

Response to the

Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda¹

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The undersigned organizations and advocates welcome the UN Special Rapporteur's Report on the demand side of trafficking, which is an important and controversial topic for international research and government action. We also welcome the statement of the Special Rapporteur that "the human rights of victims of trafficking should be at the centre of all efforts to combat trafficking and protect, assist and provide redress to victims of trafficking." (4)²

We are, however, concerned that the Report is fundamentally flawed and the conclusions and recommendations set out in the Report are not supported by documentation, evidence, cogent analyses of international law, or an independent, impartial review of research. We are particularly concerned about the failure of the Report to (1) establish a human rights framework, (2) employ a rigorous, professional methodology, (3) consider other sectors into which people are trafficked, (4) establish a clear link between the undefined concept of 'demand' and human trafficking, (5) recognize the difference between prostitution and trafficking within the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Palermo Protocol), (6) address adequately the difference between unenforceable 'consent' in trafficking and the agency of adults to consent in prostitution, (7) maintain an objective position with regard to the impact (or lack thereof) of criminalizing clients and human trafficking, and (9) cite to any verifiable research establishing that different prostitution regimes can directly impact the level of trafficking.

1. Special Rapporteur reports should employ a human rights-based analysis

The Special Rapporteurship for trafficking in persons was created by the Commission on Human Rights in 2004 "to focus on the human rights aspects of the victims of trafficking in persons." A human rights-based approach to human trafficking acknowledges the root causes of trafficking, such as discriminatory practices in education, health and education marginalizing women, girls and minorities, and focuses on empowerment models to reduce or eliminate the vulnerability of persons to being trafficked. A human rights approach is more effective than a solely repressive criminal law strategy that claims to address the consequences of trafficking but not the causes. A human rights approach addresses conditions in origin and destination locales that place barriers to women and men's rights, and works to change conditions without further constraining

¹ <http://daccessdds.un.org/doc/UNDOC/GEN/G06/109/64/PDF/G0610964.pdf?OpenElement>

² Numbers in brackets refer to paragraphs in the Report.

the rights of persons to make decisions, including decisions to migrate, to work without the legal documents and to engage in a form of labor of their choice.

A human rights-based approach also addresses the consequences of trafficking by promoting respect for and protection of the human rights of trafficked persons and by opposing government use of trafficked persons solely as instruments to pursue prosecutions. It recognizes trafficked persons as positive actors in changing their own situation, rather than as passive recipients of services or only victims in need of rescue. Finally, a human rights-based approach opposes anti-trafficking measures that adversely affect or infringe upon the human rights of trafficked persons or other affected groups. This approach requires that human rights are at the core of any anti-trafficking strategy and that legislation, policies, programs and processes integrate the norms, standards and principles of the international human rights instruments.

Human rights are the core principles upon which all work of the Special Rapporteur must be grounded. However, the Report fails to adhere to this human rights mandate. It does not engage in a human rights-based analysis or ground any of the discussions about demand, prostitution, clients and trafficking within a rights framework. It further fails to identify specific human rights instruments implicated in human trafficking; it cites only the Trafficking Protocol, which is a subsidiary instrument to a multinational crime convention, and, as such, only touches upon human rights. The report also misrepresents the legal meaning of the Protocol).

Even when the Report does mention human rights, it presents confusing articulations of ‘rights’. It states, for example, that “[m]en do not have a human right to engage in the use of prostituted persons.” (81) Unfortunately, this statement reflects a complete misunderstanding of the core human rights instruments and the way that human rights principles are applied to specific actions. Most disturbingly, the Report does not, in this instance or many others, actually cite to any real actor claiming such a ‘right’ and we are unaware of any person making such a claim. This example exemplifies the format of the Report, in which conclusory statements are cited as evidence of the issue they address, with no reference to sources, or logical reasoning. In general, the Report synthesizes a series of unnamed sources as proof and, in the process, makes misleading and unhelpful analyses of demand, even as it claims to address the relationship between demand, clients, prostitution and trafficking.

2. Special Rapporteurs must be impartial and cite evidence that meets common standards of credibility

Unavailable sources. The Special Rapporteur relies upon a number of sources, including a Questionnaire that was sent to member States, IOM and UNICEF, NGOs and individuals. She also attended a number of meetings and conferences. Unfortunately, the Report does not include a summary of the responses to the Questionnaire, a literature review on the issue of ‘demand’ and trafficking, or official reports from the meetings and conferences she attended. As a result, it is impossible for any reader to check most of the facts or any of the sources (except for published reports) contained in the Report.

