

United States of America

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1. Introduction

Background

The United States (US) is predominantly a destination country for people who are trafficked, although a number are also trafficked within the US (OSCE, 2005). It is often stated that about half of trafficking cases are labour trafficking (e.g. sweatshop labour, domestic servitude, agricultural work, maid service, peddling and begging) and the other half are sex trafficking (e.g. prostitution, stripping and massage parlour services) (Hyland, 2001, Miko, 2006 and O'Neill Richard, 1999). The number of persons trafficked to the US is “high in absolute terms and in comparison with many other countries...” (OSCE, 2005, 2). The estimated number of persons trafficked into the US each year is between 14,500 and 17,500 (see e.g. Attorney General, 2006). The US government has suggested that this figure may be “overstated” (see Attorney General, 2006 at 3). Alternatively, other sources estimate the number of trafficked persons may be much higher and amount to 50,000 (OSCE, 2005). The figure of 50,000 was the figure estimated by the Central Intelligence Agency (CIA) in 1999 and also cited in the *Trafficking Victims Protection Act of 2000* (TVPA). In addition to estimating persons trafficked to the US, the US government also provides estimates of global human trafficking. These estimates have been criticised by the US Government Accountability Office as “questionable” and the data collection efforts on which they are based “fragmented” (see United States Government Accountability Office [GAO], 2006, 10).

To some extent, the US government has also recognised its failure to generate reliable estimates of the scale of trafficking in the US. For example, in September 2005, one of the four recommendations by the Department of Justice (DOJ) for improving US anti-trafficking efforts was that the US more accurately estimates the number of its domestic and foreign trafficked persons (DOJ, Assessment of US Government Efforts to Combat Trafficking in Persons in Fiscal Year 2005, 2006 (DOJ 2006a)). A September 2006 update on activities to implement this recommendation suggests that it has yet to be fully addressed. In September 2006, it was reported that the National Institute of Justice is “undertaking research that focuses on developing an empirically credible method which, given available data, may be used to generate transparent and reproducible estimates of the prevalence of human trafficking into the United States...” (DOJ 2006a, 3).

Focus on Transnational and Sex Trafficking

US assessments of the scope of trafficking are characterised by a disproportionate focus on transnational trafficking and sex trafficking. The US has recognised that since passing the TVPA, “United States efforts to combat

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trafficking in persons have focused primarily on the international trafficking in persons, including the trafficking of foreign citizens into the United States” (*Trafficking Victims Protection Reauthorization Act of 2005* [TVPPRA 2005], section 2(3)). The focus on trafficking into the US is not explicitly required by US laws concerning trafficking in persons (Chacón, 2006). The focus instead owes to a number of factors, including the perception of the quintessential trafficked person as a Third World female, sexualised and disempowered “victim” moved across international borders (Kapur, 2001) and that one of the goals of the TVPPRA is to establish a system of immigration relief for trafficked persons who would otherwise be illegally present in the US (see 2 below). This focus also comes about because one of the two types of prevention activities mandated by the TVPPRA requires the President to “establish and carry out international initiatives to enhance economic opportunity for potential victims” (TVPPRA, s106). The US has criticised other countries (e.g. Pakistan) for failing to sufficiently address internal trafficking (Department of State, Trafficking in Persons Report [TIP Report], 2006).

US Position on Prostitution and its Relationship with Trafficking

The US’ anti-prostitution and anti-trafficking policy is indivisible. It is the US position that “...prostitution is inherently harmful for men, women, and children, and that it contributes to the phenomenon of trafficking in persons” (Response of the US Government to the country assessment by the Special Representative on Trafficking in Human Beings, 2005 (US Response to OSCE), 6). This position reportedly derives from US President George Bush’s classified February 2002 National Security Presidential Directive 22 (see DOJ, Report on Activities to Combat Human Trafficking, Fiscal Years 2001–2005, 2006 (DOJ 2006b)) in which it was stated that:

The United States opposes prostitution and any related activities, including pimping, pandering, and/or maintaining brothels as contributing to the phenomenon of trafficking in persons. These activities are inherently harmful and dehumanizing. The United States Government’s position is that these activities should not be regulated as a legitimate form of work for any human being.

Under this position, a preference for enforcement of both morality and borders trumps concerns for the protection of the human rights of migrants. These imperatives (morality and border protection versus protection of migrants) are identified as separate goals because prostitution is not considered a legitimate form of work. The US’ abolitionist approach to prostitution informs all elements of the government’s anti-trafficking agenda: from the role of consent in the definition of a trafficked person, to the legal and policy position that it will not fund projects or groups that promote, support or advocate the legalisation or practice of prostitution (see 2 below).

While the US government has undertaken the “positive” step (OSCE, 2005, 8) of indicating that it will put more focus on trafficking into forced and bonded labour (TIP Report, 2006), in light of its strong position both on the nature of prostitution and its links to trafficking, it is difficult to see how the disproportionate focus on sex trafficking will be overcome. This failure should not be taken lightly; in both its 2005 and 2006 TIP Report, the US placed several countries in the lowest Tier ranking (Tier 3) “...primarily as a result of their failure to address trafficking for forced labour among foreign migrant workers” (TIP Report, 2006, 9).

US Definition of Trafficking

The cornerstone of US anti-trafficking efforts is the TVPPRA, signed into law on 28 October 2000. It was subsequently reauthorised in both the *Trafficking Victims Protection Reauthorization Act of 2003* (H.R. 2620) (TVPPRA

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2003); and TVPRA 2005 with some relevant amendments that are mentioned in later sections. The TVPA preceded both the US' signature (on 13 December 2000) and ratification (on 3 December 2005) of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, supplementing the United Nations *Convention against Transnational Organized Crime* (UN Trafficking Protocol). The TVPA concerns only "severe forms of trafficking in persons," which is defined in section 103(8) as:

- sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
- the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subsection to involuntary servitude, peonage, debt bondage, or slavery.

Sex trafficking is defined as: "...recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act" (TVPA, s103(9)). "Coercion" is defined as "(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process" (TVPA, s103(2)).

Comparison between the US and UN Trafficking Protocol Definitions

The definition of "severe forms of trafficking in persons" is narrower than the definition of "trafficking in persons" in Article 3 of the UN Trafficking Protocol, despite the fact that the US encourages other countries (such as China) to incorporate the UN Trafficking Protocol's "full definition" (TIP Report 2006, 91).

This narrowness is partly due to the different functions of the definition in the TVPA and that of the UN Trafficking Protocol. The TVPA definition is designed to identify a class of trafficked persons that will be entitled to particular assistance, with a view to minimising exploitation of such assistance, and also to ensure successful prosecutions (Lee and Lewis, 2003). The UN Trafficking Protocol does not create a hierarchy of trafficked persons or the services to which they are entitled. These differences in approach are evident in three elements of the definition: the privileging of sex trafficking; consent; and the treatment of children.

First, the US definition encompasses both sex trafficking and trafficking for labour or services. However, sex trafficking comes within the definition of "severe forms of trafficking in persons" when it is induced by any of the means listed in the law (force, fraud or coercion), whereas trafficking for labour or services only comes within the definition when it is induced by any of these means listed *and* it can be demonstrated that the trafficking was for the purpose of "subjection to involuntary servitude, peonage, debt bondage, or slavery". The removal of this purposive requirement for sex trafficking indicates that the US sees persons trafficked for sex as more victim-like than those trafficked for non-sex work, who must meet additional criteria before they come within the Act's regime of assistance (see e.g. Abramson, 2003).

