanctions that have left them unprotected and exposed them to a risk of abuse.³¹

National NGO Sonke Gender Justice highlights that decriminalizing sex work would create a path for effective application of labour laws and appropriate rights protections, including to street-based sex work, which is currently subject to municipal by-laws that are often used by law enforcement officials to harass sex workers and carry out arbitrary arrests and detentions.³²

Sisonke, a South African sex workers' organization, also warns that the confusion created by conflating consensual adult sex work with human trafficking can perpetuate further stigmatization and violence against sex workers.³³ There is legislation that directly addresses human trafficking in South Africa but in the absence of a regulatory framework for sex work, and the absence of decriminalization, it becomes difficult to identify and address suspected cases of human trafficking in sex work.³⁴

The most recent recommendations of the CEDAW Committee to South Africa further underscore the importance of establishing a legal and policy framework that can eliminate gender-based violence and support those wishing to exit sex work.³⁵ This legal framework must also be conducive to adult persons – in the absence of force, abuse of authority or fraud – engaging in this work freely and safely if they so choose; must explicitly recognize the human rights of sex workers; must reduce harm stemming from criminalizing sex workers; and must address exploitation in the industry.³⁶

Conclusion

The ICJ thanks the Special Rapporteur on violence against women and girls, its causes and consequences for the opportunity to provide input for her upcoming report. The ICJ remains available for further engagement in relation to this submission.

³¹ See GroundUp "Tough blow" for sex workers as decrim bill delayed" 7 June 2023 <https://www.groundup.org.za/article/sex-work-decriminalisation-bill-heads-back-to-the-drawing-board/>; Business Tech "New laws to decriminalise sex work in South Africa" 9 December 2022 <https://businesstech.co.za/news/government/650537/new-laws-to-decriminalise-sex-work-in-south-africa/>.

³² Mail & Guardian "Sex work decriminalisation postponed" 17 July 2023, available at: <https://mg.co.za/news/2023-07-17-sex-work-decriminalisation-postponed>; see also IOL "Protest after arrest of 57 sex workers" 10 December 2020, available at: <https://www.iol.co.za/capetimes/news/protest-after-arrest-of-57-sex-workers-df343ed2-c1e8-4241-b5bd-7aa2163d3956>.

³³ Sisonke South Africa, CEDAW Shadow Report, (20 September 2021) 7-8, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCEDAW%2FNGO%2FZAF%2F46662&Lang=en.

³⁴ As above.

³⁵ Committee on the Elimination of Discrimination against Women, Concluding observations on the fifth periodic report of South Africa, CEDAW/C/ZAF/CO/5 para. 38: "The Committee recommends that the State party: (a) Address the root causes of prostitution and adopt economic and public policies that support sustainable livelihood options and basic living standards for women and girls in poverty; (b) Eliminate gender-based violence and discrimination against and the sexual exploitation of victims of trafficking and ensure that they have access to justice, including legal aid and adequate reparations; protection, including shelters; and health care; (c) Provide exit programmes and alternative income-generating opportunities to women who wish to leave prostitution, as well as rehabilitation and reintegration programmes."

³⁶ See Wezi Masuku & Seraphine Kwanje "The decriminalising of sex work in South Africa: A brief trajectory overview of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022" *De Rebus* 1 June 2023, available at: <https://www.derebus.org.za/the-decriminalising-of-sex-work-in-south-africa-a-brief-trajectory-overview-of-the-criminal-law-sexual-offences-and-related-matters-amendment-bill-of-2022/>.