Problematic Questionnaire³. The Special Rapporteur on trafficking and the Special Rapporteur on the sale of children, child prostitution, and child pornography, Juan Miguel Petit, developed the Questionnaire. The problematic design of the Questionnaire raises serious concerns about the validity of the statements, conclusions and recommendations contained in the Report.

First, the Questionnaire does not disaggregate responses regarding children from those dealing with adults, which means that it treats adults (i.e., women) as having no more rights or status under law than children.

Second, it seeks information about ‘sexual exploitation’ without supplying any unifying definition, which means that, in general, responses are not probative of any particular claim, since there is no means to ensure that all respondents are speaking about the same phenomenon. While the various World Conferences on Commercial Sexual Exploitation of Children have attempted to produce a global consensus on the range of meanings of ‘sexual exploitation’ when applied to minors⁴, there is no consensus or internationally-accepted legal definition of ‘sexual exploitation’ of adults. However, the Report does not recognize the difference between children and adults or reflect the diversity of Questionnaire responses. It assumes instead, without explanation, a uniform agreement on the meaning of this term for all persons.

Fortunately, the Special Rapporteur on the sale of children analyzed the responses to the same Questionnaire and reports⁵ that “the answers revealed divergences in understanding the sexual exploitation of adults. A number of Government and other respondents distinguished between voluntary and forced sexual services” and “identified forced prostitution, including prostitution involving trafficked persons, as a form of sexual exploitative service.” (29) He also reports that “[o]ther respondents considered all forms of prostitution to be sexually exploitative services.” (31)

Third, the Questionnaire contains questions about ‘sexual exploitation’ that are not clearly linked to trafficking (e.g., “2. Please provide available estimates on how many people in your country solicit services that derive from *sexual exploitation*”). It contains similar questions about demand without any definition or context for understanding ‘demand’ (e.g., “3. Please provide available information on which factors, attitudes or policies create or increase *demand* for services that derive from *sexual exploitation*.”).

Lack of standards of review and objectivity. Special Rapporteurs are also expected to carry out their human rights mandate to evaluate specific facts and situations according to internationally accepted standards and laws with impartiality and objectivity. However, the Report substitutes a marshalling of opinions, rather than analysis and evidence. The format presented is more suitable for a summary of a loosely-conducted opinion poll than even a focus group study or an empirically-based investigation. It is not possible to evaluate the conclusions or recommendations against any objective set of criteria or research. The Report cites some sources

³ The Questionnaire is annexed.

⁴ The Stockholm Declaration and Agenda for Action. First World Congress against the Commercial Sexual Exploitation of Children in Stockholm, Sweden 1996.

⁵ E/CN.4/2006/67, <http://daccessdds.un.org/doc/UNDOC/GEN/G06/101/70/PDF/G0610170.pdf?OpenElement>

for the opinions quoted but, with regard to conclusions drawn, it employs terms such as ‘believe’, ‘little reason to believe,’ ‘good reason to believe’ and ‘extremely unlikely,’ in evaluating arguments about, for example, the relationship between various legal regimes governing prostitution and trafficking. Such terms denote opinions and not research, let alone substantiated facts upon which conclusions may be drawn or sound policy developed.

3. The Report on ‘demand’ should cover all forms of trafficking, as established in the Palermo Protocol

We regret that the Report is limited to investigating trafficking into the sex industry. (27) Given that the Palermo Protocol’s broad definition covers all forms of trafficking into factories, farms, homes, brothels and other sites,⁶ it would have been logical and productive to undertake the research according to the language of the Protocol - “the demand that fosters *all* forms of exploitation of persons...that leads to trafficking.” (50) For example, the research by Anderson and O’Connell Davidson in *Is Trafficking in Human Beings Demand Driven?*⁷ (which is cited in the Report) shows that many similarities can be found between demand for trafficked services in domestic work, the sex industry and other forms of (informal) labor, as well as the relationship between impunity for abuse, the extent of abuse and the notion of demand for low cost labor and services overall.

The Report would have been more valuable and relevant if it had extended beyond the sex industry, in an empirical or at least soundly analytic way: it could have been used to compare demand in different sectors, and to explore the different ways in which governments address the relationship between impunity for abuse, ability of trafficked persons to obtain redress and the costs to consumers (and thus construct a practical model for demand of consumers) of all forms of trafficked labor.