Second, Article 3(b) of the UN Trafficking Protocol provides that, "The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the

means set forth in subparagraph (a) have been used.” In contrast, the TVPA does not specifically address consent. In practice this textual silence has at times allowed an interpretation by law enforcement institutions that prosecution of traffickers should not be pursued as rigorously in cases where persons have provided some form of initial consent to sex work and are later subject to exploitative work conditions (see Case of Crazy Horse Nightclub, 2001).

Case of Crazy Horse Nightclub, 2001

Following a 4 January 2001 raid on the Crazy Horse nightclub in Alaska, a 23-count indictment was issued against four individuals for trafficking six Russian females (between the ages of 16 and 30) to dance nude in strip clubs. The case was to be the first prosecuted under the TVPA. The women had told prosecutors that when they were brought to the US, they were told by one of the accused that the cultural festivals in which they were meant to perform native folk dances were over and that they would need to dance nude to pay off their travel debts. The indictment charged that when the women refused, they were screamed and cursed at, and told that they “...could not leave the country until they had earned enough money dancing at the club to pay for their return ticket and living expenses”. The indictment further records the extent of their exploitation: “Unable to leave the country without their plane tickets and travel documents, unable to speak English, and fearing that harm would come to them if they did not acquiesce, [the women] submitted to the defendants’ demands . . .” Despite the strength of evidence against the defendants (e.g. Crazy Horse management had confirmed that the women were not able to keep any of their earnings), prosecutors negotiated lesser charges. According to local media, prosecutors took this course of action after the defence submitted a memorandum outlining the results of investigations in Russia that suggested that the women may have known that they would be required to dance nude and arguing that this consent meant that the women had not been trafficked. These events prompted two of the women to defend themselves publicly, thereby subjecting them to unnecessary trauma (Kandathil, 2005, 102–107).

Third, Article 3(c) of the UN Trafficking Protocol provides a blanket protection for children by stating that “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article” and defines a child as being under eighteen years of age (Article 3(d)). In contrast, under the TVPA, the definition of “severe forms of trafficking in persons” only automatically includes children that have been induced to perform commercial sex acts, not children that have been involved in other forms of trafficking. This distinction confirms that despite the attempt to address trafficking for sex, labour and services, the definition of “severe forms of trafficking in persons” is not concerned with exploitative labour arrangements *per se*, but very much depends on the nature of the work being performed.

2. Current Frameworks to Address Trafficking

Trafficking is primarily dealt with at the federal level, although as of September 2006, 22 states had anti-trafficking legislation (DOJ 2006a). As mentioned earlier, the key legislation governing trafficking is the TVPA and its

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reauthorisations. The TVPA supplements existing laws which remain available for the prosecution of trafficking. This includes laws concerning asset forfeiture; involuntary servitude statutes; labour laws; the *White-Slave Traffic Act, 1910* (known as the Mann Act); the *Racketeer Influenced and Corrupt Organizations Act, 1970* (RICO Act or RICO) and the *Prosecutorial Remedies and other Tools to end the Exploitation of Children Today (PROTECT) Act, 2003* (DOJ 2006b). Two other important elements of the legal framework are: laws and policies imposing funding restrictions for anti-trafficking initiatives; and laws on prostitution.

TVPA, TVPRA 2003 and TVPRA 2005

TVPA

In addition to defining “severe forms of trafficking in persons”, the TVPA does four key things.

First, the TVPA expands the crimes and increases penalties available to assist in investigating and prosecuting traffickers (see 3 below). The TVPA increases penalties for the existing crimes of peonage (§1581(a)), obstructing enforcement of section 1581 (s 1581(b)), enticement into slavery (§1583), and involuntary servitude (s1584), and creates the following new criminal offences: forced labour; trafficking with respect to peonage, slavery, involuntary servitude, or forced labour; sex trafficking of children or by force, fraud or coercion; and unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labour (see 18 U.S.C. ss1590–1592) (TVPA, s112).

Second, it sets out a regime of protections and assistance for particular trafficked persons. The Act enables immigration relief by making trafficked persons eligible to receive what is called a ‘T visa’ under certain stringent conditions, including in particular, cooperation with law enforcement (see 4 below outlining the different immigration options for trafficked persons). It also authorises federal agencies to provide benefits and services to trafficked persons who receive certification by the Secretary of Health and Human Services (in the case of adult trafficked persons) or have been issued Letters of Eligibility, in the case of trafficked children (see 5 below).

Third, the TVPA generally expands US activities internationally and in particular mandates the Secretary of State to submit an annual report to Congress on severe forms of trafficking occurring in other countries. The first TIP report was issued in 2001. In the TIP report, countries are classified according to particular Tiers (Tier 1, Tier 2, Tier 2 Watch List and Tier 3) based on the extent to which the country: is a source, transit or destination point for severe forms of trafficking; complies with the minimum standards set out in the TVPA; and has resources or capabilities to address severe forms of trafficking (TIP Report, 2006). The four minimum standards for the elimination of trafficking are set out in section 108(a) of the TVPA and stipulate that:

- (1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.
- (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.

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(3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offence.

(4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

For the fourth minimum standard to be assessed, the TVPA sets out 10 criteria that can be used to determine whether it has been met (TVPA, s108(b)). The Department of State's Office to Monitor and Combat Trafficking in Persons has identified five of these 10 criteria as core ones: "(1) prosecution of traffickers, (2) prosecution of corrupt government officials who contribute to trafficking, (3) protection of victims, (4) prevention of trafficking, and (5) demonstrated progress in combating trafficking from year to year" (United States GAO, 2006, 26).

Governments that fully comply with the Act's minimum standards are placed in Tier 1. Countries that do not fully comply but are considered to be making significant efforts to do so are categorised as Tier 2. Pursuant to TVPA 2005, countries on the Tier 2 Watch List are those which do not fully comply but are making significant efforts to do so, but have some other particular cause for concern, e.g. the absolute number of trafficked persons is very significant or increasing. Tier 3 countries are those whose governments do not fully comply with the TVPA's minimum standards and are not making significant efforts to do so.

The TIP Report is a controversial and questionable aspect of the US' anti-trafficking efforts. A July 2006 report by the US GAO entitled "Better Data, Strategy, and Reporting Needed to Enhance US Antitrafficking Efforts Abroad" has concluded that the TIP reports have "limited credibility" and do not "consistently influence antitrafficking programs" (GAO, 2006, 26). Specifically, the report found that:

...the report's explanations for these ranking decisions are incomplete, and agencies do not consistently use the report to influence antitrafficking programs. Information about whether a country has a significant number of trafficking victims may be unavailable or unreliable, making the justification for some countries' inclusion in the report debatable. Moreover, in justifying the tier rankings for these countries, State [the Department of State] does not comprehensively describe foreign governments' compliance with the standards, many of which are subjective. This lessens the report's credibility and hampers its usefulness as a diplomatic tool. In addition, incomplete country narratives reduce the report's utility as a guide to help focus US government resources on antitrafficking programming priorities (GAO, 2006, 26).

Fourth, the Act establishes the institutional framework for addressing trafficking. It mandates the President to establish an Interagency Task Force to Monitor and Combat Trafficking (s105(a)), which the President did pursuant to Executive Order 13257 in February 2002 (see further DOJ 2006b) and requires the US Department of State to establish an Office to Monitor and Combat Trafficking in Persons (s105(e)), which opened one year later in October 2001 (Tiefenbrun, 2005).

