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**Mandate of the Working Group on Discrimination against Women and Girls**  
**Mandate of the Working Group on Arbitrary Detention**

**IN THE FEDERAL HIGH COURT OF NIGERIA**  
**IN THE ABUJA JUDICIAL DIVISION**  
**HOLDEN AT ABUJA**

*Joint Amicus Curiae Submission by the United Nations Human Rights Council's  
Working Group on Discrimination against Women and Girls and the Working Group  
on Arbitrary Detention on the case of Blessing Nnaji & 5 ORS vs. THE MINISTER,  
FCT & 13 ORS*

*3 February 2020*

**Suit No: FHC/ABJ/CS/968/2019**

**IN THE MATTER OF AN APPLICATION BY BLESSING NNAJI FOR AN ORDER FOR THE ENFORCEMENT OF HER FUNDAMENTAL HUMAN RIGHTS TO PERSONAL LIBERTY AND FREEDOM OF MOVEMENT, RIGHT TO DIGNITY OF HER PERSON, FREEDOM OF ASSOCIATION AND FREEDOM FROM DISCRIMINATION BROUGHT PURSUANT TO ORDER II RULES 1, 2, 3, 4 & 5; XI AND XII OF THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES, 2009 AND SECTIONS 34, 35, 36, 40, 41, 42 AND 46 (1) & (2) OF THE CONSTITUTION OF THE FEDERAL**

REPUBLIC OF NIGERIA, 1999 (AS AMENDED); ARTICLES 2, 3, 4, 5, 6, 7, 10(1), 11 AND 12 (1) OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS (RATIFICATION AND ENFORCEMENT) ACT CAP A9, LAWS OF THE FEDERATION OF NIGERIA, 2004; AND UNDER THE INHERENT JURISDICTION OF THIS HONOURABLE COURT.

BETWEEN

BLESSING NNAJI ..... APPLICANT

AND

1. THE MINISTER, FED. CAPITAL TERRITORY (FCT)
  2. THE FEDERAL CAPITAL TERRITORY ADMINISTRATION
  3. THE FEDERAL CAPITAL DEVELOPMENT AUTHORITY
  4. HAJIYA SAFIYA UMAR, ACTING SECRETARY SOCIAL DEVELOPMENT SECRETARIAT OF THE FCT
  5. THE ABUJA METROPOLITAN MANAGEMENT COUNCIL
  6. THE ABUJA ENVIRONMENTAL PROTECTION BOARD
  7. HASSAN ABUBAKAR, H.O.D ABUJA ENVIRONMENTAL PROTECTION BOARD
- RESPONDENTS
8. EZE ENYA EZE (position at ) ABUJA
  9. ENVIRONMENTAL PROTECTION BOARD
  10. NIGERIAN SECURITY AND CIVIL DEFENCE CORP.
  11. THE INSPECTOR-GENERAL OF POLICE
  12. INSPECTOR THOMAS NZEMEKE AKA 'YELLOW'
  13. THE ATTORNEY-GENERAL OF THE FEDERATION
  14. IDAYAT AKANNI OLAIDE (CHIEF MAGISTRATE 1)

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# 1. Introduction

## 1.1 *Interveners*

The Working Group on Discrimination against Women and Girls (WGDAWG) and the Working Group on Arbitrary Detention (WGAD) make this joint submission in relation to the cases that have been filed at the Federal High Court in Abuja against the Federal Government and law enforcement agencies,<sup>1</sup> concerning the arrest of the complainants in Abuja and their detention in April 2019. This brief is provided on a voluntary basis for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials, and experts on mission, which include the experts of the WGDAWG and WGAD<sup>2</sup>, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

The WGDAWG and the WGAD are independent expert human rights mechanisms, known as Special Procedures, of the United Nations Human Rights Council (HRC), which is an inter-governmental body of the United Nations responsible for strengthening the promotion and protection of human rights globally. The HRC established the mandate of the WGDAWG in October 2010 in recognition of the fact that discrimination against women persists, despite progress made over the years in integrating women's human rights fully into domestic law through constitutional and legal reforms in many countries. The WGDAWG is tasked with developing a dialogue with States and other actors on laws and practices that discriminate against women or have a discriminatory impact on women. To fulfill its mandate, the WGDAWG conducts country visits at the invitation of the relevant Government; addresses communications to Governments on allegations of human rights

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<sup>1</sup> The Minister, FCT; Federal Capital Territory Administration; Federal Capital Development Authority; Hajiya Safiya Umar, Acting Secretary Social Development Secretariat of the FCT; Abuja Metropolitan Management Council; Abuja Environmental Protection Board; Nigerian Security and Civil Defense Corp; Inspector General of Police; Attorney-General of the Federation.