The Report states that “often governments do not engage in the type of investigative or educational activities that would discourage demand in many consumers markets. Instead, states are often willfully blind to the use of trafficked labour in the production of many consumers good sold in their domestic markets.” (footnote 12) Therefore, research on the demand for all forms of trafficked labor, including the role of states in facilitating that demand, is indeed needed in order to fully understand the scope of the problem across all sectors and to be able to explore a variety of responses and solutions to the many forms of trafficking that flourish around the world.

Our present understanding about trafficking within and out of countries in Africa, Asia and Latin America indicates that a high proportion of trafficking is into sites, such as mining, small businesses and domestic work, as well as into prostitution.⁸ By not addressing these other sites

⁶ Palermo Protocol, art. 3

⁷ www.iom.int/DOCUMENTS/PUBLICATION/EN/mrs_15_2003.pdf

⁸ E.g., Combating Trafficking in Children for Labour Exploitation in West and Central Africa: Synthesis report, ILO-IPEC (2001) <http://www.ilo.org/public/english/standards/ipec/publ/field/africa/central.pdf>; Borderline Slavery: Child Trafficking in Togo, Human Rights Watch (2003) <http://hrw.org/reports/2003/togo0403/>;

of trafficking, the Report ignores the human rights violations that occur to thousands of people in these continents. We regret that the limitation to demand for the sex industry, in effect, results in the exclusion of people trafficked for other forms of labor, the exclusion of large parts of the world and the exclusion of a variety and a diversity of responses and solutions to the demand for trafficked labor other than criminalization.

4. Objective, evidence-based research is necessary to establish a clear understanding of links between ‘demand’ and trafficking

In some respects, we share the Special Rapporteur’s understanding of the meaning of demand in the Palermo Protocol: “demand must be understood expansively, as any act that fosters any form of exploitation that, in turn, leads to trafficking.” (52) For example, demand for trafficked persons in the construction industry would then be understood to include the state-created barriers to legal means for willing workers to enter countries to take jobs that citizens are unwilling to take as an “act that fosters” the exploitation of undocumented workers “that, in turn, leads to trafficking.” Unfortunately, this is not one of the ‘acts’ covered in the Report. Instead, the Report focuses solely on the role of individuals and misses entirely the role of state actors in creating the environment in which trafficking can flourish.

The Report notes that “States parties need not eradicate demand simply because that demand is occasionally met by goods produced by trafficked labour.” (59) We too hope that the demand for goods produced by trafficked labor can be addressed by reducing the tolerance of consumers and customers for low-priced goods and services obtained with trafficked labor. (59) Similarly, we hope that the demand for sexual services involving trafficked persons can also “be reduced by informing customers and encouraging them to avoid the purchase of those services.” (59)

By this logic, then, states should not expend scarce anti-trafficking resources to try to eradicate all demand for sexual services (or other services) that are occasionally produced by trafficked labor. It would be a waste of time, money and effort (and also impossible) to try to eliminate trafficking simply by focusing on the demand for goods or services when the root problem is not the goods or services but the criminals who are locating vulnerable persons to traffic into forced labor or services. A much better use of resources would be to focus on the root causes of the vulnerability leading to trafficked labor in both origin and destination locales, prosecuting the persons responsible enforcing labor laws and supporting the access of trafficked persons to remedies. It is also important to develop rational labor migration laws that allow willing workers enter to take jobs that citizens do not want to take, to eliminate work visa systems that tie workers (e.g., domestic and farm workers) to specific employers who use this system to hold workers in forced labor situations and to ensure living wages and labor rights for all workers⁹

However, the Report rejects the analogy between trafficked labor for goods and trafficked labor for sex claiming “there is little reason to *believe* that the same holds true in the sex-trafficking

Trafficking of Nigerian Girls to the Netherlands, Terre des Hommes Netherlands, in cooperation with the Nigerian Union Netherlands (1999) <http://www.terredeshommes.nl/>.

