

FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW



I RAW
ASIA PACIFIC

 **nswp**
Global Network of Sex Work Projects
Promoting Health and Human Rights



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GLOSSARY & ACRONYMS

AAAQ	Acceptability, Availability, Accessibility and Quality (standards in healthcare established by the World Health Organisation)
CAT	Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities
DAW	Division for the Advancement of Women
ECOSOC	United Nations Economic and Social Council
GAATW	Global Alliance Against the Traffic in Women
GBV	Gender-based violence
GC	General Comment
GR	General Recommendation
ICCPR	International Covenant on Civil and Political Rights
ICCPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IHRL	International Human Rights Law
UNODC	United Nations Office of Drugs and Crime
VAW	Violence Against Women

SECTION I:
INTRODUCTION

Sex workers across the world face acute human rights violations that occur in a variety of social, economic, political and legal contexts. Discriminated against by law and often socially stigmatized and marginalized, sex workers confront abuse in the context of health and social care, housing, employment, and education, often perpetrated by police and other state actors.¹ A comprehensive, human rights-based response to these multiple levels of discrimination and violations requires a nuanced approach to protecting sex workers—one that not only recognises the contexts within which such violations occur, but also addresses diversity among people in sex work, as well as the structural inequality and systematic exclusion that produces these cycles of victimization and violence.

Radically different viewpoints and tough debates—discussed more fully in this Introduction—have characterized efforts to develop coherent responses. The debate is often fierce, in part because some participants think there are essential truths at stake about ‘women’, sex, and the exchange of sex for money. Here, gendered (and often racialized) dichotomies have dominated the human rights debates around sex work, so that any word must be understood as making a choice: distinctions between “sex work” and “prostitution”; “agency and “victimhood”; and “consent” and “coercion” have proven to be pivotal in legal and policy responses to sex work.

Human rights embrace both formal and informal discourses and systems which value and respond to variety in humanity, while also promoting the conditions for equality and freedom of self-determination for all. Within the formal architecture of human rights, international human rights treaties and treaty bodies address the rights accorded to or withheld from people as they act on or carry out different sexual practices. As such, treaty bodies can bring special weight to these discussions; moreover, treaties set the standards, norms, and values by which national policies and laws are both formulated and critiqued.

This Framework seeks to connect human rights principles to the debates around prostitution laws and sex work. It is intended to be a tool to inform the rights discourse on sex work in the context of one such international human rights treaty—the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, hereinafter the Convention). As such, this Framework reflects on the dichotomies mentioned above, particularly

the ways in which they have been treated within the feminist and women’s movements over the last few decades.¹

Although feminist debates provide an important backdrop for the discussion over and development of current laws and policies that impact sex workers, these legal frames have also been influenced by long histories of patriarchal, age, and race-based ideologies. All these ideologies are embedded in human rights treaties as well. IRAW Asia Pacific is committed to engaging with feminists to understand their concerns, but in drafting this Framework, the project began from a practical and conceptual agreement that International Human Rights Law (IHRL) can be applied to sex worker lives as defined by the needs of diverse sex workers and as relevant to the ongoing evolution of IHRL.

Thus, the framework aims to provide historical, theoretical, and practical perspectives on the relationship between sex work, international human rights law, and various feminisms. To do this, the Framework proceeds from a specific perspective: it catalogues the kinds of rights violations from which sex workers suffer from, as defined by sex workers; and ultimately suggest opportunities for rights-claiming by sex worker networks and NGOs using specific articles contained within the Convention and referenced by other international treaties.

1. Global Network of Sex Work Projects, Consensus Statement on Sex Work, Human Rights and the Law, 2013. Available at: <http://www.nswp.org/sites/nswp.org/files/ConStat%20PDF%20EngFull.pdf>
1 While there are clear intersections between the feminist/women’s movement and the sex workers’ movement, it should also be noted that the evolution of sex workers movements is distinct and, at the onset, important to consider some of the theoretical and strategic tensions between the movements. Similarly, connections between LGBTI, feminist and sex worker movements are evolving and often contested.

This framework works from the premise that using a rights-based legal discourse will be helpful for sex worker rights advocacy groups to redirect attention from the “abolitionist” narrative espoused by some feminists towards the voices and experiences of sex workers themselves, taking into account their diverse historical, political and cultural contexts.

1.1 DEVELOPMENT OF THE FRAMEWORK ON RIGHTS OF SEX WORKERS UNDER CEDAW

IRAW Asia Pacific is an international women’s rights organization that envisions a world in which everyone enjoys human rights and fundamental freedoms on the basis of equality, without discrimination on the grounds of sex or gender, and free of oppressive power relationships, with individuals and societies benefiting from sustainable and inclusive development. In the 23 years since its establishment, IRAW Asia Pacific has focused on the realisation of women’s human rights, by filling gaps between the promise of women’s human rights as embodied in international human rights treaties, and their actual realisation at the national level. Its organizational values embrace equality and non-discrimination; diversity and inclusion and feminism as foundational to all its work. In line with these values and working towards its mission that *“adopt[s] an approach based on the universal nature of human rights, focusing particularly on the experience of women and girls from the Global South and recognizing the need to eliminate multiple and intersecting forms of discrimination at all levels...”* it adopts a broad understanding of women and works to strengthen rights claims for all women.

The **Global Network of Sex Work Projects (NSWP)** exists to uphold the voice of sex workers globally and connect regional networks advocating for the rights of female, male, and transgender sex workers. NSWP is a membership organisation. Their members are local, national or regional sex worker-led organisations and networks across five regions: Africa, Asia and the Pacific, Europe, Latin America and North America and the Caribbean. NSWP’s work is based on three core values:

- Acceptance of sex work as work.
- Opposition to all forms of criminalisation and other legal oppression of sex work (including sex workers, clients, third parties*, families, partners and friends).²
- Supporting self-organisation and self-determination of sex workers.

The Framework presented here is the outcome of sustained engagement of IRAW Asia Pacific with groups of sex workers advocating for their equal rights and seeking to engage with the CEDAW framework in their advocacy. In 2013, the **Sex Workers Rights Advocacy Network (SWAN)** first sought IRAW Asia Pacific’s technical support to develop a regional strategy on use of CEDAW to seek protections for rights of women in sex work in the Central and Eastern Europe and Commonwealth of Independent States (CEE/CIS) region. One part of this strategy aimed at facilitating the increased participation of sex workers’ rights groups at the CEDAW review sessions in recognition of their continued exclusion and marginalisation from women’s rights advocacy, including the CEDAW Committee itself. The other part of the strategy worked toward an express articulation of CEDAW’s application to protect the rights of women in sex work. This Framework is a result of the second strategy.

As part of this process, a **CEE/CIS Regional Consultation on Use of CEDAW in Advancing Rights of Women in Sex Work and Women Who Use Drugs**, was organized in November 2014 by IRAW Asia Pacific in partnership with SWAN. This discussion explored how sex workers’ rights advocacy groups aiming to use CEDAW in their work could expand and bolster their networks within the region. It also enabled the development of plans for integrating CEDAW advocacy strategies within organizational working plans of sex workers rights advocact groups. It also resulted in the initiation of this Framework.

2 The term ‘third parties’ includes managers, brothel keepers, receptionists, maids, drivers, landlords, hotels who rent rooms to sex workers and anyone else who is seen as facilitating sex work.

Subsequently, an **Expert Group Meeting on Rights of Sex Workers under CEDAW** was organized in July 2016. The meeting was organized as a cross-movement consensus-building initiative, focused on gathering expert insight from sex workers’ rights groups and women’s rights groups to identify common ground and consolidate the foundation for advocacy under the CEDAW framework. It included members of sex worker-led organisations from global, regional and national networks; members of women’s rights and/or human rights organizations; and individual experts from Asia, Africa, Eastern Europe and Central Asia (EECA), Western Europe, Latin America and North America. The meeting resulted in extensive revisions to the draft framework to better reflect the contextual realities of sex workers as well as the advocacy opportunities and challenges they envision in advocating for their rights under CEDAW. These revisions are reflected in this document.

Among the groups that IRAW Asia Pacific has worked with so far on this issue, there is consensus that decriminalisation is the appropriate measure through which to ensure the protection and fulfillment of women’s human rights amongst sex workers. There is also consensus on the need to address the lack of balanced information on the advocacy around the reform of sex work laws and on the lack of a framework to address exploitation in labour and other analogous rights contexts in relation to sexuality rights, bodily integrity, agency, etc. This forms the current basis of IRAW Asia Pacific’s approach to the rights of sex workers whose rights are protected under the CEDAW framework.

The Framework as it stands now has been jointly developed by IRAW Asia Pacific and NSWP with expert input from Professor Alice M. Miller, Associate Professor (Adjunct) of Law at Yale Law School, Assistant Clinical Professor of Public Health and the Co-Director of the Global Health Justice Partnership, along with assistance of research assistants Sanya Kumar, L.L.M. and Ann Sarnak, B.A., recent graduates of Yale Law and Yale College respectively.

1.2 BACKGROUND: FEMINIST POLITICAL HISTORIES AND THE EMERGENCE OF A GLOBAL SEX WORKER RIGHTS MOVEMENT

1.2.1 Historical legal frames, early feminisms, and patriarchy engage with prostitution law and sex work

Many different historical and ideological trajectories have affected the creation and implementation of state policies around sex work. These trajectories have country- and region-specific origins, but there are some common circumstances that have affected the range of national approaches to sex work that we see today. Under British, French, and Spanish colonial rule, for example, prostitution law was developed around the assumption that sex workers were ‘women,’ and that women sex workers were by definition the guilty party in expressions of sexuality deemed “transgressive” or “deviant.”³ Early transnational conversations about prostitution, embedded it in the language of ‘exploitation’. In the late 19th and early 20th century, notions of ‘trafficking’ developed around patriarchal understandings of prostitution as harmful to chastity—and a woman’s chastity in this system was not just her honor but her personhood. Sexually active women were tainted women. The early definition of ‘trafficking’ was movement to “gratify the passions of another,” but the underlying logic was that the sexual engagement of a women was, by definition, using or exploiting her.

By the early and through the mid-20th century, as scholar Prabha Kotiswaran argues, some feminist movements began advocating for an ‘abolitionist’ approach to sex work, claiming “*that all forms of prostitution are inherently exploitative and degrading to women*”⁴ and viewed “*prostitution as an institution of coercion and discrimination and understands women selling sex as victims and ‘sex slaves.’*”⁵ In this way, one frame of feminist concern used exploitation as a short-hand to capture the

³ Many historical and legal scholars have written about the colonial-era influences on sex work policy and prostitution law. See, for instance, Luise White’s *The Comforts of Home: Prostitution in Colonial Nairobi* or Anne McClintock’s *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest*.

⁴ This Framework refers to the terms ‘prostitution’ and ‘prostitute’ only where it is used as such in international/ national legal texts, policy documents and academic writings. The Framework purposively uses the terms ‘sex work’ and ‘sex worker’ in all other instances based on the recognition that the sex workers rights movement rejects the terms ‘prostitution’ and ‘prostitute’.

⁵ International Committee on the Rights of Sex Workers in Europe, *Feminism needs Sex Workers, Sex Workers need Feminism: Towards a Sex Worker Inclusive Women’s Rights Movement*, Intersection briefing paper #2, March 2016

⁶ Prabha Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India*, Princeton: Princeton University Press, 2011

sense of dominant male access to female bodies and sexuality, and made explicit the link of slavery (labor exploitation through the treatment of people as chattel) to sexual exploitation. They harnessed this understanding of ‘exploitation’ to the 19th century patriarchal anti-prostitution language of ‘trafficking.’

As the women’s movement engaged with the human rights movement in the late 1990s, a new frame—*violence*—was added to ‘exploitation’ and ‘slavery’ as the harm, such that all activities around buying and selling sex were seen to “*constitute gender-based violence.*” Women in prostitution were, in this view, regarded as victims of male-generated violence (to body and soul through sexual control) as a form of systematic patriarchal oppression. In the view of current ‘abolitionist’ feminists, any form of sex work, even when functionally consensual and non-violent for the sex worker, is seen to involve harm to all women and perpetuate their inequality and oppression, and therefore becomes ‘violence.’

Since the late 1990s, and accelerating with the adoption of a new international law on trafficking in 2000 that extended into all sectors of labor including but not limited to the sex work sector (See § 2 below), some branches of feminism, most vocally the ‘abolitionist’ feminist movement, has reclaimed the 19th and early 20th century language of exploitation using the language of ‘sex trafficking’ (also sometimes referred to as ‘white slavery’) and commercial sexual exploitation when describing any movement into or practice of selling and buying sexual activity.⁶ The recent attention to the shifts and intensification in the trans-national movement of people across borders, including both cis- and trans-gendered persons, as migrants or refugees, means that debates over migration, smuggling and other modes of movements have been drawn into this discussion, as well.

Exerting significant influence in the larger discourse around ‘trafficking’ and sex work, the abolitionist feminist movement today has managed to “*significantly reconstruct the understanding of trafficking in the popular imagination to trafficking specifically for the purpose of sexual exploitation.*”⁷

⁷ Ibid. See also: Sanghera, Jyoti. “Unpacking the trafficking discourse.” *Trafficking and prostitution reconsidered: New perspectives on migration, sex work, and human rights* 3 (2005): 14.

⁸ International Committee on the Rights of Sex Workers in Europe, *Feminism needs Sex Workers, Sex Workers need Feminism: Towards a Sex Worker Inclusive Women’s Rights Movement*, Intersection briefing paper #2, March 2016.

This in turn has resulted in further confusion around the meanings of the terms violence, gender-based violence, migration, sex work, exploitation, and trafficking within public discourse, policy formulation and policy practice.⁸

1.2.2 Counter-narratives and sex worker rights movements

Throughout the 20th and 21st centuries, this approach has been critiqued on several grounds by some feminists and sex worker rights advocates.

Critiquing the victim narrative. First, critics of the narratives of ‘sex work abolitionism’ point out that this approach adopts, by ideological preference, a ‘victim narrative’ in which a woman is forced into prostitution, either having been abducted and sold into the sex industry, or having “no choice” but to enter sex work due to poverty. Women in the sex sector are portrayed as helpless and unwitting, with little or no real agency in selling sex for monetary or other material advantages, thus requiring rescue and rehabilitation. Although evidence demonstrates that the characterization of ‘victim’ does not match the lived experiences of many sex workers, (i.e. those who have entered the sex industry as a strategic decision based on the options available to them, keep their earnings, have decision-making power over clients and work life), it is still argued that sex work is always inherently abusive and harmful—and can never be “*a legitimate enactment of agency and choice.*”⁹ Through an abolitionist-feminist lens, the apparently empowered sex worker must be either a temporary historical aberration (through race or class privilege) and/or a victim of false consciousness.

Sex worker advocates have argued that this assumption of innocent victimhood leads in practice to a strange presentation. In the ‘ideal’ abolitionist world, all persons in sex work would be worthy of attention, but in reality, the persistent notion that willing sex makes one guilty means that in most campaigns against sex work, two ‘classes’ of sex workers are effectively created: one that ‘deserves’ legal protection because they were duped, tricked or forced into sex work, and another that does

⁹ Kotiswaran, Sanghera supra.

¹⁰ Supra at 3

not, because they are sexually fallen and have chosen this work. The notion of these two ‘classes,’ perpetuated by a distinction between those who have been forced into sex work and those who have voluntarily engaged in sex work, continues to justify the many ways in which sex workers are further categorized as deserving/undeserving, moral/immoral, and empowered/disempowered. National laws are made and applied in confusing and often incoherent ways around these rhetorical distinctions. Importantly as we discuss more in §2, the legal and policy response sometimes uses the language of ‘exploitation,’ sometimes ‘sexual slavery,’ and in actual practice much more rarely, violence.

This confusion between rhetorical use and legal use of these terms is more than just a puzzle: it renders invisible (i.e. often legally unrecognizable) the incidents of actual violence in the lives of sex workers – such as beatings or rape by police, or assaults and theft by clients or community members – while defining their lives as ‘victims of violence.’ And as we also discuss in §2, it makes exploitative working conditions – low wages, wage theft, unsafe working conditions and policies—invisible as well, since the persons in sex work are imagined as ‘exploited’ merely by virtue of selling sex.

Finally, the focus on the victim narrative also completely disregards the principles of all persons’ rights to self-determination, regardless of gender, and discredits the role of sex workers themselves as potential partners with a key stake in discussions about their experiences and policy decisions that might affect them.

Engaging with reality: sex workers as many-gendered. A second critique of the abolitionist framework is that it fails to recognize that “*sex work is a multi-gendered phenomenon, and sex workers of all genders and sexual orientations offer sexual services and are actively involved in the sex workers’ rights movement,*” according to the International Committee on the Rights of Sex Workers in Europe.¹¹ In denying the diverse gender and identities of sex workers, and acting as if non-cis-gender sex workers can be addressed only in so far as they resemble the innocent girls

and ‘women’ of the abolitionist imagination, sex work abolitionism reinforces the patriarchal and misogynistic representation of all sex workers as cis-gender, heterosexual women who are devoid of agency and require ‘rescuing’ from cis-gendered heterosexual men. As Halley would describe it, all men are more powerful in this narrative than all women.¹² It also leads to the further marginalizing and invisibilizing of sex workers who are lesbian, gay, bisexual, transgender and/or intersex (LGBTI).¹³

Engaging with reality: sex work as one element of work in the global power structures. Other theoretical approaches to sex work have attempted to transform abolitionists’ narrow focus on victimhood, rescue, and rehabilitation of ‘powerless women.’ The postcolonial feminist lens, for instance, takes the discourse on sex work into a broader terrain.¹⁴ This approach addresses the impact of the broader economic and political subordination and expropriation of other nations’ labour, resources, land, raw materials and market, and the exclusion of the ‘native’ – both men and women – from sovereignty and legal entitlements.¹⁵ Issues related to movement, redistribution of economic and political powers and economic agencies of sex workers would thus have to be located within the projects and processes of imperialism, rather than solely interpreted through the lens of male domination or sexual violence by men against women.

1.2.3: Sex worker rights approaches take the center

Resisting forms of control through governance, power, and narrative, sex workers around the world have mobilized around the protection of their human rights and dignity. As a result, the past three decades or so have seen the emergence of a global sex worker-led rights movement, precipitated largely by an HIV/AIDS epidemic that has disproportionately affected sex workers, among other sexually and gender marginalized

populations.¹⁶

Through the lens of a human-rights based approach to health, sex workers have organized at the grassroots and created sex work projects that seek to promote health and human rights among sex workers’ communities, rather than insisting on abolition, “rescue,” and “rehabilitation” as primary objectives of sex work-related policy and law.

The global sex worker rights movement is led by sex workers, putting their voices at the centre of developing evidence and rights based approaches to sex work, as well as ensuring the involvement of sex workers in the development, implementation and evaluation of relevant policies and programmes. The sex worker rights movement has also advocated for the creation of legal frameworks that foster safe environments in which sex workers can live and work. This means opposing all forms of sex work criminalisation, and other forms of legal oppression as a prerequisite for protecting, respecting and fulfilling the human rights of sex workers.

Furthermore, the sex worker rights movement calls for the international recognition of sex work as a form of labour and advocates for the agency and self-determination of individuals in sex work. Rather than viewing “prostitution” as a structure that inherently degrades any ‘women’ who participate in it, a labour perspective views sex work as a livelihood or form of wage labour. A labour analysis emphasizes the agency of the individual sex worker who can choose to enter into this form of work and who can negotiate the terms of their labour within sex work. Sex workers have demanded greater recognition within labour movements, which would entail protections afforded by labour laws, the right to self-organise, unionise and claim all related employment rights. To some, this is also equated with seeing sex work as a potentially empowering and liberating act, one through which to assert bodily control and autonomy.¹⁷ This does not, however, negate the need to address the structures of power and oppression that continue to gender agency, autonomy, labour and sexuality, thereby disenfranchising some while empowering others.

This position reaffirms the status of sex workers as rights bearers and continues to challenge the institutions, structures and actors that may violate the human rights of sex workers.

¹⁶ Das, Pamela, and Richard Horton. “Bringing sex workers to the centre of the HIV response.” *The Lancet* 385 (9962): 3-4.

¹⁷ Prabha Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India*, Princeton: Princeton University Press, 2011

¹¹ International Committee on the Rights of Sex Workers in Europe, *Underserved. Overpoliced. Invisibilized. LGBT Sex Workers Do Matter*, Intersection briefing paper #1. October 2015

¹² Janet Halley, *Split Decisions: How and Why to Take a Break From Feminism*, (Princeton, NJ: Princeton University Press, 2008).

¹³ See also: Amnesty International, Policy on State Obligation to Respect, Protect and Fulfil the Human Rights of Sex Workers, POL 30/4062/2016, 26 May 2016, at p 5. “While the majority of the world’s sex workers are cisgender women, when examined on a per capita basis a larger proportion of the transgender community is involved in sex work compared to the proportion of the population of cisgender women who are sex workers.”

¹⁴ Post-colonial perspective locates and frames the issues around sexuality within the broader debates on tradition, nationalism, culture and the struggle for power.

