

Issue 1, June 2012

anti trafficking review

Special Issue: Where's the Accountability?

Editorial

Measuring the success of counter-trafficking interventions in the criminal justice sector: Who decides--and how?

GRETA's first years of work--review of the monitoring of implementation of the Council of Europe Convention on Action against Trafficking in Human Beings

Accountable to whom? Accountable for what? Understanding anti-child trafficking discourse and policy in southern Benin

The road to effective remedies: Pragmatic reasons for treating cases of "sex trafficking" in the Australian sex industry as a form of "labour trafficking"

Using human rights to hold the US accountable for its anti-sex trafficking agenda: The Universal Periodic Review and new directions for US policy

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Debate Section

Sex trafficking, law enforcement and perpetrator accountability

Accountability and the use of raids to fight trafficking

'We have the right not to be "rescued"...': When anti-trafficking programmes undermine the health and well-being of sex workers



anti trafficking review

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The *ANTI-TRAFFICKING REVIEW* is published by the Global Alliance Against Traffic in Women (GAATW), an alliance of over 100 NGOs worldwide focused on advancing the human rights of migrants and trafficked persons.

The *Anti-Trafficking Review* promotes a human rights-based approach to human trafficking. It explores trafficking in its broader context including gender analyses and intersections with labour and migrant rights. It offers an outlet and space for dialogue between academics, practitioners and advocates seeking to communicate new ideas and findings to those working for and with trafficked persons.

The *Review* is primarily an e-journal, published annually. The journal presents rigorously considered, peer-reviewed material in clear English. Each issue relates to an emerging or overlooked theme in the field of human trafficking.

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Editorial

It is my great pleasure and honour to welcome readers to the first issue of the *Anti-Trafficking Review*. For those of us who have been working on the problem of human trafficking for many years, the emergence of a specialist journal is an important sign of progress - a welcome confirmation that our area of work and study has well and truly moved from the margins to the mainstream of international attention and concern.

The launching of the *Review* also marks an important step forward in terms of research and scholarship. Human trafficking has attracted a great deal of attention over the past decade, but many have rightly questioned the quality of much research and writing on this issue. Early researchers in particular, were criticised for failing to acknowledge the substantial gaps in knowledge and understanding that inevitably compromised the truth and value of their work. Even today, I would argue, the generally accepted standard appears lower than in other, comparative areas of study. Certainly much writing on trafficking continues to be insufficiently rigorous. For example: inconvenient complexities are frequently ignored; contrary views are rejected without adequate consideration; and data is shaped to fit pre-determined conclusions. In my own specialist area, law, much of the scholarship demonstrates an unsettling alignment between policy preference and legal analysis. In other words, those writing on the legal aspects of trafficking are all too frequently succumbing to the understandable, but dangerous, temptation to conflate the law *as it is* with the law as they would like it to be.

Of course, this very human tendency - to accept what fits with our beliefs, and to discard what does not - is nothing new. Writing in 1620, the philosopher Francis Bacon described it with almost painful accuracy:



The human understanding, when any preposition has been once laid down...forces everything else to add fresh support and confirmation; and although more cogent and abundant instances may exist to the contrary, yet it either does not observe them or it despises them, or it gets rid of and rejects them by some distinction, with violent and injurious prejudice, rather than sacrifice the authority of its first conclusions.¹

Many factors will contribute to better scholarship around human trafficking: for example, access to reliable, accurate and verifiable evidence about the nature of the problem and the impact of interventions, must be a priority. But it is a personal awareness of actual or potential biases - and an acknowledgement of the extent to which such biases operate to influence scholarship - that may, in the end, have the greatest effect. Our goal should not be to produce work that is value free. Indeed, the values of rights, freedom and dignity are fundamental. Without them, human trafficking, and related exploitation would never have been identified as problems in the first place. However, an awareness of how our own history, beliefs and values influence shape our ideas can help us to recognise weaknesses and deficiencies in knowledge and understanding. In relation to our research and scholarship, such awareness should operate to encourage us to be objective when possible, and to be truthful when objectivity is impossible or unwise.

As Guest Editor of the first issue of the *Review*, I actively sought contributions from different 'ends' of the trafficking spectrum (if such a classification can be said to exist). The editorial team also worked hard to bring in the voices of practitioners: those guardians of essential knowledge and insight who stand outside the academy and, for that reason alone, too often remain unheard. While the final selection of articles is indeed a diverse one, our efforts in this regard were only partly successful. I urge future editors of this Journal to champion different experiences and different viewpoints by encouraging all those with something important to share to make their contribution.

The above observations are not intended to reflect negatively on the quality of the articles included in this volume. Each of these has been subject to double blind peer review involving at least two, and in some

¹ F Bacon, *Novum Organum: True directions concerning the interpretation of nature*, Mobiclassics, 1620, p.11.



cases three, different reviewers. At this point it is appropriate for me to thank the many persons who contributed their time and expertise to the review process. While you cannot be publicly acknowledged, your contribution has been, and will continue to be a critical one.

This Issue

In developing their vision for the *Anti-Trafficking Review*, the GAATW editorial team determined that each issue should have one overarching theme that would link all contributions. The theme chosen for the first issue was ‘accountability’. The call for papers invited submissions that addressed the lack of accountability that appears endemic in the ‘anti-trafficking industry’: a situation that has contributed to the continuing marginalisation of trafficked persons and their views as well as apparently only minimal progress in decreasing trafficking and strengthening the rights of trafficked persons. It was proposed that the first issue consider how the ‘accountability vacuum’ affects the ability of migrants to realise their rights and entitlements; what this means for rights-based approaches to human trafficking; and the role that anti-trafficking organisations could play in promoting greater accountability.

