

Input to the addendum to the report of the UN Special Rapporteur on violence against women and girls on the concept of consent in relation to violence against women and girls

January 2025

1. Introduction

This submission, developed by 18 organisations, lawyers and academics (see addendum) responds to the Special Rapporteur's call for inputs on "The Concept of Consent in Relation to Violence Against Women and Girls." We also link our concerns here to those raised in a separate submission to the simultaneous call for inputs to the report, "Forms of Sex-Based Violence Against Women and Girls: New Frontiers and Emerging Issues." We believe that these two thematic initiatives are interconnected and likely to undermine existing human rights norms and standards essential to the global struggle to end gender-based violence against women in all their diversity.

Consent has become an integral part of international law and standards. It is the result of years of sustained advocacy. Examining it in such a limited context as the questions posed in the Special Rapporteur's call for input risks the re-criminalisation of personal autonomy and agency, as well as retrogressing to protectionist approaches to gender-based violence that fail survivors and neglect root causes.

This submission therefore approaches the topic of consent in the expansive and empowering way in which consent is conceptualised in international human rights law and manifests in daily life. It explores consent in the different ways it exists in law and its impact on marginalised and excluded communities, including sex workers, LGBTQI+ persons, young persons, women with disabilities and others.

2. Legal doctrines of consent

Respect for human rights requires a robust understanding of autonomy, which is fundamental to interpreting the concept of consent.¹ However, some of the ways in which consent is defined in law and in practice discriminates against those that are marginalised and excluded (trans, gender diverse people, sex workers, drug users) or deemed "lacking the capacity" to consent (persons with disabilities, young people).

The denial of bodily autonomy and the denial of recognition of the capacity of individuals to consent have allowed human rights violations such as rape, including marital rape, and involuntary sterilisation to be carried out with impunity. At the same time, treating consent as legally non-existent or "irrelevant" has also led to consensual sex outside marriage, same-sex relations, sex work, and adolescent sex to be criminalised. In both of these cases, the capacity of the individual to consent is disregarded and society's interest in controlling their bodies is privileged.

The recognition of individuals' right to consent has been key to challenging these discriminatory laws and practices, and to strengthening the protection of human rights related to gender equality.

¹ See Report of the UN Working Group on Discrimination against Women in Law and Practice, UN Doc. A/HRC/32/44, 2016

3. Consent-based laws on sexual violence

Historically, non-reproductive sexual behaviour, regardless of consent, was considered sinful² and criminalised, such as in the crimes of “sodomy” and “adultery.” Colonisation took this understanding of sexual behaviour to the penal codes³ of many countries, which are yet to be repealed.⁴ LGBTQI+ persons are particularly impacted by these laws. Additionally, within marriage, many countries have yet to recognise consent in sexual behaviour. This is often based on the common law doctrine of coverture⁵ and implied consent to sex in marriage.⁶ Over time, legal and social reform has had limited success, same-sex relations and abortion, although consensual, are still being criminalised whereas marital rape is not in many countries across the world.

Consent-based laws defining sexual violence as a violation of a person’s sexual autonomy and bodily integrity have become an integral part of challenging these practices,⁷ thanks to the concerted efforts of generations of feminists and women’s rights and other social justice advocates. They have argued that such laws can protect a broader range of victims and help reduce gender-based violence by fostering social attitudes and norms respecting all individuals’ autonomy and agency, and contributing to more

² Carol Vance, *Interrogating Consent*, CREA, *Global Dialogue: Decriminalisation, Choice, and Consent* (2014), <https://creaworld.org/wp-content/uploads/2020/10/Global-Dialogue-Decrim-Choice-and-Consent-CREA-2014.pdf>

³ Reflected in the crimes of Sodomy and abortion in the penal codes of colonised countries (like India, Sri Lanka, Bangladesh, etc.), for example.