<sup>2</sup> Current members of the WGDAWG are: Ms. Meskerem Techane (Chair-Rapporteur, Ethiopia), Ms. Elizabeth Broderick (Vice-Chair, Australia), Ms. Alda Facio (Costa Rica), Dr. Ivana Radačić (Croatia), Ms. Melissa Upreti (Nepal). The current members of the WGAD are: Mr. José Antonio Bermúdez Guevara (Chair-Rapporteur, Mexico), Ms. Leigh Toomey (Vice-Chair, Australia), Ms. Elina Steinerte (Vice-Chair, Latvia), Mr. Seong-Phil Hong (Republic of Korea), Mr. Sètondji Roland Adjovi (Benin). The process of drafting this brief was led by Dr. Radačić (on behalf of the WGDAWG) and Ms. Toomey (on behalf of the WGAD).

violations falling within its mandate; and submits an annual thematic report to the HRC. It also acts as *amicus curiae* in cases which raise issues of discrimination against women.<sup>3</sup>

The former Commission on Human Rights (which preceded the HRC) established the mandate of the WGAD in March 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights (UDHR) or in the relevant international legal instruments accepted by the States concerned.<sup>4</sup> In determining whether deprivation of liberty is arbitrary, the WGAD refers to the five categories outlined in its Methods of Work, namely: 1) when it is impossible to invoke any legal basis justifying the deprivation of liberty; 2) when the deprivation of liberty results from the exercise of certain rights guaranteed by the UDHR or the International Covenant on Civil and Political Rights (ICCPR); 3) when the right to a fair trial has been seriously violated; 4) when asylum-seekers, immigrants or refugees are subjected to prolonged administrative detention without the possibility of administrative or judicial review or remedy; and 5) when the deprivation of liberty constitutes a violation of international law on the grounds of discrimination of any kind. To fulfill its mandate, the WGAD adopts opinions on alleged cases of arbitrary detention brought to it from individuals in countries around the world; conducts country visits at the invitation of the relevant Government; addresses communications to Governments on allegations involving arbitrary detention; develops deliberations on topics concerning arbitrary detention, and carries out follow-up of the implementation of its opinions.

## *1.2 Summary of the facts and concerns*

According to the facts as contained in the affidavit in support of the originating summons, the applicants were among 71 women who were arrested at various public spaces in Abuja between 17 and 26 April 2019. The officers who conducted the raids were followed by a television crew, and a video of the arrest has since circulated in the media, including on social media. Notably, only *women* suspected of being sex workers were arrested during

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<sup>3</sup>Amicus Curiae Briefs submitted by the WGDAGW, available at <https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/AmicusCuriae.aspx>

<sup>4</sup>UNCHR Res 1991/42, Question of Arbitrary Detention, 5 March 1991, E/CN.4/RES/1991/42, para 2.

the raids.<sup>5</sup> During the arrests, the officers allegedly folded the women's breasts and verbally insulted them. The women were reportedly not informed of the reasons for their arrest. They were taken into custody, where they were allegedly harassed, beaten and some were raped. The women who were menstruating were denied sanitary hygiene products. Most of the women were reportedly released when they were coerced into pleading guilty, or exchanged sex or paid cash for bail. Some of the complainants were sentenced under the Penal Code for offences relating to being an "idle person",<sup>6</sup> while others were sentenced under the Environmental Protection Board Act for selling goods at a junction or other public places.<sup>7</sup>

The alleged facts raise concerns with regard to, *inter alia*, the right to freedom from gender-based discrimination; the right to liberty and security; and the right to be free from torture and inhumane treatment. The purpose of this brief is to lay out the international standards in relation to content and scope of these rights in the circumstances of the cases at hand, and in particular the jurisprudence of the interveners on these questions. Through the submission of this brief, the WGDWAG and WGAD wish to highlight international human rights standards as they apply to punitive laws relating to sex work, as well as standards pertaining to arbitrary arrest and detention, police violence and conditions of detention.

## **2. International human rights standards**

### *2.1 Introduction*

International human rights law is based on the principles of human dignity and equality.<sup>8</sup> All major human rights treaties contain non-discrimination norms, and some also include the right to equal protection of the law. Accordingly, persons engaged in prostitution/sex

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<sup>5</sup> In the case of *Dorothy Njemanze & 3 Others v Nigeria*, Judgment N°: ECW/CCJ/JUD/08/17, the ECOWAS Community Court of Justice found that a "systematic sting operation directed against only the female gender furnishes evidence of discrimination" (at p.38).