General Articles Section

The articles in this section are loosely organised according to the scope of their focus: from international, to regional, to national. In the first article, Gallagher and Surtees consider accountability for anti-trafficking interventions in the criminal justice sector, a fast emerging area of activity for international organisations, bilateral donors and national governments. There is growing pressure for such interventions to demonstrate accountability, results and beneficial impact, but Gallagher and Surtees question how this can actually happen in practice: determinations of success vary considerably depending on who is consulted; the criteria established to measure success; and the assumptions built into those criteria. The authors draw on examples of recent practice to explore each of these aspects, concluding that, among other things, a lack of a common vision of ‘success’ is significantly hampering progress - by allowing mediocre or even harmful interventions to flourish and good work to go unrecognised and unrewarded.

The international legal framework around human trafficking has been considerably strengthened in recent years, and the monitoring and



oversight mechanisms attached to that framework are potentially important vehicles for increasing the accountability of States for violations of their obligations under the relevant treaties. Planitzer's article considers the monitoring framework established by the Council of Europe Trafficking Convention. Her specific focus is the work of the Group of Experts (GRETA), during its first year of operation. Through an analysis of the documentation produced by both GRETA and the States Parties subject to its reporting procedure during this period, Planitzer is able to identify a number of strengths and weaknesses. Looking to the future, she proposes several ways in which the procedure can be made more effective; including an increased commitment to transparency on the part of States Parties and greater, more structured involvement of civil society in reporting and follow-up.

Child trafficking in southern Benin is the subject of the next article, by Howard. The author's field research in that country has led him to believe that the discourse that has emerged around child trafficking significantly misrepresents the actual situation; that 'a disjunct existed between the way institutions *represented* and responded to "trafficking" and the "trafficked", and the way the trafficked understood and represented themselves'. He contends that by failing to accurately capture the reality of youth migration in Benin, the discourse, and the policies that have emerged from it, also fails those it intends to protect. In seeking to explore why better information has not led to a change in understanding and perception, Howard concludes that this is not a matter of deliberate ill will. Rather, he argues, these ideas have been shaped and retained through inertia and the desire for harmony, as well as through larger forces that include change-resistant institutions and political structures. Howard's conclusions, in terms of accountability are sobering: at present, the policy-maker is not accountable, or indeed particularly influenced by, the so-called policy beneficiary.

There is growing acknowledgement that the long-standing dichotomy between trafficking for sexual exploitation and for exploitative labour is, in many respects, (although perhaps not all), a false one. However, the separation is still very much a feature of the national legal and policy environments in many countries. In Australia, for example, Simmons and David show that critically important labour laws and associated protection systems are not being made available to workers in the (largely legalised) sex industry. As a result, workers in that industry are missing out on a range of potentially effective prevention interventions as well as access to civil remedies. The solutions are not straightforward, and the authors call for practical and financial



support to enable the national industrial regulator to work directly with affected groups in identifying opportunities and barriers to accessing the labour law system, particularly for migrant sex workers.

In their article *Using Human Rights to Hold the US Accountable for its Anti-Sex Trafficking Agenda*, Lerum and colleagues consider a relatively new international accountability mechanism: the Universal Reporting Procedure (UPR) established under the United Nations Human Rights Council. The authors trace the recent social histories of two competing ideologies that, in the US, have clashed sharply around the issue of human trafficking: the influential ‘new prohibitionist’ movement, and the less dominant ‘sex worker rights’ movement. They then relate the highly strategic process, underpinned by broad-based coalitions and a commitment to evidence, by which ‘a human rights agenda for US-based sex workers’ was introduced and approved at the United Nations Human Rights Council through the UPR. The result of that effort was official US government acceptance of a recommendation that: ‘[n]o one should face violence or discrimination in access to public services based on sexual orientation or their status as a person in prostitution’. The authors conclude by analysing the potential of an international process such as UPR to improve accountability by bringing a diversity of new and often marginalised voices to the attention of national policy makers.

The final article in this section confronts an issue of increasing concern: the overlap between trafficking and asylum. In *A Lie More Disastrous than the Truth*, Stepnitz explores the identification of victims of trafficking in the UK. Her research uncovers a worrying link between the identification experience and a woman’s citizenship, residency and documentation. The fact that most non-EU nationals presenting as victims of trafficking are also asylum seekers is highly relevant. In short, women who have been trafficked and are claiming asylum in the UK are experiencing significant difficulty being identified correctly and therefore accessing their rights and entitlements. The author notes that a key problem is the procedure itself: in the UK, asylum claims and trafficking identification processes are dealt with, often simultaneously, by the same case officer, despite the existence of very different determination criteria. Many of the concerns that have been raised in relation to asylum determinations are, unsurprisingly, also relevant for trafficking determinations. The author concludes that immigration control and crime reduction are the key drivers of anti-trafficking policy and practice in the UK and that these imperatives are reflected in the highly discriminatory outcomes of identification procedures.



The debate section

In furtherance of its commitment to genuinely open dialogue, the editorial team has included a ‘debate section’. It is my hope that this will become a standing feature of the *Anti-Trafficking Review*: a place for scholars and practitioners with very different points of view to address one issue of current significance or controversy. As John Stuart Mill argued in *On Liberty*, the opportunity for us to profess contrary opinions, and to listen to those who express them, is important for two reasons. First, because what is otherwise kept from us could indeed be true, or may contain some truth. And second, because if our opinions go uncontested, then truth risks being separated from its rational roots, and eventually becoming hidden in sources of prejudice and dogma. In his words: ‘if the opinion is right, [we] are deprived of the opportunity of exchanging error for truth: if wrong, [we] lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error’.²

The editors of the *Anti-Trafficking Review* have selected, for the first debate, the controversial practice of rescuing victims (or presumed victims) of trafficking. These rescues are invariably aimed at victims of sexual exploitation and conducted through brothel raids. They typically involve local law enforcement agencies but are often encouraged or facilitated by external bodies including international non-governmental organisations. In her vigorous defense of properly prepared and executed raids and rescues, veteran human rights campaigner Holly Burkhalter, now with the International Justice Mission (IJM), challenges critics to consider the human costs of opposing rescues, particularly of child victims of sexual exploitation. She argues that sustainable child protection must involve law enforcement; and that attention should be on reforming local police to ensure that legitimate and professional interventions can and do occur. Burkhalter concludes that, in the meantime, ‘children and trafficked adults being raped for profit should not have to wait until police everywhere in the world have been pronounced good enough to protect them’.