¹⁵ Ratna Kapur, **Multi-tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law**, *Jindal Global Law Review* Volume 4, Issue 1, August 2012.

SECTION II:

TERMINOLOGY, KEY CONCEPTS, AND LEGAL FRAMEWORKS

This section defines the key terminology used to discuss sex work in this paper, as well as the key concepts and legal frameworks that help to structure advocacy, documentation, and analytical work done by sex worker projects and NGOs. These definitions are rooted not only in existing research, law and policy, but more importantly, in the lived realities of people who sell sex. The section concludes with a brief overview of other kinds of repressive laws and policies outside of criminal law that may target sex workers or affect their lives.

TERMINOLOGY

In any discussion about law and policy on sex work, the terminology used is important. This is because the words used to describe sex work are linked to particular political and ideological positions. The relationship between terminology and ideology translates into real world consequences for sex workers, which cannot be underestimated. Terminology is therefore closely related to understanding key concepts, and in turn to understanding the legal frameworks that flow from (or claim to flow from) these ideas.

For example, abolitionist feminism's favoured term 'prostituted women' constructs sex work as only and always a form of violence against women and paints all sex workers as passive victims. Clarity about terms is essential to resist the 'victim narrative' on the one hand, and make visible empowering and disempowering structures and practices in real life, on the other,

The terms sex worker and sex work have been embraced worldwide by people who sell sex because it recognises the labour involved in sex work rather than reinforcing stigmatised or victimised identities. The term sex work is preferred because it recognises that sex workers have agency and even in the most limited and difficult circumstances are still able to make decisions about their lives. They are not passive victims.

Not all people who sell sex actively identify with the label "sex worker."² For many, sex work is simply a job, a way to secure a livelihood to support themselves and their families or to meet occasional financial needs rather than an identity. When we use the term "sex worker," we use it simply as a description of behavior for those 18 and over who sell or trade sex; it is not determinative of each individual's use of that identity.

2.2 UNDER 18S

There is limited data available on the numbers of young people under the age of 18 who sell sex but research does show that these young people have a multitude of different experiences.³ Regardless of these different experiences, evidence shows that young people under 18 are at an increased risk of HIV through involvement in commercial sex compared to adult sex workers.⁴ According to the World Health Organisation this increased risk arises as a result of a range of "biological, behavioural and structural risk factors."⁵

2.1 SEX WORKER

UNAIDS and the World Health Organisation define sex workers as "female, male and transgender adults aged over 18 years who sell consensual sexual services in return for cash or payment in kind, and who may sell sex formally or informally, regularly or occasionally."¹ The term sex worker then, specifically refers to people of *all* genders who sell sexual services *consensually*. It is also important to note that the definition of sex work relates only to those who are over the age of 18 years. That is not to ignore the fact that sex is sold by people under the age of 18 all across the world (see section 2.2).

¹ World Health Organisation and UNAIDS, 2011, "Technical Guidance for Global Fund HIV Proposals Round 11 Key Populations: Sex workers", p.1, available at http://www.unaids.org/sites/default/files/sub_landing/files/20110909_Technical_Guidance_Sex_Workers_en.pdf (last accessed 31 January 2017)

² UNAIDS, 2012, "Guidance Note on HIV and Sex Work", p.4, available at http://www.unaids.org/en/resources/documents/2012/20120402_UNAIDS-guidance-note-HIV-sex-work (last accessed 31 January 2017)

³ NSWP, 2016, "Policy Brief: Young Sex Workers", p.4, available at <http://www.nswp.org/resource/young-sex-workers> (last accessed 31 January 2017)

⁴ World Health Organisation, 2014, "HIV and Young People Who Sell Sex: A Technical Brief", pp.9 – 14, available at http://www.who.int/hiv/pub/guidelines/briefs_sw_2014.pdf (last accessed 31 January 2017)

⁵ Ibid at p.9

Among these structural risk factors is the impact that laws and policies have on young people who sell sex. In many countries, young people under 18 who sell sex are criminalized under the same laws that apply to adult sex workers. Furthermore, laws and policies ostensibly designed to protect children from sexual exploitation⁶ often have the effect of excluding young people who sell sex from being able to access health and support services.⁷ For example, laws that require mandatory reporting to the authorities if someone under 18 is involved in selling or trading sex means that they will avoid health services for fear of being reported to the authorities.⁸ Raid and rescue operations targeted at young people under 18 involved in selling sex often result in lengthy stays in detention centres where abuse and violence is commonplace.⁹ It is absolutely essential, for the well-being of young people under 18 involved in sex work, that policy-makers support rights and evidence-based interventions that do no harm. Among these interventions “comprehensive, accessible, and affordable sexual and reproductive health services and information for young people under 18” are essential.¹⁰

2.3 EXPLOITATION

The term “exploitation” is widely invoked in debates about prostitution but frequently without any clear definition of what it means. The term “exploitation” has no agreed definition in international law, and the concept is often described as “ambiguous.”¹¹ There are specific references to exploitation in the context of prostitution both in the CEDAW Convention and in the United Nations Convention on Trafficking (Palermo Protocol). Article 6 of the CEDAW Convention proclaims that “States Parties shall take all appropriate measures... to suppress...exploitation of prostitution of women.”¹² The Palermo Protocol makes reference

PALERMO PROTOCOL

The Palermo Protocol was adopted by the UN General Assembly in November 2000. It serves as a supplement to the UN Convention against Transnational Organized Crime, and aims to “prevent, suppress, and punish trafficking in persons, especially women and children.” Other purposes of the protocol include the protection and assistance of victims of trafficking, “with full respect for their human rights,” and finally, the promotion of “cooperation among States Parties in order to meet those objectives.”

(Full text of Palermo Protocol available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>.)

“to the exploitation of the prostitution of others” as a specific form of “exploitation” that is to be combatted by the Protocol.

The term “exploitation of prostitution” was not specifically defined in either the CEDAW Convention or the Palermo Protocol. The *travaux préparatoires* suggest that the CEDAW Convention did not intend to suppress “prostitution” as such but rather the “exploitation of prostitution”. Whereas some delegations made proposals to broaden the purview of Article 6 to encompass prostitution generally, these proposals were ultimately dropped.¹³ In the discussions around the drafting of the Palermo Protocol, a variety of views on the term’s meaning were expressed: some States sought “to confirm international legal opposition to all prostitution” while others felt this to be over-broad.¹⁴ An Interpretive Note that accompanied the drafting of the Palermo Protocol explains that States intentionally chose not to set out a definition of the term “exploitation of prostitution” in recognition of the wide diversity of ways in which States address the issue of prostitution in law.¹⁵ Similarly, the CEDAW Committee has also refrained from establishing a definition of “exploitation

of prostitution” and “has considered human rights issues associated with prostitution from a range of different (and sometimes, inconsistent) perspectives.”¹⁶

The argument, therefore, that exchanging sex for money is always a form of exploitation is not at all reflected in international law. When abolitionist feminists make this argument, it is based on their particular ideological position, rather than on the logic of any international legal authority.

In a step which was meant perhaps to clarify, but which instead muddies the waters, the United Nations Office on Drugs and Crime (UNODC) has suggested that there is a general understanding that the term “exploitation of the prostitution of others” refers “to profiting from the prostitution of another person.”¹⁷ This is an odd reading, as it seems to go in two directions at once. First, it describes ‘exploitation’ in terms that are neutral—many forms of work have third parties ‘profiting’ from the labor of another: football team owners profit from the labor of athletes, and factory and business owners profit from the labor of others. Second, as the UNODC is defining a term in a criminal statute, it seems to be suggesting that such profiting from labor would always be a crime. Moreover, if exploitation is deemed ‘always’ a crime, such a usage implies that sex workers can never enter into a working relationship with another—such as an employer or manager without it automatically being considered exploitation. This position is deeply unsatisfactory and in its apparent blanket condemnation of all profitable relationships between workers in the sex sector and managers, it fails to take account of the diversity of relationships between sex workers and third parties who may make their own ‘profits’ from their labor, as most managers do.¹⁸

For example, in research about management in the Canadian sex industry the sex workers interviewed gave a range of reasons why they, in some cases, preferred to work for a third party, including that it provided increased safety and security, reduced the risk of personal prosecution under sex work laws, represented a better alternative to working outdoors and helped them avoid the challenges of

advertising and working independently.¹⁹

The researchers in this study note that “sex workers mirror workers in the mainstream labour market in their desire (or lack thereof) to be independent and run their own business.”²⁰ Rather than a blanket assertion that any prostitution involving third parties as managers is exploitative, it is important to examine these relationships through a labour rights framework to identify specific forms and practices of exploitation.

KEY CONCEPTS

This section discusses some key concepts and analytic frameworks that advocates should be aware of as they begin to research and document claims under the CEDAW Convention. It raises some new core concepts (such as ‘consent’) and returns to others (such as ‘exploitation’) that come up in almost all discussions about the rights of sex workers. This section situates these concepts in historical and political context, as well as highlights key aspects of each issue that advocacy around sex worker rights needs to pay attention to. s. Here, we note the differences between ideological claims of violence, exploitation and ‘trafficking,’ and real-world assessments of what kind of conditions are exploitative for sex work (i.e., give rise to real risk of violence, coerced labor, and trafficking in persons). These arguments will be key in the last two sections of the Framework, §3 and §4, in which we seek to address application of the CEDAW Convention to these concepts.

2.4 DECENT WORK AND LABOUR EXPLOITATION IN SEX WORK

For the sex workers rights movement, acceptance of sex work as work is key to advancing the human rights of sex workers. Analyzing sex work through a labour framework means that discussions are focused on improving the working conditions within the sex work industry rather than continuing protracted moral debates about the acceptability and legitimacy of selling sex. It recognises that there is nothing inherently violent or exploitative about sex work but that violence and exploitation are a

6 In the context of uner 18’s, the Convention on the Rights of the Child does use the term ‘sexual exploitation’ in its article 34, where in it notes that “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.

7 World Health Organisation, 2014, “HIV and Young People Who Sell Sex: A Technical Brief” and NSWP, 2016, “Policy Brief: Young Sex Workers”

8 World Health Organisation, 2014, “HIV and Young People Who Sell Sex: A Technical Brief”, pp.15-16

9 Ibid.

10 NSWP, 2016, “Policy Brief: Young Sex Workers”, p13

11 UNODC (2015), “Issue Paper: the concept of exploitation in the trafficking in persons protocol”, available at https://www.unodc.org/documents/congress/background-information/HumanTrafficking/UNODC_2015_Issue_Paper_Exploitation.pdf (last accessed 20 March 2017)

12 Article 6, *Convention on the Elimination of All Forms of Discrimination Against Women*, 30 June 1979, UN Women, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

13 Janie Chunag, Article 6, p. 176, in Freeman, Chinkin, Rudolf (eds.) CEDAW Commentary (Oxford: OUP 2011)

14 Ibid. at p27

15 Travaux Préparatoires for the Organized Crime Convention and Protocols, p. 347 (or Interpretative Notes A/55/383/Add.1, para. 64).

16 Kotiswaran, supra at p.28

17 Ibid.

18 NSWP, 2017, “Policy Brief: The Decriminalisation of Third Parties”, available at <http://www.nswp.org/resource/policy-brief-the-decriminalisation-third-parties> (last accessed 23 March 2017)

19 Chris Bruckert and Tuulia Law, 2013, “Beyond Pimps, Procurers and Parasites: Mapping Third Parties in the Incall/Outcall Sex Industry”, available at <http://www.powerottawa.ca/ManagementResearch.pdf>, p26-28.

20 Ibid. at p28

result of bad laws, policies and labour practices. The International Labour Organisation (ILO) recognised that sex workers are workers within the informal economy in its discussions related to Recommendation 200, which concerns HIV/AIDS and the world of work.²¹ Paragraph 2(a) sets out the scope of the Recommendation and it is explicitly noted in the official record that “sex workers were included ...[as] all workers working under all forms or arrangements at all workplaces.”²²

The ILO’s policy on Decent Work is a key labour rights framework that can be applied to sex work to better identify examples of labour exploitation.²³ The definition of decent work that was created by the ILO and endorsed by the international community is “productive work in conditions of freedom, equity, security and human dignity.”²⁴ There are certain key indicators for what constitutes decent work and these include that the work is productive and secure; that it provides an adequate income; that it offers social and legal rights protection; and that opportunities are given for collective action, including union activity.²⁵ The importance of the global commitment to the attainment of decent work is reflected in its inclusion in the United Nations Sustainable Development Goals.²⁶

Empower, a sex worker group from Thailand, has applied the ILO’s Decent Work criteria to sex work and found that there are no sex workers in Thailand whose working conditions comply with the ILO’s definition of decent work.^{27 28} They describe 87.2% of sex workers as working in substandard conditions, “left unprotected by labour frameworks including Occupational Health & Safety Codes and Social Security.”²⁹ Examples of bad labour practices identified in Empower’s research that impact on

21 International Labour Organisation (ILO), 2010, “Recommendation 200: Recommendation concerning HIV and AIDS and the world of work”, available at http://www.ilo.org/ilc/ILCSessions/99thSession/texts/WCMS_142613/lang-en/index.htm (last accessed 31 January 2017)

22 This was noted after an amendment had been proposed by the Netherlands to explicitly mention sex workers in the recommendation. See International Labour Organisation, 2010, “International Labour Conference Provision Record 13 (Rev.) 99th Session, Geneva, Fifth item on the agenda: HIV/ AIDS and the World of Work - Report of the Committee on HIV/AIDS, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_141773.pdf (last accessed 31 January 2017)

23 “Decent Work”, International Labour Organisation, last accessed 31 January 2017 at <http://www.ilo.org/global/topics/decent-work/lang-en/index.htm>

24 International Labour Organisation (ILO), 2008, “Toolkit for Mainstreaming Employment and Decent Work: Country Level Application”, p.vi, available at http://ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_172612.pdf (last accessed 31 January 2017)

25 Empower, 2016, “Moving Toward Decent Sex Work: Sex Worker Community Research, Decent Work and Exploitation in Thailand”, p17

26 Sustainable Development Goal No.8 – “Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”

27 Empower, 2016, “Moving Toward Decent Sex Work: Sex Worker Community Research, Decent Work and Exploitation in Thailand”, available at <http://www.nswp.org/sites/nswp.org/files/Moving%20Toward%20Decent%20Work%20EMPPOWER%20-%20April%202016.pdf> (last accessed 31 January 2017)

28 Ibid. at p.87

29 Ibid. at p.88. The remaining 12.8% of workers are working in unacceptable forms of form including 7% identified as being subjected to forced labour.

sex workers include things like compulsory and unpaid overtime, no rest periods, pregnancy-related dismissals, illegal deductions from wages, and no paid sick leave.³⁰

Based on their research and years of experience of the sex industry in Thailand, Empower concludes that the criminalisation of prostitution is the major barrier to the achievement of decent work standards for sex workers.³¹ They argue that “replacing criminal law with labour law has the potential to move over 260,000 sex workers out of substandard working conditions and toward decent work.”³² The shift to decent work standards in sex work will take time but experience from other industries demonstrates that with the right level of determination and commitment from all parties (government, business and sex worker organisations), it is possible.³³ When we look to countries that have already replaced criminal laws against sex work with labour laws, we see significant improvements in sex workers’ working conditions.

New Zealand is one of the few countries in the world that has removed criminal laws against sex work and replaced them with labour and human rights protections. Sex workers now have recourse to the same rights as all other workers, including occupational health and safety protection at work.³⁴ They are able to take their managers to court if they withhold wages or financially exploit them and sex workers have wider protections from workplace discrimination and harassment. In a famous case from 2014 a sex worker was awarded NZ\$25,000 by the New Zealand Human Rights Review Tribunal after she complained of sexual harassment from her manager in a brothel. The Human Rights Tribunal noted that:

“Sex workers are as much entitled to protection from sexual harassment as those working in other occupations. The fact that a person is a sex worker is not a licence for sexual harassment, especially by the manager or employer at the brothel. Sex workers have

30 Ibid. at pp71 – 76

31 Ibid. at p.87

32 Ibid. at p.91

33 Ibid. at p.94. Empower describe in detail the work done to improve working conditions in the fishing industry in Thailand. They note that “in the fishing industry, rather than respond by imposing criminal law or attempting to eliminate fishing altogether there has been a united response to solve the problems of exploitation and correct existing decent work deficits.”

34 New Zealand Occupational Safety and Health Service, 2004, “A Guide to Occupational Health and Safety in the New Zealand Sex Industry”, available at <http://www.worksafe.govt.nz/worksafe/information-guidance/all-guidance-items/sex-industry-a-guide-to-occupational-health-and-safety-in-the-new-zealand> (last accessed 31 January 2017)

*the same human rights as other workers. The special vulnerability of sex workers to exploitation and abuse was specifically recognised by the Prostitution Reform Act 2003 which not only decriminalised prostitution but also had the purpose of creating a framework to safeguard the human rights of sex workers and to promote their welfare and occupational health and safety.”*³⁵

The demand to recognize sex work as work and the striving for decent work standards does not in any way attempt to imply that all sex workers have positive experiences in sex work. Sex workers, like all workers in all industries, have diverse attitudes to their work. Empower uses the term “pragmatic work” to describe the situation where workers continue with work “they do not enjoy because it satisfies other pragmatic conditions such as amount of income needed.”³⁶ Labour rights are essential for all workers, including sex workers, regardless of their individual attitudes to their work. The importance of addressing labour exploitation in all sectors, including sex work, is crucial to advancing human rights globally and represents an area that, thus far, has received relatively little attention from states and the CEDAW committee.

In advancing the rights of sex workers, it is, therefore, important not to assume that all sex work is inherently exploitative. This assumption distracts from an examination of the actual conditions within which people sell sex and how these conditions impact on their health, human rights and wellbeing. Governments and the CEDAW Committee need to view “exploitation of prostitution” within a labour rights framework. The CEDAW Committee and other human rights treaty bodies should examine the ILO indicators for decent work and examine whether laws and policies facilitate decent work for sex workers or prevent it. For example, they should focus on examining whether the legal framework of a particular country offers sex workers health and safety protection at work, recourse against exploitative managers/working conditions and opportunities for collective action. This is especially important given that sex work is often part of the informal economy making sex workers, especially

35 DML v Montgomery and M&T Enterprises Ltd 2014 NZHRRRT 6, available at <https://www.justice.govt.nz/assets/Documents/Decisions/2014-NZHRRRT-6-DML-v-Montgomery-and-MT-Enterprises-Ltd.pdf> (last accessed 31 January 2017)

36 Empower, 2016, “Moving Toward Decent Sex Work: Sex Worker Community Research, Decent Work and Exploitation in Thailand”, p.28.

migrant workers, particularly vulnerable to labour exploitation. The CEDAW Committee has already shown a willingness to engage with issues of sex work through a labour rights framework and in its concluding observations for Hungary from 2013 recommended that the government “ensure that legislation on their [sex workers] right to safe working conditions is guaranteed at national and local levels.”³⁷

2.5 EXPLOITATION, TRAFFICKING AND MIGRATION

The relationship between exploitation, trafficking, migration, and the law is complicated and highly contingent on both national policy and international guidelines. These complexities are addressed in three parts below. In many situations, migration and ‘trafficking,’ (i.e. coercive movement into an exploitative work situation) are linked. Migration across borders or from rural to urban for example often means relying on networks of different actors for movement: these actors may play a role in enabling rights, or contribute to vulnerability to abuse, especially if they are key to enabling cross border or resettlement work which is outside of the law. A great deal of trafficking arises because of the lack of safe and legal means to cross borders in search of work. However, it is also important to note that, ‘trafficking’ and migration are not always linked—many migrants move without coercion, and much exploitative work arises without movement.

2.5.a Trafficking in the Law

“Trafficking in persons,” as defined in the Palermo Protocol, requires three main elements – actions, means and purpose.³⁸ The actions (e.g., arranging travel) are done using various means (e.g., deception, use of force, coercion) for a specific purpose (e.g., exploitation). As noted above, the Palermo Protocol explicitly lists “the exploitation of the prostitution of others” as a form of exploitation that meets the definition of trafficking, but only if actions and means are also present.

37 CEDAW Committee, 2013, “Concluding Observations on the combined seventh and eighth periodic reports of Hungary adopted by the Committee at its fifty fourth session (11 February – 1 March 2013)”, CEDAW/C/HUN/CO/7-8, p.6

38 Article 3(a) of Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (known as the Palermo Protocol), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx> (last accessed 31 January 2017)

One particular feature of arguments used by abolitionist feminists is to conflate consensual sex work and consensual migration with human trafficking, a crime of violence and coercion. It is frequently argued that the “majority” of sex workers are trafficked and working against their will.³⁹ If the human rights of both sex workers and victims of trafficking are to be respected, protected and fulfilled it is critical that this conflation is critiqued and challenged.