<sup>6</sup> Article 405(1)(d) of the Penal Code states that "a common prostitute behaving in a disorderly or indecent manner in a public place or persistently importuning or soliciting persons for the purpose of prostitution", is an idle person.

<sup>7</sup> Article 35(1)(d) prohibits "selling or displaying or offering or carrying any good or article of trade in a road junction or other unauthorized place".

<sup>8</sup> Universal Declaration of Human Rights, Preamble.

workers<sup>9</sup> are entitled to the enjoyment of all human rights. The State has a duty to protect the enjoyment of human rights by sex workers, including the right to equality and non-discrimination, the right to be free from inhumane and degrading treatment, the right to liberty and security, the right to a fair trial, the right to private and family life, and the right to health. These rights are found, *inter alia*, in the Universal Declaration of Human Rights (UDHR, Articles 2, 3, 5, 7, 9, 10, 11, 12), the International Covenant on Civil and Political Rights (ICCPR, Articles 2, 7, 9, 10, 14, 17 and 26)<sup>10</sup> and the International Covenant on Economic, Social and Cultural Rights (Article 12)<sup>11</sup>, as well as the African Charter on Human and Peoples' Rights (African Charter, Articles 2, 3, 5, 6, 7)<sup>12</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol, Articles 2, 3, 4, 8, 14)<sup>13</sup>. These rights are of universal nature and apply to everyone.

Nevertheless, sex workers are frequently subjected to various forms of human rights abuse, often at the hands of State agents, in the form of arbitrary arrest and detention, inhumane conditions of detention, police violence, and violation of due process rights, among others. Indeed, sex workers frequently report that the violence, harassment and misuse of the law by the police are one of the most difficult aspects of their lives.<sup>14</sup> The problem of police abuse is particularly acute in jurisdictions in which sex workers are criminalized, either directly (through criminalization of engaging in prostitution) or indirectly (through laws criminalizing other behavior, such as vagrancy or public nuisance).<sup>15</sup>

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<sup>9</sup>The brief uses the term sex worker, as the word generally preferred by persons engaged in prostitution, though the term women engaged in prostitution is also occasionally used for female sex workers, when it makes sense. The word prostitution is used to refer to the activity of exchanging sex for money, as sex work is a broader term. The use of these terms does not imply any particular ideological view of prostitution and sex work.

<sup>10</sup> Nigeria has been a party since 29 July 1993.

<sup>11</sup> Nigeria has been a party since 29 July 1993.

<sup>12</sup> Nigeria ratified the African Charter on 22 June 1983.

<sup>13</sup> Nigeria ratified the Maputo Protocol on 16 December 2004.

<sup>14</sup> Women's Legal Centre (2016), *Police Abuse of Sex Workers*, available at <http://wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf>; SWEAT, *The Policing of Sex Work in South Africa*, available at <http://www.sweat.org.za/wp-content/uploads/2019/09/Policing-Report.pdf>.

<sup>15</sup> SWAN (2015). *Failures of Justice: State and Non-State Violence against Sex Workers and the Search for Safety and Redress*, available at <http://www.swannet.org/files/swannet/FailuresOfJusticeEng.pdf>.

## 2.2 *Criminalization of sex workers*

### 2.2.1 Discriminatory impact on women

Prostitution is a gendered phenomenon: not only are most sex workers female (and most clients male), but women engaged in prostitution are also disproportionately targeted by law enforcement. The WGDAGW has noted that female sex workers are disproportionately affected and targeted by law enforcement agents, not only where prostitution is criminalized, but also in countries where prostitution itself is not a criminal offence: women who engage in it may be prosecuted and incarcerated for other offences, including loitering, vagrancy and public indecency, and for migration-related infractions.<sup>16</sup> The WGAD has documented how, in certain countries, female sex workers are detained for vagrancy offences, which the WGAD has defined as deprivation of liberty on discriminatory grounds, contrary to the obligations under Articles 2 and 7 of the UDHR and Articles 2 and 26 of the ICCPR to ensure the equal protection of the law without distinction of any kind.<sup>17</sup>

Gender based stereotypes, compounded by stereotypes based on race, sexuality, gender identity, poverty (among others), play an important role in the deprivation of liberty of female sex workers. Targeting of women engaged in prostitution is based on laws and social attitudes that seek to control women's morality and sexuality.<sup>18</sup> Moreover, laws targeting sex workers do not take account of the fact that the lack of decent work opportunities, affected by the context of gender discrimination, is one of the major reasons for women's involvement in certain forms of prostitution.<sup>19</sup>

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<sup>16</sup> Working Group on Discrimination against Women and Girls, *Report on women deprived of liberty*, A/HRC/41/33, para 36.