² J S Mill, Chapter II, ‘Of the Liberty of Thought and Discussion’, *On Liberty*, 1869.



The following two articles in the debate section take a very different position. In *Accountability and the Use of Raids to Fight Trafficking*, Ditmore and Thukral argue that raids are ‘one of the clearest examples of misguided anti-trafficking efforts’: that they should not be an accepted tool in the anti-trafficking armory and, instead, should only ever be considered a measure of last resort. Using data from a US study, the authors contend that, in addition to causing harm to those involved, raids do not serve their stated purposes of locating and identifying victims of trafficking, or indeed, of securing evidence to prosecute exploiters. They conclude that it is necessary to identify new approaches to locating, identifying and assisting victims; approaches that are based on meeting the needs, protecting the rights and supporting the self-determination of trafficked persons.

In ‘*We have the right not to be “rescued”...*’, Ahmed and Seshu, focusing on raids and rescues in Sangli, Maharashtra State, India, echo many of the concerns expressed in the previous paper. Their particular charge is that these interventions have highly negative impact on HIV programmes that are being run by sex workers themselves and, thereby, on the health and well-being of Indian sex workers. The authors trace the origins of the ‘raids, recues and rehabilitation industry’ to the neo-abolitionist movement in the United States that has encouraged and supported the activities of IJM and its national equivalents. They argue that the very concept is flawed because reliance on the State inevitably results in violence against sex workers, and in continuing violation of their rights, including through arbitrary detention in shelters.

It is not the job of the Guest Editor to draw conclusions, or even to offer her views on the various points raised by the three papers in the debate section. However, it is perhaps justifiable to ask some questions that were not directly addressed or answered. For example: is trafficking for sexual exploitation qualitatively different to other serious, violent crimes in a way that justifies a different criminal justice approach including in relation to victim rescue? What considerations, if any, are sufficient to outweigh risks of harm to victims? Why are raids and rescues (and the debate around this issue) invariably connected to the sex industry? Do different or additional considerations apply to identifying and rescuing individuals trapped in exploitation on farms or boats, or in factories or private homes?

In concluding this editorial, I would like to thank the many persons who have been involved in finalising the first issue of the *Anti-Trafficking Review*. The amount of thought and work that must go into launching a new journal took us all by surprise. Many time-consuming



and difficult tasks fell to the editorial team, and I thank them most sincerely for their hard work and patience with a demanding Guest Editor. A special thanks is also due to the GAATW leadership: Bandana Pattanaik was fully behind my efforts to encourage the inclusion of new and dissident voices. In doing so, she showed great understanding of Mill's warning that 'we can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we *were* sure, stifling it would be an evil still'.³ It is my sincere hope that those who are involved in the future of the *Review* continue these modest first efforts to bring rigour, criticism and a genuine spirit of enquiry into our important field of work.

Anne Gallagher
June 2012

³ *Ibid.*



Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who decides—and how?

Anne T. Gallagher and Rebecca Surtees

Abstract

Global concern about human trafficking has prompted substantial investment in counter-trafficking interventions. That investment, and the human rights imperatives that underpin counter-trafficking work, demand that interventions demonstrate accountability, results and beneficial impact. How this can happen in practice is complicated and contested. This article, which considers success measurements with respect to criminal justice interventions, seeks to cut through the complexities presented by multiple theories and elaborate methodologies by focusing on one key issue: who decides success, and how? A review of evaluation reports and interviews with practitioners confirm that determinations of success (or failure) will vary according to: (i) who one consults and their role in the intervention; (ii) the criteria against which success is measured; and (iii) the assumptions that are built into that criteria. Each aspect is considered with reference to examples and insights drawn from recent practice. A major finding of the article is that the lack of an overarching vision of what “success” might look like allows mediocre or even harmful interventions to flourish and good work to go unrecognised and unrewarded.

Key words: trafficking, human trafficking, criminal justice, monitoring, evaluation, impact assessment



Introduction

Global concern about human trafficking has nurtured great legal and normative change. Over the past decade, it has also prompted substantial investment in counter-trafficking interventions by intergovernmental organisations, states and civil society. Initial waves of intervention took place in a performance evaluation vacuum. This was noted by, amongst others, the United States Government Accountability Office which, in 2006, criticised the absence of ‘measurable goals and associated indicators to evaluate the overall effectiveness of [US] efforts to combat trafficking abroad’ and echoed the State Department’s Inspector-General in calling for ‘performance indicators to compare progress in combating trafficking from year to year’.¹ Time, experience and heightened expectations about what can be achieved have fed a demand for tools and mechanisms to make sense of the problem and validate what is being done by, for example, measuring the true extent of trafficking or evaluating the absolute and comparative worth of an individual state’s response or a particular intervention. A rapid rise in the formulation and application of “success indicators” is one manifestation of the new environment within which counter-trafficking is being discussed and targeted.²

Equally relevant are the recent but increasingly frequent calls for greater transparency and accountability within the counter-trafficking sector, including through rigorous impact evaluation.³ It is not difficult to sustain a strong argument that counter-trafficking interventions, including those in the criminal justice sector, should be carefully monitored and evaluated. Certainly, the human rights imperatives that underpin counter-trafficking work and the significant investment of public resources demand that interventions demonstrate accountability, results and beneficial impact. How this can happen in practice is more complicated, and there has been relatively little analysis of the practical

¹ United States Government Accountability Office (USGAO), *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad*, USGAO, Washington, DC, 2006, p. 25.