⁹ See, Forced Labour and migration to the UK”, Bridget Anderson and Ben Rogaly (Trades Union Congress: London, 005) <http://www.compas.ox.ac.uk/publications/papers/Forced%20Labour%20TUC%20Report.pdf>

market, and thus States parties have an obligation...to discourage the use of prostituted persons generally”. (60) In other words, without any data or evidence, the Report rejects the possibility that persons who purchase sex can be educated and discouraged from purchasing sex from trafficked persons. The Report simply concludes that “[p]rostitute-users are typically incapable of distinguishing and/or unmotivated to differentiate between prostituted persons who have been subjected to the illicit means delineated in article 3(a) of the Protocol and those who have not.” (60)

The Special Rapporteur on the sale of children, in analyzing the same data as the Special Rapporteur on Trafficking, concludes that “there is no shared understanding of what constitutes demand for exploitation, and how best to address it. In its latest major report on forced labor, the International Labour Organisation (ILO) states that “[r]igorous work on the demand aspects of human trafficking ... is still badly lacking”. E/CN.4/2006/67 (para.19). He further notes that respondents have different views on the issue of demand and that some respondents suggested to “widen the focus away from clients’ demand for prostitution to the traffickers’ and employers’ demand for profits through the forced labour of victims.” (51) He also explores the vulnerability of women and girls to trafficking because they are pushed into the unregulated sectors and irregular migration streams. (54) We appreciate this balanced approach because it accurately informs readers about the lack of a clear understanding on the meaning of ‘demand.’

5. The Palermo Protocol recognizes that prostitution cannot be legally equated with trafficking under international law

The Report states that the Palermo Protocol definition of trafficking “reflects an important resolution between deeply divided views regarding the acceptability of the commercial sex industry, establishes clear criteria for understand what counts as trafficking, and makes it possible to frame anti-trafficking initiatives with consistency and clarity.” (33). However, the Special Rapporteur misunderstands the meaning of the final language in the Protocol. The final agreement of the governments drafting the document, as reflected in the wording of the Protocol, accepted that the Protocol does not determine, as a matter of international law, that all movement into the sex sector is trafficking. The delegates to the Trafficking Protocol negotiations were unable to develop a consensus on the question of whether or not trafficking of adults includes free and unfree sex work, or only unfree sex work. The international crime of trafficking focuses on the elements of force, coercion and fraud in addition to prostitution or other forms of labor and services. The *travaux préparatoires* to the Protocol reflects this outcome, in which the delegates explain that governments are free to make this determination in their national implementing legislation:

“The *travaux préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are *not defined* in the Protocol, which is therefore *without prejudice* to how States Parties address prostitution in their respective domestic laws.” [Italics added.] (Report footnote 4)

Thus, under the Protocol, a state is legally able to meet the obligations of the Protocol with a legal regime that criminalizes coerced or abusive forms of prostitution but does not criminalize non-coerced forms of adult prostitution. Similarly a state can determine to criminalize all forms of prostitution, as long as, in doing so, it does not violate other norms of international law such as non-discrimination, right to privacy, etc.

The Report is also incorrect in stating that the “Protocol casts an extremely wide net in defining trafficking, one which *arguably* captures every present manifestation of prostitution.” This is wrong: different manifestations of prostitution as a matter of international law are trafficking only if there is force or coercion and the treaty then accepts different legal regimes at the national level. (48) Again, the *travaux* make it abundantly clear that the Protocol definition of trafficking only ‘captures’ as much of the activities of prostitution and sex work as a government decides to include in its domestic law under the rubric of trafficking. For example, the laws of the United States, The Netherlands, Germany, Italy and Belgium do not consider all prostitution to be a form of trafficking, and those countries can be states parties to the Protocol without reservation.

Even though the Protocol recognizes that domestic trafficking laws can adopt different positions with regard to prostitution and trafficking, the Report asserts that they cannot. The Special Rapporteur claims it is “*evident* that most prostitution is accomplished by one or more of the illicit means outlined in subparagraph (a) of the Protocol and therefore constitutes trafficking.” (48) The Special Rapporteur also states that she *believes*, without any evidence, that “[i]t is rare that one finds a case in which the path to prostitution and/or a person’s experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability.” (42) These statements are examples of the tendency throughout the Report to substitute unsupported beliefs for research, including beliefs about the impact of law and the validity of research. Contrary to these *beliefs*, it is a legal fact that the Protocol definition of trafficking in article 3, as explained in the *travaux* cited above, rejects the position that prostitution always involves trafficking.

The Special Rapporteur’s arguments on terminology may reflect advocates’ debates but they are beyond the scope of international law and conflict with basic principles of international legal interpretation.