This conflation also finds its way into law. Some older statutes call any form of selling or buying sex, without any element of coercion or fraud, “trafficking.” This is the case in South Korea, where sex work laws are all contained in legislation relating to trafficking, principally through the Act on the Punishment of Acts of Arranging Sexual Traffic. According to a 2012 UNDP report on sex work laws in Asia and the Pacific, this Act explicitly defines sex work as a form of trafficking.⁴⁰

When introducing legislation to combat trafficking in persons, many states fail to comply with the definition from the international protocol with the result that consensual and voluntary sex work becomes defined as trafficking. For example, Amnesty International has documented this collapse of all sex work including voluntary sex work by adults into trafficking, that relies on an over-broad definition of exploitation, in Argentina:

“...the 2012 amendment of the Federal Anti-trafficking Law criminalized a broader range of conduct and the law now simply requires proof of “exploitation,” for which there is no clear definition in law. In the context of commercial sex, the authorities are interpreting this to simply require some form of involvement in the organization of sex work. As many government officials deem sex work exploitative, current legislation allows human trafficking and sex work to be treated in practice as one and the same and there is little or no incentive to distinguish between the two.”⁴¹

39 See, for instance, an open letter to the Amnesty International Board of Directors from a number of trafficking-related NGOs. Coalition Against Trafficking in Women, “Open Letter to Amnesty International,” July 22, 2015, available at <http://catwinternational.org/Content/Images/Article/617/attachment.pdf>.

40 UNDP, UNAIDS, UNFPA. Sex Work and the Law in Asia and the Pacific: Laws, HIV and Human Rights in the Context of Sex Work. October 2012, available at <http://www.undp.org/content/dam/undp/library/hiv/aids/English/HIV-2012-SexWorkAndLaw.pdf>.

41 Amnesty International, 2016, “Argentina: What I’m doing is not a Crime”, p.27, available at <https://www.amnesty.org/en/documents/amr13/4042/2016/en/> (last accessed 31 January 2017)

The very same situation applies in many other countries, including the United Kingdom⁴² and the Philippines.⁴³ This conflation of consensual sex work and trafficking can have serious consequences for sex workers as it makes them vulnerable to prosecution *as traffickers* under trafficking laws if they work together to move or sell sex, and such prosecutions in many cases carry extremely high penalties.

The Palermo Protocol notes that the consent of a victim of trafficking is irrelevant and cannot be used as a defense when means including threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or giving or receiving of payments or benefits to get the consent of a person having control over another person have been used, or when the person so moved is under 18. ⁴⁴ This recognizes that people over 18 can be made to give consent to certain things when exposed to, for example, threats of violence or other forms of coercion. However, just because consent is not a valid defense to trafficking when fraud or coercion is present does not mean that everyone working in exploitative conditions lacks the ability to give consent and is therefore trafficked. This is a crucial point that is addressed extensively by the United Nations Office of Drugs and Crime (UNODC) in its guidance on ‘the role of consent’ in the Palermo Protocol.⁴⁵ The guidance is unequivocal that “exploitative conditions alone are insufficient to establish trafficking.”⁴⁶ This acknowledges that a person can consent to work in exploitative conditions, meaning that others profit, or that their remuneration is too low etc. as happens all over the world in many different forms of work, including sex work.

42 In the United Kingdom laws against trafficking fail to require any element of “means” and criminalise assisting anyone to migrate into conditions of exploitation. See s. 2 of the Modern Slavery Act 2015 (England and Wales), s.1 of the Human Trafficking and Exploitation (Scotland) Act 2015, s.2 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015

43 It is deemed to be an act of trafficking under section 4 of the *Anti-Trafficking in Persons Act 2003* “ – this potentially criminalises clients and third parties working consensually with sex workers, there is absolutely no requirement for there to be elements of force or coercion to be classed as an act of trafficking.

44 This list of means contained in the Palermo Protocol are “by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”

45 UNODC, 2014, “Issue Paper on The Role of Consent in the Trafficking in Persons Protocol”, available at https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf (last accessed 31 January 2017)

46 Ibid. at p.7

2.5.b ‘Consent’ and its Role in Trafficking and Migration

The concept of consent plays a key role in law, often setting the border between legal actions and crimes (as in consensual sex vs. rape). In regard to current situations around both same-sex behavior and sex for money, the borders of consent are more complex. For example, in places where same-sex behavior or selling sex is a crime, ‘consent’ is made legally irrelevant to the prosecution of the crime. Human rights advocates, however, care about consent because it drives our actions: things may be formal crimes (voluntary sex work or voluntary same sex behavior) but NOT human rights violations. Indeed, in these settings the law itself is an abuse. Or the action might be both a formal crime AND a human rights violation, as with forced same-sex activity or coerced sex work.

Given complexities of the circumstances of trafficking, smuggling, migration and sex work that arises within these settings, the concept of consent is best acknowledged in a way that explores how issues of consent and exploitation exist in constant juxtaposition. For example, in a piece of research done with women who had been trafficked from Thailand to Japan to work in the sex industry, this complexity in their experiences is described:

“Women’s migrant and other social identities change...Women moved from being migrant workers to undocumented migrants to trafficked victims to documented migrants to returnee migrants; some women occupied a few of these identities simultaneously. Yet these legal categories or labels did not necessarily adequately or holistically reflect women’s lives. One single framework or category may not be relevant for women’s complex lives.”⁴⁷

Even if people are initially trafficked into the sex industry this does not mean that they will not be able to move in and out of sex work voluntarily after escaping the trafficking situation.⁴⁸ Research on migrants working in the UK sex industry noted that of the minority who felt they had been trafficked

47 Self Empowerment Program for Migrant Women (SEPOM) and Global Alliance Against Traffic in Women (GAATW), 2010, “‘Trafficked Identities’ as a barrier to community reintegration: Five stories of women rebuilding lives resisting categorisation”, p4, available at http://www.gaatw.org/FPAR_Series/FPAR_SEPOM.2010.pdf (last accessed 31 January 2017)

48 Ibid. at p.12. This is reflected in the research with Thai women who were trafficked to Japan. For example, the following is shared about one of the women interviewed: “Having been trafficked twice, she resisted and escaped both times to start new economic ventures both in Japan and Thailand, as a sex worker (working together with other independent sex workers), in the restaurant business (opening restaurants in Thailand and Japan) and on her husband’s pineapple plantation.”

and forced to sell sex all of them “kept on working in the UK sex industry independently.”⁴⁹ The research also confirmed that those who had been trafficked “drew clear distinctions between exploitative and non-exploitative practices in the sex industry and accepted it was possible for women to sell sex freely and consensually.”⁵⁰

Even in some of the most extreme and precarious situations, for example, where people are displaced due to conflict situations, it remains crucial to approach issues of “exploitation” and sex work (in this context often described as “transactional sex” or “survival sex”) with nuance. A 2016 Women’s Refugee Commission (WRC) report on self-settled refugee women (including LBT) in urban settings interviewed many who found sex work to be their best livelihood option and others who felt coerced and ashamed.⁵¹ It is, therefore, unhelpful to suggest that selling sex in situations of conflict, displacement and poverty is always, and inevitably, “sexual exploitation” and instead it is crucial to examine the complexity of the conditions in which people find themselves and recognise their ability to act with agency:

“Although survival sex is the result of economic decision- making in highly invidious circumstances, it nevertheless involves a level of agency and negotiation that distinguishes it from sexual offences like rape, sexual assault, forced prostitution and sexual slavery, where consent is absent.”⁵²

The 2016 WRC report notes that:

“...refugees who do sex work have different perspectives and attitudes towards it. Where some regard it as shameful, others personally feel no shame but feel stigmatized by other refugees, family members, and service providers. All of them, however, were unapologetic about earning a livelihood in what they felt was the best of limited options, or even the only option, available to them.

49 Nicola Mai, 2009, “Migrant Workers in the UK Sex Industry: First Findings”, p.3, available at <http://www.uknswp.org/wp-content/uploads/ESRC%20Sex%20Industry%20Findings%20Document%20Final.pdf> (last accessed 31 January 2017)

50 Ibid. at p.3

51 Women’s Refugee Commission. *Mean Streets: Identifying and Responding to Urban Refugees’ Risks of Gender-Based Violence*. February 2016, available at <https://www.womensrefugeecommission.org/gbv/resources/1272-mean-streets>.

52 Diane Otto (2007) ‘Making sense of zero tolerance policies in peacekeeping sexual economies’ in Vanessa Munro and Carl F. Stychin (Eds), *Sexuality and the law: Feminist engagements* (pp. 259 – 282), Routledge-Cavendish at p.261. See also Olivera Simic (2009), ‘Rethinking ‘sexual exploitation’ in UN peacekeeping operations’ *Women’s Studies International Forum*, Vol 32(4), pp. 288-295

And all of them expressed a desire for more information about sexual health and friendly health providers, as well as access to peer support and trainings on how to do sex work more safely within the city.”⁵³

Some of the findings of the WRC report include the ways that police and local laws can better address selling sex, and examine the ways in which local host communities can best support refugees generally, including those who sell sex. Together, these recommendations make it clear that there are many policy and practice changes that would be more rights-enhancing for sex workers.

In sum, a blanket assertion that all “survival sex” is exploitation often leads to the imposition of regressive and blunt solutions, which may do more harm than good.⁵⁴ Rather than removing income generating opportunities gained through selling sex it is instead important to respond directly to the complex needs of migrants, refugees and displaced persons, as they themselves express them. This approach in no way tries to minimize the very real experiences of harm and exploitation experienced by women in all contexts of migration and displacement but simply asks that the focus always remain on the material conditions in which sex is sold. This means that rather than holding to an ideology that equates all exchange of sex for money as exploitative or coercive we can begin to examine the diverse forms of exploitation that occur in practice, and crucially, work out how best to address them.

2.5.c. Responding to Trafficking

The trafficking of any person into any job is a gross violation of human rights, including any trafficking into the sex industry. At the same time, it is crucial that we develop a more careful approach to distinguishing between sex work, migration and trafficking—and that these distinctions are grounded in the realities of peoples’ lives. By being clear when we are talking about practices in sex work, practices that constitute migration and

practices that make up ‘trafficking’ we can focus on identifying actions which must be stopped because they are abusive, rather than accidentally adding rights condemnations to issues that are seen as immoral or illegal (such as border crossing without papers, etc.). Failure to distinguish (such as calling all migratory sex work ‘trafficking’) only further constrains the ability of marginalized persons to operate in the shadow of the law, and confuses ‘fixing’ illegality with ‘fixing’ how illegality makes you vulnerable to abuse. The criminal law in particular should be reserved for crimes of trafficking within the definition set by the Palermo Protocol (requiring all three elements of actions, means and purpose) and must not conflate consensual migration and sex work with trafficking.

It is often argued by abolitionists that the demand for sex work should be reduced by criminalizing the purchase of sex, which it is said, will in turn reduce amounts of trafficking. This approach to addressing trafficking, often called ‘*end demand*’, is, however, deeply flawed. The Global Alliance Against the Traffic in Women (GAATW) points out, first of all, that there is absolutely no evidence to establish that “end demand” approaches have any impact on reducing the prevalence of trafficking.⁵⁵ Furthermore, it identifies a number of harmful and unintended consequences for sex workers, noting that “end demand” policies criminalizing the clients put sex worker livelihoods at risk, increase the stigma they face, and intensify police power over them.⁵⁶ Noting that “trafficking is a gross human rights violation,” GAATW calls for anti-trafficking measures to be adopted that “actually impact trafficking rather than simply promoting a particular ideology about sex work.”⁵⁷

Further, the focus of anti-trafficking efforts should be on tackling the demand for all “exploitable labour.”⁵⁸ This includes trafficked labour but also extends to other categories such as undocumented migrant labour or unprotected workers in the informal economy, categories that can be applied to many sex workers globally. There are a number of legal and policy measures that can be adopted

to reduce demand for “exploitable labour,” which will address trafficking and improve conditions for other groups of marginalised and exploited workers. They include creating more opportunities for fair and legal migration channels for all workers, giving undocumented migrants the ability to regularise their status, enforcing labour standards and improving working conditions.⁵⁹

The Palermo Protocol sets out a number of obligations on states to offer support and assistance to victims of trafficking including appropriate housing, medical assistance and employment opportunities, as well as the possibility to access compensation for the harms suffered.⁶⁰ States are also urged to consider adopting appropriate measures to enable victims of trafficking to remain in the destination country, temporarily or permanently.⁶¹ The remedies offered to victims of trafficking should have “transformative potential,” which means they should not be focused simply on returning people to “the pre-trafficking context” but should address the conditions that actually *led* to the trafficking.⁶² Evidence shows, however, that countries not only consistently fail to meet their duties to provide appropriate and effective remedies to trafficked persons but that in many cases victims of trafficking are themselves criminalised.⁶³ Criminalisation, therefore, not only impacts negatively on consensual sex workers but also on persons who are trafficked into the sex industry.⁶⁴ Efforts to tackle trafficking in the sex industry must be focused on rights-based interventions that address conditions of exploitation for all workers and provide appropriate and adequate remedies to trafficked persons while investigating, prosecuting and sanctioning traffickers.

LEGAL FRAMEWORKS

There are a number of different legal frameworks that address sex work and the discussion around appropriate legislation of the sex industry can get confusing without a clear definition of what each of these frameworks means in practice. The first point to clarify is that regulation in some form or other exists in all of the different legal frameworks, albeit to very different degrees and with different priorities. Legal frameworks and regulation should focus on protecting the health, human rights and wellbeing of sex workers and not on attempts to exert unreasonable and excessive control of commercial sex. The different legal frameworks are set out below paying particular attention to the role of regulation in each and discussing the harms and benefits to sex workers.

2.6 CRIMINALISATION

Criminalisation is the legal framework for sex work that predominates across the world with the vast majority of countries having criminal laws prohibiting sex work and the activities associated with sex work. There are some countries in the world that criminalise every single aspect of sex work including buying, selling and facilitating. That means that sex workers, clients and third parties⁶⁵ can be charged and prosecuted under any and all circumstances. This legal model operates in countries such as the USA (except some counties in the state of Nevada), South Korea, Vietnam and Egypt. It is also common for countries to criminalise selling sex and the organising of sex work but to have no codified law on buying sex. Ultimately, this has the same effect of making sex work completely illegal in any circumstance. This is the situation in countries such as Thailand, Croatia, and Uganda.

There are other countries where the buying and selling of sex is legal, but many of the activities required to undertake sex work are criminalised. For example, there are laws against soliciting for sex in a public space in many countries around the world where it is perfectly legal to actually sell sex. Laws against brothel-keeping are used to criminalise sex workers who work indoors even when selling sex is legal. Countries such as the UK,

53 Women’s Refugee Commission, 2016, “Mean Streets: Identifying and Responding to Urban Refugees’ Risks of Gender-Based Violence”, p.99
54 Ibid. Otto and Simic critique the United Nations “zero tolerance” policy on sexual contact between UN peacekeeping forces and local people as a way to prevent “sexual exploitation”. Otto says at p.278: “Rather than acknowledging the complexities of the economic decision-making that constitute the practices of survival sex, the sweeping sexual prohibitions make the [policy] a blunt and dangerously over-inclusive instrument, which leaves no intellectual, legal, cultural, or personal space for listening and responding to the material circumstances in which survival sex is negotiated.”

55 Global Alliance Against Traffic in Women (GAATW), 2011, “Moving Beyond ‘Supply and Demand’ Catchphrases: Assessing the uses and limitations of demand-based approaches in anti-trafficking”, pp.29 – 30, available at http://www.gaatw.org/publications/MovingBeyond_SupplyandDemand_GAATW2011.pdf (last accessed 31 January 2017)
56 Ibid. at pp.33 - 34
57 Ibid. at p.30
58 Ibid. at p.48

59 Ibid. at pp.60 - 63
60 Article 6 of Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (known as the Palermo Protocol)
61 Ibid. at Article 7
62 Maria Grazia Giammarinaro, 3 August 2015, Report of the Special Rapporteur on trafficking in persons, especially women and children, U.N. Doc. A/70/260, p.17/23 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/260 (last accessed 31 January 2017)
63 Joy Ngozi Ezeilo, 9 August 2011, Report of the Special Rapporteur on trafficking in persons, especially women and children, U.N. Doc. A/66/283, p.8, available at <http://www.ohchr.org/Documents/Issues/Trafficking/A-66-283.pdf> (last accessed 31 January 2017). The report notes that “significant challenges still remain in ensuring the enjoyment of the right to an effective remedy by trafficked persons.”
64 International Women’s Human Rights Clinic, City University of New York Law School Trafficking Victims Advocacy Project, Legal Aid Society of New York, 2015, “Criminalization of Trafficking Victims: Submission to the United Nations Universal Periodic Review of United States of America”, available at <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Criminalization-of-Trafficking-Victims.pdf> (last accessed 31 January 2017)
65 The term ‘third parties’ includes managers, brothel keepers, receptionists, maids, drivers, landlords, hotels who rent rooms to sex workers and anyone else who is seen as facilitating sex work.

India, Zimbabwe, and Malawi adopt this model of criminalisation.

The third and final model of criminalisation is what is most commonly known as the Nordic or Swedish Model. This is the legal framework where the buying of sex is criminalised and the selling or offering to sex are decriminalised, although this element of the model varies across jurisdictions. For example, in Northern Ireland, which recently introduced the Nordic model, soliciting on the streets was decriminalised but sex workers working indoors are still criminalised under the brothel-keeping laws⁶⁶. In France, which also recently adopted the Nordic model, sex workers, especially migrant sex workers, are still targeted using local by-laws against sex work.⁶⁷ In Norway, while sex workers are not criminalised, they have been subjected to a targeted campaign of forced eviction from their homes by the authorities.⁶⁸ The harms caused to sex workers through the criminalisation of clients has been widely documented in research and some of the most serious consequences include an increase in experiences of violence⁶⁹, difficulty accessing condoms⁷⁰, forced evictions⁷¹, and an increase in societal stigma.⁷²

The Nordic model results in all the same harms to sex workers as any other form of criminalisation: increasing stigma and discrimination against sex workers, forcing them into more dangerous working conditions and compromising their health, safety, and wellbeing.

These is extensive evidence from across the world that criminalisation of any kind around sex work leads to a multitude of harms for sex workers, including poor health outcomes and increased risks of violence.⁷³

66 See the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015

67 Thierry Schaffauser, "Loi anti-prostitution, 6 mois après : un premier bilan catastrophique", L'Obs, 19 October 2016, accessed 31 January 2017 at <http://leplus.nouvelobs.com/contribution/1567576-loi-anti-prostitution-6-mois-apres-un-premier-bilan-catastrophique.html>

68 Amnesty International, 2016, "The Human Cost of Crushing the Market: Criminalisation of Sex Work in Norway", available at <https://www.amnesty.org/en/documents/eur36/4034/2016/en/> (last accessed 31 January 2017)

69 Dodillet and Ostergren, 2011, "The Swedish Sex Purchase Act: Claimed Success and Documented Effects, Conference paper", available at <http://gup.ub.gu.se/records/fulltext/140671.pdf>, p.23; Norwegian Ministry of Justice and the Police, 2004, "Purchasing sexual services in Sweden and the Netherlands: Legal Regulation and Experiences", available at https://www.regjeringen.no/globalassets/upload/kilde/jd/rap/2004/0034/ddd/pdfv/2322-16-purchasing_sexual_services_in_sweden_and_the_netherlands.pdf, p.12-14; Ostergren, 2004, "Sexworkers Critique of Swedish Prostitution Policy", available at http://www.petraostergren.com/pages.aspx?r_id=40716, p.2,5

70 Levy and Jakobsson, 2014, "Sweden's abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden's sex workers", *Criminology and Criminal Justice*, 14(5), 593, 600-602

71 Amnesty International, 2016, The Human Cost of Crushing the Market: Criminalisation of Sex Work in Norway"

72 Jordan, 2012, "The Swedish Law To Criminalise Clients: A Failed Experiment in Social Engineering", available at <http://www.fair-paysex.de/fremddateien/Issue-Paper-4%5B1%5D.pdf>, p.12

73 Kathleen N. Deering et al. "A systematic review of the correlates of violence against sex workers." *American journal of public health* 104.5 (2014): e42-e54.

2.7 DECRIMINALISATION

The term decriminalisation refers to the removal of the criminal laws that prohibit sex work itself or associated activities like soliciting, buying sex and brothel-keeping. Decriminalisation does not necessarily imply the absence of any regulation of the sex industry. Under decriminalisation, regulations are put in place that aim to respect and protect sex workers' human and labour rights, like occupational health and safety standards. Furthermore, regulation of sex work businesses would be undertaken in accordance with the existing regulations that are applied to other similar businesses.

Decriminalisation has been adopted by a few countries across the world including New Zealand, the state of New South Wales in Australia and Slovenia. There is strong evidence, especially from New Zealand, to show that decriminalisation has improved the working conditions and rights of sex workers there.⁷⁴ It is, however, important to remember that even in a decriminalised context the challenges and difficulties faced by sex workers cannot be resolved only by law reform. Societal discrimination and stigma persists, and exploitative working conditions can sometimes continue without concerted and committed action by both state and non-state actors to address these issues.