TVPRA 2003

TVPRA 2003 reauthorised the TVPA, recognised that trafficked persons "...have faced unintended obstacles in the process of securing needed assistance, including admission to the United States..." and introduced the following key amendments:

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- Created a new civil remedy by which trafficked persons could bring a civil action against a trafficker in a US district court (see 5 below);
- Removed the requirement that trafficked persons between the age of 15 and 18 had to show a willingness to assist in investigation before being eligible for the ‘T visa’;
- Imposed limits on funding for programmes and organisations by stipulating that funds could not be used to “promote, support, or advocate the legalization or practice of prostitution” or to implement programmes by “any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution” (see further below);
- Contributed to the institutional framework for combating trafficking by codifying the establishment of a Senior Policy Operating Group, which implements the policies of the Interagency Trafficking Task Force. The OSCE has concluded that it appears “[a]t least on the surface... that this mechanism may not provide the US with an entity that is comparable to or sufficient as a national coordinating body” (OSCE, 2005, 3) and that the institutional arrangements in the US fall short of what the US “promotes” internationally and what is either in effect or in the process of being established in a number of Tier 1 and 2 countries (OSCE, 2005, 4).

TVPRA 2005

The most significant feature of TVPRA 2005 was its increased focus on addressing the demand side of trafficking. This emphasis has been described by the US as follows:

We do not seek to reduce prostitution by decriminalizing the selling of sex and only arresting the buyer. However, just recently on December 14, the US House of Representatives passed legislation aimed at shifting the focus from arresting women engaged in prostitution and encouraging, through federal grants, US States and cities to arrest male customers (US Response to OSCE, 2005, 6).

On signing the Act, President Bush stated that:

Yet we cannot put the criminals out of business until we also confront the problem of demand. Those who pay for the chance to sexually abuse children and teenage girls must be held to account. So we’ll investigate and prosecute the customers, the unscrupulous adults who prey on the young and innocent.¹

This rhetoric exemplifies two elements of the US approach to trafficking: the conflation of trafficking and internationally recognised abuse, such as the sexual abuse of children, with prostitution and the prioritisation of a law enforcement model to address trafficking. For example, the TVPRA 2005 makes available US\$25 million each of the fiscal years 2006 and 2007 to fund programmes of state and local law enforcement agencies (see section 204, TVPRA 2005) that *inter alia*, “investigate and prosecute persons who engage in the purchase of commercial sex acts” (section 204(a)(1)(B)) and “...educate persons charged with, or convicted of, purchasing or attempting to purchase commercial sex acts...” (section 204(a)(1)(C)). However, the Act authorises less than half of this amount for programmes that are arguably more rights protective than an “end demand” approach²: the Act authorises US\$10 million for each of the fiscal years 2006 and 2007 for the establishment of a grant programme

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to develop, expand and strengthen assistance programmes for persons subject to either sex trafficking or severe forms of trafficking (section 202(d)).

While the ‘end demand’ elements of TVPRA 2005 are not as harmful as those originally set out in the End Demand Bill (this Bill could not get support in the House so parts of it were incorporated in TVPRA 2005), concerns remain about how such increased law enforcement will adversely affect sex workers.³ Advocates and sex worker rights organisations in the US have documented how ‘end demand’ programmes and the increased policing of public space harm sex workers. For example, sex workers are still susceptible to arrest for misdemeanours such as ‘loitering’ or ‘trespassing’ and police targeting of sex workers’ regular clientele may result in sex workers accepting clients they have previously rejected as unsafe.⁴ The focus on ending demand for sex trafficking also means that persons subject to other prevalent forms of trafficking, such as for domestic labour, are ignored.

Other elements of TVPRA 2005 mandate further research on trafficking in persons and commercial sex acts, and focus on the prevention of trafficking in conjunction with post conflict and humanitarian emergency assistance.

Laws and Policies Imposing Funding Restrictions for Anti-Trafficking Initiatives

The US devotes extensive financial resources to anti-trafficking efforts. However, the extent to which these resources benefit *all* trafficked persons is undermined by the US’ legal and policy position that it will not fund types of projects or groups that promote, support or advocate the legalisation or practice of prostitution. Anti-prostitution pledge requirements exist in both the TVPRA 2003 and the *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act* of 2003 (the Global AIDS Act). The Global AIDS Act prohibits the use of funds to “promote or advocate the legalization or practice of prostitution and sex trafficking” (22 USC. s7631(e)) and prohibits funding for organisations that do not have a policy “explicitly opposing prostitution and sex trafficking” (22 USC. s7631(f)).

The DOJ initially advised that the anti-prostitution pledge of both Acts could only be applied to foreign organisations working overseas, but withdrew this advice in September 2004. USAID subsequently issued a directive on 9 June 2005 (AAPD 05-04 *Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Opposition to Prostitution and Sex Trafficking* (AAPD 05-04)) requiring all US and non-US organisations receiving Global AIDS funding to include in all of its grants or cooperative agreements a provision entitled *Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking*.

This provision requires that funds cannot be used to promote or advocate the legalisation or practice of prostitution or sex trafficking and that organisations have a policy explicitly opposing prostitution and sex trafficking. The basis for this requirement is clear in the language of the provision: “The US Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons” (AAPD 05-04, 5). The directive also contains a certification requirement by which organisations must certify compliance with the provision (AAPD 05-04, 6). These requirements apply not only to US government grants but also to an organisation’s use of its private funds.

These funding restrictions were challenged in US courts by US-based organisations DKT International (filed suit

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in August 2005) and Pathfinder International, Alliance for Open Society International (AOSI), and the Open Society Institute, with which AOSI is affiliated (filed suit in September 2005). In May 2006, two US district courts found that requiring these organisations to have a policy explicitly opposing prostitution and sex trafficking (under 42 USC. s7631(f)) and to certify that they have such a policy (under AAPD 05-04) was an unconstitutional restriction on the use of the organisations' private funds (see further DKT International, 2006; Open Society Institute, 2006). On February 27, 2007, the decision in the DKT International case was reversed by a three-judge panel of the US Court of Appeals for the District of Columbia Circuit on the basis that s7631(f) does not "...compel DKT to advocate the government's position on prostitution and sex trafficking; it requires only that if DKT wishes to receive funds it must communicate the message the government chooses to fund" (*DKT International, Inc. v. United States Agency for International Development and Randall L. Tobias, Administrator, United States*, 10). The appeal from the decision in Pathfinder International, Alliance for Open Society International (AOSI), and the Open Society Institute is still pending in the U.S. Court of Appeals for the Second Circuit in New York.

While the US Court of Appeals decision is a setback and the initial District Court decisions are important, the latter decisions do have limits. First, they did not overturn the anti-prostitution and sex-trafficking limitations on federal funding grants. Second, they only addressed the unconstitutionality of requiring that organisations have an anti-prostitution and sex trafficking policy, and not the restriction by which funds cannot be used to promote or advocate the legalisation or practice of prostitution or sex trafficking. Third, these decisions concerned the legality of restrictions on US organisations working abroad, and do not apply to foreign organisations (see Center for Health and Equity, 2005; Editorial, Two Important Rulings on AIDS, 2006).

This means that these funding restrictions continue to stigmatise and alienate sex workers and sex worker organisations; discourage the building of coalitions between advocates; and undermine the use of rights-protective programmes. The latter happens either because organisations drop or modify programmes in order to continue to receive US funds or because organisations refuse to comply with anti-prostitution pledge requirements. For example, the funding restrictions have resulted in one organisation (SANGRAM in India) giving back grants designed for peer HIV prevention programmes among sex workers (with subsequent impacts on condom access and access to health care services) and in other cases, the discontinuation of programmes, such as teaching English to sex workers (see Kaplan, 2006; Kinney, 2006).