The Report further states as a fact, without support, that the “Protocol’s definition of trafficking *implicitly* rejects the terminology of ‘sex work’, ‘sex worker’ and ‘clients’.” (47) On the contrary, the Protocol by its structure *acknowledges* that countries may choose to recognize adult participation in the sex sector as non-coerced labor and not criminal, while other governments may choose to reject this approach. While the term ‘sex work’ is not included in the Protocol, the fact that prostitution is ‘sex work’ in a number of countries that have ratified the Protocol¹⁰ the term ‘sex work’ is consistent with the Protocol and the *travaux préparatoires* quoted above. Thus, whether one uses the term ‘prostitution’ or ‘sex work’, the fact remains that, in many countries and in the experience of many people in the sex sector, prostitution is a form of work, whether it is legal or not.

¹⁰ For example, United States, The Netherlands, Australia, Germany, South Africa, New Zealand, Mexico, Panama, Denmark, Germany and Brazil.

The Report next states, also without support, that the “Protocol’s sharp distinction between the ‘exploitation of prostitution’ and ‘forced labour’ would be conflated by use of the terms ‘sex work’, ‘sex workers’ and ‘clients’.” (49) Again, the Rapporteur’s analysis is wrong. The Protocol contains both sets of terms (exploitation of prostitution and forced labor) as a means to solve a political problem, a difference of opinion among participants, rather than to construct a legally significant distinction between forced labor and forced prostitution. The term “exploitation of prostitution” is not defined in the Protocol¹¹ or anywhere else in international law and it can include a wide range of actions. The ILO definition of forced labor¹² certainly covers unfree or forced prostitution but does not cover not free or voluntary prostitution while the undefined term ‘exploitation of prostitution’ would certainly include unfree or forced prostitution but would not cover free or voluntary (sometimes legal) adult prostitution, unless the term ‘exploitation’ is interpreted to include economic exploitation (a la Marx).

Thus, the analysis and conclusions conflating prostitution and trafficking are incorrect and nothing more than an expression of personal *beliefs*, unsupported by existing legal scholarship and contrary to the interpretive tenets of international law.¹³ Unfortunately, the Report adopts the view that all prostitution involves trafficking and rejects, without evidence, the other view that prostitution can and does exist without trafficking.

In contrast, the Special Rapporteur on the sale of children reports objectively on the different views represented in the responses to the Questionnaire. He reports that some respondents consider all prostitution to be coerced (45) and other respondents disagree (48). His report is respectful of the different views and information submitted and does not substitute his personal beliefs for the information with which he may disagree. Given the fact that governments have ‘agreed to disagree’ on the issue, it would have been proper for the Special Rapporteur on Trafficking also to simply report the information submitted by governments accurately., Any analysis then supplied by her would then have to be more fully substantiated beyond an avowal of her personal views on the subject.

6. Adults have legal capacity to consent to a wide range of activities, but no one can consent to unfree labor or slavery-- what is ‘unfree’ is a matter of determination of fact in the Protocol

The Special Rapporteur states “that the consent of the adult victim is irrelevant to a determination of whether trafficking has occurred.” (36) Our understanding, which is grounded in the basic principles of international criminal law, requires that this statement be clarified.¹⁴ If an adult consents to migrate without documents, to work without documents or to work in the

¹¹ Palermo Protocol, art. 3.

¹² “For the purposes of this Convention the term *forced or compulsory labour* shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” Forced Labour Convention C29, art. 2.1.

¹³ United Nations. Vienna Convention on the Law of Treaties, 1969.

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

¹⁴ International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).http://www.un.org/law/icc/statute/99_corr/3.htm

sex industry, the person has not consented to work in *forced* labor, slavery or servitude in the sex or any other sector as it is legally impossible for someone to consent to forced labor, slavery or servitude. Furthermore, all consent obtained by fraud is invalid and thus is not real consent.

The Palermo Protocol follows the shifting burden of proof in which the prosecution has the primary burden of proving the facts of the case, and only then does the burden shift to the defendant to disprove those facts, or at least to raise reasonable doubt as to the facts alleged by the prosecution. This applies equally to the issue of consent and is in accordance with recent jurisprudence from the ad hoc war crimes tribunals and the International Criminal Court.¹⁵ Once the prosecution has stated its case for trafficking into forced labor, for example, the defense of consent to the crime can be made, but the defense can be overcome if the prosecution has sufficiently proven the existence of *forced* labor or the use of fraud or force or abuse of authority to obtain the consent.¹⁶ Under those evidentiary circumstances, ‘consent’ is made legally irrelevant as a defense. Human rights advocates, including women’s rights advocates have produced important research about the circumstances under which consent can be proved to be coerced. However, this is not the same thing as saying that - as a matter of policy or presumption - that consent—including in cases of prostitution --is deemed to be irrelevant. The Palermo Protocol specifically rejects the policy position of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which by its terms and as a matter of policy (not individualized fact finding) renders adult consent irrelevant.¹⁷