2.8 DEPENALISATION

Depenalisation is closely related to decriminalisation and is a term that is used in contexts where individual sex workers are not prohibited from selling sex under criminal laws but rather through administrative offences⁷⁵ and other public order laws.⁷⁶ Administrative offences and public order laws often give the authorities a wide range of discretion in how they are implemented, which often acts as a cover for unlawful police practices such as violence and extortion. In effect, criminalization

⁷⁴ Gillian Abel, Lisa Fitzgerald, and Cheryl Brunton, 2007, "The Impact Of The Prostitution Reform Act On The Health & Safety Practices Of Sex Workers", Department of Public Health and General Practice, University of Otago, available at <http://www.otago.ac.nz/christchurch/otago018607.pdf> (last accessed 31 January 2017)

⁷⁵ Administrative offences are often created by the state to deal with matters related to public order and security. While they may be viewed as 'minor' offences compared to crimes, they are still enforced by the police and often still result in harsh punishments including large fines and imprisonment.

⁷⁶ Public order laws regulate the use of public space and may impact on how and where sex workers and sex work businesses can exist. They may incorporate mandatory licensing for sex work businesses or zoning restrictions including 'prostitution-free' zones. Non-compliance with public order laws may result in penalties that are often out of proportion and overly harsh. Punishments frequently involve fines but they can also include detention at a police station or lengthy prison sentences. Imprisonment is often used for repeat offences or if fines are unpaid.

and the application of administrative penalties often produce the same results for sex workers, including abuse, extortion, exposure to violence by clients/police, and the denial of civil liberties and due process protections. Countries that penalise sex workers using administrative offences or public order laws include Romania, Moldova, Lithuania and Russia.

Like decriminalisation, depenalisation describes the removal or reform of administrative offences and public order laws so that they are no longer used as a way to target and penalise sex workers.⁷⁷ In reality, most countries that use administrative offences or public order laws against sex workers also have criminal laws in place to criminalise other aspects of sex work, like third party involvement.⁷⁸ As a result, depenalisation and decriminalisation are almost always called for together.

Depenalisation benefits sex workers by removing the danger of harassment from the police and enabling them instead to focus on safe working practices. Fines are most often the punishment imposed for breaching administrative offences and public order laws, which can lead sex workers into a never-ending cycle of sex work to pay off fines, which in turn leads to more fines. Depenalisation is crucial for sex workers working in these contexts but unless accompanied by full decriminalisation of the sex industry is unlikely to result in any significant improvement to working conditions.

2.9 LEGALISATION

Legalisation is often assumed to refer to the idea that sex work (ie. the exchange of sex for money under voluntary and non-exploitive arrangements) is legally recognised or 'legal.' There are a number of problems with these assumptions, which misrepresent what the legalisation of sex work actually aims to achieve. First, some systems of legalisation permit only certain forms of sex work. Other ways of selling and buying sex remain criminal (for instance, brothel-based sex work may become 'legal' and street or internet sex work may not be). Second, the term legalisation is used by

77 NSWP, 2014, "Sex Work and the Law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms", available at <http://www.nswp.org/resource/sex-work-and-the-law-understanding-legal-frameworks-and-the-struggle-sex-work-law-reforms> (last accessed 31 January 2017)

78 For examples, Belarus and Azerbaijan both criminalise the organizing of sex work under the penal code but selling sex itself is an administrative offence.

sex worker rights advocates to describe a negative step: the introduction of sex work-specific laws that aim to impose state regulation and control on sex work, as these laws are often the result of seeing sex work as something so different that it cannot be regulated under normal business and labour legislation. Unlike decriminalisation, which is a term used to recognize situations where sex work is treated as legitimate work and involves the introduction of regulations that focus on the labour and human rights of sex workers, legalisation is the term used when the state promulgates restrictive laws and policies. Examples include local planning laws that severely restrict the number, location and rules of operation for sex work businesses, or public health laws that require mandatory registration and/or the compulsory STI or HIV testing of sex workers.⁷⁹ Countries that adopt a legalised system include Austria, Greece, Lebanon, Peru, Uruguay and Senegal.

Legalisation may bring some benefits in terms of opening up the possibility of legal workplaces for some sex workers.⁸⁰ However, there is a significant risk of harm as this framework often leads to the creation of a two-tier system of legal and illegal sex workers.⁸¹ This is because the rules and requirements in a legalised system are often particularly onerous and place many restrictions on how, when and where sex work happens. For example, to work legally sex workers may have to register with the authorities and undertake regular health checks. Many sex workers, for a variety of reasons including migration status or concerns about privacy, will choose not to register and therefore end up working illegally and at greater risk of exploitative conditions and human rights violations. This is the situation in Senegal, for example, where sex workers, if they want to work legally, are required to register at an STI clinic (their file is then transferred to the police), carry a health card and visit the clinic twice a month for screening.⁸² Only women over 21 can register. Research, however, shows that a large number of sex workers in Senegal choose not to register and instead work

79 NSWP, 2014, "Sex Work and the Law: Understanding Legal Frameworks and the Struggle for Sex Work Law Reforms"

80 See Barbara Sullivan (2010). When (some) prostitution is legal: the impact of law reform on sex work in Australia. *Journal of law and society*, 37(1), 85-104, part of which explores the impact of restricted legalization in Queensland, Australia, which opens up legal working options for some workers but others, especially street workers "remain extremely vulnerable to violence and to heavy legal penalties" (p.104)

81 Ibid. See also Hendrikk Wagenaar, (2006). Democracy and prostitution: deliberating the legalization of brothels in the Netherlands. *Administration & Society*, 38(2), 198-235, at 225-226.

82 Ellen E Foley and Rokhaya Nguer. (2010). Courting success in HIV/AIDS prevention: the challenges of addressing a concentrated epidemic in Senegal. *African Journal of AIDS Research*, 9(4), 325-336.

clandestinely with one of the main reasons given for not registering being the risk of exposure, which would lead to a range of negative consequences for them, including a risk of violence.⁸³

In countries that include brothel licensing in their legalised systems the rules are sometimes so strict that only a minority of managed premises will comply, leading to the development of an illegal unlicensed sector. The state of Victoria in Australia has such a legalised system:

“Concern has been expressed that Victoria’s system of legalised prostitution has resulted in a split, two-tiered sex industry evolving, with a tightly controlled legal sector operating alongside a large and often vulnerable illegal sector...Those who cannot obtain employment in the licensed brothels work instead in the illicit underground sex industry where their insecure legal status renders them vulnerable to exploitation, harassment and organised crime.”⁸⁴

The *legal recognition* of sex work as work and the acknowledgement of economic, social and cultural rights, including labour rights, for sex workers should not be confused with *legalisation*, which can be highly stigmatising, and is grounded in a desire to control sex work and sex workers.

OTHER REPRESSIVE LAWS AND POLICIES RELEVANT TO SEX WORKER RIGHTS

In addition to the sex work-specific laws that criminalise and penalise sex workers there are a number of other laws that in practice are used to oppress sex workers. Other legal oppressions include non-sex work related laws such as anti-trafficking laws, public nuisance laws, drug laws, laws against gender identity or expression, and laws against homosexuality. None of these laws specifically criminalise sex work but are frequently used to target sex workers.

⁸³ Ibid. See also: Mgbako, Chi, and Laura A. Smith. “Sex work and human rights in Africa.” *Fordham Int’l LJ* 33 (2009): 1178.

⁸⁴ Jan Jordan, (2005) “Legalisation: Victoria, Queensland and Western Australia” in *The Sex Industry in New Zealand: A Literature Review*, New Zealand Ministry of Justice, available at <https://www.justice.govt.nz/assets/Documents/Publications/sex-industry-in-nz.pdf> (last accessed 20 March 2017)

Public health laws and policies are also frequently used as a way to impose control on sex workers lives and workplaces. Mandatory registration and compulsory testing for HIV and STIs are frequently justified on public health grounds despite the fact that they constitute human rights violations. For example, in Macedonia in 2008 a number of sex workers were detained and forcibly tested for HIV and STIs.⁸⁵ Compulsory testing is a coercive medical practice that is recognised by the World Health Organisation as violating human rights. It inhibits sex workers’ rights to bodily integrity and privacy and constitutes a form degrading treatment.

Arbitrary or targeted and draconian application of general immigration laws, can also be used to oppress migrant sex workers and some countries have specific immigration laws that forbid entry onto their territory to current and/or former sex workers.

Some countries have religious or customary laws that can be applied to people who sell sex. For example, in countries following Sharia law there are *zina* laws in place⁸⁶, which forbid any kind of sexual contact outside of marriage and carry harsh penalties. Some countries, like Egypt, include laws in their penal code that criminalise acts related to “debauchery,” which affect both sex work and same-sex conduct.⁸⁷

Finally, regardless of which laws are used as the basis for arresting sex workers it must also be remembered that judicial practice, including policing and court processes, are fundamentally hostile and harmful towards sex workers in many countries around the world. No matter whether a sex worker is arrested using sex work laws or vagrancy laws, their treatment at the hands of the police and the judicial system is consistently abusive and discriminatory.

⁸⁵ SWAN, “Macedonia: Police Raid and Forced Testing of 23 Sex Workers in Skopje”, available at <http://swannet.org/node/1572>

⁸⁶ “Islamic legal tradition treats any sexual contact outside a legal marriage as a crime. The main category of such crimes is *zina*, defined as any act of illicit sexual intercourse between a man and woman.” See: Ziba Mir Hosseini, *Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts*, March 2010, available at: <http://www.zibamirhosseini.com/documents/mir-hosseini-article-criminalizing-sexuality.pdf>

⁸⁷ “Appendix: Laws Affecting Male Homosexual Conduct in Egypt,” in *In a Time of Torture: The Assault on Justice in Egypt’s Crackdown on Homosexual Conduct*. Human Rights Watch. March 2004, available at <https://www.hrw.org/reports/2004/egypt0304/>.

SECTION III:

INTERNATIONAL HUMAN RIGHTS LAW AND SEX WORK IN THE CONTEXT OF CEDAW

3.1 THE CHALLENGE OF HUMAN RIGHTS, PARTICULARLY CEDAW, FOR SEX WORKERS

Human rights are meant to be universal, which means that they should apply equally to all human beings. Yet, for some groups of people, accessing the claims to dignity and humanity promised by the universality of human rights can be elusive. For sex workers in particular, engaging with the human rights framework has been challenging, even dangerous, as articulated in the Introduction to this framework.

International human rights treaties have played a significant role in providing a legal basis for the emergence of key principles, which constitute rights claims, as well as setting out the specific state obligations to promote and protect rights. Thereby, they have formed the foundation for advocacy and action by various communities seeking to end abuses.

This section turns to the methods and tools that advocates need to engage with the human rights system as a component of sex worker rights. This Framework focuses on the CEDAW Convention, recognizing that CEDAW is part of a larger system of global and regional rights treaties, which can be used to guide national and local policy and practice. We focus on CEDAW because of the historic and ongoing role that CEDAW plays in driving human rights forward from the perspective of discrimination ‘on account of sex,’ understood historically as between women and men (initially women as cis-gendered and now more expansively engaged).¹ CEDAW’s clear obligations on states to dismantle structures of discrimination and rights violations makes it an important focus for advocates. Its broad and powerful scope for gender equality, along with its almost universal ratification, are key reasons to work with the CEDAW Convention and the Committee.

However, sex workers should also think about how their analysis under CEDAW can be moved to other treaties as well—especially those treaties which have strong histories of engagement on

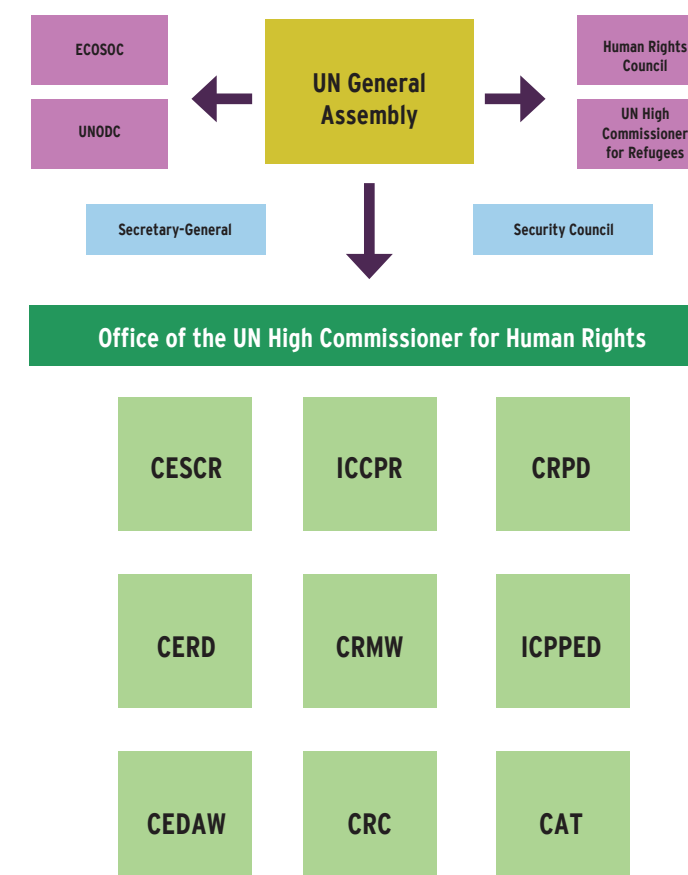
specific issues, including labor rights (International Covenant on Economic, Social, and Cultural Rights) or race discrimination (International Convention on the Elimination of All Forms of Racial Discrimination), age discrimination (Convention on the Rights of the Child), and policing and fair trial rights (International Covenant on Civil and Political Rights). The practice of each of these treaties can be advanced in dialogue with the CEDAW Convention and Committee, which has historically led other treaties and treaty bodies in new and forward-thinking application of rights across sex and gender.

In this section, we first describe the adaptive processes by which such legal regimes evolve to address and include new rights-claimants in human rights (section 3.1). This is a regular part of human rights evolution and not unique to the CEDAW Convention. We then explore some of the barriers to rights-claiming for sex workers under the CEDAW Convention and other treaties (section 3.2). In order to overcome these barriers, advocates must collaborate to constructively apply human rights principles to the diverse facts and circumstances of sex workers’ lives. We remind advocates that innovation in the application of human rights principles is the most basic and common way forward for all of human rights. It is what has happened for over 75 years of rights work globally, as new claimants step into rights-claiming—in conflict settings, in migration, from across disabilities, with newfound and renewed attention to gender and sexuality, age, and other social factors. Finally, we consider some of the specific challenges to applying the CEDAW framework to the lives of sex workers (section 3.3), challenges which spring in part from the very diverse realities of sex worker lives that necessitate the evolution of international human rights law in the first place. These lives belong not only to cis-gendered women, but also transgender persons, as well as some cis-gendered men.

As we discuss in more detail below, because CEDAW was drafted as non-discrimination treaty, rather than a treaty setting out the full range of underlying rights this means that the CEDAW Convention and the Committee often need to innovate—to develop analysis and explicitly articulate how the Convention’s protections apply across all rights,

such as privacy rights which were not originally explicated in the Convention. All of these challenges are surmountable using the common tools of treaty interpretation, and relying on the CEDAW Committee’s past experience of progressive innovation. Also, here advocates can build by foregrounding analyses by and for sex workers, in all their diversity as the claimants of rights.

From a human rights perspective, the experiences of people claiming rights must be at the center of the documentation and arguments for how rights are applied. This, too, is classic human rights work. This means that sex workers, in all their diversity, will be using the practices of human rights documentation and advocacy. In this advocacy, they will be in dialogue with the CEDAW Committee and national government actors on using the CEDAW Convention to best protect their lives, work, families, equality, freedoms and dignity.



3.1.1 INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS: A SYSTEM IN CONSTANT EVOLUTION

Human rights evolve for at least two reasons. First, they evolve in response to **new facts and emerging material realities** to which they have not previously been applied—new facts such as developing technologies, or global demographic and disease shifts or new powerful actors such as corporations or international financial institutions on the national and global stage. Second, rights evolve to **counteract human rights system failures**, such as when some rights claiming has been blocked by ideological perspectives that determine who counts as a person worthy of rights. Such ideologies and stereotypes may be attached to age, color, race, embodiment and disability, genders and sexualities, as well as national and other statuses. In either case, the process of evolution builds on applying existing principles to the new concerns.

New facts and shifts in ideology have played key, overlapping roles in the evolution of human rights, since 1945 when the United Nations Charter placed human rights as one of the purposes of the newly forming UN. For example, ‘new facts’ have led to new principles within rights, or expanded statements of principles and understandings of rights, as with the evolution of human rights and the world wide web,² or in regard to contemporary conflicts and increased migration flows,³ or vis à vis the human rights obligations of corporations.⁴ “New attitudes” have emerged everywhere as well and signal ideological changes.

¹ Rosenblum, Darren. “Unsex Cedaw, or What’s wrong with Women’s Rights.” *Colum. J. Gender & L.* 20 (2011): 98. See also: http://ilga.org/downloads/2015_UN_Treaty_Bodies_SOGIEI_References.pdf

² La Rue, Frank. “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.” (2011), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

³ Salama, Peter, Nan Buzard, and Paul Spiegel. “Improving standards in international humanitarian response: The Sphere Project and beyond.” *JAMA* 286.5 (2001): 531-532.

⁴ UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5.

Changes connected to ‘new attitudes and ideas’ include the constant refinements of equality under the law, as well as fair trial rules⁵ which now encompass the evolution of state obligations toward gender-based violence, especially specific steps related to the subset of GBV called ‘VAW’ (violence against women).⁶ Most recently there have been great shifts in the content of rights attached to diversity of sexual orientation or gender identities, bodily integrity and expressions.⁷ State duties as well as a greater acceptance of the legitimacy of bringing claims have shifted because of evolving ideas about ‘fairness,’ the meaning of violence and evolving ideas about gender and sexuality – each of these ideas has some global common thread.

There is nothing unusual, therefore, in sex workers coming to international human rights asking for evolution in the scope of state duties and new recognition and application of rights. As a matter of law, independent human rights treaty bodies are key players in the evolution of rights and the setting of human rights standards thanks to their jurisprudence. While it is nation-states who are the ultimate speakers as to what constitutes the ‘law’ of international human rights, either through adopting treaties or through their customs and regular practices, this law making often defers to and/or relies on the interpretation of treaties and treaty bodies like CEDAW.

It is useful to remind ourselves that the call from sex workers to CEDAW to help promote and protect their rights has many aspects in common with all other rights claims that the Committee has taken time to address—issues related to migrant workers, women living with HIV, women involved with the criminal justice system, women with non-heteronormative expressions of sexuality or gender, etc. These issues are relevant to sex worker rights substantively; they are also relevant to sex worker rights because they are proof of the evolving practice of the Committee. However, while many forms of intimate bodily labor and service have been recognized as labor by both the Committee

and states parties—ranging from massage therapy to professional athletic performance—other forms of gendered labor are notable in having been only slowly, if at all recognized by States.⁸ This is especially true for those forms of labor associated with traditional women’s roles (e.g., care giving of children and the elderly). Here, the Committee has taken a lead, pushing states to recognize unpaid care work as both a part of national economies as well as labor organizations.

The Committee at the same time is also concerned about how best to address prostitution and sex work and, given the many narratives of abuse and violence for women in prostitution. The Committee is currently revising how it addresses the rights of sex workers, and the role of rights in sex work more generally, through an ongoing dialogue with states parties and affected women, increasingly with NGO documentation from the experiences of sex workers themselves. As a UN treaty body, the Committee can move progressively to generate new analyses, but its process of evolution will necessarily reflect wider societal debates.

As this Framework and its accompanying *shadow report guidelines* take the position that persons can voluntarily exchange sexual conduct for money, we argue that all persons selling sex deserve the same protections for their labor as all other workers. Following the Committee’s practice, which is especially strong in addressing the material context of rights promotion, we argue that this protection will require attention to:

- a. the enabling role of rights (for conditions of life with equality and thriving);
- b. the protective, anti-violation role of rights.

Rights have a double function: creating enabling conditions as well as protecting against abuse.⁹ Enabling conditions are positive rights (rights one *can demand access to*) and span both material conditions (e.g., housing, clean air and water, access to functioning schools) and political and ideological conditions (e.g., a free media and public life to allow access to ideas, speech, thought, expression and association). Freedoms from abuse have

been called negative rights, meaning freedoms *from* state and non-state actor abuse and repression, but they are closely linked to enabling rights. The set of state obligations (respect, protect, promote, fulfil) set out below attaches to these obligations.

As we have noted earlier, many 19th and 20th century arguments, based on the strand of ‘abolitionist’ feminism, called for attention to prostitution by starting with stories of misery or destitution. In contrast, we start from equality claims, labor rights and a focus on the variety of claims arising from living stories of people in sex work all over the globe.