Laws on Prostitution

US anti-prostitution laws and policy have disproportionately focused on the arrest of prostitutes rather than the arrest or fining of buyers. The selling of sex is illegal in "almost every state" in the US (except some counties in Nevada) and buying sex is illegal in "many states" (US Response to OSCE, 2005, 6). While the US has recently indicated that it intends to put greater emphasis on the demand side of prostitution (see above) it has also clearly indicated that it does "not seek to reduce prostitution by decriminalizing the selling of sex and only arresting the buyer" (US Response to OSCE, 2005, 6).

3. An Analysis of Relevant Laws and Policies

As mentioned above, the TVPA supplements existing laws. It does this through introducing a series of "incremental

changes” (Chacón, 2006, 3019). While the TVPA introduced new criminal offences (see 2 above), it has been argued that these amendments fail to “significantly expand or revise pre-existing criminal prohibitions on sex trafficking and forced labor” (Chacón, 2006, 3019). The changes that were made seek to facilitate greater prosecution and punishment of traffickers, e.g. through the increased penalties for trafficking-related crimes. Such changes are accorded priority over rights-protective anti-trafficking strategies. The most obvious example of this prioritisation is the fact the Act makes protections for trafficked persons contingent on whether they have assisted law enforcement (see 4 and 5 below).

This emphasis on prosecution is partly a legacy of the system which preceded the TVPA. Because the TVPA supplements rather than completely overhauls US anti-trafficking laws, problems with the existing legal framework were not completely addressed and undermine the Act’s effectiveness (Chacón, 2006). These problems include: marginalisation of migrants in exploitative conditions because of their “presumptive criminality;” prioritisation of prosecution over protection; disproportionate focus on prostitution rather than addressing exploitative labour practices in the sex industry and other sectors; depiction of “sex traffickers” as the foreign “other” and trafficked persons as “innocent victims;” and a preference for border interdiction strategies over internal outreach (Chacón, 2006, 3021).

Prosecution: Low Rates and Disproportionate Focus on Sex Trafficking

Despite giving priority to prosecutions, the US record on both the rates and nature of prosecutions is poor (see Attorney General, 2006, DOJ 2006a and *Numbers of trafficking investigations, defendants charged, and convictions since 2001* below).

In the first few years after the TVPA was passed (i.e. in 2001 and 2002), the majority of trafficking prosecutions continued to be brought under laws other than the TVPA. This balance has shifted in recent years, with the majority of trafficking prosecutions now being brought under the TVPA. In terms of the number of trafficking prosecutions, little progress was made between 2001 and 2003.⁵ During this period the number of cases filed, defendants charged and convictions secured either remained flat; increased at a marginal rate; or declined (e.g. in 2003 there were less defendants charged and convicted than in 2002). From 2003–2005 these figures improved, although not at a significant rate (e.g. in 2005 there were only two more convictions than in 2004).

These figures still remain disproportionately low compared to the estimated scope of the trafficking problem in the US and compared with the number of trafficking arrests and prosecutions by other countries (OSCE, 2005). The OSCE has concluded that similar numbers of arrests, prosecutions and convictions have led to other OSCE countries being classified within Tier 2 in the US TIP Report. As a result of these low levels of prosecution, the OSCE has further concluded that:

In the United States, as elsewhere, the risk of being prosecuted is not high enough to alter traffickers’ sense of impunity. Deterrence effects will only be achieved, when there are more sustained proactive investigations that lead directly to the prosecution and conviction of many more traffickers and to the disabling of networks through forfeiture of criminal assets (OSCE, 2005, 5).

Failure to deter trafficking would mean that the US violates some of its minimum standards that are set out in the TVPA. For example, the US’ apparent failure to be a government that “... vigorously investigates and prosecutes

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acts of severe forms of trafficking in persons, and convicts and sentences persons responsible for such acts...” ((TVPA, 108(A)(3)) suggests that it has not met the minimum standard under the TVPA which stipulates “serious and sustained efforts to eliminate severe forms of trafficking in persons”.

Moreover, prosecutions that have occurred have focused disproportionately on sex trafficking despite other forms of trafficking in the US. There have been cases brought under the new forced labour offence, including for example, a high-profile case in May 2006 in which Jefferson Calimlim Sr. and his wife, Elnora Calimlim, were found guilty on four counts (two of which drew on the forced labour statute) in relation to keeping Irma Martinez as a domestic servant for 19 years. The prosecutors in the case recommended just under six years of imprisonment and on 16 November 2006, each of the defendants was sentenced to only four years of imprisonment, and on 14 February 2007 ordered to pay \$916,635.16 to Martinez in restitution. On 22 February 2007, the defendants’ motion for judgment of acquittal or dismissal was denied, as well as their motion for bond pending appeal (see *US v. Calimlim*, 22 Feb. 2007, 14 Feb. 2007 and 16 Nov. 2006). However, excepting cases filed in 2001, sex trafficking constituted the majority of cases filed, defendants charged, and convictions secured every year from 2001–2005.

Numbers of trafficking investigations, defendants charged, and convictions since 2001

All Trafficking Prosecutions*	01	02	03	04	05
Investigations total	63	65	82	129	139
Cases Filed					
Total	10	10	11	26	34
Labor	6	3	6	6	8
Sex	4	7	8	23	26
Defendants Charged					
Total	38	41	27	47	95
Labor	9	17	6	7	20
Sex	26	27	21	40	75
Convictions					
Total	23	28	21	33	35
Labor	8	5	5	3	10
Sex	15	23	16	30	25

* Many of the TIP cases contain both labor and sex elements, making it difficult to categorize the cases. DOJ is continuing to discuss the best method for addressing this problem. (Source: DOJ 2006a, 14)

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Note that defendants charged in 2005 with a trafficking offence are not necessarily the same defendants convicted and sentenced in 2005.

There are also situations in the US where prosecution is not pursued because of the status of the persons responsible for the trafficking, e.g. where the traffickers claim diplomatic immunity. This failure to prosecute can also delay victim assistance as the following example demonstrates:

Teresa was a young woman working as a nanny in her home country in Latin America. The family she worked for were diplomats, and when the husband was posted to the United States, the family asked her to accompany them in the same capacity. Teresa was reluctant to leave her home and her own family, but her employers promised her education, English lessons, and increased wages. On this basis, Teresa agreed and came to the United States. Once here, she was required to sleep on the kitchen floor, to work fourteen hour days, was paid only rarely and far less than what was agreed, and was not allowed to leave the apartment. She was also continually verbally abused and threatened with deportation if she complained. A friend of the employer's witnessed the situation, and contacted ICE [Immigration and Customs Enforcement] who rescued Teresa from the situation, and referred her to a social service agency. However, since the traffickers were diplomats, no prosecution was ever pursued because of diplomatic immunity. Moreover, the ICE agents involved in the "rescue" were reluctant to provide the LEA [Law Enforcement Authorization], but did so after continuous requests. Teresa is now resettled in the US in T status (Urban Justice Center, 2005, A-20).

4. Laws, policies and practices on immigration and to prevent the abuse of migrant workers

Background

In the US undocumented workers in exploitative labour arrangements have little means to seek redress against their employers. The illegality of their presence in the US is emphasised over their exploitation and they are often seen as criminals and deported. Under immigration and labour law, preventing exploitation of illegal migrant labour focuses on either stopping workers from entering the country or removing undocumented workers rather than preventing their exploitation at work. Between entry and removal, the undocumented migrant worker is left without meaningful access to many of the protections available to other workers. This lacuna, combined with the constant threat of deportation is used by employers to keep migrant workers in exploitative labour conditions (Chacón, 2006; GAATW, 2004; Kandathil, 2005). These insufficient labour protections for undocumented migrant workers combine with stringent border control policies that limit options for legal cross-border movement create greater opportunities for exploitation and trafficking rather than reducing either practice (Chacón, 2006).