Turning to research and evidence on the ground, adults are not legally incompetent to consent to work in situations that do not amount to trafficking. Only in countries with legal systems adopting the position that *all* free and unfree prostitution or sex work is trafficking, would consent to work in prostitution, even in situations free from force or coercion, be invalid because the laws take the position that adults do not have the right to make decisions regarding sex work. In those countries then all adults working, freely or unfreely, in the sex sector would be classified by those governments as ‘victims.’ The Special Rapporteur’s Report seems to adopt this view. Consequently, the Report is promoting the view that governments should treat all persons in the sex sector equally because they are all victims and thus entitled to protections, services and privileges the government provides for trafficking victims, such as visas, services, support and freedom from prosecution for prostitution-related offences.

The remark that ‘the road to prostitution and the life within ‘the life’ is rarely one marked by empowerment or adequate options” (42) might be true for many women, men and transgender persons in prostitution (as it is true of men, women and trans people in many irregular markets) but it does not mean that prostitution is always the result of trafficking and lack of real consent. Unfortunately, the Report does not cite any empirical evidence to support this generalization. Although people working in the sex sector can be and often are vulnerable to violence and abuse

¹⁵ <http://www.countertrafficking.org/pdf/Palermo%20protocol.pdf>

¹⁶ <http://www.countertrafficking.org/pdf/Palermo%20protocol.pdf>

¹⁷ “Article 1: The Parties to the present Convention agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.”

of power and authority, there is no evidence to support the above-stated *belief* that prostitution without abuse is not possible and that “most prostitution ... constitutes trafficking.”(48) Consequently, the conclusion that prostitution as actually practiced in the world usually satisfies the elements of trafficking is unwarranted and unsubstantiated. (48)

7. Criminalizing clients is an unproven, questionable approach to prevent trafficking

The Special Rapporteur “*believes* that [the state obligation to discourage the demand side of trafficking] can be effectively met through criminalization of the use of prostituted persons and good faith enforcement of these provisions.” (88) Unfortunately, the Report fails to explain how this would work in reality. The Report also offers the extreme position that *all* purchasers of sexual services (men purchasing sex from women, women purchasing sex from men, men from men, and women from women, or anyone purchasing sex from transgender persons) are traffickers and so they should be treated the same (as traffickers) because *all* prostitutes are ‘trafficking victims.’ Interestingly, the Rapporteur states, that “[u]nlike the purchaser of consumer goods produced through trafficked labor, the prostitute-user is simultaneously both the demand-creator and (by virtue of his receipt of the trafficked person) part of the trafficking chain.” (63) By this logic, then, people eating food served by a trafficked domestic worker or restaurant worker are part of the trafficking chain since they create the demand for the services and are end users in direct contact with the trafficked persons. Of course, the employer in all three situations (brothel owner, home owner and restaurant owner) are traffickers, but the Special Rapporteur argues that the people directly receiving the services of the trafficked persons are *also* traffickers, whether they are aware of the status of the victim or not.

The Report also declares that all purchasers of sexual services are rapists, even though the crime of rape is, by definition, committed against the will of the victim. (63) It then acknowledges that “there is good reason to *believe*” that many - but not all - clients “are aware that the women and children they use in prostitution are subjected to the illicit means...in the Protocol.” (63) However, it continues to argue that “it is *extremely unlikely* that any substantial number of prostitute-users would be deterred from using prostituted persons on the grounds that the prostituted person has been subjected to” force, threats, coercion, fraud, deception, abuse of power, and/or abuse of a position of vulnerability. (63) There is no empirical evidence produced to support this claim. On the basis of these beliefs, the Report proposes criminalizing all clients, whether or not the adult sex workers are working freely or unfreely and whether or not the clients had any knowledge about those working conditions. Such an approach violates basic human rights principles protecting defendants from arbitrary arrest and prosecutions.