3.1.2 CEDAW: CHALLENGES AND OPPORTUNITIES

The CEDAW Convention was part of the on-going work of international human rights evolution. In 1979, the year of its adoption, the treaty drafters rejected the idea that barriers to ‘being human’ were justified according to ideas of ‘man’ and ‘woman.’ Its content drew from decades of women’s rights and feminist thinking on how to understand discrimination on the basis of ‘sex’ as arising from multiple sources: stereotyped ideas about roles for women and men found in most political systems, religious institutions, market systems, family structures, and more.¹⁰

The CEDAW Committee and its supporters have been working productively with the idea that the language and ideas of the 1970’s on ‘discrimination’ – codified in the adoption of CEDAW in 1979 – were foundational: one of the most critical aspects of the focus on substantive equality is its expansive and responsive capacity: the evolution of CEDAW’s

STATE OBLIGATIONS UNDER CEDAW: RESPECT, PROTECT, PROMOTE, AND FULFIL

The CEDAW framework on state obligations requires State parties to take appropriate and effective measures, “immediately” and “without delay” to overcome all forms of discrimination against all women, whether by public or private actors.

This requires states to act with due diligence in combating any forms of discrimination or rights violations against sex workers and ensuring practical realisation of their rights. Specifically,

The State must **respect** the rights of women: the State or its agents cannot do anything that violates the rights of women in sex work (**Articles 2(d)** and **2(f)**). This places a duty on state to ensure that criminal, civil, administrative and labour laws are not used against sex workers but rather provide an effective legal framework that prevents discrimination and violence.

The State must **protect** the rights of women by prohibiting discrimination that binds both public and private actors such as other institutions, private enterprises or individuals (**Article 2(b)** and **2(e)**). This places positive obligation on the state to exercise due diligence in protecting sex workers from violence and other forms of violations committed by public institutions or non-state actors. It ensures that enabling and safe environment is created to ensure that women in sex work are able to access justice, in timely manner, in cases of discrimination and violence.

The State must **promote** rights of women. It must create awareness on rights of sex workers among all sectors of society. Thus, the State party is to be forward looking and adopt policies and programmes of action that include education and awareness campaigns targeted at eliminating stereotypes, prejudices and discrimination against women in sex work.

The State must **fulfil** rights of all women, including sex workers. It must remove impediments, take positive steps, create institutions and remedies for legal protection of women, and provide enabling measures (**Articles 2(a), 2(c), 2(f), 3** and **4**)

Further, Article 3 contains the overarching obligation to ensure women’s “development and advancement” and enjoyment of rights on an equal basis with men. (Freeman, 2003) Read together with Article 2, it provides the basis for addressing emerging forms of discrimination that had not been identified at the time of drafting of the Convention. (CEDAW, General Recommendation No. 28) Thus, States are obligated to take all appropriate measures in all fields towards this end. However, the requirement to “take all appropriate measures” should not be interpreted as granting complete discretion as to what is appropriate, but as an indication that they must determine what needs to be done, in what order, based on their legal and political systems. (CEDAW, General Recommendation No. 28)

5 Kismödi, Eszter, Cottingham, Jane, Gruskin, Sofia, & Miller, Alice M. (2015). Advancing sexual health through human rights: The role of the law. *Global Public Health*, 10(2), 252–267. <http://doi.org/10.1080/017441692.2014.986175>

6 General Recommendation 19: Violence against women, UN Committee on the Elimination of Discrimination Against Women, 1992. See also UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, available at: <http://www.refworld.org/docid/3b00f25d2c.html>.

7 Arc International, *Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process, Results and Implications*. 32nd Session of the Human Rights Council, June/July 2016, available at <http://arc-international.net/wp-content/uploads/2016/08/HRC32-final-report-EN.pdf>.

8 Sepúlveda Carmona, Magdalena. “Report of the Special Rapporteur on Extreme Poverty and Human Rights: Unpaid Care Work and Women’s Human Rights.” (2013), available at <http://www.un.org/esa/socdev/egms/docs/2013/EmpowermentPolicies/Report%20of%20the%20Special%20Rapporteur%20on%20extreme%20poverty%20and%20human%20rights.pdf>.

9 Amnesty International, *It’s In Our Hands: Stop Violence against Women* (2004); AI Index: ACT 77/003/2004, available at <https://www.amnesty.org/en/documents/act77/001/2004/en/>.

10 Coomaraswamy, Radhika. “To bellow like a cow: Women, ethnicity, and the discourse of rights.” Human rights of women: National and international perspectives 39 (1994): 56; see also Daren Rosenblum, supra ‘UnSex CEDAW.’

practice over the last forty years demonstrates that what constitutes ‘discrimination’ can be re-envisioned: its basic frame and concepts remain productive and capable of adaptation. This potential for productiveness arises in part because of the core focus of CEDAW on addressing not just formal equality, but substantive equality, as well as specifically focusing on relationships of power. CEDAW as treaty and living instrument of human rights has been used to rectify the distribution of power and resources based on stereotyped ideas about the right roles of ‘women’ and ‘men’ (and which we now call ‘gender analysis’).

CEDAW’s initial textual framing of issues was possibly too narrow (not including privacy for example, or fair trial), but because CEDAW also highlights crucial ideas about state obligations in public and private life, and de jure and de facto enjoyment of rights for women, its potential scope is wonderfully expansive, much as was the scope of the Convention on the Elimination of Racial Discrimination (CERD) upon which CEDAW was modeled.¹¹

CEDAW addresses action within the family and the market, as well as other aspects of public life like the institutions of and practices of state, from education to courts to border crossing rules.¹² CEDAW also incorporated feminist analysis about the way state power operates in direct and indirect ways: its core principles call for change in how states act and how states regulate non-state actors—be they family members or employers. CEDAW therefore assumes that both the formal operation of law, and its actual (de facto) operation are subject to review and change.¹³

The adoption of the many General Recommendations by the CEDAW Committee over the years, encompassing not only violence, but health, access to justice, HIV/AIDS, older women, the economic consequences of marriage and divorce, core obligations of states and the specifics of discrimination for rural women means that there have been constructive re-readings of the initial

11 Committee on the Elimination of Racial Discrimination, General Recommendation 25, Gender Related Dimensions of Racial Discrimination (Fifty-sixth session, 2000), U.N. Doc. A/55/18, annex V at 152 (2000).

12 CEDAW Committee, General Recommendation No. 23 Article 7 (political and public life) CEDAW Committee; General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures.

13 Cusack, Simone; Pusey, Lisa --- "CEDAW and the Rights to Non-Discrimination and Equality" [2013] MelbJIntLaw 3; (2013) 14(1) Melbourne Journal of International Law 54, accessed <http://www.austlii.edu.au/au/journals/MelbJIL/2013/3.html>

GENDER AND INTERNATIONAL HUMAN RIGHTS LAW

Drafting CEDAW did not instantly bring women’s human rights more firmly into the overall human rights framework. As a treaty, CEDAW was sidelined for a long time – serviced by the Division for the Advancement of Women (DAW) in Vienna, and then New York and not by the Center for Human Rights in Geneva. Many parts of the UN human rights system resisted carrying out either a ‘gender analysis’ or moving CEDAW with its focus on ‘women’ into the main debates and practices of human rights for some time. The movement of the 1990s, declaring that “women’s rights are human rights,” was instrumental in insisting on evolved understanding of human rights law, and moving CEDAW and gender analysis into the center of human rights practice.

text of the treaty.¹⁴ These developments have for the most part produced contextualized understandings of rights and non-discrimination which can be very helpful for the diversity of persons in sex work.

Nevertheless, there are some textual challenges for the Committee and advocates to surmount. The Convention’s original text did not directly address the rights of persons affected by criminal prosecution as does the ICCPR and several other international and regional human rights treaties. More recently a 2015 General Recommendation (GR 33) on ‘access to justice’ engages with criminal law extensively, but does not engage very expansively with the rights of persons charged with crimes, such as under laws criminalizing prostitution. Moreover, other central rights, such as rights to privacy and private life, or rights to association, unionization, or expression are not explicitly laid out in the text. As we describe more in §4, however, these initial silences on underlying rights in the Convention’s basic text are not fatal flaws—the treaty’s non-discrimination language can be read to assume these rights and then apply them to specific circumstances. This is exactly what the Committee has already done on a regular basis.

14 See all CEDAW General Recommendations, available at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

It has been Article 6 of the treaty which has been most troubling for sex worker rights—however, a careful reading of both the text of the article and its drafting history in light of basic human rights principles, as well as the evolution of rights today makes Article 6 potentially useful to sex workers rights. Article 6 of the Convention states that “state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”¹⁵ It is essential to note that states adopted the approach of suppression of *exploitation* of prostitution rather than the suppression of prostitution in itself.¹⁶ As the discussion in §2 makes clear, there are exploitative conditions in sex work that must be identified and stopped so that sex work can be decent work for those who perform it.

While the CEDAW Committee has not at this point adopted a clear position recognizing the right of women to choose sex work, it has clearly articulated the obligations of states to address violence against women identified as ‘in prostitution’ and has also consistently recommended that ‘women in prostitution’ be decriminalized. This position has most recently been expressly reaffirmed in its recently adopted General Recommendation (GR 35) on gender based violence against women. It has also noted that the continued criminalization of the sex sector has had a disproportionate, negative impact on women.¹⁷ The Committee has also expressed concern about “*discrimination against women sex workers and the lack of State party’s action aimed at ensuring safe working conditions and exit programmes for those wishing to leave this activity...*”¹⁸ In this context, the Committee recommended that the State party “...*(a)dopt measures aimed at preventing discrimination against sex workers and ensure that legislation on their right to safe working conditions is guaranteed at national and local levels.*”¹⁹

In sum, the CEDAW Committee is concerned with what sex worker advocates are concerned with: the conditions which promote rights and prevent abuse. Under this analysis, distinguishing when a sex worker is raped and when she is exchanging sex

15 Article 6, CEDAW. See also Chuang supra for history.

16 Ibid

17 CEDAW Concluding Observations China, CEDAW/C/CHN/CO/6 (2006), para. 10; CEDAW Concluding Observations Fiji, CEDAW/C/FJI/CO/4 (2010), para. 25; CEDAW Concluding Observations Albania, CEDAW/C/ALB/CO/3 (2010), para. 29.

18 CEDAW Committee, Concluding Observations, Hungary, 2013 CEDAW/C/HUN/CO/7-8 (2013), para. 23(e)

19 CEDAW Concluding Observations Hungary, CEDAW/C/HUN/CO/7-8 (2013), para. 23(e)

under safe and agreed upon conditions is clearly a way forward for the Committee. Any other position would contribute to the continued marginalization of too many persons in sex work as livelihood.

3.1.3 RE-THINKING SEX AND GENDER UNDER CEDAW: WHOM DOES IT COVER?

As CEDAW so firmly addresses ‘women and men’ in its texts, and in the minds of both states and many advocates, we highlight some specific concerns about who is covered within the CEDAW framework. How does gender interact with other forms of discrimination, and how should this matter to CEDAW?

Sex workers come from, live in, and work in diverse communities, and CEDAW aims to take into account intersectionality and multiple forms of discrimination against women. Although the text of the CEDAW does not explicitly refer to intersectionality, it contains references to women’s multiple identities such as those based on marital status, pregnancy or rural setting. Over the last 30 years CEDAW’s body of practice on intersectionality has been consistently evolving through its concluding observations, General Recommendations and views in inquiries and communications regarding women’s human rights violations. The strongest of these articulations is found in General Recommendation 28 which directly links intersectionality with the scope of state obligations under Article 2 and states that “*the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity.*”²⁰

CEDAW is a tool to change how gender works—to change, more specifically, the rules governing how ideas of masculinity and femininity are allocated across bodies and those bodies’ access to resources and rights. Under this understanding, transgender women clearly fall under the rubric of CEDAW protection as do persons identifying as lesbians. A review of the last five years of CEDAW’s concluding

20 CEDAW, “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,” 16 December 2010, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>.

comments and other statements on transgender persons and intersex persons makes it clear that the ‘needle is moving’ as to CEDAW’s scope to be inclusive of transgender persons, regardless of declared gender and intersex: the Committee’s concluding observations to Argentina’s 2016 report interweave a rich, if not entirely consistent, panoply of categories: they raise concerns with both transgender persons and transgender women – as well as ‘gender identity.’²¹ CEDAW expresses concern at “The hate crimes against lesbian, bisexual, transgender and intersex **persons**, including reports of harassment by the police, murders of transgender **women** and the killing of lesbian, bisexual, transgender and intersex **activists**” – all under the heading, “Gender-based violence against women,” and they recommend that Argentina “denounce attacks on the human dignity and integrity of lesbian, bisexual, transgender and intersex persons.” Moreover, CEDAW has praised Argentina’s identity law, which allows self-designation of gender in its “Positive Aspects” of its [Concluding Observations](#).

Moreover, while this project specifically engages with ‘women’ (under the contemporary broadened definition) in sex work, it also assumes that changing how ‘women’ are regarded will change how ‘men’ are treated under rights work—whether they are men selling sex, buying sex or in other parts of the sex work relationship. This question of how to re-think the roles of, status of and harms to men in the criminal regulation of the sex sector is thus ripe for reexamination.

FORWARD WITH CEDAW

All of these lessons about the strengths of CEDAW as well as its historic limitations -- and its reinterpretation in an adaptive way to new facts and new approaches to claims of injustice -- are familiar to fundamental work on human rights advocacy generally and to the context of CEDAW in particular. International human rights law is, and has always been an evolutionary practice, moving into new claims with old principles and rights as new claimants arise. CEDAW practice has already exemplified this. As Miller et al. argue, (often political) contestation within the broad field of rights is necessary in order to defeat regressive claims and ensure that different principles and legal doctrines are used strategically and comprehensively to advance the basic human rights of new claimants.²² Advocates coming to the CEDAW Committee are seeking to use both the positive claim of rights to enabling conditions (for their lives) and the negative claim of ending violations to ensure the equality, dignity and rights of people in sex work.

This is the basic posture which we stake out in crafting – along with partners in sex worker networks– in the rest of this document to articulate the fundamental principles which undergird CEDAW, link these principles to the basic rules of human rights (and the evolving practice of human rights) and apply them to the diverse lives of people who can be identified as sex workers, or who are affected by the laws and policies which govern the buying and selling of sex.

We turn now to some suggestions on how to do this work by and for sex workers, to make the CEDAW framework useful for the protection of their rights.

3.1.4 SUMMING UP AND GOING

²¹ Argentina’s 2016 [Concluding Observations](#) under CEDAW.

²² Miller, Alice M., et al. “Sound and Fury – engaging with the politics and the law of sexual rights.” *Reproductive health matters* 23.46 (2015): 7-15.

SECTION IV:

CLAIMING SEX WORKER RIGHTS THROUGH CEDAW

4. APPLYING RIGHTS IN A NEW FRAME: FROM THE PERSPECTIVE OF SEX WORKERS

As the Introduction to this Framework stresses, certain key principles that guide the development and application of human rights, support our approach to developing analyses for the rights of diverse sex workers under CEDAW. These key principles include:

- i) the primacy of non-discrimination and equality;
- ii) the equal dignity of all persons;
- iii) state obligations to protect and respect core rights to protection against violence (rights to bodily integrity) and its consequences;
- iv) understanding that all rights – civil, political, economic, culture and social – are interconnected and interdependent in their realisation;
- v) building accountability between state (and increasingly non-state) actors and rights holders to create rights enabling environments;
- vi) the participation of individuals and groups in the determination of issues affecting them.

A number of specific ways to develop and apply existing treaty rights follow from these principles. Since the CEDAW Convention in particular was drafted as a non-discrimination treaty, the text of its articles focuses on equality in regard to a right (equality between women and men). Each form of equality described in the Convention necessarily assumes an underlying right: equality around work rights would be meaningless without the right to work, equality in family life would be meaningless without the underlying right to form or not form a family, and so on.

In order for the evolution of rights described in §3 to proceed, NGOs, treaty experts and states parties need to learn to apply the guarantees of the Convention to the newly documented facts of sex workers' lives. This last section aims to apply the

Convention in a holistic way to the specific issues and concerns of sex workers. While the CEDAW Committee has a practice of addressing the treaty article by article, our Framework focuses on the issues and sometimes groups of rights, citing CEDAW articles as relevant and instrumental in helping NGOs and sex worker advocacy groups to strengthen their rights claims.

The list itself is not exhaustive, but rather representative of some of essential and often violated rights for sex workers. While the section is structured by right, it is also worth reiterating that these rights also work in tandem; for instance, protecting sex workers' freedom from stigma and prejudice is a distinct legal obligation for states parties under CEDAW, and is also closely connected to protecting sex workers' ability to access equal protection of law in the first place. These rights and freedoms are thus inter-connected and inter-penetrating, as we try to make clear throughout the section. Furthermore, we draw on General Recommendations (GRs), which are clarifications and elaborations generated by the Committee that flesh out states' legal obligations under CEDAW.

However, we do not rely exclusively on the text of CEDAW to locate states' legal obligations with regard to sex workers. As we noted in §3 above, CEDAW was drafted in such a way that certain key rights—such as privacy, expression and association, or fair trial and due process rights in the criminal justice system—were not explicitly included. For this reason, as we argue in §3 above CEDAW is meant to be read in conjunction *with* the other core treaties, such as the ICCPR and ICESCR, CERD and CAT, such that it applies substantive non-discrimination analysis to the rights in these treaties (fair trial rights, expression rights, freedom from torture and fair trial rights). Therefore, as these rights arise as important claims for people in sex work, we can use CEDAW to apply a gender-specific, non-discrimination lens to them and we can also go to the other treaty bodies to make these rights claims depending country context. For this reason, throughout this section, we also include occasional references to other UN treaties and commentaries, and actors such as Special Rapporteurs, Committees, or Councils, as needed.

Here, we follow commonly accepted tenets of how human rights law develops to articulate the shape of CEDAW based claims to respond to sex workers needs to association or expression or privacy, or as criminal defendants or undocumented migrants. To do this, we cite many general recommendations, the process by which treaty interpretations evolve, especially those on access to justice (GR33), core obligations of states parties (GR28), migrant workers (GR26), women and health (GR 24) or women in political and public life (GR 23) among others.

This section is structured in the following way for each enumerated right. First, we provide an overview of the content of the right, as well as a list of legal obligations surrounding that right under CEDAW and any other relevant texts within international human rights law. Then, we discuss in detail rights violations as they exist in the abstract and in practice. We draw on case examples from laws and policies in a variety of countries to demonstrate different ways in which the rights of sex workers have and might be violated. Finally, we examine avenues for clarification and opportunities for future work around the protection of these rights in legal interpretation and in practice. To this end, we examine specific vulnerabilities and abuses experienced by sex workers in context of the legal principles that might be used to further expand and extend legal protections, and we recommend clearer articulations of position and principle by CEDAW in several instances.

The section concludes with a brief overview of the role that advocates, NGOs, and sex worker networks might play in catalyzing the further evolution of international human rights law with respect to protecting the rights of sex workers. The core of this project is the documentation of rights violations and lived experiences in relation to specific legal obligations under CEDAW, the practicalities of which are further explained in IWRAP-AP's Shadow Reporting Guidelines on Sex Workers Rights.

4.1 EQUAL PROTECTION OF THE LAW AND NON-DISCRIMINATION

4.1.a Overview and Legal Obligations

The CEDAW Convention maintains an overarching commitment to eliminating discrimination against all women (with specific reference to the diversities among and between women) and promoting equality between women and men.¹ The denial of equal protection and equal application of law to sex workers directly violates this commitment. Women may face criminalization based on actions that men do not take (e.g., seeking abortion); confront the excessive use of the criminal law for petty crimes; or may be disproportionately impacted by laws based on social circumstance, behavior, or participation in certain forms of activity (e.g., criminal law related to prostitution).²

In these ways, discriminatory actions, both by the state and by non-state actors that the state has obligation to remedy, constitute violations of the right to equal, non-discriminatory protection of the law. Articles 1, 2, 3, and 5 of the Convention speak to equal protection in general, and subsequent articles articulate equal protection in different spheres and for different issues. Article 7 refers to equality in political and public life; Article 10 to education; Article 11 to employment; Article 12 to health care; Article 13 to economic and social life; Article 15 to law and civil life; and Article 16 to family life. The Committee not only covers constitutional law in its purview here, but also a wide range of civil and family law, labour, administrative law, immigration and criminal law.

Article 2 (e) extends the reach of the State obligation to private actors, as well. As noted in §3 above, for sex workers, these actors may include family members, clients, persons organizing the conditions of work for people in sex work (whether owners of web sites, brothels, windows, apartments or other services by which persons seek to sell their sex). General Recommendation 35 states:

¹ Article 2 and 5, Article 15, Marsha A. Freeman, Christine Chinkin, Beate Rudolf, The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary, p. 183, available at: <http://opil.ouplaw.com/view/10.5422/fso/9780199565061.001.0001/acrade-9780199565061>

² Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation on women's access to justice, July 2015, CEDAW/C/GC/33, available at http://tbinetnet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf.