As discussed in '3' above, the TVPA can provide immigration relief for trafficked migrant workers, but it is a narrow scheme of labour protections that are unevenly applied to different groups of migrants. For example, while there is some attempt in the Act to address trafficking into forced and bonded labour and provide greater remedies for migrant workers against their employers (e.g. through creating a new civil remedy, see 5 below), the focus of the Act's implementation has been sex trafficking and not trafficking for other forms of exploitation, for example in domestic labour (Chacón, 2006). While undocumented migrants *trafficked* for sex work can, in

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certain circumstances, avail themselves of the Act's protections, undocumented migrant workers who willingly perform sex work break the law both as undocumented migrants and as prostitutes.

The US' reluctance to ensure full labour protections and its focus on sex trafficking means that it falls short of its stipulation that: "It is the responsibility of the receiving or "demand" country governments to proactively screen workers to ensure they are not victimized by debt bondage or forced labor; when identified, criminal investigations leading to potential prosecutions should be the response" (TIP Report, 2006, 8; and 12, 22).

Immigration Options for Trafficked Persons

Trafficked persons may be eligible for immigration relief through the following:

- Continued Presence – this enables an individual to stay legally in the US if federal law enforcement officials determine that "...such individual is a victim of a severe form of trafficking and a potential witness to such trafficking, in order to effectuate prosecution of those responsible..." (TVPA, s107(C)(3)). Continued Presence is granted by the Department of Homeland Security, ICE, Office of International Affairs, Parole and Humanitarian Assistance Branch. It is normally initially granted for one year and it can be renewed if the investigation is ongoing.
- T-visa – this is established by the TVPA specifically for trafficked persons and is discussed further below. Despite the estimated number of trafficked persons in the US, the TVPA limits the number of T-visas to be issued each year to 5,000.
- U-visa – this is also established by the TVPA (s1513) but is not practically available because there are not yet any implementing regulations. Until the regulations are issued, individuals who would be eligible for a U-visa can apply for U-visa interim relief which gives them a temporary legal status. The U-visa is for individuals who suffer substantial physical or mental abuse as a result of being victims of certain crimes enumerated in the TVPA, including rape; torture; trafficking; sexual assault; abusive sexual contact; prostitution; sexual exploitation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; and felonious assault. Like the T-visa, the U-visa is contingent on the individual's co-operation – the individual must have information about the crime, and must have been helpful, being helpful or likely to be helpful to either local, State or Federal authorities. The number of U-visas that can be issued per year is also capped, but is double that allowed for T-visas.
- S-visa – this is relevant for material witnesses of terrorism or organised crime-related crimes, but only 200 are to be issued each year and they are "rarely offered" (Urban Justice Center, 2002).

Each of these visas is a non-immigrant visa issued for law enforcement purposes. Other forms of relief that are available to trafficked persons include political asylum; special immigrant juvenile status where the trafficked individual is under the age of 21; and self-petition under the *Violence Against Women Act* in cases where the trafficked person is a battered spouse or child (Urban Justice Center, 2002).

In practice, the two forms of immigration benefits for which trafficked persons are most directly eligible are:

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Continued Presence and the T-visa. Both of these are provided for by the TVPA. This is necessary because before the TVPA, trafficked persons were regularly detained and deported as illegal immigrants and criminals (Dalrymple, 2005; Stumpf and Friedman, 2002). Fear of deportation also prevented many trafficked persons from leaving their exploitative labour arrangements (Kandathil, 2005).

However, these benefits are limited in a few ways. First, low rates of identification (see 5 below) suggest that a number of trafficked persons may be improperly prosecuted or deported (GAATW, 2004). Second, the T-visa has stringent conditions and there is a cap on the number of T-visas that can be issued. These latter limitations are not accidental. They were designed to ensure that benefits were not granted for the full range of forms of exploitation for which migrants are trafficked and to ensure that undocumented migrant workers could not readily or fraudulently take advantage of immigration assistance (Chacón, 2006; Dalrymple, 2005; Kandathil, 2005). As a result, these limitations preserve the “presumptive criminality” of migrants (Chacón, 2006, 412). Moreover, both forms of relief are guided by law enforcement rather than protection concerns. In both cases, trafficked persons are only eligible for immigration relief if they either potentially assist law enforcement (through being granted ‘Continued Presence’) or comply with what the Act calls “reasonable requests” for assistance in investigation and prosecution (as is required for the ‘T-visa’).

Continued Presence

Requests for Continued Presence are low compared with the estimated number of trafficked persons. For example, in 2005 there were only 160 requests for Continued Presence to the Parole and Humanitarian Assistance Branch (see Attorney General, 2006 and DOJ 2006a). Moreover, the procedures of ICE in processing requests mean that trafficked persons still experience the constant threat of deportation. It is ICE practice to issue a ‘Notice to Appear’ charging an individual with an immigration violation and then run background checks on the individual. If the authorities choose to terminate Continued Presence, the Notice is then filed in an immigration court (Sadruddin et al, 2005).

T-visa

Individuals may be given a T-visa to stay in the US for up to four years. An individual over the age of 18 is eligible for a T-visa if he or she:

- **Has been subject to a severe form of trafficking in persons.** The restrictive definition of “severe forms of trafficking in persons” (see 1 above) limits the availability of immigration relief. It is also difficult for law enforcement personnel to immediately determine whether individuals come within the definition (Dalrymple, 2005). It would have been preferable for the law to create a presumption that individuals have been subject to a severe form of trafficking until the contrary is proven (Dalrymple, 2005). The final determination of whether a person has been subject to a severe form of trafficking in person lies with immigration authorities and not with the law enforcement agents with whom those given a T-visa are required to cooperate.
- **Is physically present in the United States “on account of” being trafficked.** This is a very legalistic requirement that constitutes an additional hurdle for T-visa applicants (Sadruddin et al, 2005).

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- **Has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking.** This requirement of cooperation is contrary to a human rights-centred approach to make relief contingent on willingness to assist law enforcement. This requirement can exclude those who are most in need of assistance but who are too traumatised to cooperate. While TVPRA 2003 requires that statements of local and state law enforcement personnel shall be “considered” in determining whether a trafficked person has complied with any reasonable request for assistance, the de-emphasising of the input of local and state law enforcement can create an additional hurdle for relief as a number of trafficked persons, affected communities and advocates are more likely to have contact with local or state law enforcement (see 5 below). Additionally, even though the trafficked person interacts with law enforcement agents, it is the immigration authorities who ultimately determine whether a request for assistance in the investigation or prosecution is reasonable (Sadruddin et al, 2005).
- **Would suffer extreme hardship involving unusual and severe harm upon removal.** This requirement is a rigorous one that is too difficult for most trafficked persons in the US to meet (Dalrymple, 2005; Sadruddin et al, 2005). One commentator has noted that:

A demonstration of “extreme hardship” in the context of a trafficking victim is highly inappropriate. Victims of sex trafficking are typically isolated, confined, never kept in the same location for long, and are therefore without the kinds of “hardship”-producing relationships that the provision contemplates (Kandathil, 2005, 114).

It has been noted that the requirement of “extreme hardship involving unusual and severe harm upon removal” is a higher standard than that which must be proved for other forms of immigration relief in the US (Dalrymple, 2005; Urban Justice Center, 2005). This standard is also more stringent than criteria used to judge whether the fourth minimum standard the US requires of other countries has been met (Dalrymple, 2005): under the TVPA this criteria considers whether the government “protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for *legal alternatives to their removal to countries in which they would face retribution or hardship...*” (emphasis added).