In support of a *belief in the efficacy of criminalizing clients to stop trafficking*, the Report cites the Swedish law criminalizing clients of sex workers. However, it fails to provide any concrete evidence or verifiable research across sex sectors before and after the law is implemented and addressing both national and non-national persons in prostitution and fails to prove that this law has actually had any impact on trafficking. (83) The Report also cites the South Korean crackdown on prostitution as a model (84) but fails to address the full range of impacts and acts included in the legal change, such as the fact that the South Korean government abruptly closed brothels and, as a result, Korean sex workers protested and some even went on hunger strikes in

protest.¹⁸ While there is no evidence that trafficking has diminished in South Korea as a result, there is evidence that the precarious nature of immigrant women's lives has been made more precarious vis-à-vis access to health and other services as well as in regard to arrests and threats of deportation.¹⁹

The Report also refers to a new law in the Philippines that criminalize anyone who engages “in prostitution or pornography” and a new law in Chile that criminalize “prostitute-users who exploit prostituted children” but the Report fails to demonstrate any impact that these laws have had on trafficking, or indeed on the rights of trafficked persons. (84) With regard to the research by the Venezuelan government on the impact of different legal regimes on trafficking (85), we await the results and hope that it and other such research will shed much-needed light on this issue.

There is no independently-verifiable evidence in the entire Report supporting the usefulness of criminalizing clients to reduce *trafficking or to increase the power of trafficked persons to seek remedies to their abuse*. The Report cites, as support for this view, unsubstantiated opinion statements by two unnamed NGOs on the usefulness of criminalizing clients to reduce demand. (85) It recognizes that “criminalization does not guarantee” that people will stop purchasing sex but claims that “expressive condemnation of harmful conduct is one of the central functions of the legal system” and so “it *stands to reason*” that criminalizing clients is a “way of fulfilling [state] obligations” to reduce demand. (89) Undocumented claims that a law’s effects ‘stands to reason’ is not evidence and is not a basis for recommending solutions to address the rights abuses of trafficking. The Special Rapporteur is thus asking governments to adopt a criminal law and expend enormous resources in implementing a law having no proven effect, nor clearly expressing a rights goal, on a vaguely argued problem simply because the law might ‘express’ social disapproval and discourage behaviors.

In contrast, the Special Rapporteur on the sale of children notes that, with respect to criminalizing clients of adult sex workers, “member States took very different approaches” (81) and summarizes the information provided by the States that responded. His even-handed approach provides readers with information from governments that are trying different approaches to reduce or eliminate prostitution, although none of the governments provides any evidence showing the impact of criminalizing clients on reducing or eliminating trafficking into the sex sector.

8. Impartial, evidence-based research is lacking on the relationship of different prostitution laws and human trafficking

The Report notes the claim that criminalization can push “prostitution out of sight, thus making trafficking victims more vulnerable to human rights abuses.” (92) Unfortunately, the Report does not further explore this potential risk, including the extensive literature in public health that considers the negative impact of repressive criminal regimes on rights and health. Neither does it

¹⁸ Cheng, Sealing, “Korean sex trade ‘victims’ strike for rights”. Dec 22, 2004
<http://www.atimes.com/atimes/Korea/FL22Dg01.html>

¹⁹ *Supra*.

make any recommendations on how to reduce this risk. Instead it dismisses this potential for harm by claiming that “legalization of prostitution has the effect of making human rights abuses appear as if they were simply legitimate work, thereby ‘hiding’ such abuses in plain view.” (92)

Support for the operation of this process of abuse through ‘hiding in plain sight’ came only from an unattributed and unsupported statement by one NGO, which expressed its *belief* that “authorities” do not pay attention to what is happening in the legal sex sector. (92) However, from reports of countries where the sex industry is legalized, the legal mechanisms that are in place to monitor abuse and crimes in other sectors are brought into action for the sex sector. Governments are obliged to control the working conditions in the sex industry and actively investigate for signs of trafficking or other forms of abuse.²⁰

It is remarkable that, when discussing legal systems on prostitution, the Report only focuses on the criminalization of clients and legalization of the sex industry. These ‘models’ are actually hardly representative of prostitution policies around the world. In most countries, governments combine repression with unofficial tolerance no matter what legal system is in place.