“... Article 2 (e) of the Convention explicitly provides that States parties are required to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. This obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole... Under the obligation of due diligence, States parties have to adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors... The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women⁴¹. These failures or omissions constitute human rights violations.”⁴

It is important to note that the language of GBV as discrimination includes the way transgender women are attacked as women *and* as transgender (i.e. gender discrimination as intersecting, as described in GR 28). Furthermore, the gender stereotypes which justify violence against women who defy norms of chastity by selling sex and controlling their own sexuality fall within the prohibitions against GBV and should be documented at Article 1, 2, 3, 5 violations. [See 4.3 Violence below]

Beyond the Convention articles, several General Recommendations (GRs) shed light on states’ legal obligations toward protecting sex workers’ right to equal protection of law and signal the development of the Convention over time. In GR 19, the Committee observed that *“[p]rostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.”³* The Committee advised States to take action to ensure that the group is protected – from violence, from wage theft or coercive services and other exploitative

actions in the work place (formal or informal). General Recommendation 35 that now updates General Recommendation 19 identifies ‘women in prostitution’ as one of the intersecting identities of women that may experience gender based violence differently and thereby, require appropriate legal and policy responses. Further, it calls upon states to: *“[R]epeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them; including in customary, religious and indigenous laws. In particular, repeal: a) ... legislation that criminalises... women in prostitution...”*

This emphasis is reflected in the Committee’s actions and reactions to state policies around sex work. In 2013, the Government of Hungary was asked to *“[a]dopt measures aimed at preventing discrimination against sex workers and ensure that legislation on their right to safe working conditions is guaranteed at national and local levels.”⁵* In 2015, Malawi was asked to address discrimination against sex workers in healthcare and other services; and to provide income-generating opportunities for those wishing to leave sex work.⁶ The Committee also expressed concern in 2010 that the Government of Malawi’s plan to subject sex workers to compulsory HIV testing would result in discrimination in the context not only of the right to health but also of equal protection of the law, especially vis à vis privacy rights (see below).⁷ Further, the Committee directed Tanzania in 2016 to *“Repeal discriminatory provisions of the Penal Code and eliminate discriminatory practices faced by women in prostitution, including when accessing health-care services.”⁸* Further, the Committee has directed states to consider “the intended as well as unintended effects (of various laws regulating trans-border movement, especially laws of general application) including those pertaining to risk of violence and to health, *in particular in regard to those women without residence permits who are engaged in prostitution.*”⁹

5 CO Hungary, <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.HUN.CO.7-8.pdf>
6 U.N. Committee on the Elimination of Discrimination Against Women, *Concluding observations on the seventh periodic report of Malawi*, C/MWJ/CO/6, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMWJ%2fCO%2f7&Lang=en.

7 U.N. Committee on the Elimination of Discrimination Against Women, 45th Session, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Malawi*, 2010. U.N. Doc. C/MWJ/CO/6, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-MWJ-CO-6.pdf>.

8 U.N. Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined seventh and eighth periodic reports of the United Republic of Tanzania*, CEDAW/C/TZA/CO/7-8, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fTZA%2fCO%2f7-8&Lang=en

9 CO The Netherlands, A/56/38, 25th Session (2001) paras 209–10; CO The Netherlands, CEDAW/C/NLD/CO/4 (2007) paras 21–2

3 Committee on the Elimination of All Forms of Discrimination against Women. General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 1, July 2017, CEDAW/C/GC/35, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf.

4 U.N. Comm. on the Elimination of Discrimination against Women, *CEDAW General Recommendation No. 19: Violence against Women*, 11th Sess., 1992, U.N. Doc. A/47/38 (1992).

Access to justice is a final key component of any equal protection of the law. In GR 33, the Committee comments on access to justice, affording us more clarity on how to argue for fair treatment in prosecutions of women, including sex workers. Law-enforcement actors, such as judges, police, prosecutors, and attorneys, must meet non-discrimination standards. Courts, as well as tribunals of any kind (criminal, administrative, customary, etc.), are also covered. The standards include that legal process must be meaningfully available; accessible (geographically, and as a matter of language, disability, etc.); of good quality (i.e., independent/not corrupt, impartial, competent to the issue, and able to provide effective remedies); and accountable (transparent and operating under a principle of accountability through some oversight mechanisms). Legal assistance and public defense are seen as key components of this work. The Committee in the context of Fiji’s review in 2010 recommended that *“sex workers who are victims of violence, torture or ill-treatment are provided an opportunity for a fair trial and, as appropriate, receive medical and psychosocial services as well as compensation, including reparations and guarantees of non-repetition”¹⁰*.

4.1.b Forms of Violation

Very often people in sex work do not have access to the even most basic form of equality: the ability to call on legal protection from violence and other crimes, including from rape, other assaults, theft, domestic violence and physical harassment. This disparity in access to legal protection stems from two determining circumstances: sex workers’ marginalized status makes them more susceptible to abuse in the first place, and this marginalization in turn negatively affects their ability to seek legal protection from those abuses.

In many countries, the laws are also simply not adequate (either in their legal scope, or in their practical application) for women of any kind, or for non-nationals, or for gender or sexually diverse persons, or for the poor or racially marginalized of any gender. However, whether formally adequate or inadequate, basic protections against violence (through recognition that the violence is a crime

10 UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the fourth periodic report of Fiji*, CEDAW/C/FJI/CO/4, available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-FJI-CO-4.pdf>

denying rights) are often not applied to sex workers because of their criminalized or stigmatized status.”

The non-application or enforcement of these laws may occur in a number of ways. People in sex work may lack faith in police officials to deal with their cases with fairness, and for this reason do not bring forward complaints. Frequently, police officers doubt or disdain sex workers’ complaints; they may refuse to view them as victims of rape or physical mistreatment, failing to investigate their complaints altogether, and not infrequently may perpetrate abuses themselves. In each case, as discussed further below, the diversity among people in sex work also matters: transgender-women face a specific set of harms and exclusions, non-nationals another, cis-gendered women another, and sex workers with children face yet another set of problems in using law as a tool for justice.

Sex workers are also subjected to abusive police and criminal justice policies, which add to the challenges they face to obtain access to redress mechanisms and effective remedies.¹² Many sex workers hesitate to file complaints because they may risk exposure to extortion- for sex and for money, verbal harassment, disclosure of their identities, and other forms of police abuse.¹¹ Migrant sex workers face additional barriers while trying to access the legal system, since reporting abuse may expose them to removal and detention based on nationality/citizenship status. Many sex workers, not only migrant workers, are subject to unlawful raids conducted by police, who subsequently disclose identity and work status to families or the public, further reducing sex workers’ faith in legal actors and enforcement.

In addition to facing discrimination within the realm of criminal law, studies show that sex workers are also discriminated against in housing, access to healthcare, education and other social, economic, and political sectors; these forms of discrimination also look different for sex workers of different genders, races, ethnicities, nationalities, classes,

11 Rape Shield Laws in New York State — New York Criminal Procedural Law Section 60.42(2)
12 Dodillet, Susanne, and Petra Östergren. “The Swedish sex purchase act: Claimed success and documented effects.” *International Workshop on Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges*. The Hague, 2011; Levy, Jay. *Criminalising the Purchase of Sex: Lessons from Sweden*. Milton Park: Routledge, 2015; Skilbrei, May-Len and Charlotta Holmstrom. *Prostitution Policy in the Nordic Region*. Surrey: Ashgate, 2013. From Stewart: further citations here?
13 Human Rights Watch has documented this pattern of abuse. “Off the Streets: Arbitrary Detention and Other Abuses against Sex Workers in Cambodia”, “Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities” 2012

ages, and social statuses.¹⁴ Sex workers are often unaware of their rights, or the processes to follow to assert their rights and get justice; and the legal assistance provided to sex workers, if any, is ineffective or exposes them to the risk of further violence and/or violations of their human rights.¹⁵

4.1.c Opportunities for Clarification and Remedy through Legal Interpretation and Practice

In light of the Convention’s provisions, the General Recommendation and the Committee’s Concluding Observations, states are under an obligation to guarantee equal protection of laws to sex workers. While the CEDAW Committee has begun to recognize the specific problems people in sex work face, it is also still grappling with the full diversity of sex workers—especially in terms of gender identity. However, as noted above, the Committee is very aware of HIV status and citizenship status as key determinants of rights protection.

4.2 REEDOM FROM STIGMA AND PREJUDICE

4.2.a Overview and Legal Obligations

The legal, political, and cultural norms that stigmatize sex workers are often based in stereotypes about women’s roles in families and communities. Article 5 of the Convention requires elimination of stereotypes or prejudices, and places an obligation on States to take all “appropriate measures” for the same. State parties are obligated to act against gender stereotypes: those that are formally embedded in some laws, others that informally motivate the scope and application of other laws and policies and those embodied in individual and collective societal attitudes against sex workers.

Sexuality—especially expressed in defiance of cultural and legal standards of sexual ‘modesty’ for

JUDICIAL INDEPENDENCE AND GENDER STEREOTYPES

In 2011, the Human Rights Council’s Special Rapporteur on the independence of judges and lawyers, an appointed UN official responsible for documenting the relationship between judicial independence and human rights violations, reported that gender stereotypes and prejudices significantly affect how criminal rules of evidence and procedure are implemented. The Rapporteur noted specifically that the belief that “it is impossible to rape a sex worker” and other assumptions around the extent to which women are consenting sexual agents bias courts against women, and sex workers in particular. (Interim report of the Special Rapporteur on the independence of judges and lawyers, A/66/289, August 2011)

women—is a potent site of stigma and prejudice flowing from gender stereotypes.¹⁶ This stigma attaching to persons, especially cis-gendered women who sell sex, is often exacerbated by other beliefs, such as an association between sex for money and ‘unclean-ness’ and fear of HIV, and it is compounded by racial and ethnic discrimination in all countries. Transgender women may face stigmas associated not only with misogyny, but also homophobia, to the extent that some cultures/legal policies view sex between transgender women and men as homosexual sex.

4.2.b Forms of Violation

The criminalization of sex work perpetuates stigma and prejudices against sex workers, foreclosing on opportunities for their full and equal participation in all aspects of public life, violations of Articles 1, 2, and 7.¹⁷

Media also tends to propagate a stereotypical image of sex workers, which in turn interacts with

stereotypes and prejudices based on other forms of identity, such as race, ethnicity, or gender. Together, criminalization and media perpetuate forms of stigma that allow state institutions, ranging from the police to the judiciary, to deny equal protection to sex workers. Under such regimes, institutional discrimination is allowed to proceed with impunity, which limits opportunities for sex works to negotiate for better living and working conditions, and impedes their access to healthcare (Article 12) and other social welfare services (Article 11). Moreover, wide spread stigma contributes to denial of a wide range of marriage and family life rights, ranging from taking children away from persons believed to be in prostitution to evictions from housing and exclusion from education.¹⁸

The intersections of what Gail Pheterson calls the ‘whore stigma’ and the other prejudices, particularly around STIs and HIV/AIDS, have had particularly negative effects on not only health rights, but almost every civil, cultural and economic right detailed in the CEDAW convention and other treaties¹⁹. For instance, in its General Recommendation 25, the Committee has noted that these forms of stigma and prejudice ‘affect women not only through individual acts by individuals, but also in the law, and legal and societal structures and institutions.’²⁰ The Committee also observed, in the context of Tunisia’s requirement of weekly medical check-ups and police control (for those engaged in legal prostitution), that “these measures may infringe on the women’s right to private life and privacy and their freedom of movement and that it may contribute to their social stigmatization.”²¹ Stereotypes and stigmatization that are propagated by state intervention, state negligence, or media portrayal obstruct appropriate avenues of criminal justice and prosecution for crimes like rape, sexual harassment, or physical abuse against sex workers.

4.2.c Opportunities for Clarification and Remedy

The Committee is concerned about the stigmatization of sex workers but unsure about what legal and policy changes should combat this stigma. It is still working through its position on whether decriminalizing both buying and selling is consistent with the Convention. Moreover, (as noted in §2 on de-penalization), while removing criminal sanctions would be an essential step forward, some stigma remains in almost all cultures and political settings; sex outside of marriage in general and sex for money is regarded as ‘demeaned’ sex. The degree to which this stigma attaches to women of all kinds more than men is important to address under CEDAW, but the answer is not ‘equalizing’ the stigma directed at men—who sell or buy sex.

Documentation and new analyses are needed to advance the rights based argument that persons’ ability to determine the meaning and mode of their sexual activity, including as a form of labor or service, with or without romantic intimacy, is a paramount dignitary rights claim. (See section 4.9 for more on the power of documentation for sex worker advocates.)

4.3 FREEDOM FROM VIOLENCE

4.3.a. Overview and Legal Obligations

Freedom from violence has been clearly understood as a fundamental right of all persons, with specific attention to the way that violence operates as both a cause and consequence of discrimination against women.²² While the Convention did not initially explicitly address violence, through the Committee’s pioneering interpretation in General Recommendation 19 defining violence against women as a form of discrimination according to article 1 of the Convention, the Convention is now a central tool in combatting all forms of violence in public and private life, regardless of the nature of the actor. Recognition of the many forms of violence, as well as its many perpetrators and sites of perpetration, is key to understanding how violence leads to other rights violations, including barriers to equality in private and public life,

14 Godwin, John. "Sex Work and the Law in Asia and the Pacific." Thailand: UNDP, 2012. <http://www.undp.org/content/dam/undp/library/hiv/aids/english/HIV-2012-SexWorkAndLaw.pdf>.
15 Implementing comprehensive HIV/STI programmes with sex workers: practical approaches from collaborative interventions. Geneva: World Health Organization, 2013. http://apps.who.int/iris/bitstream/10665/90000/1/9789241506182_eng.pdf?ua=1; Anand Grover. "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." New York: UN General Assembly Human Rights Council 14, no. 3 (2010): A/HRC/14/20. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>; Human Rights Watch. "World Report 2014." New York: Human Rights Watch, 2014. https://www.hrw.org/sites/default/files/wr2014_web_0.pdf; Amnesty International. "Amnesty International Policy on State Obligations to Respect, Protect and Fulfill the Human Rights of Sex Workers POL 30/4062/2016". New York: Amnesty International, May 2016. <https://www.amnesty.org/en/documents/pol30/4062/2016/en/>

15 Consultation Notes

16 Cook, Rebecca, and Simone Cusack. *Gender stereotyping: transnational legal perspectives*. University of Pennsylvania Press, 2011.

17 Removing laws criminalizing sex work and related activities can help create empowering environments that allow sex workers to access HIV and other health services, to report violence and abuse (including by police and third parties), and to take steps to mitigate the impact of HIV. In addition, removing criminal prohibitions enables persons in sex work to become more visible and public (if they choose), organize politically, demand better treatment, and counter stigma. See Report of the Prostitution Law Review Committee on the operation of the Prostitution Reform Act of 2003. Wellington: Government of New Zealand, 2008. <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>.

18 See one example of forced evictions from Bangladesh in *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and Ors v. Government of Bangladesh and Ors.*, BGD002, [2001] 53 DLR or in India, *Sahyog Mahila Manda and Anr. v. State of Gujarat and Ors.*, IND023, [2004] 2 GLR 1764.

19 Gail Pheterson, *The Prostitution Prism*, (Amsterdam, Netherlands: Amsterdam University Press, 1996).

20 GR 25 para 7; eg CO Luxembourg, A/55/38, 22nd Session (2000) para 404.

21 U.N. Comm. on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Tunisia*, 47th Sess., Oct. 4-22, 2010, ¶ 34, U.N. Doc. CEDAW/C/TUN/CO/6.

22 UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.

freedom of association, health and bodily integrity rights, as well as rights to family life, etc. ²³

CEDAW prohibits violence in a number of ways, as clarified in General Recommendations 12, 19 and 35 updating General Recommendation 19. General Recommendation 19 interprets discrimination under CEDAW to include gender-based violence, which has further been defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”²⁴ General Recommendation 35 expands upon the definition of violence to include ‘acts or omissions intended or likely to cause or result in death, or physical, sexual psychological or economic harm or suffering to women, threats of acts, harassment, coercion and arbitrary deprivation of liberty.’²⁵

In reference to other human rights treaty bodies and special procedures,²⁶ the Committee adopted the stance that gender-based violence against women may amount to torture or cruel, inhuman or degrading treatment in certain circumstances if the purpose and intent requirement of torture are satisfied when acts or omissions are gender specific or perpetrated against the person on the basis of sex.²⁷ Violations of women’s sexual and reproductive health and rights could also amount to torture, including forced sterilization, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services.²⁸

General Recommendation 35, draws upon several other General Recommendations²⁹ in recognizing the multiple and intersecting identities of women which causes varying forms and degrees of

²³ United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, available at <http://www.un.org/womenwatch/daw/beijing/platform/>.

²⁴ General Recommendation 19, *supra*.

²⁵ CEDAW Committee, General Recommendation No. 35, par 14 (gender-based violence against women, updating general recommendation no.19)

²⁶ CEDAW Committee, General Recommendation No. 35, par 17 (gender-based violence against women, updating general recommendation no.19). The CEDAW Committee makes reference to the concluding observations and general comments by the Committee against Torture, and the Human Rights Committee, and reports by the Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment.

²⁷ CEDAW Committee, General Recommendation No. 35, par 17 (gender-based violence against women, updating general recommendation no.19)

²⁸ CEDAW Committee, General Recommendation No. 35, par 18 (gender-based violence against women, updating general recommendation no.19)

²⁹ 12 General recommendation No. 33, par 8 and 9 (access to justice). Other general recommendations relevant to intersectional discrimination are general recommendation No. 15 on women and AIDS, No. 18 on women with disabilities, No. 21 on equality in marriage and family relations, No. 24 (women and health), No. 26 (women migrant workers), No. 27 (older women and protection of their human rights), No. 30 (women in conflict prevention, conflict and post-conflict situations), No. 31 (harmful practices), No. 32 (the gender-related dimensions of refugee status, asylum, nationality and statelessness of women) and No. 34 (the rights of rural women).

GENERAL RECOMMENDATIONS 19 AND 35 AND GENDER-BASED VIOLENCE AGAINST WOMEN

General Recommendation 19 states that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. The indivisibility and interdependence of a life free from violence with other human rights and freedoms is reiterated under general recommendation 35. These rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work.

discrimination, thereby requiring appropriate legal and policy responses. In addition, it recognizes ‘being in prostitution,’ as an intersecting identity that makes women more vulnerable to gender-based violence. ³⁰

Violence is prohibited in both public and private life, as well as by state and non-state actors.³¹ The obligation of ‘due diligence’ developed strongly by the CEDAW Committee is part of the argument that states must shoulder the legal steps to reduce and respond to violence by private actors against any ‘woman’ as covered by CEDAW as a form of GBV. Article 2(d) of the Convention also requires the State to ensure that public authorities and institutions do not discriminate against women. For sex workers, this would mean judges, police, public health and public-school authorities among others.

³⁰ CEDAW Committee, General Recommendation No. 35, par 12 (gender-based violence against women, updating general recommendation no.19)

³¹ CEDAW Committee, General Recommendation No. 35, par 20 (gender-based violence against women, updating general recommendation no.19)

The CEDAW Committee has raised concerns with the issue of state actor violence faced by sex workers.³² In its 2015 Concluding Observations to Kyrgyzstan, the Committee expressed concern “about reports of discrimination and harassment against women because of their sexuality as well as about acts of harassment against women in prostitution by police officials.”³³ It urged the government to apply the Convention to all women, without discrimination, and to “protect them from all forms of discrimination and violence by public and private individuals.”

Moreover, the Special Rapporteur on Violence, in her Mission to India report, stated that “sex workers are exposed to a range of abuse, including physical attacks, and harassment by clients, family members, the community and State authorities. Many sex workers are forcibly detained and rehabilitated, and they also face a consistent lack of legal protection.”³⁴ In her mission to Honduras report, she noted that “violence against sex workers is escalating.”³⁵

In order to mainstream attention to violence against women as a human rights violation throughout the UN system, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women (DVAW) in 1993, which explains that violence against women encompasses physical, sexual, and psychological violence like rape or intimidation, as well as trafficking in women and forced prostitution.³⁶ It further imposes an obligation on States to ensure that law enforcement officers and public officials who are responsible for preventing, investigating, and punishing violence against women “receive training to sensitize them to the needs of women.”³⁷

³² U.N. Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report of the Russian Federation*, C/RUS/CO/8, 20 November 2015, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=CEDAW/C/RUS/CO/8.

³³ U.N. Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Fourth Periodic Report of Kyrgyzstan*, C/KGZ/CO/4, 11 March 2015, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=CEDAW/C/KGZ/CO/4.

³⁴ Rashida Manjoo, Special Rapporteur on Violence, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum, Mission to India, 1 April 2014, A/ HRC/26/38/Add. 1.

³⁵ Rashida Manjoo, Special Rapporteur on Violence, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum, Mission to Honduras, 31 March 2015, A/ HRC/29/27/Add. 1.

³⁶ Declaration on the Elimination of Violence Against Women, G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993), article 2.

³⁷ Id, article 4(i).