⁴ Same-sex relations are still criminalised in Sri Lanka. A Private Members Bill sought to decriminalise these, however, it was challenged as unconstitutional before the Supreme Court. The Supreme Court held the bill to be consistent with the Constitution last year.

⁵ A woman’s legal existence was suspended under “marital unity,” a legal fiction in which the husband and wife were considered a single entity: the husband. Coverture, *Britannica*, <https://www.britannica.com/topic/coverture> (last visited Jan. 27, 2025). In non-common law countries, rape in marriage has also been slowly recognized: see, “Rape within marriage ruled crime in Mexico / Decision reflects changing attitudes” Elisabeth Malkin, Ginger Thompson, *New York Times* (Nov 17, 2005).

⁶ The idea of implied consent comes from a statement made by British Jurist by Matthew Hale when he declared “[b]ut the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (Emlin ed. 1736)

⁷ See Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), Article 36; CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para. 29 (e). See also concluding CEDAW Committees’ conclusion observations on: Romania, CEDAW/C/ROU/CO/7-8, para. 19 (b); Sweden, CEDAW/C/SWE/CO/8-9, para.15; Portugal, CEDAW/C/PRT/CO/8-9, para 25 (a); Croatia, CEDAW/C/HRV/CO/4-5, para. 19 (h); Finland, CEDAW/C/FIN/CO/7, para 19 (e); Hungary, CEDAW/C/HUN/CO/7-8, para. 20 (g); Norway, CEDAW/C/NOR/CO/8, para. 24 (b).

gender-equal societies. In contrast, coercion-based laws have been criticised for perpetuating harmful gender stereotypes, rape myths and heteronormative ideas about sexuality and sexual violence harms.⁸

4. Adolescents and consent

Most States set an age at which adolescents are deemed legally capable of consenting to sex through “age of consent” provisions. Often found in penal codes, these provisions generally make consent under specified ages irrelevant, rendering all sex with persons under identified ages (e.g. 16, 17, 18) sexual violence, deemed rape or statutory rape. While age of consent provisions may be intended to protect children from sexual abuse, they can also be used to unfairly suppress, regulate or prosecute consensual sex between adolescents.⁹

Although States have an obligation under international human rights law to protect children and adolescents from sexual coercion and violence, they are also required to respect, protect and fulfil their human rights, including in the realms of their developing sexualities, and in accordance with their evolving capacities. To that end, human rights bodies have called upon States to recognise that adolescents are rights holders, and (in accordance with the principle of evolving capacities) not to impose a strict age of consent requirement on adolescents¹⁰ and to avoid criminalising adolescents of similar ages for factually consensual and non-exploitative sexual activity.¹¹

Often age of consent provisions are also discriminatory towards adolescent girls by setting a lower age of consent compared to boys, and towards LGBTI adolescents by enforcing a higher age of consent for same-sex activity or subjecting them to increased penalties irrespective of consent.¹² The UN Convention on the Rights of the Child (CRC) requires states to ensure that adolescents are protected from discrimination on the basis of sex, which requires equalising age of consent provisions for boys and girls (regardless of the type of sex involved).¹³ It also requires that adolescents who engage with one another in consensual sexual acts, not be criminalised.¹⁴ In 2011, the OHCHR called for the repeal of discriminatory laws which set higher age of consent thresholds for sex between same-sex partners.¹⁵

⁸ Sara Uhnoo, Sofie Erixon, Moa Bladini, “The wave of consent-based rape laws in Europe”, *International Journal of Law, Crime and Justice*, Volume 77, 2024, 100668, ISSN 1756-0616, <https://doi.org/10.1016/j.ijlcrj.2024.100668>.

⁹ ICJ, “The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty” [March 2023]

¹⁰ UN General Assembly Resolution, CRC, 44/25, 1989, paras 9, 12

¹¹ CRC Committee, General Comment 20 (2016) on the implementation of the rights of the child during adolescence, UN Doc. CRC/C/GC/20 (2016), para. 40.