<sup>17</sup> See, for example, Working Group on Arbitrary Detention, *Report on its visit to Sri Lanka*, A/HRC/39/45/Add.2, paras 65-68, 90(a) (noting that any form of discrimination that results in the deprivation of liberty is clearly arbitrary, and that States must find affordable alternatives to detention, such as social services, for the most vulnerable members of society, including female prostitutes).

<sup>18</sup> Working Group on Discrimination against Women and Girls, *Report on women deprived of liberty*, A/HRC/41/33, para. 36. See also *Dorothy Njemanze & 3 Others v Nigeria* (supra), in which women accused of being sex workers (which was not proved by the State) were found to have been arbitrarily arrested, detained and harassed, in violation of the African Charter on Human and Peoples' Rights and the ICCPR.

<sup>19</sup> WGDAGW, *ibid*, para. 61.



The WGDAWG has argued that discriminatory use of criminal law, punitive sanctions and legal restrictions to regulate women's control over their own bodies and sexual behavior (including in relation to engaging in prostitution) is a severe and unjustified form of State control.<sup>20</sup> The enforcement of such provisions generates stigma and discrimination and violates women's human rights. It infringes women's dignity and bodily integrity by restricting their autonomy to make decisions about their own lives and health.<sup>21</sup>

Criminal laws and other punitive regulations have imposed custodial sentences on women engaged in prostitution in a manner that has been shown to harm rather than protect them.<sup>22</sup> The criminalization places sex workers in a situation of injustice, vulnerability and stigma, violating their human rights.<sup>23</sup> The WGDAWG has therefore argued for the reform of such laws, calling for the repealing of 'laws and practices policing, targeting, punishing or confining women in relation to ... sex work/prostitution'.<sup>24</sup>

The negative effect on women of criminalization of prostitution has also been recognized by the United Nations Committee on the Elimination of All Forms of Discrimination against Women (the CEDAW Committee). In its General Recommendation No. 19 on violence against women, the CEDAW Committee noted that 'prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them' and emphasized that they need the equal protection of laws against rape and other

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<sup>20</sup> Working Group on Discrimination against Women and Girls, *Report on health and safety*, A/HRC/32/44, para. 76.

<sup>21</sup> Ibid. See generally Ciara O'Connell, *Reconceptualising the first African Women's Protocol case to work for all women*, African Human Rights Law Journal, Vol. 19, No. 1 (2019) (arguing that sex work should be seen through the lens of human dignity and as part of the right to work).

<sup>22</sup> Working Group on Discrimination against Women and Girls, *Report on health and safety*, A/HRC/32/44, para. 76.

<sup>23</sup> Working Group on Discrimination against Women and Girls, *Report on health and safety*, A/HRC/32/44, para. 84. See, for example, the concerns expressed by the WGAD and other Special Procedures mandate holders in UA AZE 2/2017, concerning the alleged unlawful arrests and detention, torture and ill-treatment of persons perceived to be gay, transgender persons or persons involved in sex work in Azerbaijan.

The communication is available at:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=23369>.

See also Working Group on Arbitrary Detention, *Opinion No. 14/2017*, paras. 47-49 (finding that a law that criminalized private sexual behavior between consenting adults violated Articles 2, 7 and 12 of the UDHR and Articles 2, 17 and 26 of the ICCPR, and that detention pursuant to such a law had no legal basis and was arbitrary. The case concerned the criminalization of consensual same-sex relations, but it is submitted that the findings are equally applicable to private and consensual acts performed by sex workers).

