



Submission to the Special Rapporteur on trafficking in persons, especially women and children on the implementation of the non-punishment principle

This submission is made on behalf of CREA in partnership with Aahung (Pakistan), Hidden Pockets Collective (India), Youth Advocacy Network (Sri Lanka), YP Foundation (India) and YUWA (Nepal).

The submission aims to highlight how the unduly heavy normative and practical reliance on criminal legal systems for identification, protection and assistance of trafficking victims is an impediment to the meaningful realization of the goals of the non-punishment principle ('NPP'). Specifically, the overemphasis on 'sexual exploitation' as a singularly exceptional form of trafficking and persistent conflation of sex work with trafficking for ideological and political ends¹ infringes the rights of, among others, sex workers and also displaces attention and resources from trafficking victims/survivors.

About the organisations

CREA is a feminist international human rights organization based in the Global South working at the intersection of sexuality, gender, violence against women, and human rights advocating for positive social change at the grassroots, national, regional and international levels.

Aahung is a Karachi-based NGO working towards improving the sexual and reproductive health and rights ('SRHR') of men, women, and children.

Hidden Pockets Collective conducts research on SRHR in cities of Global South.

Youth Advocacy Network engages with government representatives on key areas related to SRHR and Gender equality of young people.

¹Global Alliance Against Traffic in Women, Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions (2018), p. 37, available at <https://www.gaatw.org/resources/publications/941-sex-workers-organising-for-change>.

The YP Foundation is a youth run and led organization that supports and develops youth leadership to advance rights of young women, girls and other marginalized youth.

YUVA works with people between the age of 16 to 29 and concentrates on SRHR, Active Citizenship and research through its Centre for Youth Studies in Nepal.

Non Punishment Principle (NPP): situating human rights in a carceral framework

The organisations who are part of this submission strongly support the NPP as it centres human rights of the victims of trafficking and recognizes the inadequacy of relying on a criminal law centric approach to provide remedies for victims and to fully encompass all that is needed to reduce or eradicate trafficking. While situating the NPP within the context of the criminal legal systems in South Asia, the failures and challenges of such a carceral framework are apparent, as we suggest below.

Criminal legal systems are designed to control, discipline and punish certain behaviours and persons. Such policing is based on and further regiments gender, racial, ethnic, religious, caste and class fault lines. In the face of the overwhelming compulsion of the state to control and punish, concepts of social inclusion, rehabilitation and restitution are side-lined.

And yet these commitments – to social inclusion, rehabilitation and restitution – are core to the NPP. For the NPP to be fully realised in spirit, it is crucial to focus more on strengthening victim support systems and advancing community and restorative justice mechanisms, so as to deconstruct inequity in the in implementation of laws, and the centrality of gender, race, ethnicity, caste, class and religion within criminal legal systems in South Asia.

Criminalisation of sex work and its implications for the NPP

Trafficking laws in South Asia unduly target adult sex workers performing such work voluntarily. Sex workers recognise that trafficking is a criminal offence and that no person should be forced into a profession they have not willingly chosen. However, the conflation of sex work and trafficking severely undermines the human rights of sex workers while failing to secure rights of people who are trafficked. This faulty presumption results in misdirecting resources into policing sex work, rather than identifying people who are coerced and/or deceived and providing them appropriate support, regardless of sector in which they are located². This profound misunderstanding of both sex work and trafficking exacerbates the lack

²See UN Women, Note On Sex Work, Sexual Exploitation and Trafficking (2013), available at <https://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf> ; UNAIDS Guidance Note On HIV and Sex Work (2012), available at https://www.unaids.org/sites/default/files/media_asset/JC2306_UNAIDS-guidance-note-HIV-sex-work_en_0.pdf.

of legal remedies to redress violence and erodes the efforts of sex workers fighting for legal and social recognition of their rights to dignity and livelihood.³ Further, criminalisation of sex work breaches the NPP. Not only does the criminalisation of sex work negate consent of adult women, it also fails to recognise their autonomy and shifts all responsibility away from the State to fulfil its obligations to respect, protect and fulfil their rights.