¹² UNFPA, ‘Harmonizing the legal environment for adolescent sexual and reproductive health and rights: A review of 23 Countries in East and Southern Africa’, 2017, at: https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf

¹³ UN Convention on the Rights of the Child, Article 2.

¹⁴ UN Committee on the Rights of the Child, General Comment 24 (2019), para 12.

¹⁵ UN Human Rights Council, Annual Report of the United Nations Office of the High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General. Follow-up and implementation of the Vienna Declaration and Programme of Action. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/19/41 (2011), para. 84(d). See also CRC Committee, Concluding Observations: Chile, UN Doc. CRC/C/CHL/CO/3, 2007, para.

5. People with disabilities and consent

The legal capacity of women with disabilities to provide and refuse consent should be recognised on an equal basis with others, yet discriminatory laws often strip women with disabilities—who make up nearly one-fifth of all women—of their legal capacity to consent, through systems like guardianship, conservatorship, and health laws that allow for forced treatment. Women with disabilities who marry face an increased risk of having their legal capacity revoked. This denial of legal capacity leads to numerous violations of their basic rights, including the right to marry and have a family, make independent decisions about their sexual and reproductive health, consent to or refuse intimate relationships, pursue justice for abuse, and fully participate in all aspects of civil, political, cultural, economic, and social life.¹⁶

Legal frameworks also often promote substitute decision-making regimes in cases where women with disabilities are considered to have impaired decision-making skills. It has been documented that in some jurisdictions there are higher rates of imposing substitute decision-makers on women than on men.¹⁷

Where the legal capacity of women with disabilities to consent is diminished, caregivers and family members can act as gatekeepers to women's access to justice because they hold the sole power to initiate legal or judicial proceedings. Women are also involuntarily detained in institutions—either without their consent or with the approval of a substitute decision-maker - which constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the CRPD. There are also practices of substitute decision-makers giving consent to medical treatment on behalf of persons with disabilities, which violates the right to receive healthcare based on free and informed consent (under Article 25 of the CRPD), and the obligation on States to ensure that all health and medical professionals (including psychiatric professionals) obtain the free and informed consent of persons with disabilities before administering any treatment (as set out in the General comment on Article 12 of the CRPD).

6. Sex work and consent

For sex workers consent means agreed upon terms and conditions under which sexual services are provided. If these terms and conditions are violated, this is not consent and sex workers should be able to complain and access non-judgmental support services and justice. Sex workers use consent to maintain boundaries, e.g. by refusing certain clients or certain sexual acts. For sex workers, the right to select customers and to choose which services they provide is an essential right.

Denying sex workers the capacity to provide consent, denies them also the capacity to refuse consent. Framing all sex work as violence obscures the actual violence sex workers may face and leads to the dangerous assumption that women who sell sex cannot be raped because prostitution is inherently

29; The United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/15/Add.134 (2008), para. 22; Austria, UN Doc. CCPR/C/79/Add.103 (1998), para. 13. Amnesty International also calls for states to harmonize age of consent in its report Making love a crime: Criminalization of same-sex conduct in sub-Saharan Africa (Index: AFR 01/001/2013)

¹⁶ Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD) acknowledges the right of persons with disabilities to enjoy legal capacity on an equal basis with others in all aspects of life, while Article 23 states the right to non-discrimination in all matters relating to marriage, family, parenthood, and relationships.

¹⁷ CRPD General Comment No. 1, Equal recognition before the law (2014), para. 35.

violent: if all sex work is rape, nothing is rape. Or as one sex worker said who attempted to report rape: “the police told me that I could not be raped, as rape is my work”.¹⁸

Consenting to sex or selling sex does not mean consenting to violence. While there are many systemic factors and personal circumstances, such as poverty, discrimination and gender inequality, that contribute to an individual's decision to engage in sex work, such conditions do not render individuals incapable of exercising agency in these contexts. To say otherwise is deeply problematic from a human rights perspective because it denies agency to an entire group of people (most of whom are women), placing the power to make decisions about their lives in the hands of the State.