<sup>24</sup> Working Group on Discrimination against Women and Girls, *Report on women deprived of liberty*, A/HRC/41/33, para. 80(c).

forms of violence.<sup>25</sup> In General Recommendation No. 35. on violence against women, updating General Recommendation No. 19, the CEDAW Committee called on States to repeal provisions criminalizing ‘women in prostitution’, on account that they are ‘discriminatory against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence’ against them.<sup>26</sup> This has also been recommended in a number of concluding observations, where States were called upon to repeal provisions that penalize sex workers, including provisions on administrative offences, and to suspend the imposition of fines.<sup>27</sup>

### 2.2.2 Negative impact on health and safety

Both the WGDAWG and United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (the Special Rapporteur on health) have noted the negative impact of criminalization of prostitution on sex workers’ health and safety.<sup>28</sup> Specifically, as noted by the Special Rapporteur on health:

Criminalization represents a barrier to accessing services, establishing therapeutic relationships and continuing treatment regimes, leading to poorer health outcomes for sex workers, as they may fear legal consequences or harassment and judgement... Raids, cautions and arrests generally result in a shift of the sex worker population, often towards unsafe areas, putting sex workers at higher risk. Criminalization has

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<sup>25</sup> Committee on the Elimination of Discrimination against Women, *General recommendation No. 19: Violence against women*, Article 6(15).

<sup>26</sup> Paras. 29(c) and 31(a), CEDAW/C/GC/35.

<sup>27</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations on the eighth periodic report of the Russian Federation*, CEDAW/C/RUS/CO/8, para. 26(c); *Concluding Observations on the eight periodic report of Belarus*, CEDAW/C/BLR/CO/8, para. 27(b); *Concluding Observations on the combined fourth and fifth periodic reports of the Republic of Moldova*, CEDAW/C/MDA/CO/4-5, para. 22 (d); *Concluding observations on the combined fourth and fifth periodic reports of Tajikistan*, CEDAW/C/TJK/CO/4-5, para. 20(b); *Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina*, CEDAW/C/BIH/CO/4-5, para. 26(a); *Concluding observations on the combined seventh to ninth periodic reports of Rwanda*, CEDAW/C/RWA/CO/7-9, para. 29(a).

<sup>28</sup> See, for example, United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report to the Human Rights Council*, A/HRC/14/20; United Nations Working Group on Discrimination against Women and Girls, A/HRC/32/44.

also been noted to diminish the “bargaining power” of sex workers in choosing clients and negotiating condom use.<sup>29</sup>

As a result, the Special Rapporteur on health has urged States to fully decriminalize adult consensual sex work.

### *2.3 Arrests and detention based on vague laws*

As stated above, in the case at hand, the complainants were arrested on the basis of the provisions of the Environmental Protection Board Act, even though the Act does not refer to prostitution and does not appear to be applicable. One complainant was arrested under the Criminal Code, which uses the vague term ‘common prostitute’ and in addition requires that person behaves in a ‘disorderly or indecent manner in a public place or persistently importunes or solicits persons for the purpose of prostitution,’ the elements of which do not all seem to exist in the cases at hand.

The application of these laws to penalize sex workers raises the question of their compatibility with one of the main principles of international law – the principle of legality. This principle requires that any limitation of (non-absolute) rights must be prescribed by law, which must be foreseeable and accessible. The principle of legal certainty or legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law and regulate his or her conduct accordingly.<sup>30</sup> Both the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, as well as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, provide that any laws restricting the enjoyment of rights should be “clear and accessible to everyone.”<sup>31</sup> The principle of legality is a basic principle of criminal law, which is an ultima ratio measure, which should be used to criminalize serious and harmful behavior, rather than the ‘status’ of a person, such as being a ‘common prostitute.’

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<sup>29</sup> United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report to the Human Rights Council, A/HRC/14/20*, paras. 36-37.

<sup>30</sup> See, for example, Working Group on Arbitrary Detention, *Opinion No. 41/2017*, paras. 98-101.

<sup>31</sup> Siracusa Principles, para. 17; Limburg Principles, para. 50.

Laws which are vague or ambiguous may bear particular risks for marginalized groups, such as sex workers, both because they lack requisite detail defining what is punishable, and because they enable discriminatory application of the law. Indeed, very often laws used to target sex workers breach the principle of legal certainty. In some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.<sup>32</sup> In such cases any resulting detention is considered arbitrary, and thus in breach of the right to liberty and security of person. Article 9(1) of the ICCPR states that no one shall be subjected to arbitrary arrest or detention and no one shall be deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.

#### *2.4 Failure to inform the applicants of the reasons for their arrests*

The complainants in this case allege that they were not provided with a reason for their arrests in violation of Article 9(2) of the ICCPR, which provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest. An arrest is considered to be the commencement of a deprivation of liberty, and the requirement of providing reasons for the arrest applies regardless of the formality or informality with which the arrest is conducted and regardless of the legitimate or improper reason on which it is based.<sup>33</sup> The purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded.<sup>34</sup> The reasons must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the alleged wrongful act.<sup>35</sup> The reasons for the arrest must be provided immediately upon arrest.<sup>36</sup>

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<sup>32</sup> Working Group on Arbitrary Detention, *Opinion No. 62/2018*, paras 57-59 (noting that the principle of legality under Article 11(2) of the UDHR and Article 15(1) of the ICCPR requires laws to be formulated with such precision that the individual can regulate his or her conduct).