The predominant narrative arising from sex worker led organizations and collectives, cutting across regions, is that criminalisation of sex work results in or exacerbates rights violations, including sex workers' rights to life, health and safety.⁴ Due to the societal stigma attached to criminalisation, they, their children and families often face stigma, discrimination and violence. Further, criminalising sex work puts victims of trafficking at greater risk of harm. This is because the conflation of sex work and trafficking makes it more difficult to identify those who have been trafficked, but criminalisation further restricts access to justice.

Criminalisation of sex work becomes an unrestrained weapon in the hand of law enforcement officials to arbitrarily harass, abuse and extort money from sex workers. Police harassment, sexual assault and violence is especially magnified in the case of transgender sex workers who are more vulnerable due to their extreme marginalization in society.⁵ Hence, a comprehensive structural response is needed in order to eliminate violence against sex workers and to more effectively reduce or eliminate trafficking, which must mandatorily include sensitisation and capacity building of all relevant stakeholders.

Situating the NPP within the criminal legal system in cases of trafficking, often results in victims of trafficking being 'detained' in shelter homes, for indeterminate periods, thereby

³See joint submissions by CREA, India and All India Network of Sex Workers (AINSW), India and 90 sex worker led community based organisations on the General Recommendation on Trafficking in Women and Girls in the context of Global Migration (2019), available at <https://www.ohchr.org/Documents/HRBodies/CEDAW/GRTrafficking/All%20India%20Network%20of%20Sex%20Workers%20and%20CREA.docx>.

⁴See joint submissions by CREA, India and All India Network of Sex Workers (AINSW), India; and 90 sex worker led community based organisations on the General Recommendation on Trafficking in Women and Girls in the context of Global Migration (2019), available at <https://www.ohchr.org/Documents/HRBodies/CEDAW/GRTrafficking/All%20India%20Network%20of%20Sex%20Workers%20and%20CREA.docx>.

⁵See Peoples' Union for Civil Liberties, Karnataka (PUCL-K), Human Rights violations against the transgender community: A study of kothi and hijra sex workers in Bangalore, India (September 2003), available at https://queeramnesty.ch/docs/HR_Vioalction_Transgender_India_PUCL2003_text.pdf; see Ministry of Social Justice and Empowerment of India, Report of the Expert Committee on Issues relating to transgender persons (2014), p. 47, 119, available at <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>; see Deepika Ganju & Niranjan Saggurti, Stigma, violence and HIV vulnerability among transgender persons in sex work in Maharashtra, India, Culture, Health & Sexuality, 19:8, 903-917 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6176758/pdf/tchs-19-1271141.pdf>.

increasing victims' risk of violence and trauma.⁶ Thus, while the NPP seeks to protect the human rights of victims of trafficking and protect them from traumatization, international and domestic policies geared towards 'raid and rescue' contradict that very position.

Based on her visit to India, in 2014 the U.N Special Rapporteur on violence against women noted that due to the tendency to conflate sex work with trafficking in persons, when sex workers are identified as victims of trafficking, the assistance that is provided to them is not targeted to their specific needs.⁷ She also observed the State focus on maintaining 'public morality' as opposed to rights based interventions to human trafficking.⁸ Such an approach invariably resulted in forcible detentions and denial of services.⁹

Incorrect and inadequate identification of trafficked persons

Such a dangerous and ill-conceived conflation combined with overzealous and aggressive law enforcement harms trafficking victims.

The current identification model used worldwide depends mainly on police operations aimed at identifying indicators of the crime of trafficking. Given that recommendations of regional human rights bodies and mechanisms underline the need for a multi-sectoral and gender sensitive approach to identification of trafficked persons, it is unclear how the NPP can be brought to life in a response centring policing, the securitization of borders and the creation of new and more powerful anti-trafficking units.¹⁰

Anti-trafficking efforts based on such perspectives typically ignore the possibility of engaging sex workers as partners in identifying, preventing and resolving situations that do involve trafficked people.¹¹ Sex workers' organisations and sex work networks play a significant role in addressing trafficking in persons. They are best placed to establish safe working norms, and

⁶For instance see SANGRAM (India), *Raided: How Anti-Trafficking Strategies Increase Sex Workers' Vulnerability to Exploitative Practices* (2018), pp. 63-69, available at <https://sangram.org/resources/RAIDED-E-Book.pdf>.