² See: A Gallagher and J Chuang, ‘The Use of Indicators to Measure Government Responses to Human Trafficking’ in B Kingsbury and S Merry, *Indicators as a Tool of Global Governance*, Oxford University Press, forthcoming 2012.

³ G Baumann, ‘Measuring Effectiveness of Counter-Slavery Work’, *Free the Slaves*, Washington, DC, 2006; G Danailova-Trainor, ‘Evaluation of Counter-Trafficking Programmes and Research’ in C Aghazarm, F Laczko, et al., *Human Trafficking: New directions for research*, International Organization for Migration (IOM), Geneva, 2008, pp. 44–56; M Dottridge, ‘Research Needs

issues and challenges that may arise in efforts to evaluate counter-trafficking work. In our view, discussions of counter-trafficking evaluations should identify and acknowledge these obstacles and constraints, and consider what might be done to accommodate or overcome them.

Impact and effectiveness evaluation in the context of international development is complicated and contested. Multiple theories and elaborate methodologies abound, and these can present a daunting impediment to those seeking practical guidance in determining “what works”. This article has sought to cut through some of these complexities by focusing on several basic issues that are directly implicated in evaluating counter-trafficking interventions in the criminal justice sector. The key question is: who decides, and how? Determinations of success (or failure) are likely to vary according to who one consults and their role in the intervention, as well as, most importantly, the criteria against which success is measured and the assumptions that are built into that criteria. By addressing this

Concerning the Monitoring, Evaluation and Impact Assessment of Both Research about Human Trafficking and Projects and Programmes to Address Human Trafficking’ in C Aghazarm, F Laczko, et al., *Human Trafficking: New directions for research*, IOM, Geneva, 2008, pp. 57–71; M Dottridge, ‘Measuring Responses to Trafficking in Human Beings in the European Union: An assessment manual’, European Commission (Paper prepared for the Directorate-General Justice, Freedom and Security European Commission), 2007; M Friedman, ‘This story could have been written 10 years ago. We need to do more’ Rights Work: www.rightswork.org, online publication, 15 August 2011; Global Alliance Against Traffic in Women (GAATW), *Collateral Damage: The impact of anti-trafficking measures on human rights around the world*, GAATW, Bangkok, 2007; GAATW, C Hames, F Dewar, and R Napier-Moore, *Feeling Good about Feeling Bad...A global review of evaluation in counter-trafficking initiatives*, GAATW, Bangkok, 2010; J Intili, et al., *An Evaluation Framework for USAID-Funded TIP Prevention and Victim Protection Programs*, Social Transition Team, Office of Democracy, Governance and Social Transition of the United States Agency for International Development (USAID/E&E/DGST), Washington, DC, 2009; IOM, *Handbook on Performance Indicators for Counter-Trafficking Projects*, IOM, Geneva, 2008; A Jordan, ‘More Funding for Impact Assessments?’ Rights Work: www.rightswork.org, online publication, 15 October 2010; R Rosenberg, *Best Practices for Programming to Protect and Assist Victims of Trafficking in Europe and Eurasia*, USAID/E&E/DGST, Washington, DC, 2008; R Surtees, *Re/integration of Trafficked Persons: Developing monitoring and evaluation mechanisms*, KBF, Brussels, and NEXUS Institute, Washington, 2009; USGAO, *Human Trafficking: Monitoring and evaluation of international projects are limited, but experts suggest improvements*, USGAO, Washington, DC, 2007; E Williamson, et al., *Where is the Research on Human Trafficking and the Evaluation of Counter-Trafficking Efforts?*, ICF International, 2008.



question, the authors seek to contribute, in a practical way, to current discussions about how trafficking-related interventions can be effectively evaluated.

Several limitations of focus deserve to be flagged upfront. The first is the article's attention to the criminal justice side of counter-trafficking responses: interventions that are directed primarily at strengthening the investigation, prosecution and/or adjudication of trafficking-related cases, as well as the applicable legal framework. Typical "criminal justice sector" interventions include support for criminal law reform; training of police, prosecutors and judges; direct support for investigations and prosecutions; and institutional reform (for example, capacity building of institutions such as specialist investigation units, prosecutorial offices and courts, and development of procedures and protocols governing investigations and prosecutions). While some of the article's findings may be applicable to different areas of counter-trafficking work such as prevention and victim assistance, others are specific to the criminal justice response. A second limitation relates to the focus on externally supported interventions: those that are funded (and typically also developed, managed and evaluated) by bilateral and multilateral donors. While certain conclusions implicate key actors in international development cooperation, such as donors and their evaluators, the issues raised are ultimately relevant to any counter-trafficking intervention, including those initiated, funded and implemented by national governments. It is also important to note that the analysis is limited to just a few of the relevant issues—a consideration of stakeholders, criteria and selected underlying assumptions. A broader study, of which the present article forms part, will extend this analysis to include matters such as data availability, accessibility and quality; resources; and identification of unintended negative consequences.⁴

The article (and the study of which it forms a part) is based on a review of relevant literature including a selection of evaluation reports of recent externally supported interventions with a significant criminal justice focus. Evaluation reports of interventions that did not focus specifically on criminal justice aspects of the counter-trafficking response were also examined for comparative purposes. While

⁴ 'Assessing the Impact and Effectiveness of Counter-Trafficking Interventions in the Criminal Justice Sector: A discussion paper on issues, obstacles and opportunities', Asia Regional Trafficking in Persons Project, forthcoming 2012.

approximately half the reports utilised are publicly available,⁵ the remainder were obtained and used on the basis of confidentiality. In this regard, it is relevant to note that several major donors working in this area do not release their evaluation reports. Confidential interviews were also conducted with twelve individuals currently working in the counter-trafficking field, with professional backgrounds in criminal justice (law enforcement, prosecution, and the judiciary), international law, human rights, development, and monitoring and evaluation.⁶ An important, supplementary source of information was provided by the authors' own experiences of designing, managing, implementing and evaluating counter-trafficking interventions in different regions including Europe, the former Soviet Union and Asia.