<sup>33</sup> Human Rights Committee, *General Comment No. 35 on Article 9 (Liberty and Security of Person)*, CCPR/C/GC/35, para. 24.

<sup>34</sup> *Ibid*, para. 25.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*, para. 27.

In its jurisprudence, the WGAD has emphasized that, in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law which may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case.<sup>37</sup> When the authorities fail to give reasons for an arrest, they fail to invoke a legal basis for the arrest, and the deprivation of liberty is arbitrary and in violation of Article 9(1) and (2) of the ICCPR.<sup>38</sup>

## 2.5 *Failure to provide meaningful access to judicial review of detention*

The circumstances in which the women in the present case were arrested and detained suggest a failure on the part of the Nigerian arresting officers to provide them with meaningful access to judicial review of their arrests and detention. No specific measures appear to have been taken or were available in this case to assist the women to seek judicial review of their detention, resulting in them resorting to other means of seeking release such as exchanging sex for bail, a manifest denial of their human rights.

According to Article 9(3) of the ICCPR, anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.<sup>39</sup> As the United Nations Human Rights Committee has noted, this requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it. The requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity. The right is intended to bring the detention of a person in a criminal investigation or

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<sup>37</sup> See, for example, Working Group on Arbitrary Detention *Opinion Nos. 46/2019, 33/2019, 14/2019, 9/2019, 53/2018, 46/2018, 36/2018, 10/2018*. Opinions adopted by the WGAD are available at: <https://www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx>

<sup>38</sup> See, for example, Working Group on Arbitrary Detention *Opinion Nos. 46/2019*, para. 51; *81/2018*, para. 30 (a case concerning Nigeria); *10/2018*, para. 47; *38/2017*, para. 74; *18/2017*, para. 38; *10/2015*, para. 34. See also African Commission on Human and Peoples' Rights, Communication No. 368/09, *Hadi and Ors. v. Republic of Sudan*, para. 82 (referring to similar principles in the Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and the Robben Island Guidelines).

<sup>39</sup> See also African Commission on Human and Peoples' Rights, Communication No. 301/05, *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, para. 216 (referring to similar principles in the Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa).

prosecution under judicial control.<sup>40</sup> While the exact meaning of ‘promptly’ may vary in each case, 48 hours is ordinarily sufficient to bring a person before a judicial authority, and any longer delay must remain absolutely exceptional and be justified under the circumstances.<sup>41</sup>

Moreover, Article 9(4) of the ICCPR enshrines the principle of habeas corpus. It entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. The WGAD has stated that the adoption of specific measures by States is required under international law to ensure that certain vulnerable individuals and groups of detainees – including women and sex workers – have meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies under Article 9(4) of the ICCPR.<sup>42</sup>

## *2.6 Forced guilty pleas through threats of further detention*

Some of the complainants allege that they were forced to plead guilty. Article 14(3)(g) of the ICCPR prescribes that every person charged with a criminal offence is guaranteed the right not to be compelled to testify against him or herself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.<sup>43</sup> The burden is on the State, in this case Nigeria, to prove that guilty pleas have been given by the applicants of their own free will and were not coerced.<sup>44</sup>

In its jurisprudence, the WGAD has repeatedly upheld this guarantee, recalling that the burden of proof is on the State concerned to demonstrate that a confession of guilt was

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<sup>40</sup> Human Rights Committee, *General Comment No. 35 on Article 9 (Liberty and Security of Person)*, CCPR/C/GC/35, para. 32.

<sup>41</sup> *Ibid.*, para. 33.

<sup>42</sup> United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, principle 17.

<sup>43</sup> Human Rights Committee, *General Comment No. 32 on Article 14 (Right to equality before courts and tribunals and to a fair trial)*, CCPR/C/GC/32, para. 41.

<sup>44</sup> *Ibid.*

given freely.<sup>45</sup> The WGAD has also emphasized that coerced pleas of guilt violate an accused person's right to the presumption of innocence under Article 11(1) of the UDHR and Article 14(2) of the ICCPR<sup>46</sup> because they effectively remove the State's burden to prove the guilt of the accused.