4.3.b Forms of Violation

Sex workers are vulnerable to violence committed by State, as well as private actors, who often commit violence against them with impunity. Impunity, and more generally lack of accountability for violence and other abuse of persons in sex work is built through the interactions of stigma and marginalization. Sex workers experience various forms of violence committed against them by their clients, people posing as clients, partners, or casual acquaintances. They also are subjected to sexual, physical and verbal abuse at the hands of police officers. Police officers conduct unlawful raids which lead to such harassment – the legal and practical habit of collapsing the crime of “trafficking” into sex work gives way to ‘rescue raids.’ Research reveals that during these raids, police officers grossly misuse their authority to extort sex workers, and cause physical and psychological violence. An example of the extortion for sex by police officers is the practice known as ‘Saturdays’ in Ukraine, Russia and Kazakhstan, where sex workers are forced to service law enforcement officers without monetary compensation, in lieu of protecting themselves from further threats or violence during the service of sexual provision.³⁸

Many of the interactions between police officers and sex workers, especially when sex work is criminalized, result in rapes, beatings, arbitrary arrest and detention based on false charges, confiscation of condoms, extortion of money, smart phones, or threats of deportation, in case of immigrant sex workers. In some countries, sex workers are forced into detention for ‘therapy’ or ‘rehabilitation,’ and many of these centers end up being abusive as well. Thus, police end up being the perpetrators of human rights violations, rather than protective agents of law enforcement for sex workers.³⁹ Consequently, sex workers often do not have faith in police officers and do not report abuse or seek access to legal remedies. These practices are part of the cycle of violence and impunity. Moreover, specific laws and policies can increase the risk of violence from customers and clients: in Sweden the so called ‘decriminalization’ of selling

³⁸ U.N. Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report on Ukraine*, C/UKR/CO/8, 9 March 2017, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2F%2FUKR%2F%2F8&Lang=en.

³⁹ See Peters, Alicia W. "Trafficking in meaning: Law, victims, and the state." PhD diss., Columbia University, 2010; Cheng, Sealing. *On the move for love: Migrant entertainers and the US military in South Korea*. Philadelphia: University of Pennsylvania Press, 2011; Saunders, Penelope, and Jennifer Kirby. "Move Along: Community-based Research into the Policing of Sex Work in Washington, DC." *Sexuality, Criminalization and Social Control Action Research* (2011): 107-127.

sex while introducing penalties for buying sex have led to increased violence against street level sex workers who are less able to take the time to screen potential clients.⁴⁰

4.3.c: Opportunities for Clarification and Remedy

While providing an important framework for state obligations to end VAW, the CEDAW Committee’s General Recommendations on the issue do not provide clear definitions of trafficking, such that many readers have assumed that ‘trafficking’ includes all forms of sex work, whether coerced or not, and that sex work equals the violence of trafficking. Subsequent international law has clarified that this is not to be the case (see Section 2.3 on the meaning of the Palermo Protocol) but some feminists insist on this meaning and many State parties have not clarified their own legal positions.

Moreover paragraph 12 of CEDAW’s General Recommendation 19 also reflects historical ideologies and contestations. It uses language reflecting one understanding of sex and material with sexual content as inherently harmful to women (a position taken by some 2nd wave feminists) when it interprets CEDAW as saying that: “... *the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence...*”⁴¹

GR 19 further states that: “.... *there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse...*”⁴² As noted in §3 all human rights law must evolve, being clear about its historical and ideological approaches and revising those that new circumstances and new ideas reject, as every treaty body has done—over same-sex

criminality, young people and gender expression, reproductive rights, rejection of the death penalty and other human rights issues.

More usefully, GR 19 goes on to say “...*Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence...*” and later in paragraph 16, “*wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.*”⁴³ While these assertions are true at times, a key contribution to modernize CEDAW will be to document the specific practices which make the coercion and fraud of ‘trafficking’ over the more frequent practice of many different informal livelihood strategies adopted by women of all kinds in conflict, displacement and poverty settings. ⁴⁴ Documentation and shadow reporting to CEDAW can help resolve this legal confusion consistent with International Human Rights Law (IHRL) and move the debate forward by presenting clear facts of when exploitation is happening in sex work (i.e., when persons are forced; when wages are withheld, when services are coerced and when persons are not free to leave their work place, or migrate safely, or are denied freedoms of association, etc.).

General Recommendation 35 does not address the ongoing confusion about, and conflation of sex work and trafficking, nor does it remedy the confusion generated in General Recommendation 19’s apparent lack of attention to trafficking in industries and sectors beyond the sex sector. However, Para. 31(a) of General Recommendation 35 obliges states to: “*[R]epeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them; including in customary, religious and indigenous laws. In particular, repeal: a) ... legislation that criminalises... women in prostitution...*” This provides an entry point for further progressive interpretation of the CEDAW Convention in light of the grounded understanding of how sex work actually functions and which we have described earlier in § II..

43 Ibid.

44 See report by Refugee Women: <https://www.womensrefugeecommission.org/gbv/resources/1272-mean-streets> for an initial but good analysis and research of different settings for sex work and GBV in post conflict settings.

4.4 RIGHT TO WORK AND EQUALITY IN WORK AND WORKING CONDITIONS

4.4.a. Overview and Legal Obligations

The right to work is a core right across human rights, found in the Convention on Economic, Social, and Cultural Rights (CESCR), as well protected in numerous International Labour Organisation (ILO) and regional treaties. Work includes both formal and informal sector forms of labor; the concept of ‘decent work’ addressed in §2 seeks to ensure that clear principles about safety, decisional autonomy, equality and fair remuneration are used as the parameters of work, not any particular structure of formal labor.

The CEDAW Convention and the Committee, as noted above, focus on gendered discriminations against women in work in formal and informal sectors. The Committee has identified both the law (including criminal, civil, labor, social, banking, housing, and zoning law) and de facto practices (including the role of gender stereotyping and racial, ethnic, and nationality-based marginalization) as instruments in segregating labor markets by gender. Low wages and unfair working conditions in woman-dominated sectors create barriers for women to retain their earnings. All these practices have been identified as forms of work related discrimination: careful analysis of diverse experiences of sex workers can help build the application of these analyses to sex work.

Article 11(1)(a) of CEDAW states that ‘the right to work is an inalienable right of all human beings.’ Thus, CEDAW places the right to work in a category of rights that cannot be taken away, providing an essential guarantee for women’s economic freedom.⁴⁵ Read in conjunction with Articles 1, 2, 3, 5, and 15, the conditions of work must be regulated to avoid circumstances of exploitation.

In 1998, the ILO, the official labour agency of the UN, produced a report on the economic impact and scope of sex sectors in several Asian countries. It stated that “for those adult individuals [who] freely choose sex work, the policy concerns should focus on improving their working conditions and social

45 Marsha A. Freeman. Christine Chinkin, Beate Rudolf, The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary, p. 286, available at: <http://opil.ouplaw.com/view/10.5422/fso/9780199565061.001.0001/actrade-9780199565061>

protection, and on ensuring they are entitled to the same labour rights and benefits as other workers.”⁴⁶

Because the CEDAW Convention affirms an underlying right, which is further elaborated in other treaties, we turn here to additional information from ICESCR. The right to work, according to General Comment 18 of the CESCR Committee, also entails the accessibility of ‘decent work.’ ⁴⁷ Further, ILO has stated that gender-equality concerns are at the heart of its agenda of promoting ‘decent work’ which targets four strategic objectives: rights at work, employment protection, social protection and social dialogue. These rights are also enshrined in CEDAW to differing degrees. Article 11(1)(c) guarantees the right to free choice of profession and employment and all benefits and conditions of service; Article 11(1)(e) guarantees the right to social security; and Article 11(1)(f) provides for the right to protection of health and to safety in working conditions. ⁴⁸ Thus, in line with CEDAW’s commitment, people engaged in sex work are guaranteed wages, benefits, social security, health security, appropriate working hours, safe working conditions (choice of place of work as well as conditions of work). Further reading Article 11 together with Article 7, provides the frame for sex workers to have the rights to organize and unionize themselves, and enter collective bargaining in the same manner as people engaged in other work do. Criminalization presents a direct barrier to sex workers accessing these labour rights.

So far, the CEDAW Committee has emphasized the empowerment of women involved in sex work. While in countries without legalized prostitution the Committee advocates that States promote economic empowerment for women and girls who have been exploited in prostitution and are seeking to leave, the approach is different in States with legalized prostitution. ⁴⁹ In the Netherlands, for example, the Committee “encourages the State party to allocate adequate funding for the

46 The sex sector, ILP, 06 August 1998, p. 212

47 CESCR, ‘General Comment 18’ (2005) UN Doc E/C 12/GC/18 para 12

48 ‘The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training’.

49 See U.N. Comm. on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Botswana*, 45th Sess., Jan. 18 – Feb. 5, 2010, ¶28, U.N. Doc. CEDAW/C/BOT/CO/3 (Mar. 26, 2010); U.N. Comm. on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Japan*, 44th Sess., July 20 – Aug. 7, 2009, ¶40, U.N. Doc. CEDAW/C/JPN/CO/6 (Aug. 7, 2009); U.N. Comm. on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Angola*, July 12-16, 2004, ¶ 157, U.N. Doc. A/59/38 Part II (2004).

empowerment of prostitutes.”⁵⁰ The Committee has also expressed support for State policies aiming to improve working conditions, social security, and health and hygiene of persons in sex work.⁵¹

4.4.b Forms of Violation

The criminalization of the various aspects of sex work (selling, buying, or third-party transactions/ interaction) diminishes the control that sex workers have over their conditions of work. Furthermore, criminalization enables exploitation because practices of policing and prosecution drive transactional sex underground. In the case of street-based or apartment-based sex work, this may give sex workers less time to screen clients and ensure security and safety in their work, which is effectively forced outside the scope of legal systems and structures. ⁵² In other settings, the inability to determine their clients, or to make decisions about the sexual acts that they will agree to constitute labor violations. The practices of debt control in many sex work settings deny sex workers their earnings, which may be fraudulently kept by managers. Accounting practices maybe non-transparent, and coercive deductions (for infractions, exorbitant rent or other charges) may keep sex workers from receiving their fair remunerations. (See § 2 above on discussion of EMPOWER’s documentation on ‘decent work’ in the Thai sex sector).

In many countries, people engaged in sex work are not guaranteed any labor rights and protections. Without these, sex workers are at a risk of encountering the many unfair labor practices noted above, as well as unsafe conditions of work as well as discrimination in accessing a myriad of services—such as housing, healthcare, social security benefits, or workers’ compensation—without any legal recourse. Their inability to safely bank and account for their own incomes furthers their precariousness. ⁵³

50 U.N. Comm. on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: The Netherlands*, 45th Sess., Jan. 18 – Feb. 5, 2010, ¶ 31, U.N. Doc. CEDAW/C/NLD/CO/5 (Feb. 5, 2010).

51 U.N. Comm. on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Germany*, 43rd Sess., Jan. 19 – Feb. 6, 2009, U.N. Doc. CEDAW/C/DEU/CO/6 (Feb. 12, 2009).

52 Both the Courts’ argument and the permitted evidence in *Canada (AG) v Bedford* 2013 SCC 72, [2013] 3 SCR 1101 make clear the connections between law, policy and the conditions that put sex workers at risk of violence.

53 Smarajit Jana, Bharati Dey, Sushena Reza-Paul, Richard Steen; Combating human trafficking in the sex trade: can sex workers do it better? *J Public Health (Oxf)* 2014; 36 (4): 622-628. doi: 10.1093/pubmed/fdt095

4.4.c Opportunities for Clarification and Remedy

One dimension of CEDAW’s practice holds that States are under an obligation to strengthen and harmonize their labor laws for protection of sex workers, with some suggestions that this improvement should hold irrespective of migrant status, HIV status, marital status, or gender identity. It follows from this that states must ensure equal access to and protection under national labor laws to all sex workers, across diverse forms of sex work and analyze the specific conditions of persons working in different settings (i.e., street, apartment, internet, brothel, window etc.)

However, promising this stream of work from the CEDAW Committee is, there are also confusions and countervailing pressures within the CEDAW advocacy space by which some advocates and experts are pushing the Committee to condemn all forms of sex work as exploitation and a form of GBV, and never a legitimate form of work. Acknowledging this reality is important for taking concrete next steps. The CEDAW Committee has not confirmed any clear reading of Article 6 or Article 11. Better documentation and analysis drawn from the experience of advocates (see the work of Empower in §2 above) will be essential to allowing the CEDAW Committee to distinguish exploitative sex work from safe conditions and fairly remunerated work, just as it distinguishes trafficked workers in agriculture, domestic work or any other labor sector from protected workers.

4.5 RIGHT TO PRIVACY AND FREEDOM FROM ARBITRARY INTERFERENCE

4.5.a Overview and Legal Obligations

The right to privacy (or to private life) is the site in which many key components of rights are grounded, and can be conceptualized as the space for decision-making for oneself, and as a member of one’s community. As such, it is a component of every other aspect of one’s rights: expression, work, health, decisions around family formation, and rights within family and marriage. Privacy may be classified in a number of different ways, but at its legal core lies the right for persons to “live as they choose, as opposed to being controlled,

alienated, or estranged from society or from themselves.”⁵⁴ There are several different forms of privacy to which a sex worker might claim access: spatial (protective against invasion in or around one’s body or home), decisional (protective against state or other intrusions on one’s capacity to make intimate or personal choices), and reputational (protective against invasion into one’s identity and self-development), among others.⁵⁵ Privacy in all of these spheres of life and personhood is necessary in order for sex workers to make decisions that best ensure the integrity of their dignity, health, well-being, and autonomy.

Although the text of CEDAW does not contain any explicit language on the right to privacy, within human rights law generally and within the last twenty years of work on gender-specific rights, this right has regularly been addressed as critical to human dignity, as well as gender equality.⁵⁶ It has been named in decisions of global reach on sexual rights: holding the criminalization of homosexual practices to be violative of human rights (Human Rights Committee views in *Toonen v. Australia* case, 1994); on reproductive rights, striking down the prohibition on contraception (United States Supreme Court decision in *Griswold v. Connecticut* case, 1965); on gender identity- reaffirming that the right to privacy should not be denied on grounds of gender identity (Indian Supreme Court decision in *National Legal Services Authority v. Union of India and Others*, 2014); and crucially has been linked as a core component of such public civil and cultural rights such as expression, marriage and association. Moreover, the link between access to information (a public, civil and cultural right) and meaningful decision-making in private life has been upheld with respect to many core aspects of reproductive health (e.g. a right to information on contraception, HIV protection, abortion information, etc.).⁵⁷

As noted, CEDAW, through its focus on non-discrimination in such core rights as marriage and family life, logically affirms the underlying obligation of state protection for private life found

54 Koops et al., “A Typology of Privacy,” *University of Pennsylvania Journal of International Law*, 38, no. 2 (2017): 493.

55 Ibid.

56 Miller, Alice, M. “Sexuality and human rights: discussion paper.” *Versoix: International Council on Human Rights Policy* (2009); Khosla, Rajat, Lale Say, and Marleen Temmerman. “Sexual health, human rights, and law.” *The Lancet* 386.9995 (2015): 725-726.

57 See, for example, Paragraph 96 of the Beijing Declaration and Platform for Action generated at the Fourth World Conference on Women in September 1995, available at <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

in the International Covenant on Civil and Political Rights (ICCPR) and regional treaties such as the Inter-American Commission on Human Rights and European Convention on Human Rights. In particular, Articles 1, 2, 3 and 5 (addressing gender stereotypes) coupled with Article 16 on family life have enabled strong statements by the CEDAW Committee on the specific protections needed by girls and women in sexual and reproductive health and rights decision-making, which in turn are strongly embedded in privacy rights. Protections for private life in Human Rights Committee General Comment 18 and the ICCPR include the range of laws and policies that affect the information and equality of decision-making.

A wide range of security of the person laws (no searches or seizures without valid warrants) have been criticized by human rights bodies. There have also been a range of cases that strike down strip searches and invasive body cavity searches in custodial settings. As such, a range of issues regularly faced by sex workers, from invasive searches (often experienced by transgender women as well as cis-gendered) to raids of home and living and working spaces, raise privacy concerns.

4.5.b Forms of Violation

Discriminatory laws, policies and practices of the State lead to invasion of privacy of sex workers. There have been instances of eviction of sex workers from their place of domicile (brothels); forcible and arbitrary fingerprinting of sex workers; restrictions in relation to travel/movement and requirement to register⁵⁸; disclosure of work status to public and family members; forced testing for HIV/STI status, and disclosure of the results to public and family; and confiscation of property by police, such as confiscation of phones to look through phone contacts, which is otherwise treated as confidential information. Surveillance and unlawful raids in hotels and other private properties are often carried out by police or religious actors. Sometimes they are accompanied by media, who unethically infringe privacy by releasing information and photographs.

In Kyrgyzstan, in addition to disclosing private information, the media has also spread hate speech, ⁵⁸ Consultation Notes – done in Netherlands

which contributes to violence against sex workers.⁵⁹ Thus, police, doctors and media are often complicit in disclosure of private information to the public. In Russia, while recognizing the right to information and freedom of speech and expression, the State is also required to regulate the media to maintain confidentiality of private information and respect a sex worker's right to privacy; however, these rights are not respected for sex workers. Other examples include public parades and other forms of public shaming.

Further, unlawful raids often result in arbitrary stripping and intrusive body searches, violating fundamental rights of bodily autonomy. Police may also conduct arbitrary search of homes and places of work of sex workers. Sex workers in Spain are required to undergo sexual health checks conducted by brothel owners and pay excessive fees for these checks.⁶⁰ Often these are not kept confidential, which violates the sex workers' right to privacy. In the United Kingdom, sex workers' names and photographs have been printed and distributed which infringes the right to privacy and exposes them to violence and discrimination.⁶¹ In Slovakia, there have been instances of health care workers refusing medical care to sex workers and making discriminatory remarks about pregnant sex workers alleging that they are not fit to bear children.⁶²

4.5.c Opportunities for Clarification and Remedy

The current confusion within CEDAW over sex workers right to their livelihood compounds the lack of protections for privacy for persons in sex work. National courts have also been mixed about rights protection of persons in sex work in this area. For instance, in *S v. Jordan* (South Africa) the decision wrongly determined that if money is exchanged, the zone of intimacy for sexual conduct loses its protection of privacy.⁶³

Clear analysis, first of the need to afford autonomy of decision-making to persons in sex work can be advanced by documentation about practices

59 Consultation Notes

60Melissa Hope Ditmore, *Encyclopedia of Prostitution and Sex Work, Volume 2*, (Westport, CT: Greenwood, 2006): 647.

61 Ibid.

62 Ibid.

63 *S v Jordan* 2002 (11) BCLR 1117

which deny information needed to make informed decisions by sex workers, as well as practices which degrade their public reputation as invasions of privacy. The CEDAW practice addresses public shaming, strip searches, virginity checks and other invasions of privacy vis à vis 'good women' [i.e. women not deemed sex workers-]. This analysis should be extended expressly to include these violations when they occur in the context of people in sex work.

4.6 RIGHTS TO HEALTH

4.6.a Overview and Legal Obligations

The right to health has been recognized as a central right for the equality, dignity and freedom of all persons. The last two decades have seen an explosion of understanding and legal commitments to the right to health as an obligation not only of health services and goods, but of creating the conditions (social, political, economic and cultural and civil) in which all persons can enjoy their highest attainable right to health.⁶⁴

CEDAW itself recognizes rights to health in Article 12, which requires that states parties "*take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure [...] access to health care services, including those related to family planning.*"⁶⁵ Article 12 also requires states parties to ensure that women have access to "appropriate services" in connection with pregnancy and the post-natal period. Although Article 12 offers the most direct reference to the right to health in CEDAW, other articles also deal with it. Article 10 discusses the importance of affording women with educational information related to family planning; Article 11 on non-discrimination in employment addresses the importance for women to have access to occupational health and reproductive health services no matter their form of employment; and Article 14 accounts for the particular problems faced by rural women, noting access to health care facilities and family planning information in particular.⁶⁶

64 Both the World Health Organisation and the Office of the UN High Commissioner for Human Rights have recently issued detailed fact sheets on the "right to health," which each describe as an "inclusive" right containing both freedoms and entitlements that extend not only to biomedical or healthcare systems, but to other state structures and institutions that provide for people's overall well-being. Available at <http://www.who.int/mediacentre/factsheets/fs323/en/> and <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>, respectively.

65 Article 12, Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, 29th session, 30 June 1979, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article12>.

66 Articles 10, 11, 14, Ibid.

Reproductive health constitutes a major focus of CEDAW's language, but other treaty bodies have also evolved in their understanding of health to include a clean and safe working environment, access to occupational health services as well as sexual and reproductive health services, and specific commitments and obligations around HIV/AIDS. More recently, the need to address mental health has risen to the top of the global health agenda, and the particular concerns of women and mental health are being addressed. The Convention on the Rights of Persons with Disabilities (CRPD) extensively addresses the health aspects of disability (both mental and physical), and its Committee has likewise been developing its jurisprudence around gender and sex discrimination.

In these ways, the right to health has been built comprehensively around sex and gender, and it has also been built in tandem with the recognition of core state obligations set out in other texts in international human rights law. General Comment 14 of the CESCR Committee, for instance, not only recognizes non-discrimination on the basis of sex but also sexual orientation or gender identity. Human rights to health are now understood to obligate the state—and the global community—to uphold their duties to respect the right, to protect it from violations by others and to create the state structures that can address it, with a focus on the acceptability, availability, accessibility and quality (AAAQ).⁶⁷

For sex workers, the right to health means more than a set of systems, policies, and programs that support health sexual and reproductive lives; it necessitates attention to a full range of health services, especially occupational health-wise, to ensure a healthy life across the life cycle. This includes support for chronic health issues, as well as issues arising for the elderly.