- **Has not committed a severe form of trafficking in persons offense;** and
- **Is not otherwise inadmissible under the Immigration and Nationality Act.** Generally speaking, the TVPA enables waiver of grounds that would normally make a person inadmissible to the US if the inadmissible conduct was caused by, or incidental to, trafficking. However, trafficked persons may still be vulnerable to removal in cases where inadmissible conduct (such as any former prostitution which is prohibited under the Prostitution and Commercialized Vice ground for inadmissibility) is found to be not caused by, or incidental to the acts of trafficking being prosecuted (Hartsough, 2002).

Children under the age of 18 do not need to establish all of these requirements to be eligible for a T-visa. For example, children under the age of 18 are not mandated to cooperate with law enforcement. However, they are still required to prove “extreme hardship involving unusual and severe harm upon removal”, although their age will be considered in the determination of whether they will face such hardship (see generally Urban Justice Center, 2005).

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The complexities of these requirements mean individuals can only receive full protection if they have an appropriately qualified lawyer. The shortage of such lawyers providing free legal services (Dalrymple, 2005; Sadruddin et al, 2005) is another reason why trafficked persons do not receive their full immigration and other entitlements. The extent of this failure is shown by the extremely low number of persons who apply for T-visas. For example, in 2005 only 229 trafficked persons applied for a T-visa. This was a decrease from the small number (302) who applied in 2004. These low application rates are matched by the low number of T-visa applications that are approved (see *Number of persons who applied for, were granted, or were denied a T visa in 2004 and 2005*).

Number of persons who applied for, were granted, or were denied a T visa in 2004 and 2005

	05	04
<i>Victims</i>		
Applied	229	302
Approved*	112	136
Denied**	213	292
<i>Family of Victims</i>		
Applied	124	177
Approved*	114	216
Denied**	18	25

* Some approvals are from prior fiscal year(s) filings.

** Some applicants have been denied twice (i.e., filed once, were denied, filed again). It should be noted that 170 denials stemmed from one case in which it was determined that the applicants were not victims of trafficking as defined in the TVPA statute.

(Source: DOJ 2006a, 10)

Permanent Residency

While it is positive that the US offers some trafficked persons the chance for permanent residency (OSCE, 2005), a T-visa holder is not automatically eligible for permanent residency. Permanent residence status will then only be awarded if the individual has been physically present in the US for a continuous period of at least three years from issuance of their temporary residency visas; has been a person of good character; has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking; and would suffer extreme hardship if removed from the US.

These requirements, along with the three year waiting period heighten a trafficked person's "instability and fear" (Freedom Network (USA), 2004, 1). The Freedom Network (USA), a coalition of 22 NGOs providing services to trafficked persons, recommends that "trafficking survivors should be granted immediate eligibility for adjustment

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of status to permanent residence upon approval of the T visa”. In 2004, it made the following additional five recommendations as follows:

- All survivors of trafficking who have demonstrated that they are victims of severe forms of trafficking and are present in the US should be permitted to remain in the US if they comply with reasonable law enforcement requests OR would face extreme hardship upon removal.
- The law should clearly state that law enforcement officials are required to provide a “law enforcement agency” endorsement to a trafficked person when that person exhibits willingness to cooperate by offering information on a trafficking situation.
- All trafficked persons who come forward to cooperate with law enforcement should have the express right to legal counsel.
- The 3-year and 10-year bars to re-entry into the US should be lifted for trafficking survivors.
- The “extreme hardship” requirement for families should be removed so that all trafficking survivors are able to reunite with their families as soon as possible (Freedom Network (USA), 2004, 1).

Law Enforcement versus Immigration Objectives

Immigration authorities have control over the key decisions that affect whether an individual can remain in the US and the benefits to which they will be entitled (Sadrudin et al, 2005). While some of these decisions are properly within the scope of immigration authorities (e.g. whether an individual faces extreme hardship), they are also empowered to second-guess determinations that may be more reliably made by law enforcement, including whether the person has been subject to a severe form of trafficking in persons and whether she or he has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking (Sadrudin et al, 2005). This reserves a lot of power to the authorities, primarily the ICE, whose “paramount concern is control and deportation of immigration law violators” (Sadrudin et al, 2005, 394).

This scope for scrutiny and suspicion of trafficked persons only increased when the Immigration and Naturalization Service was transferred to the Department of Homeland Security (see Fitzpatrick, 2003). In the US, increased concerns about the relationship between immigration, security and terrorism have had adverse consequences for trafficked persons. For example, one sex worker organisation has been reported as expressing concern that “law enforcement’s focus on anti-terrorism has made it difficult for trafficking victims to get help from federal immigration agents in applying for special visas, Social Security benefits and other forms of assistance” (DeStefano, 2003).

5. The Human Rights Impact of Laws and Policies

The prosecutorial focus of US anti-trafficking strategies, combined with significant gaps in its protection and prevention programmes significantly undermines the rights of all persons affected by trafficking. In addition, the anti-prostitution focus of all US anti-trafficking measures has particularly adverse effects for sex workers and migrant sex workers (see 3 above).

Prosecution

The US government equates its prosecutorial focus with a ‘victim-centred’ approach to trafficking: “... we believe the US Government approach – one that prioritizes catching perpetrators to put them out of business and cease to exploit other victims – is a ‘victim-centered approach’” (US Response to OSCE, 2005, 4). However, its prosecutorial focus often runs counter to the rights of trafficked persons.

The two key ways in which it does this is to make both eligibility for immigration relief (see 4 above) and other benefits only available to a very narrow class of trafficked persons (those who have been subject to severe trafficking) and contingent on cooperation with law enforcement. The TVPA authorises the Department of Health and Human Services to certify adult trafficked persons to receive benefits and services, including cash assistance, housing and food stamps. However, trafficked persons over the age of 18 will only be certified if they have been subject to a severe form of trafficking; are “... willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons”; and have either been granted Continued Presence or submitted a *bona fide* T-visa application (both of which also require them to cooperate with law enforcement). As explained in ‘4’ above, cooperation with law enforcement will not in and of itself guarantee that a trafficked person can remain in the US on completion of the investigation or trial. For example, a T-visa will not be granted unless it is also shown that a person would suffer extreme hardship involving unusual and severe harm upon removal. Further, permanent residency status also requires this condition be met, along with a finding that the trafficked person has been a person of good character.

The requirement that persons be subject to a severe form of trafficking means that only a select group of trafficked persons are potentially eligible for benefits and services. As discussed above in ‘1’, this definition generally favours those who have been trafficked for commercial sexual exploitation, but only those who have not shown any agency or willingness to perform past commercial sex acts.

Mandating cooperation with law enforcement as a condition for benefits and services is also not consistent with a human rights approach to trafficking which centres the trafficked person (OSCE, 2005). It makes demands on trafficked persons who may not be physically or emotionally equipped to provide assistance to investigation and prosecution. It also fails to take into account trafficked persons’ fear or wariness of law enforcement due either to their previous negative experiences in their country of origin or the ways in which traffickers encourage and exploit the fear of police and immigration authorities to keep trafficked persons in exploitative arrangements (Kandathil, 2005; Lee and Lewis, 2003; Sadruddin et al, 2005). Cooperation also places the security of trafficked persons at risk, as they may face retribution from their traffickers. Further, it means that decisions about whether and when to provide assistance to a trafficked person are based on factors that are not related to the person’s rights, such as resource constraints or the best way to achieve a particular criminal justice result. For example, to ensure cooperation of trafficked persons, law enforcement agents might delay certifying cooperation for the purposes of a T-visa until a trial or investigation is completed, or not provide this certification because investigation or prosecution is not being pursued at that moment (Urban Justice Center, 2005). It has been reported that federal agencies are “unable to probe all allegations of trafficking, passing up more than half of cases nationwide” (DeStefano, 2006).