## 2.7 *Police violence and abuse in custody*

The complainants were also allegedly subjected to abuse in custody, including inhumane conditions of detention. Police abuse has been found to be a common aspect of prostitution, particularly prevalent in criminalized contexts.<sup>47</sup> The vulnerability of sex workers to violence has also been recognized by the Special Rapporteur on health,<sup>48</sup> as well as the CEDAW Committee and the WGDAWG, as discussed above. In particular, the WGDAWG has called on States to ensure that law enforcement officials serve a protective function, as opposed to engaging in or perpetuating violence against women engaged in prostitution.<sup>49</sup>

Studies suggest that physical, psychological and sexual violence by police is largely occurring in the course of arrest and detention, or under the threat of arrest and detention, which are often carried out in a manner that exposes the identity of sex workers (or their HIV status) to the wider public.<sup>50</sup> Being in detention places sex workers at high risk of experiencing further human rights violations, including physical and sexual violence. Sexual violence in detention is a form of gender-based discrimination and a severe violation of human rights. Rape by a State official is considered a form of torture.<sup>51</sup> In

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<sup>45</sup> See, for example, Working Group on Arbitrary Detention *Opinion Nos. 44/2019*, para. 69; *32/2019*, para. 43; *52/2018*, para. 79(i); *17/2017*, para. 42; *1/2014*, para. 18.

<sup>46</sup> See, for example, Working Group on Arbitrary Detention *Opinion Nos. 44/2019*, *32/2019*, *52/2018*, *78/2017*, *47/2017*.

<sup>47</sup> SWAN (2015), *supra* note 15; Stelko, S. and Radačić, I. (2017). Relationships with Police: Context of Repression, in Radačić and Pajnik (eds). *Prostitution in Croatia and Slovenia – Experiences of Sex Workers*.

<sup>48</sup> United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report to the Human Rights Council, A/HRC/14/20*, para. 41.

<sup>49</sup> Working Group on Discrimination against Women and Girls, *Report on health and safety, A/HRC/32/44*, para. 85.

<sup>50</sup> SWAN (2015), *supra* note 15.

<sup>51</sup> See *Aydin v. Turkey*, App. no. 23178/94, Judgment of 25 September 1997.

addition, conditions of detention are often inhumane, and prisoners are often denied the services they need, such as access to hygiene facilities and products, which women need.<sup>52</sup>

Police violence and inhumane conditions of detention *prima facie* violate the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment under Article 5 of the UDHR, Article 7 of the ICCPR, and Articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (to which Nigeria became a State party on 28 June 2001), as well as the right to dignity of the human person under Article 10 of the ICCPR, Article 5 of the African Charter and Article 3 of Maputo Protocol, and the right to privacy under Article 12 of the UDHR and Article 17 of the ICCPR. Moreover, the abuse of detainees, such as alleged in this case – in particular, the physical beatings, rape and emotional abuse – would have had a potentially negative effect on their ability to participate in their defense, likely resulting in their proceedings being fundamentally unfair and their detention arbitrary.<sup>53</sup>

## 2.8 *The duty to provide an effective remedy for human rights violations*

The complainants in this case are seeking redress for human rights violations before this Court. The WGDWG and WGAD recall that international human rights law imposes a clear duty on States to provide effective remedies for human rights violations. This includes not only the duty to ensure accountability of those responsible (including criminal punishment for certain forms of serious human rights abuse, such as rape) and the duty to provide reparations to the victim, but also the duty to take all necessary measures to prevent further violations of human rights. In particular, States have obligations of due diligence to prevent and punish violence against women.<sup>54</sup> However, around the world, violations of

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<sup>52</sup> Working Group on Discrimination against Women and Girls, *Report on health and safety*, A/HRC/32/44, para. 59.

<sup>53</sup> In *Opinion No. 29/2017*, the WGAD stated that, although its mandate does not cover conditions of detention or the treatment of prisoners, it must consider to what extent detention conditions can negatively affect the ability of detainees to prepare their defense and their chances of a fair trial (para. 63). See also Working Group on Arbitrary Detention, *Opinion Nos. 53/2018*, para. 77(c); *52/2018*, para. 79(j); *47/2017*, para. 28; *Report of the Working Group's visit to Argentina* (E/CN.4/2004/3/Add.3, para. 33). See also *Opinion No. 32/2019*.