Core principles and phenomena that must be considered in analysing sex workers' health rights are non-discrimination, the impacts of stigma and the need for freedom from discrimination, as well as freedom from violence, mandatory testing/privacy rights, associational and labor rights as well as economic and social security to support health

67 World Health Organisation. Right to Health Fact Sheet. Joint Fact Sheet WHO/OHCHR/323, August 2007, available at http://www.who.int/mediacentre/factsheets/fs323_en.pdf.

across the life cycle. The recognition that a majority of female sex workers are mothers means specific attention to maternal health and rights as well as to family rights. The right to equal protection of the law is also critical in that the undocumented status, or irregular work status of many sex workers keeps them outside of most progressive public health efforts (except for their surveillance as 'vectors' of disease for HIV and STIs). As such, the right to health is intimately interconnected with many other rights enumerated in this section—which makes sense given the expansive understanding of health articulated in human rights doctrine, law, and policy (i.e., that health is not merely the absence of disease, but the presence of physical, mental/emotional, and social wellbeing).

4.6.b Forms of Violation

Sex workers face many violations of their right to health, ranging from unsafe working conditions and coercive working practices to denial of care and specific services.

First, the criminalisation of sex work and the social marginalization of sex workers themselves can directly result in risks to health. One of the most significant health concerns for sex workers is HIV. As much public health research has demonstrated, the burden of HIV among female sex workers is disproportionately high.⁶⁸ Legal environments and state policies around sex work contribute to the severity of this epidemic, and stigma and discrimination may limit sex workers' ability to negotiate condom access and use, as well as other protective measures to prevent HIV.⁶⁹ Epidemiological modeling suggests that decriminalising sex work could avert 33-46% of new HIV infections in the next decade.⁷⁰

There are several other significant health concerns for sex workers that unjust laws and policies exacerbate. One set of concerns revolves around occupational health: over-work, unsafe working conditions, and a lack of nutrition may

68 Stefan Baral et al., "Burden of HIV among female sex workers in low-income and middle-income countries: a systematic review and meta-analysis," *The Lancet Infectious Diseases*, 12, no. 7 (2012): 538-549.

69 C. Beyrer et al., "An action agenda for HIV and sex workers," *The Lancet* 385, no. 9964 (2015): 287-301.

70 Kate Shannon et al., "Global Epidemiology of HIV among female sex workers: influence of structural determinants," *The Lancet* 385, no. 9962 (2015): 55-71.

contribute to poor health outcomes.⁷¹ The illegality and stigmatisation of sex work also contributes to psychological stress.⁷² Reproductive health is another area of concern for sex workers. Many sex workers around the world are mothers, and female sex workers are at high risk of maternal morbidity and mortality, given a number of sexual and reproductive risk factors.⁷³ In direct violation of CEDAW's Articles 11 and 12, access to safe pregnancy and maternal care, as well as safe abortion, are frequently denied. As discussed elsewhere in Section 4, sex workers are exposed to heightened violence from state agents and law enforcement, clients, families and the community at large, which violates not only physical, but also mental health.⁷⁴

Second, one of the most important influences on health is access to health care services. Criminalisation of sex work and discriminatory practices (even where sex work is not illegal) prevents sex workers from obtaining equal access to such services.⁷⁵ Stigma plays a large role in erecting this barrier to health care: some doctors or nurses may outright refuse to treat sex workers, or deny treatment related to certain conditions such as HIV, and sex workers may be deterred from seeking out medical care when needed because of experiences of judgment, stigma, and discrimination in healthcare settings.⁷⁶ Discrimination and abuse in healthcare settings may be compounded against LGBT or gender non-conforming sex workers, and refugee or migrant sex workers.⁷⁷

Although lack of access to services is a central issue in sex worker health, invasive health checks mandated by states also constitute a violation of human rights (see sub-section 4.5 for more on the right to privacy and freedom from arbitrary

interference).

Third, and more indirectly, the criminalization of sex work and poor working conditions may harm wellbeing in other ways. As explained in other sub-sections, violence and stigmatization are common experiences for sex workers operating under unsafe working conditions, which in turn leads to general disempowerment.⁷⁸ If health is not just the absence of disease but the existence of both physical and *social* wellbeing, then other rights and freedoms that protect the dignity, autonomy, and political/cultural/economic/bodily integrity of sex workers are bound up with and in the right to health. Since the criminalisation of sex work and social marginalisation of sex workers impedes their ability to organise for better working conditions, be visible, and participate in public life as full citizens, unjust policies and discriminatory practice constitute a violation of sex workers' holistic right to health.⁷⁹

4.6.c Opportunities for Clarification and Remedy

Public health is a complex site for rights claiming by sex workers; while advocating for the right to health can be emancipatory and transformative, health can also serve as a justification for the state's attempt to control or regulate the lives of sex workers.⁸⁰ Historically, sex workers have been treated as 'vectors of disease' and health policies directed toward them (designed in the past to maintain 'public hygiene') have more often than not served as techniques of surveillance rather than opportunities for public benefit. The CEDAW Committee should be encouraged to recognize that many health regulations under regimes of legalized prostitution treat health care in such a coercive manner, without regard to dignity and personhood (e.g., see Section 2.9 for more on Senegal's mandatory registry for sex workers). The essence of health claims under CEDAW must be directed toward an equal right to the health of all persons in sex work without discrimination, rather than enabling states to exert control over and keep surveillance on sex workers.

78 Deanna Kerrigan et al., "A community empowerment approach to the HIV response among sex workers: effectiveness, challenges, and considerations for implementation and scale-up," *The Lancet* 385, no. 9963 (2015): 172-185.

79 Michael L. Rekart, "Sex-work harm reduction," *The Lancet* 366, no. 9503 (2006): 2123-2134.

80 Open Society Institute Public Health Program, "Eight Working Papers/Case Studies Examining the Intersections of Sex Work Law, Policy, Rights and Health," Sexual Health and Rights Project, 2006.

One last area for further investigation and work around sex workers' right to health will be acknowledging the full range of health services and issues that relate to sex workers' lives, working conditions, and experiences. Advocacy and research on HIV/AIDS has been both productive of sex worker rights (i.e., brought attention to sex worker experiences of the epidemic, and their specific health needs) and constraining in that harm reduction efforts have often been limited in their scope (i.e., concerned less with respecting human rights and dignity and more with achieving certain metrics and outputs). The health of sex workers encompasses more than sexual health and HIV; as detailed here, it includes occupational, family and reproductive, and mental health, as well as freedom from violence. Research, advocacy, policy-making, and legal-interpretative efforts stand to benefit from this more expansive understanding of sex workers' right to health.

4.7 EQUAL RIGHT TO MARRIAGE (OR NOT MARRY) AND FOUND A FAMILY

4.7.a Overview and Legal Obligations

The right to marry (freely chosen) and found a family is one of the most fundamental rights. State parties are under an obligation to guarantee the right to marriage and/or family life under Article 16 of CEDAW. Consequently, sex workers have the right to enter into marriage⁸¹; the right freely to choose a spouse and to enter into marriage only with their free and full consent⁸²; the same rights and responsibility during marriage and at its dissolution⁸³; and the same rights to decide freely and responsibly on the number and spacing of their children.⁸⁴

Full recognition of the wider range of legal rights needed for family life are part of the enabling framework for sex workers through which to assert their rights. Under Article 16, States are prohibited from discriminating against sex workers regarding the right to marriage and family life, particularly in the form of deeming sex workers as unfit parents, and denying pregnant sex workers medical

treatment on those grounds. CEDAW also provides for equal parental rights for sex workers under Articles 16(1)(c) and 16(1)(f).⁸⁵

This has implications for biased application of laws and denial of guardianship and custody to sex workers. States are also under an obligation under Article 16(1)(g) to adopt measures that guarantee women the right to choose a profession and occupation without prejudice.⁸⁶ General Recommendation No. 21 on Article 16 of CEDAW further provides that "each partner must therefore have the right to choose a profession or employment that is best suited to his or her abilities, qualifications and aspiration, as provided in article 11(a) and 11 (c) of the Convention."⁸⁷ Thus, sex workers cannot be denied the right to marriage and family life based on the choice of their profession. Further, sex workers have the same property rights as their spouses under Articles 15(1), 15(2) and 16(1)(h), and consequently have the right to be recognized as the head of the household and the family provider.

The right to marry and right to found a family are often denied to persons in sex work or held out as institutions of society inimical to sex work. Examination of the core principles and rights at issue can help clarify who gains and who loses in these paradoxes: patriarchy and forces antithetical to sexual decision making are winners; sexually marginalized persons and women lose.

International human rights standards affirm the fundamental right to 'marry and found a family' and often reiterate the centrality of the family as a core unit of society. ⁸⁸ Marriage is an important institution in many societies, although historically and today, it takes diverse forms. While marriage can be the basis of family, it is increasingly recognized that marriage is not the only basis of

85 Article 16(1)(c), CEDAW provides that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights and responsibilities during marriage and at its dissolution. Article 16(1)(f), CEDAW provides that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.

86 Article 16(1)(g), CEDAW provides that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation

87 UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, Para 24, available at: <http://www.refworld.org/docid/48abd52c0.html>.

88 Many international treaties reference this right, including Article 16 of the Universal Declaration of Human Rights; Article 10 of the ICESCR; Article 23 of the ICCPR; the CRC Preamble, and Article 23 of the CRPD.

81 Article 16(1)(a), CEDAW

82 Article 16(1)(b), CEDAW

83 Article 16(1)(c), CEDAW

84 Article 16(1)(d), CEDAW

family; moreover, families can also take many shapes. General Recommendation 21 read with General Recommendation 29 recognize the various forms of families and marriages- civil, religious, customary; de facto unions and registered partnerships including for same-sex couples.⁸⁹ And while both marriage and family are important institutions, persons wishing not to marry or found a family must be acknowledged as full participants in society and entitled to rights. “Free and full consent” has been enshrined as the core principle underlying entering marriage. Increasingly these concepts also pertain to its dissolution, as well as to all activities within marriage, including sexual activity.

CEDAW affirms the underlying rights for marriage (and for persons who do not marry) and focuses on gendered inequalities in the formation, dissolution and practices of marriage under Article 16 and through several general recommendations which address marriage. Categorical exclusion from marriage on health grounds (HIV or other health grounds) or other grounds linked to health and physical characteristics (disability, for example) violates general principles of non-discrimination.

A wide range of laws may regulate marriage in any given country: family, personal status, and criminal laws, as well as health regulations and customary laws. At the same time, the role of the criminal law in ‘patrolling’ the boundaries of marriage and other forms of personal relationships is being questioned in human rights.

Moreover, health and rights analyses increasingly highlight the need for recognition of alternative forms of family in order to ensure access to appropriate services (when services are conditioned on family membership) as well as conditions of equality necessary for health for all members of the family. It is clear, however, that children have full rights regardless of the marital status of their parents.⁹⁰ In many circumstances, the health, of the child (including her or his sexual health and protection from abuse) requires respect and equal protection for the parents’ ability and right,

89 Committee on the Elimination of Discrimination against Women, General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), CEDAW/C/GC/29. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/29&Lang=en

90 Articles 1 and 2, CRC.

irrespective of marital status, or different or same sex partnership, to make decisions for and with the child, in his or her best interest, including on access to services, treatment and information.

4.7.b Forms of Violation

Sex workers’ rights in marriage and family life are often violated due to stigmatization, prejudice or other discriminatory legal provisions and practices, which in turn directly affect their right to marriage and right to found a family. In some countries, such as Tajikistan, a man is allowed to access state run database to ascertain the nature of the profession of their wives or intended brides. Sex workers also face barriers in accessing equal parental rights including guardianship, custody, adoption and transmission of citizenship.

Sex workers find it difficult to obtain birth registration and documents without naming the father of their child. For instance, in Bangladesh, birth registration is compulsory but one cannot get a birth certificate without the father’s name.⁹¹ Often, sex workers are threatened or deemed as unfit parents by the State machinery leading to loss of custody. The criminal records of sex workers are often used to deny them parental rights.

4.7.c Opportunities for Clarification and Remedy

As yet, the CEDAW Committee has not consistently applied these rights to sex workers. Sex workers, as full members of society and workers, should have abilities to support in family life, if chosen; if they decide to live outside family life, they must be afforded support for their decision as well. In this way, women who live outside of traditional hetero-normative relationships are put squarely on the human rights agenda: without acceptance that all rights are not best gained (or measured) by ‘good women in marriage’, the full diversity of lives of people in the sex sector will not be protected.

91 Human Rights Watch, Ravaging the Vulnerable Abuses Against Persons at High Risk of HIV Infection in Bangladesh, August 2003. Available at: <https://www.hrw.org/report/2003/08/19/ravaging-vulnerable/abuses-against-persons-high-risk-hiv-infection-bangladesh>

4.8 RIGHT TO ECONOMIC AND SOCIAL SECURITY

4.8.a Overview and Legal Obligations

States are under an obligation to take all appropriate measures to eliminate discrimination against women in “other areas of economic and social life” under Article 13 of CEDAW. Thus, Article 13 safeguards rights which are relevant in the economic and social fields, even if they are not explicitly mentioned.⁹² The references to areas of life which matter to CEDAW’s review echoes the scope of the definition of discrimination contained in Article 1, read in conjunction with obligations under Article 3, which include “all areas of life.”⁹³ The Committee has emphasized that the Convention is part of a comprehensive international human rights framework that, explicitly or implicitly, aims at ensuring the enjoyment of all rights by all.⁹⁴ For this reason, rights relevant in the economic and social field such as the right to adequate housing,⁹⁵ right to sanitation, right to social services and access to basic public services, and right to protection against poverty and social exclusion can be found in other international treaties too.

Under Article 13, the State parties are under an obligation to take measures to guarantee women the right to family benefits;⁹⁶ the right to bank loans, mortgages and other forms of financial credit;⁹⁷ as well as the right to participate in recreational activities, sports and all aspects of cultural life.⁹⁸ Moreover, States must put in place measures to ensure availability and access to adequate housing and other social benefits for women sex workers, including reviewing its laws and policy measures that provide remedies for women sex workers who are discriminated in this context.⁹⁹

92 Freeman Chinkin, Rudolf (eds.), The UN Convention on the Elimination of All Forms of Discrimination against Women – A Commentary, p. 339, available at: <http://opil.ouplaw.com/view/10.5422/fso/9780199565061.001.0001/actrade-9780199565061>

93 Freeman Chinkin, Rudolf (eds.), The UN Convention on the Elimination of All Forms of Discrimination against Women – A Commentary, p. 339, available at: <http://opil.ouplaw.com/view/10.5422/fso/9780199565061.001.0001/actrade-9780199565061>

94 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 28 on the Core Obligation of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/2010/47/GC.2 (19 Oct 2010) at para 3.

95 Committee has looked at right to adequate housing in the context of women in vulnerable situations Committee Report on Mexico CEDAW/C/2005/OP.8/Mexico, 32nd Session (2005) para 289 (poverty and extreme poverty); GR 27 para 12 (older women). This can be extended to barriers faced by sex workers in accessing adequate housing.

96 Article 13(a), CEDAW

97 Article 13(b), CEDAW

98 Article 13(c), CEDAW

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Further, State should adopt measures to promote women’s sex workers access to development and micro-credit opportunities in the event they wish to participant in such projects.¹⁰⁰

4.8.b Forms of Violation

Sex workers experience discrimination in the context of economic and social spheres. First, the fear of criminalization leads many sex workers to go underground and work in unsafe conditions. This may affect their ability to obtain regular income, but in order to continue working, they often have to pay “protection money” to pimps, police officers and other persons in authority. Second, sex workers may face discrimination in accessing housing and/or permanent shelter. The nature of their work exposes them to higher rents due to extortion, homelessness or displacement as they might lose housing tenure or right to domicile in the event their place of resident is considered their place of employment, thus violating certain regulations of the law. The displacement and lack of access to adequate housing in turn has effects on other economic and social security measures – sex workers and their children face barriers in accessing legal documents including identity cards, national registration documents, domicile registration, etc.

Finally, a lack of legal recognition resulting from inconsistent access to income, shelter, and basic economic need has an impact on access to essential social services such as healthcare and education. In Lithuania, sex workers who lack proper documents cannot receive elementary education, which influences other aspects of their lives and future. For example, in many countries, where residences must be registered if a sex worker does not have appropriate registration in a particular local, it is difficult to register her/their child in school or under the social security system. It is nearly impossible for sex workers to prove that they have some income or work if they are required to file documents. Sex workers often do not have access to banking systems – the criminalization of sex work precludes them from opening bank accounts or obtaining loans, and without paying taxes banks do not give any credit. It is also impossible to receive a passport if a person is not registered anywhere in


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the country and thus impacting mobility of the sex workers.

4.8.c Opportunities for Clarification and Remedy

As with so many other rights enumerated in this section, the right to economic and social security is intimately tied to the realization of other rights that are both explicitly and implicitly provided for in CEDAW, such as a right to non-discrimination and the equal protection of law, access to employment and decent work, and rights in the family. However, issues related to economic and social rights have been less thoroughly identified in practice than some of their related issues and corresponding rights. The CEDAW Committee, states parties, and sex workers rights advocates would all be well-positioned to evaluate the economic and social services available to sex workers in practice, especially under legal regimes in which sex workers are continually threatened with arrest and harassment and for this reason might not have access to benefits, stable housing, sanitation, and other basic public services.¹⁰¹

101 Urban Justice Center Sex Workers Project, "Report on Sex Workers Rights in the U.S. Under CEDAW for the 39th Session of the Committee," 2006-2007, available at <https://swp.urbanjustice.org/sites/default/files/20070803CEDAWFinal.pdf>.



SECTION V: FUTURE WORK FOR ADVOCATES: THE POWER OF DOCUMENTATION

Beyond articulating women’s human rights as indivisible, interrelated and intersectional, the CEDAW Convention applies the substantive equality approach in articulating state obligation towards the protection, respect, and fulfilment of women’s human rights. In so doing, CEDAW recognizes the multiple levels of discrimination and the need for addressing such discrimination through evidence-based measures and interventions by the state with the aim of achieving equality both in reality (de facto) and in law (de jure). It demands that the state be responsible for the practical realization of rights – i.e. to bridge the gap between law, policy and practice. It provides an understanding of the complexities of the social and systemic problems (that often perpetuate inequality and stereotypes) that need to be addressed to eliminate *all forms* of discrimination against women in sex work.

The CEDAW Committee’s approach to substantive equality clearly plays a significant role in recognizing the effects of specific contexts on risk to violations, challenges in addressing them and providing a more nuanced lens in legal approaches towards protection of rights of women in sex work. Substantive equality adopts a corrective approach that places obligations on the state to correct or modify the environment that disadvantages and discriminates against women, and in this context women in sex work. It requires all initiatives adopted by the state such as reform of laws, adoption of policies, and/or initiation of programmes and services to lead to

- i) equality of opportunity that is guaranteed by a framework of laws, policies and related programmes and other initiatives;
- ii) equality of access that requires establishing institutions and mechanisms to promote implementation and enforcement as well as eliminating barriers that impede access to opportunities; and
- iii) equality of results that demonstrate real change for the benefit of all women.

Thus, the definition of discrimination under CEDAW can be envisioned as one that recognizes the dynamic interplay between discriminatory ideologies, actions, intentions and results. Where there are discriminatory results, a specific

discriminatory intent is not required to qualify as a violation of CEDAW’s guarantee of non-discrimination. However, when unpacking specific discriminatory outcomes, it may often be necessary to analyse how those outcomes are driven by specific intentions, actions or underlying ideologies, and addressing underlying ideologies may be a pre-requisite to achieving full equality of results.

Advocates play a key role in analysing specific situations to identify and document evidence of these connections. One of the central objectives of the Framework is to encourage the documentation and analysis of a diversity of sexual lives by sex worker projects, networks, and NGOs. If the CEDAW Convention and Committee are oriented toward the “real” lives of all kinds of women, then this practice speaks directly to the Convention’s goals, procedures, and evolution over time, through the Committee’s interpretation..

In conjunction with all of the opportunities enumerated here for the CEDAW Committee and other treaty bodies to clarify legal interpretation and remedy the violation of sex workers’ human rights, advocates have the opportunity to inform and shape the contours of international human rights law through documentation. In recording the challenges documented by sex workers themselves and all who work with or on behalf of them for their wellbeing, sex worker projects, networks, and NGOs can identify gaps between legal doctrine and law enforcement, between policy and reality, and become further involved in the process of legal and policy reform, including on new aspects or issues.

International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific) is an independent, non-profit NGO in Special Consultative Status with the Economic and Social Council of the United Nations. IWRAP Asia Pacific has gained expertise, experience and credibility from over 20 years work of mobilizing and organizing women's groups and NGOs to support the work of the State in fulfilling its obligations to Respect, Protect and Fulfill women's human rights under CEDAW, through capacity building, advocacy and knowledge creation initiatives aimed toward development of effective national women's rights advocacy strategies.