⁷United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to India, A/HRC/26/38/Add.1 (1 April 2014), para 20, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/128/27/PDF/G1412827.pdf?OpenElement>.

⁸United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to India, A/HRC/26/38/Add.1 (1 April 2014), para 28, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/128/27/PDF/G1412827.pdf?OpenElement>.

⁹See UNDP, UNAIDS, UNFPA, *Sex Work and the Law in Asia and the Pacific: Laws, HIV and Human Rights in the Context of Sex Work* (2012), p.3, available at <https://www.undp.org/content/dam/undp/library/hiv/aids/English/HIV-2012-SexWorkAndLaw.pdf>.

¹⁰Council of Europe, *Recommendations on Identification and Referral to Services of Victims of Trafficking in Human Beings* (2008), para 1.2., available at https://ec.europa.eu/anti-trafficking/sites/default/files/com_recommendations_on_identification_dec_2007_1.pdf.

¹¹UNDP, UNAIDS, UNFPA, *Sex Work and the Law in Asia and the Pacific: Laws, HIV and Human Rights in the Context of Sex Work* (2012), p.15, available at <https://www.undp.org/content/dam/undp/library/hiv/aids/English/HIV-2012-SexWorkAndLaw.pdf>.

influence other actors in the industry to ensure that trafficked adults and children are not retained in sex work.¹²

Example of such a community centric, sex worker led approach is the Durbar Mahila Samanwaya Committee's¹³ (DMSC) Self Regulatory Board (SRB)¹⁴ model. DMSC has a Board (comprising 60% sex workers, 40% civil society) which monitors when new sex workers come in simply to check cases of trafficking. If the girl is a minor, and forcibly brought she is sent back to her home, or else offered space in a rehabilitation home which is also run and monitored by Durbar. If she is an adult and wants to be in the profession, she is educated about all the health and safety aspects before she starts working as a sex worker. In fact, the Supreme Court of India has called the SRB a model to emulate.¹⁵

Protectionist assumptions at the core of the Protocol are harmful to sex workers

Raid and rescue operations: intrusive and violent

Sex workers have been arrested and imprisoned under anti-trafficking statutes, even when they have never been trafficked and do not seek 'rescue'.¹⁶ Raids of workplaces of sex workers in the name of anti-trafficking are harmful and wasteful, often displacing sex workers and ironically undermining the anti-trafficking work of sex worker organisations.¹⁷

Documentation reveals that the process of 'rescue' of sex workers often involves beating, dragging by the hair, abuse, looting by the law enforcement personnel conducting the raid. This

¹²See Note by the Secretary-General, Trafficking in persons, especially women and children, UN General Assembly, A/70/260 (3 August 2015), para 24, available at <https://undocs.org/pdf?symbol=en/A/70/260>; Joint United Nations Programme on HIV/AIDS (UNAIDS), UNAIDS Guidance Note on HIV and Sex Work (2012), p. 18, available at https://www.unaids.org/sites/default/files/media_asset/JC2306_UNAIDS-guidance-note-HIV-sex-work_en_0.pdf.

¹³ See <https://durbar.org/>

¹⁴The SRB model is a multi-stakeholder model, comprising of members across Department of Health, Labour and Social Welfare, medical practitioners, lawyers, social workers, sex workers and others. This mechanism helps to identify whether the person is there by choice or coercion. See <https://durbar.org/self-regulatoryboard/>.

¹⁵ ***Budhadev Karmaskar v. State of West Bengal***, Criminal Appeal No. 135 of 2010, Supreme Court of India. This case has arisen out of a criminal appeal in the Supreme Court wherein the accused, *Budhadev Karmaskar*, was convicted for murdering a sex worker in Calcutta in 1999. While dismissing the appeal and affirming the conviction in February, 2011, the Supreme Court *suo moto* converted the appeal into public interest litigation on the rehabilitation of sex workers. For reference see <https://lawyerscollective.org/2012/04/30/170-budhadev-karmaskar-v-state-of-west-bengal-criminal-appeal-no-135-of-2010-in-the-supreme-court-of-india/>.