1. Whose success?

All counter-trafficking criminal justice interventions involve multiple stakeholders, each of whom will be impacted differently and may therefore have different (and even conflicting) views on what constitutes "success". Externally supported interventions increase the range of stakeholders who will have a perspective on whether and why

⁵ P Cunningham and S Hong, United Nations Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-region (UNIAP) Phase III (2007–2010), Mid-Term Evaluation Report Final Draft, March 2009, executive summary available from: http://www.no-trafficking.org/reports_docs/uniap_mte_execsum.pdf., full report on file with the authors; International Labor Office, Independent Evaluation Report: Mid Term Evaluation: ILO Combating Forced Labour and Trafficking of Indonesian Migrant Workers, available from: www.norad.no/en/_attachment/106242/binary/5825?download; A Jones, et al., *An Evaluation of the International Justice Mission's "Project Lantern": Assessment of five-year impact and change in the public justice system*, Philippines, 2010, http://www.ijm.ca/pageid/236#_report; NORAD, *Evaluation of the International Organization for Migration and its Efforts to Combat Human Trafficking*, 2010, <http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ct/Evaluation-IOM-CT.pdf>; United Nations Office on Drugs and Crime, *Evaluation of the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT)*, February 2011, http://www.unodc.org/documents/commissions/WG-GOVandFiN/UN.GIFT_Evaluation_-_final_draft_24Feb2011.pdf; United States Department of Labor, *Independent Final Evaluation of the Thailand Sex Trafficking Task Force: Prevention and placement program* (International Justice Mission), 2006, http://www.dol.gov/ilab/projects/asia/Thailand_TraffickingTaskForce_feval.pdf; USAID, *International Justice Mission: Counter-trafficking program in Cambodia: Assessment*, 2006, http://pdf.usaid.gov/pdf_docs/PNADG806.pdf.

⁶ Audio recordings and transcripts of all interviews are on file with the authors and journal editors.

the intervention has been successful or not. In this context therefore, the term “stakeholder” potentially includes the recipient government/agency; implementing partner agencies and officials including investigators, prosecutors and judges; donors; trafficking victims and victim support agencies; suspects and convicted offenders; evaluators; and technical experts. Each of these stakeholders may assess the success (or failure) of a particular criminal justice project or intervention in the counter-trafficking field using different standards and criteria that reflect their own positions, interests and assumptions. For example:

- *Target government/agency*: Has the intervention reflected well on the government/agency—for example, is the government/agency able to claim credit for any positive results? Did the intervention help ameliorate internal or external criticisms directed at the government/agency? Did it improve the capacity of the government/agency to investigate and prosecute trafficking-related crimes or have broader positive effects on capacity? Did it support implementation of national laws and realisation of national plans or policies? Did the intervention result in any unintended and/or negative consequences?
- *Implementing partner criminal justice agencies (e.g. police unit receiving victim interview facilities, prosecutors receiving training)*: Has the intervention raised the profile of the agency in a positive way? Do the results of the intervention reflect well on practitioners? Has there been a measurable change in relation to the criteria by which success is judged internally, such as victim rescues, arrests, prosecutions and convictions? Are perpetrators being deterred from committing future offences? Has there been an increase in the number of identified or assisted victims who are willing to cooperate? Are cases being processed more quickly? Has cross-border cooperation increased in ways that facilitated the work of the agency? Did the intervention support a focus on high-end exploiters or just the arrest and prosecution of small-time offenders? Has the intervention supported common standards and approaches that will encourage greater regional cooperation? Is the donor satisfied with the results and thereby likely to provide further assistance? Did the intervention result in any unintended and/or negative consequences that could reflect badly on the implementing partner?
- *Donor*: Has the intervention secured clear, unambiguous results that can be quantified, measured and reported? Can it be justified as representing value for money? Has the intervention



strengthened important political or strategic relationships (for example, with a partner country or regional institution)? Has the intervention served other political or strategic goals—for example, reducing the flow of trafficked persons into the donor state? Has the intervention reflected well on the donor? Did the intervention result in any unintended and/or negative consequences that could reflect badly on the donor? Can the intervention be replicated by other agencies and/or by the donor in different settings?

- *Victims:* Did the intervention facilitate accurate and timely identification of victims, their escape or removal from exploitation and protection from further harm? Did victims receive the assistance and protection they require? Did the intervention facilitate greater criminal justice awareness of victim rights? If so, did greater awareness of victim rights translate into appropriate treatment of victims? Were victims treated sensitively in the legal process with full respect of their rights? Did the intervention facilitate positive (or at least minimally traumatic) victim involvement in the investigation and prosecution of their exploiters? Was the legal process comprehensible to the victim? Did it support access to entitlements such as compensation and right to stay in the destination country? Did victims value the criminal justice response? Did the intervention result in any unintended and/or negative consequences, for example, increased likelihood of prosecution for status-related offences such as illegal work or illegal stay?
- *Victim support agencies:* Victim support agency views of success may not always align with those of trafficked persons. In addition to the above success criteria, victim support agencies may consider whether the intervention reflected well on them and their work; whether it advanced particular institutional or programmatic goals; whether it brought in additional funding or increased the prospect of future funding; and whether it improved working relations with criminal justice agencies.