In this way, the treatment of trafficked persons is largely dependent on law enforcement agents who can be unable, unwilling or insufficiently trained to assist trafficked persons:

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Presently, a large number of state and federal law enforcement personnel remain unaware that human trafficking even exists, or of how to identify victims, and how to assist victims they do encounter. Further, as advocates, we have found that it is not enough for law enforcement personnel to be knowledgeable about trafficking; individuals within law enforcement often lack the will to expend the effort necessary . . . application requirements for T- and U-visas place trafficking victims in a dependant relationship with law enforcement agencies often unaware of, or indifferent to, their needs (Lee and Lewis, 2003, 183–184).

Some of these problems arise because while TVPRA 2003 provides that statements of local and state law enforcement personnel shall be “considered,” the de-emphasising of their role produces protection gaps because community informants and advocates for trafficked persons are more likely to interact with state or local law enforcement rather than federal law enforcement (e.g. local community informants often do not call federal law enforcement because of fears of deportation) and these state and local law enforcement agents are not sufficiently equipped to identify trafficked persons (Urban Justice Center 2002, 2006). In those cases where a person is nonetheless identified and then fully cooperates with a local or state investigation, they may still face hurdles in getting the federal assistance to which they are entitled. This is demonstrated in the following extract from the testimony of Juhu Thukral, Director of the Sex Workers Project at the Urban Justice Center:

“Carmen” and “Victoria” were 17 and 19 year-old girls from Mexico who came to the US with a trafficker named Daniel. Daniel had befriended Carmen and offered to help her join her mother in the US, saying that her mother could pay him back once they were reunited. He courted Victoria and told her that he wanted to marry her, but first he wanted them to move to the US to build a better life.

However, once Daniel, Carmen, and Victoria entered the US, things changed. He raped them both repeatedly, and passed Carmen around to a number of men who gang-raped her. These were her first sexual experiences. He then set them up in two brothels, where they were forced to work as prostitutes and turn all of their earnings over to him. Daniel beat the two young women regularly when they were at home with him and repeatedly threatened that they should not try to leave him.

After a few months, Carmen and Victoria did escape from Daniel, with the assistance of a man who worked in the brothel and recognized that they were working against their will and needed help. Carmen and Victoria contacted the local police, who arrested Daniel with their assistance. A local prosecutor was interested in prosecuting the case. In fact, a federal prosecutor was interested also, but the local prosecutor was already invested in the case and decided to keep it.

The Sex Workers Project represented Carmen and Victoria in their criminal justice and immigration matters. . . . despite the fact that no less than 10 different people within the federal government were aware of my clients’ case and situation, and that all of these people believed that my clients had been trafficked and were cooperative, thus making them eligible for benefits, not one of these people in the federal government could provide me with the necessary documentation. Why? Because there was no specific federal agent assigned to the case who could formally identify Carmen and Victoria as trafficked and request Continued Presence or a Certification Letter, or fill out an I-914B. This also left us without any options to pursue benefits at the state level.

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The US DOJ got involved and after many months of advocacy, we were able to secure the necessary assistance by finding a federal agent who was willing to sign for the case, even though it was not officially her case, or a case in which the federal government was officially involved.

However, in the intervening months, my clients had no way to work legally, and we cobbled together housing, services including medical and counselling, as well as cash for them by contacting Good Samaritans and agencies willing to assist without reimbursement, and by raising money ourselves and operating a clothing drive to obtain coats and gloves for Carmen and Victoria during the winter months.

Therefore, even though Carmen and Victoria were trafficked persons who had enthusiastically cooperated with law enforcement, their ability to receive even minimal assistance was hampered by the fact that, through no decisions of their own, this was treated as a state case rather than a federal one (Urban Justice Center, 2006, 3–4).

In such cases, trafficked persons also risk additional re-trauma through having to tell their stories to numerous different people (Urban Justice Center, 2002). In cases where law enforcement decides not to pursue a case, the trafficked person may be vulnerable to deportation or even possible prosecution themselves. This risk, combined with the complications associated with getting immigration relief, make it essential for a trafficked person to have a qualified lawyer acting in their best interest. This is difficult to achieve; not only because of the lack of free legal services for undocumented migrants, but also because sometimes traffickers retain lawyers for the trafficked persons to get the trafficked person back under their control (Lee and Lewis, 2003).

Finally, even if it is accepted that the US pursues a ‘victim-centred approach’ through prosecuting perpetrators, the incredibly low rates of prosecutions (see 3 above) indicates that, on this measure, the interests of trafficked persons are not being properly served. The US itself has recognised that “in absolute numbers, it is true that the prosecution figures pale in comparison to the estimated scope of the problem” and that, “more needs to be done to increase the number of investigations and prosecutions”, particularly through increasing the role of state and local law enforcement (DOJ 2006a,16).

In addition, few cases have utilised the trafficking civil claim established by TVPRA 2003 (Kim and Werner, 2005). There are other US laws that can provide civil remedies to trafficked persons. For example, in one high profile forced labour case – the case of the 48 Thai welders who were sent to Los Angeles to work in exploitative labour conditions (see case 5 in chapter on Thailand) – the DOJ did not bring criminal trafficking charges, but instead relief for the trafficked persons came after the US Equal Employment Opportunity Commission filed a lawsuit against Trans Bay Steel, Inc., under Title VII of the Civil Rights Act of 1964, as amended, alleging discrimination on the basis of national origin. In December 2006, the case settled, and the consent-decree included measures ranging from monetary relief, to work, housing and education opportunities, and immigration relief via the T-visa (Watanabe, 2006 and US Equal Employment Opportunity Commission, 2006).

The US’ failure to adopt strategies that harmonise a prosecutorial and human rights approach to trafficking infringes one of the TVPA criteria that it uses to assess the minimum standard that “The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.” This criteria assesses whether a government’s anti-trafficking programme is consistent with the vigorous investigation and

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prosecution of acts of such trafficking, as well as with the protection of human rights of victims and the internationally-recognised human right to leave any country, including one's own, and to return to one's own country.

Protection

The low rate of prosecutions is matched by the low rate of identification of trafficked persons and certification for assistance. Despite large funds available, very few trafficked persons are assisted by any of the government programmes available (OSCE, 2005). This is the case for:

- T-visas: extremely low number of persons that apply for, and are granted T-visa status has been outlined in '4' above. The stringent requirements for getting a T-visa means that people are encouraged to stay in exploitative conditions.
- Certification and eligibility letters for benefits: the number of Department of Health and Human Services certifications and eligibility letters (for minors) is dramatically less than the estimated number of trafficked persons. The figures are as follows: in 2001: 198; 2002: 99; 2003: 151; 2004: 161; and 2005: 230 (see Attorney General, 2006 and DOJ 2006a). Even the US has acknowledged how low these figures are: "...although the rate of victim certification has increased, there is still a large gap between the estimated number of victims in the United States and the victims we serve. The US Government recognizes this, and is in the process of making additional intensive efforts to find and certify more victims" (US Response to OSCE, 2005, 3).
- Participation in the Return, Reintegration, and Family Reunification Program for Victims of Trafficking in the United States: by March 2006, the Return, Reintegration, and Family Reunification Program for Victims of Trafficking in the United States (launched in 2005) had only assisted the return of three trafficked persons and facilitated the family reunification of 24 individuals with trafficked persons in the US.
- Legal aid assistance: legal aid grants by the Legal Services Corporation assisted only 141 trafficked persons in 2005.