¹⁶ See National Network of Sex Workers (NNSW), India, Submissions to CEDAW Status Report, Violence faced by Sex Workers in India (28 March 2019), available at <https://www.sangram.org/upload/resources/violence-faced-by-sex-workers-india-cedaw-submission-28-mar-2019.pdf>.

¹⁷ Joint United Nations Programme on HIV/AIDS (UNAIDS), UNAIDS Guidance Note on HIV and Sex Work (2012), p. 4, available at https://www.unaids.org/sites/default/files/media_asset/JC2306_UNAIDS-guidance-note-HIV-sex-work_en_0.pdf.

is often accompanied by erosion of privacy by media personnel during arbitrary round ups of all individuals including the elderly and children.¹⁸

The national legislation governing sex work in India, the Immoral Traffic Prevention Act, 1956 ('ITPA'), does not criminalize the act of sex work per se but effectively criminalizes all activities in connection to commercial sex.¹⁹ This has created a chilling effect on sex workers' ability to negotiate safe sex and undermines public health interventions especially in the case of HIV related treatment and care.²⁰ Such punitive provisions also place migrant sex workers under the constant threat of being reported, arrested and deported.²¹ Reports over the decades highlight numerous incidents of police roundups, sometimes accompanied by sexual assault, violence, humiliation and abuse from law enforcement officers.²²

Involuntary detention in shelter homes

Regional consultations held with sex worker organizations in India revealed instances of sex workers being picked up against their will and remanded into rehabilitation homes for periods ranging from 3-6 months, while also disclosing their choice of profession to their family members as a part of the "rehabilitation" process.²³ There are few procedural safeguards or rights to appeal under the legislations governing sex work such as ITPA.²⁴

Sex workers experience violence, abuse, and humiliation in shelter homes where they may be kept for indefinite amounts of time, with no right to communicate freely with their family and

¹⁸ See joint submission by 19 organizations and networks working with sex workers to the Special Rapporteur on Violence against Women, Country Visit, India (April 2013), available at https://www.sangram.org/upload/resources/violence_against_people_in_sex_work_in_india.pdf; see also Centre for the Internet and Society, An Interview with Activist Shubha Chacko: Privacy and Sex Workers (2011), available at https://cis-india.org/internet-governance/blog/privacy/privacy_privacyandsexworkers.

¹⁹ See https://www.aawc.in/issue/legislation/itpa1956_lchaurcriticism.pdf.

²⁰ See UNDP, Global Commission on HIV and the Law, Risks, rights and health (2012), pp. 36-38, available at <https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/hiv-and-the-law--risks--rights---health.html>.

²¹ UNDP, UNAIDS, UNFPA, Sex Work and the Law in Asia and the Pacific: Laws, HIV and Human Rights in the Context of Sex Work (2012), p. 16, available at <https://www.undp.org/content/dam/undp/library/hivaids/English/HIV-2012-SexWorkAndLaw.pdf>.

²² See Joint United Nations Programme on HIV/AIDS (UNAIDS), UNAIDS Guidance Note on HIV and Sex Work (2012), p. 16, available at https://www.unaids.org/sites/default/files/media_asset/JC2306_UNAIDS-guidance-note-HIV-sex-work_en_0.pdf.

²³ See joint submissions by CREA, India and All India Network of Sex Workers (AINSW), India; and 90 sex worker led community based organisations on the General Recommendation on Trafficking in Women and Girls in the context of Global Migration (2019), available at <https://www.ohchr.org/Documents/HRBodies/CEDAW/GRTrafficking/All%20India%20Network%20of%20Sex%20Workers%20and%20CREA.docx>.

²⁴ The Special Rapporteur on Violence Against Women in her Report on her Mission to India recommended that the State 'review of the Immoral Traffic (Prevention) Act, 1956 that de facto criminalizes sex work and ensure that measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers'; see United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to India, A/HRC/26/Add.1 (1 April 2014), para 78, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/128/27/PDF/G1412827.pdf?OpenElement>.

community members. The resulting loss in income exacerbates the frequently precarious nature of sex workers' financial circumstances.²⁵ Taking note of these disturbing circumstances, in 2011 the Supreme Court of India ordered that “*any rehabilitation of the sex workers will not be coercive in any manner and it shall be voluntary on the part of the sex workers.*”²⁶ and that sex workers consider such corrective institutions to be ‘virtual prisons’.²⁷