If the perspectives of suspects and offenders were considered important to judgments of success, relevant criteria could include whether the intervention supported fair trial rights and proportionate sentencing; whether it contributed to correct procedures being followed in the legal process; and whether the treatment of suspects has improved. Additional and different perspectives may include those of

the evaluators, whose primary focus would likely be on the extent to which the intervention secured its stated aims, performed against its predetermined indicators and demonstrated value for money. Technical experts and others attached to the implementing agency might have a different view of what constitutes success, which may (or may not) intersect and overlap with some of the views outlined above.

Finally, in this area, it is necessary to acknowledge the existence of silent stakeholders who, while not formally associated with the intervention, nevertheless make their own judgment of success and potentially sway the perspectives of others. A conspicuous example is the United States government, which engages in a controversial but highly influential annual evaluation of state responses to trafficking.⁷ While the task of evaluating state responses to trafficking is different from evaluating the impact of a specific intervention, there are important connections and overlaps. The United States mechanism uses a range of success criteria that prioritises stronger criminal justice responses, evidenced by institution building and increases in prosecutions and convictions. This process may well affect the perspective of key stakeholders, such as recipient states and criminal justice agencies, on the success of any external intervention. Its role as a major donor in the area of criminal justice responses to trafficking has provided the United States government with an additional avenue through which to advocate its particular vision of “success”. Australia provides another example of a donor with a strong international presence in this area and the demonstrated capacity to influence how states—and even a regional grouping of states—determine success.⁸

⁸ See: Association of South East Asian Nations (ASEAN), *Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region*, ASEAN, Jakarta, 2011 (examining state and regional performance against detailed performance criteria developed with Australian government support).

⁷ In 2000, the United States Congress passed the *Victims of Trafficking and Violence Protection Act* (TVPA) requiring its State Department to issue annual reports describing ‘the nature and extent of severe forms of trafficking in persons’ and assessing governmental efforts across the world to combat such trafficking against criteria established by United States law. The TVPA lays down “minimum standards” for the elimination of trafficking as well as detailed criteria for evaluating the performance of states. The reports use a ranking system to classify all states reviewed into four tiers of counter-trafficking compliance. Any bottom-tier state, being one that does not comply with the minimum standards and that is not making significant efforts to do so, may be subject to a range of economic sanctions. See further, A Gallagher, ‘Improving the Effectiveness of the International Law of Human Trafficking: A vision for the future of the U.S. TIP Reports’ 12 *Human Rights Review*, 2011, http://works.bepress.com/anne_gallagher/16/.

2. Dealing with conflicting and divergent opinions on success

Within stakeholder groups, there may be internal differences as to what constitutes a successful outcome and, even at the individual level, views on what constitutes “success” may change over time and in response to different contexts. Some victims, for example, may view the conviction of their exploiter after a long and personally difficult legal process, as a positive (and even empowering) result. For others, the process may be so profoundly disorienting and disempowering that even a successful prosecution cannot assuage their dissatisfaction. As noted above, victim support agency views of success may not align with those of trafficking victims. The issue of shelter detention for victims of trafficking provides a relevant example, with a recent study confirming a sharp divergence in views amongst support agencies, and between support agencies and victims regarding the value and impact of shelter detention.⁹

The perspectives of certain stakeholders are often prioritised in evaluating criminal justice interventions in the counter-trafficking sector, while other perspectives are marginalised or discounted. In many externally funded interventions, donors exercise a tight grip over the structure, composition and implementation of evaluations, not least to ensure that their views and interests are given due attention. In other interventions, it is the implementing agency that controls the evaluation process—a conflict of interest that is rarely remarked upon. For example, the evaluation of the UN Global Initiative to Fight Trafficking (UN GIFT) was organised by and involved UNODC, the agency responsible for implementing this large, multi-donor programme. Donor or implementing agency control over the evaluation process can translate into a capacity to ensure that inconvenient evidence-based conclusions are downplayed or ignored.¹⁰

⁹ A Gallagher and E Pearson, ‘The High Cost of Freedom: A legal and policy analysis of shelter detention for victims of trafficking’ *Human Rights Quarterly*, vol. 32, 2010, pp. 73–114.

¹⁰ M Dottridge, ‘Research Needs Concerning the Monitoring, Evaluation and Impact Assessment of Both Research about Human Trafficking and Projects and Programmes to Address Human Trafficking’ in C Aghazarm, F Laczko, et al., *Human Trafficking: New directions for research*, IOM, Geneva, 2008, pp. 57–71, 65–66.



Research for the present article found that it is the views of the most direct and easily accessible programme beneficiaries (for example, the criminal justice officials and agencies that are the target of the intervention) that are most consistently sought out and taken into account. This can skew evaluation outcomes, particularly when the claims of such groups are not tested against the views of others, as these programme beneficiaries may be reluctant to criticise an intervention because of appreciation for assistance provided and/or a fear that such assistance could be withdrawn if negatively assessed.¹¹ In none of the examined criminal justice evaluations were the views of victims or suspects sought or considered. Of course, a failure to consult these groups does not automatically mean that such perspectives are completely ignored. For example, most of the criminal justice experts interviewed for this study explained that their assessment of the success or failure of a project, activity or single case was tied to their perception of how the intervention impacted victims and/or suspects. It is essential to acknowledge, however, that this perception may differ substantially from how victims or suspects themselves assess success or failure.