7. The circumstances in which consent is irrelevant under international law relating to trafficking in persons

Under international law, the consent of a victim of trafficking is irrelevant where any of the specified means to obtain that consent are used.¹⁹ This includes when the consent was obtained through the threat or use of force, coercion, fraud, deception or abuse of a position of vulnerability.²⁰ This means, for example, that if a person was transported to another country, having been told that they were going to work and earn a salary, but on arrival they find out they will not be paid any salary and forced to work unpaid, the fact that the person consented to to be transported to another country is irrelevant.

This is an entirely logical approach, as applying the ordinary meaning of the word “consent,” we cannot say a person has consented when they were tricked or coerced into giving that consent.

At the same time, this approach under international law recognises the right of people to consent to work or behaviour that some people may consider exploitative or degrading. Provided they were fully aware of the circumstances of this work, and gave their free and informed consent to this arrangement, no situation of trafficking has occurred.

It is only in cases of child trafficking [under 18) that the 'means' element (deception, coercion, force, threat) of the definition of trafficking in persons not required. People who claim that sex workers' consent is irrelevant and wish to treat all sex work as trafficking, even where there was no deception, coercion, force or threat, are therefore effectively treating adults as children.

Treating all sex work as human trafficking is contrary to the international legal definition of trafficking in persons, as set out in the *UN Trafficking Protocol*²¹, and diminishes and obscures actual instances of exploitation and abuse, making it harder for such instances to be identified. It has also led to violence being committed against sex workers in the name of anti-trafficking. Anti-trafficking “raid and rescue” operations on places of sex work have been linked to frequent human rights violations, including physical violence and forced detention in government facilities. This violence includes being strip-searched and

¹⁸ Wijers, M (2024). *Sex Worker Rights and Human Rights: A Double-Edged Sword*. Rights, Resistance and Mobilisations. Doctoral thesis, University of Essex, p. 104. <https://repository.essex.ac.uk/38493/>

¹⁹ Article 3 (b), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

²⁰ Article 3 (b), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

²¹ Article 3 (a), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

physically and sexually assaulted. Migrant sex workers have been particularly targeted by law enforcement in the context of “anti-trafficking” operations.²²

8. Conclusion

Limitations on the right to provide or refuse to consent are often justified on a protectionist basis i.e. a need to protect certain individuals or groups from harm. However, across the world, the harms recognised by society, and punished under criminal law, are based on power differentials. Usually the harms felt by marginalised and excluded communities and individuals are neglected, and the persons committing human rights violations against them are protected. For policies on consent to be human rights compliant, they must give voice to the experience and autonomy of marginalised and excluded communities, and their experience (or non-experience) of harm.²³

²² GAATW, *Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions*, 2018, available at:

<https://gaatw.org/publications/SWorganising/SWorganising-complete-web.pdf>

²³ Working Group on Discrimination Against Women, *Eliminating discrimination against sex workers and securing their human rights*, para 37 (2023)

<https://documents.un.org/doc/undoc/gen/g23/241/61/pdf/g2324161.pdf>

Addendum

| | |
|---|---|
| Submitting organisations and contacts: | |
| Global Alliance Against Traffic in Women (GAATW) | GAATW is an alliance of almost 100 NGOs from Asia, Africa, Europe and the Americas that promote the rights of migrant women and trafficked persons. Contact: maya@gaatw.org |
| La Strada International | La Strada International is a European NGO Platform against human trafficking, comprising 32 member organisations in Europe, that works from a human rights perspective in support of trafficked persons. The platform aims to prevent human trafficking and to protect and realise trafficked persons' rights. |
| European Sex Workers' Rights Alliance | ESWA is a sex worker-led network representing more than 100 organisations in 30 countries across Europe and Central Asia. The network's aim is to ensure that all sex worker voices are heard and that their human, health and labour rights are recognised and protected. |
| Amnesty International | Amnesty International is a movement of 10 million people which campaigns for change so we can all enjoy our human rights. Our vision is of a world where those in power keep their promises, respect international law and are held to account. We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and individual donations. |
| Women Deliver | Led by and representing feminist movements and youth advocates in the majority of the world, Women Deliver plays a pivotal role in global collective action for gender equality. Our mission is to protect and promote the bodily autonomy of girls, women, and gender-diverse people, focusing specifically on their control over their sexual and reproductive health and rights (SRHR). |
| WO=MEN Dutch Gender Platform | WO=MEN* is the largest gender platform in Europe and strives for equal power relations between women, men and gender non-conforming persons both in the Netherlands and worldwide. |
| Count Me In! (CMI!) consortium | CMI! consists of member organisations Mama Cash |