The Report is especially critical of governments that have legalized prostitution industries, stating, *without producing any evidence*, that these governments “increase and embolden the commercial sex industry within the jurisdiction, thereby increasing the demand for commercial sex and fuelling the sex-trafficking market.” (97) It also states, *also without evidence*, that those governments “have a heavy responsibility to ensure that the conditions which actually pertain to the practice of prostitution within their borders are free from the illicit means delineated in...the Protocol definition so as to ensure that their legalized prostitution regimes are not simply perpetuating widespread and systematic trafficking.” (43) The only ‘support’ for these claims is statements of opinion, not verifiable research. (98)

Expressions of belief are unhelpful in developing meaningful policies to combat human trafficking. It is apparent from the statements in the Report that the Special Rapporteur is relying upon *beliefs* rather than upon sound comparative analyses of the impact of different systems of prostitution (legalization, criminalization, regulation or toleration) on trafficking into the sex sector. Impartial, evidence-based research is needed to address the question of whether or not there is a direct correlation between different types of laws on prostitution and trafficking into prostitution. Until such research is completed and has withstood international scrutiny, it is not possible to draw the types of conclusions cited above and, even more importantly, it is not possible to develop sound policies to address trafficking into the sex sector from the perspective of criminal laws on prostitution.

It is also important to note that trafficking around the world into industries that are legal (agriculture, domestic work and factories) continues unabated as well as into industries that are

²⁰ See, e.g., Reports of the Dutch National Rapporteur on Human Trafficking, 2005 <http://www.victimology.nl/onlpub/national/NL-NRMEngels4.pdf> ; Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences, Working Group on the legal regulation of the purchase of sexual services, Norwegian Ministry of Justice and Police Affairs (October 2004) <http://odin.dep.no/jd/engelsk/012101-990578/dok-bn.html>

illegal (prostitution). If trafficking can occur in large numbers in legal and illegal industries, then perhaps legalization or criminalization of the site of trafficking is not the key factor and the Special Rapporteur would be well advised to focus more on the real root causes of trafficking - the reasons why people migrate, why they suffer abuse and traffickers enjoy impunity as well as the legal, economic and social reasons why other people are able to profit from their situation.

Conclusion

We hope that the comments, observations and concerns expressed in this document are seriously considered by the Special Rapporteur for her upcoming projects and possibly for an updated or amended Report. It is extremely important that official UN reports are soundly grounded in international human rights law and objective analysis, evidence and research. Biased methodology and assumptions are not a sound basis for making UN policy recommendations. At the same time, we recognize that, on a subject as politically-charged and sensitive as prostitution, it is inevitable that personal opinions will exist, but they should be recognized as such and not be presented in official UN reports as facts.

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ANNEX

Request for information for the preparation of the joint report of the Special Rapporteur on sale of children, child prostitution and child pornography and the Special Rapporteur on trafficking in persons, especially women and children

Questionnaire on demand for services deriving from sexual exploitation

Scope and Extent of Demand

1. Which forms of sexually exploitative services that are linked to trafficking in persons (e.g. forced prostitution) have you noticed to exist in your country? Are you aware of whether nationals from your country solicit sexually exploitative services in other countries? Please give a summary of available information.
2. Please provide available estimates on how many people in your country solicit services that derive from sexual exploitation. Please also provide available estimates on how many people from your country solicit these services abroad. If possible, disaggregate these estimates by sex and age as well as by the types of services that are sought.

Factors Creating or Increasing Demand

3. Please provide available information on which factors, attitudes or policies create or increase demand for services that derive from sexual exploitation. For instance, please provide available information on possible links between military deployment and the demand for sexually exploitative services.

Strategies to Eradicate or Decrease Demand

4. Please provide available information on which strategies are pursued by the government of your country, the private sector and/or civil society to eradicate or reduce the demand for sexually exploitative services. Did these strategies also have an impact on trafficking in persons?
5. Please provide available information on whether and how your country penalizes persons who solicit sexually exploitative services.

Are criminal proceedings initiated ex officio or only upon a complaint of the victim?

What penalties does the law provide for?

What measures are in place to protect the victims during the criminal process?

Please provide available statistics concerning criminal proceedings initiated, persons convicted and penalties imposed.

Please provide information on the differences in the legislation if victims are adult or children and if the crime is committed abroad.

6. Please provide information on whether persons who solicit sexually exploitative services face any non-criminal penalties (e.g. disciplinary measures).

7. Please provide available information on the effect of education or awareness campaigns by the government of your country, the private sector or civil society that aim to decrease demand for sexually exploitative services.

8. Is there any experience in your country on whether criminalizing, tolerating, legalizing, or regulating prostitution has any effect on demand for sexually exploitative services? What has been the effect on the victims? Has it impacted trafficking in persons?

9. Please provide any other information that you deem relevant with regard to demand for sexually exploitative services, the impact of demand on trafficking, and demand reduction initiatives.

Please submit responses to:

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