Cost, time and access considerations clearly play a part in deciding who, among stakeholders, should be involved in the evaluation process. Access to some stakeholders, such as criminal justice practitioners and victim support agencies, may be easier, less costly and less time consuming to secure than others. Certainly, the involvement of trafficked persons and suspects in any evaluation is likely to be very complex and expensive. For example, sufficient time is needed to identify a representative sample of the target group, secure informed consent and develop rapport necessary for safe, ethical and useful interviewing. Such factors may go some way towards explaining why these more complicated stakeholders are routinely omitted from consultations.¹² The possibility that the more difficult-to-reach groups are accorded a lower priority, and that resource and other constraints are used as an excuse to exclude them, should also not be discounted.¹³

¹¹ A Brunovskis and R Surtees, *Leaving the Past Behind? When trafficking victims decline assistance*, NEXUS Institute, Oslo, Fafo and Vienna, 2007, p. 105.

¹² These practical obstacles are rarely acknowledged and it is ethical issues, such as the risk of re-traumatisation, that are most commonly cited as a reason not to interview victims directly. While certainly a critical consideration in any engagement with trafficked persons, it is important that ethical concerns do not become an excuse for avoiding work that is sensitive and difficult. Trafficked persons have a right to be part of any evaluation, and the risk of wasteful and even harmful interventions is clearly increased when the experiences, assessment and needs of victims are not part of an evaluation.



Results of an intervention can be interpreted differently, depending on individual perspective, background and expertise, with widely diverging assessments of what constitutes a “successful” outcome. Consider the real-life example of an externally supported cross-border law enforcement cooperation mechanism that, somewhat unexpectedly, was linked to a significant number of victim rescues. While the donor regarded victim rescues to be a strong indicator of success, technical experts within the project had a different, more nuanced view. They pointed out that this figure revealed nothing about: the number of victims who were not rescued (including those who continued to be exploited with the knowledge of national counterparts with whom the intervention was working); the extent to which “rescues” translated into victims being offered and accepting assistance; the cost of the cooperation process relative to alternative strategies; the time and effort put into making it work; and the apparent inability of the cooperation process to facilitate the identification and arrest of suspects.

Another example of conflicting perspectives of success is provided by the common measure of trafficking prosecutions, considered further in the following section. For present purposes, it is relevant to note that the arrest, prosecution and conviction of traffickers are heavily dependent on the cooperation of victims. However, trafficking victims’ involvement in the criminal justice process may involve significant and on-going risks to their personal safety and physical and emotional well-being, for little or no personal benefit. As a result, victim cooperation must either be compelled or secured very carefully, through, in the words of an experienced law enforcement practitioner, ‘a mixture of encouragement, persuasion and lack of information’. Under these circumstances, it is very likely that trafficked persons and criminal justice agencies will feel very differently about the impact and value of a criminal justice intervention that seeks to enhance the capacity of investigators and prosecutors to bring victims into the criminal justice process as witnesses. That conflicting perspective is likely to be lost, at least in the context of formal performance evaluations conducted by criminal justice agencies, (i) because of the routine failure to seek the views of victim-witnesses; and (ii) because a primary goal (increased victim involvement in prosecutions) was likely set with little consideration of victim perspective.

¹³ M Bamberger and J Rugh, ‘Real World Evaluation. Working under budget, time, data and political constraints’, American Evaluation Association: Professional Development Workshop Session 21, 2008, 7.



One interviewee characterised the current situation, with its multiple stakeholders and multiple perspectives, as creating ‘a messy soup of expectations’ that is extremely difficult, if not impossible, to manage successfully. Certainly, a strong evaluation should take into account different views and positions. However, not all stakeholders are equal and not all perspectives are, or should be, of equal weight. For example, international human rights law provides a strong framework within which many aspects of a counter-trafficking intervention could and should be measured.¹⁴ An approach to evaluation that prioritises human rights of victims and the administration of criminal justice can provide the framework within which different considerations of success can be weighed. As a practical matter, an appropriate balancing of interests also requires that criteria for success (discussed further below) are transparent and logical; that all major stakeholders are identified and consulted; and that different perceptions of the programme and its success are openly acknowledged in the evaluation, even when this diverges from the general assessment.

3. Deciding the criteria for success

In some cases examined, criteria for success of a counter-trafficking criminal justice intervention were not articulated at all. However, such criteria are typically made formal and explicit, attached to the relevant project or programme as objectives, together with predetermined indicators. Of course, this does not prevent unarticulated criteria from influencing an evaluation. For example, while pre-determined indicators are unlikely to extend to the question of whether the intervention has served a donor’s political or strategic interests, this measure of success may nevertheless be deeply entrenched in the evaluation process and its conclusions. Nevertheless, it is the intervention’s formal indicators that, at least in principle, determine whether or not “success” has been achieved.

Several experts interviewed for this study identified the absence of an agreed set of standards that define a successful counter-trafficking criminal justice response as a major problem—an issue that is raised in the conclusion of this article. One participant, for example, noted

¹⁴ See below note 30 and accompanying text.



the lack of agreement on what constitutes progress: ‘It’s not that we can’t measure impact because of our starting point, it’s because we don’t actually know our end point, where we’re trying to get to.’ Other problems include the adoption of unrealistic or unclear objectives, formulated in ways that make evaluation of outcomes or impact virtually impossible. Examples cited included high-sounding objectives (for example, “to eliminate trafficking”) or those that are extremely vague (for example, “to develop more effective criminal justice responses”). Interviewees also pointed to an apparently widespread preference for weak or easily attainable goals—such as whether the programme has been implemented as planned—rather than whether it is able to demonstrate change and impact.¹⁵ This preference for process-related goals over those focused on outcomes enables stakeholders, most particularly implementing agencies and donors, to retain control over the “success story” in a highly uncertain environment by ensuring that evaluative measurement extends only to aspects that are under the direct control of the project or intervention.