Until very recently (with the TVPRA 2005), the US also did not provide assistance between the time of identification and certification, creating a long period of time when trafficked persons went unaided (see Attorney General, 2006 and DOJ 2006a).

These low rates of assistance are linked to an insufficiently proactive approach to identification of trafficked persons. The two key ways in which trafficked persons come to the attention of US law enforcement are through raids and trafficked persons either escaping from their traffickers or coming forward with the support of community organisations (Urban Justice Center, 2002). While the US often refers to the role of its Department of Labor's Wage and Hour Division, inspectors in interviewing migrant workers, inquiring about their transportation, inspecting their housing and identifying trafficked persons (see e.g. US Response to OSCE, 2005; DOJ 2006a), it is unclear to what extent these strategies actually identify trafficked persons or instead operate to the detriment of migrant workers (either by reducing their competitive edge or encouraging exploitative labour arrangements to be even more clandestine to avoid scrutiny).

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Since September 2005, the US has sought to adopt new strategies to strengthen identification of trafficked persons: “The US government has worked on identifying TIP victims by focusing on particular work sectors or first responders, for example the travel industry, faith-based communities, and victim service providers” (DOJ 2006a, 8). Elements of these strategies include increasing the number of people looking for trafficked persons (the “Rescue and Restore” campaign) (US Response to OSCE, 2005) and directing resource to places where victims are identified (as opposed to their “estimated location”) (DOJ 2006a, 8). However, none of these strategies will satisfactorily increase rates of identification if the US continues to rely on a narrow definition of a trafficked person and give grants to service providers (such as some faith-based organisations) who have similar perceptions.

Even when trafficked persons are identified, gaps in assistance persist. For example, it is still difficult to guarantee safe housing for trafficked persons (Fitzpatrick, 2003; Kandathil, 2005). The US has acknowledged that it still faces challenges in providing assistance and “...must improve its efforts to coordinate victim services offered by federal agencies and grant recipients” (DOJ 2006a, 9). While improving coordination between the network of federal agencies and their grantees is important, the rights of trafficked persons (particularly sex workers and migrant sex workers) are compromised in the first instance by the fact that service providers must comply with the anti-prostitution limits that attach to federal funding (see 2 above).

In addition to these general failures in protection, there are significant human rights concerns with regard to trafficked children in the US (see ECPAT-USA, 2002). These concerns stem from a number of factors. First, the failure to adequately identify the scope, and understand the nature, of the problem of child trafficking in the US (OSCE, 2005). The US itself has recognised that this failure is particularly great with respect to the situation of children who are US citizens trafficked internally (US Response to OSCE, 2005). Second, the low rate of identification of trafficked children (Shared Hope International et al, 2006). Third, trafficked children are subject to unduly burdensome requirements in order to receive assistance (Sadruddin et al, 2005; Urban Justice 2005). For example, while amendments in the TVPRA 2003 mean that children under the age of 18 do not have to assist law enforcement to receive a T-visa, they are still required to prove that they would face extreme hardship involving unusual and severe harm upon removal. In addition, minors do not have to meet the same requirements for certification as adults to receive benefits, but they still must have a recommendation from either the Department of Homeland Security or the DOJ before the Department of Health and Human Services will issue a Letter of Eligibility that states that the child is a victim of a severe form of trafficking in persons and is eligible for benefits. The result is that a very small number of children are issued Letters of Eligibility: in 2005, only 34 Letters of Eligibility for benefits and services were issued.

Fourth, even if minors are identified and deemed eligible for benefits and services, these benefits and services are not necessarily experienced by all identified children. While it is US policy to enrol children in the Unaccompanied Refugee Minors Program, participation in the programme is voluntary (US Response to OSCE, 2005; Attorney General, 2006).

Further, assistance programmes do not sufficiently prioritise the best interests of the child. This is shown by the problems with respect to shelter for trafficked children, which include:

...the lack of secure physical shelters and safe housing for victims of trafficking and the tendency in many states to house trafficking victims in juvenile detention centers. There are very few facilities that provide secure shelter specifically for child victims of human trafficking, and fewer that provide

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secure shelter for domestic victims, because the existing funding is earmarked for international victims. Often, before a foreign or domestic child is officially designated as a trafficking victim, no services are funded for that child (Shared Hope International et al, 2006, 9).

Efforts to assist trafficked children are also hindered by a lack of effective cooperation between NGOs and government agencies and a lack of preventive measures (Shared Hope International et al, 2006).

Prevention

This failure to target the prevention of trafficking in children is part of a broader failure to address the social and economic causes of internal trafficking in the US (OSCE, 2005). Instead of addressing root causes (e.g. by enhancing immigration and labour law protections or decriminalising prostitution), the US approach has been to focus on border interdiction strategies. This domestic failure is carried through to the international level where the US supports prevention strategies that fail to address the social and economic factors which cause legal and illicit global movement (OSCE, 2005). The TVPA does direct the President to “establish and carry out international initiatives to enhance economic opportunity for potential victims”, but the US’ ideological imperatives prevent it from funding prevention activities that truly address the root causes of trafficking, such as unfair labour conditions for sex workers (GAATW, *Trafficking in Persons in North America*, 2004).

6. Conclusion

Although the US claims to be a world leader in the campaign against trafficking, and to adopt a ‘victim-centred’ approach to anti-trafficking strategies, the rights of trafficked persons are eclipsed by a prosecutorial and law enforcement approach that makes assistance contingent on cooperation with law enforcement rather than as a basic right.

US policies tend to help a sub-set of trafficked persons; those who fit within the narrow definition of “severe forms of trafficking in persons”; those who have been trafficked for the purposes of commercial sex; and those who have been trafficked across borders rather than internally. Trafficked persons’ identification and assistance in the US is very low and these problems are exemplified in relation to children.

US counter-trafficking work is informed by anti-prostitution policies and programmes. This anti-prostitution stance is a moral and ideological one, according to which the US regards prostitution as inherently dehumanising and not a legitimate form of work. It affects all elements of US policy and has significant human rights implications for sex workers in general and migrant sex workers in particular, both in and outside the US, because of the refusal to fund organisations which will not take an anti-prostitution pledge or address root social and economic causes of sex trafficking (for example, by regulating the labour conditions of sex workers). This failure to focus on the regulation of labour conditions of sex workers is indicative of the absence of meaningful labour and immigration law protections in the US where undocumented migrant workers have substantially less protection than other workers. The key anti-trafficking US law does not correct this by introducing a broad range of labour protections, and instead imposes stringent conditions on immigration relief.

These factors, along with others explored in the chapter, demonstrate that the US is in many ways in violation of the minimum anti-trafficking standards to which it holds other countries.

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ENDNOTES

- ¹ White House, Press Release. *President Signs H.R. 972, Trafficking Victims Protection Reauthorization Act*, 2006. Accessed on 30 April 2007 at <http://www.whitehouse.gov/news/releases/2006/01/20060110-3.html>.
- ² Best Practices Policy Project. *New Federal Legislation against Prostitution*. Accessed on 30 April 2007 at <http://www.bestpracticespolicy.org/subpage9.html>.
- ³ Best Practices Policy Project. *New Federal Legislation against Prostitution*. Accessed on 30 April 2007 at <http://www.bestpracticespolicy.org/subpage9.html>.
- ⁴ See e.g., Desiree Alliance et al. *Initiatives to “end demand” for prostitution harm women and undermine good programs*. Accessed on 30 April 2007 at <http://www.bestpracticespolicy.org/subpage11.html>; DeStefano, 2006.
- ⁵ Unless otherwise stated, figures provided by the US governments are based on the financial year, e.g. 2005 refers to FY2005. In the United States, the financial year runs from October 1 of the previous calendar year and ends on September 30.

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