The practice of victim detention in shelters and other welfare institutions is often highly gendered. The majority of trafficked persons detained in closed shelters are women and girls: women and girls are more likely to be identified as victims of trafficking than men, and female victims are often perceived as being more in need of protection and safety.²⁸

The Special Rapporteur on trafficking has observed that such routine detention of women and children is discriminatory, unlawful and that such an approach can serve as a disincentive for victims to report cases to authorities.²⁹

The improper identification of trafficked persons by the criminal legal system violates human rights and freedoms of sex workers. Accordingly, it is stressed that the underlying premise of the NPP i.e. respecting human rights be applied across the Protocol in a comprehensive and holistic manner.

Conclusion

The past several decades have seen unprecedented levels of international migration on account of industrialisation, unequal development between and within countries, conflict, and environmental degradation amongst other structural causes. Accompanied with weakening labour and human rights protections, many women are increasingly vulnerable to exploitation.³⁰

²⁵ A research study conducted by SANGRAM and its partners in 2016-2017 included focus group discussions (156 participants in 14 FGDs), survey (243 participants) and interviews (23) in four states and found that over 70% of women in sex work who had been forcibly raided had returned to sex work after release. See SANGRAM (India), *Raided: How Anti-Trafficking Strategies Increase Sex Workers' Vulnerability to Exploitative Practices* (2018), available at <https://sangram.org/resources/RAIDED-E-Book.pdf>.

²⁶ Order dated 02. 08. 2011, *Budhadev Karmaskar v. State of West Bengal*, Criminal Appeal No. 135 of 2010, Supreme Court of India, available at <https://main.sci.gov.in/jonew/judis/38291.pdf>.

²⁷ Order dated 24. 08. 2011, *Budhadev Karmaskar v. State of West Bengal*, Criminal Appeal No. 135 of 2010, Supreme Court of India, available at <https://main.sci.gov.in/jonew/judis/38381.pdf>.

²⁸ See SANGRAM (India), *Raided: How Anti-Trafficking Strategies Increase Sex Workers' Vulnerability to Exploitative Practices* (2018), available at <https://sangram.org/resources/RAIDED-E-Book.pdf>.

²⁹ United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/20/18 (6 June 2012), para 43, available at <https://undocs.org/A/HRC/20/18>.

³⁰ Global Alliance Against Traffic in Women, *Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions* (2018), pp. 25-26, 39-40, available at <https://www.gaatw.org/resources/publications/941-sex-workers-organising-for-change>.

Thus, it is imperative that this Report explore the possibilities of addressing trafficking through a human rights lens and interrogate growing economic inequalities, lack of livelihood opportunities and unsafe and unfair working conditions which render people vulnerable to being trafficked. The Report should take account of the progress in the international human rights landscape and urge for a conceptual departure from the predominantly criminal law framework to address trafficking.³¹

The Report should recognize the harms caused by exceptionalizing trafficking for ‘sexual exploitation’ as a standalone category, in silos of systemic political, economic and social causes for trafficking. This should be followed by critiquing and challenging the conflation of sex work with trafficking, focussing on human rights violations of sex workers and broader conversations on decriminalization of sex work performed voluntarily.

This opportunity should be utilized to envision, create and strengthen existing systems which respect, promote and protect choices, consent and bodily autonomy of sex workers.³²

³¹See Note by the Secretary-General, Trafficking in persons, especially women and children, A/75/169 (17 July 2020), paras 52-53, available at <https://undocs.org/A/75/169>.

³² International human rights organizations have also pressed for de-conflation of sex work and trafficking and have pointed out the fatal flaws in over-reliance on criminal laws to address trafficking. See UNDP, Global Commission on HIV and the Law, Risks, rights and health (2012), available at <https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/hiv-and-the-law--risks--rights---health.html>; UNDP, UNAIDS, UNFPA, Sex Work and the Law in Asia and the Pacific: Laws, HIV and Human Rights in the Context of Sex Work (2012), available at <https://www.undp.org/content/dam/undp/library/hiv aids/English/HIV-2012-SexWorkAndLaw.pdf>; UN Women, Note on Sex Work, Sexual Exploitation and Trafficking (2013), available at <https://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf>.