<sup>54</sup> United Nations Special Rapporteur on violence against women, *Report to the Human Rights Council*, A/HRC/23/49; CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35.



the human rights of sex workers have been largely unaddressed; impunity has been widespread.<sup>55</sup> As most sex workers are women, the failure to provide justice for sex workers has a gender dimension.

The CEDAW Committee in its General Recommendation No. 33 on access to justice has explicitly referred to the criminalization of prostitution as one of the obstacles for women to access justice, in addition to gender stereotyping; discriminatory laws; procedural and evidentiary requirements and practices; deprivation of liberty; and stigmatization of women fighting for their rights.<sup>56</sup> Furthermore, the Committee stressed the negative impact of intersecting forms of discrimination on access to justice for specific groups of women and noted that these women often do not report violations of their rights to the authorities due to fear of being stigmatized, humiliated, tortured or being subjected to other forms of violence, including by law enforcement officials. It is thus of crucial importance that the right to justice is ensured for women engaged in sex work, as a component of eliminating all forms of discrimination against women.

Moreover, States have an obligation to provide comprehensive reparations, including restitution, rehabilitation, satisfaction, compensation and guarantees of non-repetition in instances where it has been established that an individual has been arbitrarily deprived of liberty.<sup>57</sup> The prohibition of arbitrary detention is a peremptory norm of international human rights law for which States are obliged to provide effective judicial, administrative and/or other remedies.<sup>58</sup>

In the context of the case at hand, we respectfully suggest that the appropriate remedies would include:

- (i) immediately releasing any of the complainant women who remain in detention;

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<sup>55</sup> Amnesty International (2016), *Sex Workers at Risk*, available at <https://www.amnestyusa.org/wp-content/uploads/2016/05/POL4040612016ENGLISH.pdf>.

<sup>56</sup> CEDAW Committee, *General Recommendation No. 33 on women's access to justice*, CEDAW/C/GC/33, para. 9.

<sup>57</sup> See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 16 December 2005.

<sup>58</sup> United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, para. 11; UDHR, Article 8; ICCPR, Article 2(3).

- (ii) expunging the criminal record of all the complainants;
- (iii) ordering adequate financial compensation in accordance with Article 9(5) of the ICCPR for the period spent by the complainants in detention, including reimbursement of any bail or other money paid to secure their release and payment of the legal expenses (if any) incurred in bringing this case to the Federal High Court of Nigeria;
- (iv) publishing widely any findings of this Court in favor of the complainants; and
- (v) ordering a thorough and independent investigation of the circumstances surrounding the alleged arbitrary detention of the complainants,<sup>59</sup> including the allegations of violence committed by the police, and taking appropriate measures against those responsible for the violation of their rights.

### **3. Concluding remarks**

Human rights are applicable to all, without discrimination. However, violations of the rights of sex workers have long been committed with impunity. This submission has argued that these violations are gendered; laws penalizing sex workers (most of whom are women) are based on patriarchal moral standards about women's sexuality. Laws targeting sex work are enforced disproportionately against women and facilitate systemic violence against them, including sexual violence by police and other actors. It is submitted that they can be considered discriminatory based on gender.

This submission has argued that the case at hand exemplifies the negative effects of criminalization and the vulnerability of sex workers to abuse during arrest and detention. The complainants claim that they were subjected to arbitrary arrest and detention, and subjected to abuse, such as sexual and physical violence and inhumane conditions of detention, including failure to provide menstruating women with sanitary hygiene products.

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<sup>59</sup> See *Dorothy Njemanze & 3 Others v Nigeria* (supra), noting that the State had an obligation to investigate the alleged violence and abuse carried out against the plaintiffs who were detained following a raid on women believed to be sex workers (at pp.39-40).

The WGDAWG and WGAD submit that these allegations raise serious concerns with regard to international human rights norms and standards.

The submission has highlighted that the criminalization and abuse of women engaged in prostitution constitutes a form of gender-based discrimination and has outlined the standards with respect to police conduct. This submission has also argued that detention which takes place on discriminatory grounds (against women) is considered arbitrary on this ground, as is detention on the basis of vague and overly broad laws. It is further submitted that detention is considered arbitrary where violence is inflicted on the detainees which is also likely to have a severe impact on their ability to participate effectively in any criminal proceedings. Finally, it is submitted that it is the duty of the State to provide reasons for the arrest and detention of all persons, to ensure meaningful access to judicial review of detention, to ensure that guilty pleas are given freely, as well as to provide an effective remedy for human rights violations.

The WGDAWG and WGAD remain at the disposal of the Court to provide any further information or clarification.