| | |
|---|---|
| | (MC), the Association for Women’s Rights in Development (AWID), CREA, Just Associates (JASS), and the Sister Funds Urgent Action Fund (UAF) and Urgent Action Fund Africa (UAF-Africa). |
| Global Health Justice Partnership of the Yale Schools of Law and Public Health | The Global Health Justice Partnership (GHJP), an initiative of the Yale Law School and Yale School of Public Health to promote interdisciplinary, accountable, collaborative and effective responses to key problems in health justice at local, national and global levels. |
| ILGA World | ILGA World (International Lesbian, Gay, Bisexual, Trans and Intersex Association), established in 1978, is a federation of more than 1,700 organisations from over 160 countries and territories campaigning for lesbian, gay, bisexual, trans and intersex (LGBTI) human rights. ILGA World enjoys the ECOSOC status, consistently engaging with UN human rights bodies, and conducts legal and socio-economic research on the situation of LGBTI persons. |
| Center for Reproductive Rights | The Center for Reproductive Rights is an international non-profit legal advocacy organization that uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to respect, protect, and fulfil. |
| Just Futures Collaborative | Just Futures Collaborative is a feminist initiative cultivating global cross-movement strategies for challenging criminalization, promoting human rights, and protecting democracy. |
| International Planned Parenthood Federation | IPPF is a locally owned, globally connected civil society movement. We work to ensure people are free to make choices about their sexuality and wellbeing, in a world free from discrimination. |
| EATHAN - East Africa Trans Health & Advocacy Network | EATHAN is a network of trans diverse activists & organisations in East Africa working to improve the livelihoods of gender diverse persons in East Africa. |
| Sexuality Policy Watch - ABIA, Brazil | Sexuality Policy Watch (SPW) is a global forum composed of researchers and activists from a wide range of countries and regions of the world. SPW has undertaken a series of strategic analysis devoted to the critical mapping of conditions prevailing in sexual |

| | |
|---|--|
| | politics landscapes globally and locally. |
| Dr. Ivana Radačić | Dr. Ivana Radačić is a human rights academic and the former Vice-Chair of the UN Working Group on discrimination against women and girls. Ivana holds a PhD in law from the University of London, MPhil in criminological research from the University of Cambridge and LLM from the University of Michigan, Ann Arbor, and the University of Zagreb. |
| Initiative for Strategic Litigation in Africa | The Initiative for Strategic Litigation in Africa (ISLA) is a Pan-African and feminist initiative, founded in 2014 to strengthen strategic human rights litigation across the African continent. |
| Jaime M. Gher, University of Toronto, Reproductive and Sexual Health Law Program | Jaime is a reproductive justice lawyer fighting for the human rights of women, gender-diverse individuals, and marginalized and criminalized populations worldwide. Jaime holds an LL.M. in international law and gender from American University, Washington College of Law, a J.D. from the University of San Francisco, School of Law, and a B.A. in sociology from the University of California Santa Barbara. |
| Cynthia Rothschild, BA, MA. | Cynthia is the Faculty Director, Kahane UN Program; and Resident Assistant Professor, Diplomacy and World Affairs at Occidental College, Southern California. |