Definitions of success in criminal justice responses to trafficking almost invariably fall back on what can be measured, hence the strong preference, particularly among donors, for quantifiable indicators such as number of arrests or prosecutions, number of officials trained, instances of cross-border investigation cooperation, number of special interview suites established, number of relevant treaties ratified, etc. One criminal justice specialist expressed frustration that ‘results have become so important—and the more concrete they are, the more they are appreciated’, even when the basis of these results may be weak or flawed. Another highlighted how this preference for the measurable can have negative implications in an environment where ‘even bad data is [considered] better than no data at all’.¹⁶ One evaluation expert

¹⁵ Rosenberg notes that this is also the case in almost all of the protection programmes reviewed for an assessment of trafficking programmes in the Europe and Eurasia region: R Rosenberg, *Best Practices for Programming to Protect and Assist Victims of Trafficking in Europe and Eurasia*, USAID/E&E/DGST, Washington, DC, 2008, p. 34.

¹⁶ See, for example, the response of a major United Nations agency to data quality problems in the context of its global trafficking report: ‘A poor indicator is better than no indicator as long as it is not represented as more than it is. Over time, the collection of information from so many different perspectives can, in aggregate, make up for many of the deficiencies of the data itself. Our global data set, reviewed time and again, can indeed tell us something more about the trends and patterns of the problem. This information is vital so that, in a world of limited resources, efforts can be focused for maximum effect.’ United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons*, Vienna, 2009, p. 13.



with experience in counter-trafficking interventions criticised the strong donor preference for (often poor quality) quantification over a more sophisticated and robust mix of qualitative and quantitative methods.

4. Interrogating underlying values and assumptions

Views on an intervention's success often depend on underlying values and assumptions. Criminal justice interventions in the counter-trafficking field are rife with untested assumptions about the value of a particular approach, and about stakeholders and beneficiaries that are rarely explicitly articulated. Any credible evaluation should extend to considering whether the underlying assumptions of an intervention are valid.¹⁷ Some of these assumptions, as they relate to how an intervention's success is measured, are considered further below.

Assumption 1: Increases in trafficking-related prosecutions/convictions is a strong and reliable indicator of success

As noted previously, an increase in trafficking-related prosecutions is widely viewed to indicate a more effective criminal justice response to trafficking.¹⁸ Certainly this indicator should not be dismissed outright. The failure of states to arrest and prosecute exploiters has likely contributed to the high levels of impunity currently enjoyed by traffickers and to the widespread denial of justice to victims.

However, an increase in measurable criminal justice activity (arrests, prosecutions and convictions) is a crude and potentially misleading success indicator. For example, changes in prosecution rates may be attributable to new trafficking laws, with offences previously charged under other laws, such as sexual assault, pimping, immigration fraud,

¹⁷ R Surtees, *Re/integration of Trafficked Persons: Developing monitoring and evaluation mechanisms*, KBF, Brussels, and NEXUS Institute, Washington, 2009, p. 19.

¹⁸ United States Department of State, *Trafficking in Persons Reports: 2001-2010*, United States Department of State Washington, DC, (2001)–(2010); UNODC, *Global Report on Trafficking in Persons*, UNODC, Vienna, 2009; IOM, *Handbook on Performance Indicators for Counter-Trafficking Projects*, IOM, Geneva, 2008.

now prosecuted as trafficking. They may also reflect changes in trafficking prevalence as well as the way data is collected. Most importantly, numerical information says nothing about the quality of prosecutions and convictions, discussed further below. A number of respondents argued that the emphasis on increased prosecutions and convictions has resulted in unintended consequences—for example, a focus on “easy” cases such as those involving small-time recruiters, and a misidentification of people smugglers or marriage brokers as traffickers in order to boost the number of trafficking cases pursued.¹⁹

There is some recent acknowledgment of the need to focus on the quality of prosecutions and convictions. Success indicators recently developed through one major criminal justice intervention in South-East Asia and subsequently adopted at the regional level, consider whether the procedural guarantees for a fair trial were provided; whether evidentiary requirements were met; and whether convictions result in adequate and proportionate penalties.²⁰ The International Organization for Migration’s manual of performance indicators suggests convictions as an indicator of success, with the caveat that this assumes a definition of trafficking that is in line with international standards and, critically, a credible justice system that respects due process.²¹

Assumption 2: Declines in prevalence of trafficking indicates positive change

While the prevalence of crime (the extent or proportion of cases in any given population) is not necessarily a routine indicator for criminal justice interventions,²² there appears to be a growing assumption that a decline in the prevalence of trafficking (presumably evidenced by the number of identified victims) is a useful indicator of success. The United States *Trafficking in Persons Report*, for example, implies a

¹⁹ See, for example, Association of South East Asian Nations (ASEAN), *Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region*, ASEAN, Jakarta, 2011.

²⁰ *Ibid.*, Chapters 1 and 6.

²¹ IOM, *Handbook on Performance Indicators for Counter-trafficking Projects*, IOM, Geneva, 2008, p. 38.

²² Governance and Social Development Resource Centre (GSDRC), *Helpdesk Research Report: Prevalence as an indicator for counter-forced labour and counter-sex trafficking projects*, GSDRC, 2008, p. 2.

prevalence measurement in establishing, as success criteria, ‘whether [the government under assessment] achieves appreciable progress in eliminating severe forms of trafficking when compared to...the previous year’.²³

The use of prevalence as an indicator is problematic on a number of levels. It does not take into account well-known obstacles and pitfalls associated with quantifying the extent of the trafficking problem.²⁴ It also fails to acknowledge that even if prevalence *could* be accurately measured, changes can easily be attributed to a range of factors beyond the rate at which trafficking is actually occurring. For example, increased attention given to trafficking could result in higher levels of prevalence being recorded. Similarly, increased numbers of identified and assisted victims could well be a partial measure of a country’s efforts to tackle trafficking.²⁵

Further, decreased prevalence may not necessarily signal success but rather the adaptation of trafficking systems to counter-trafficking responses. Consider a recent attempt to use prevalence of child prostitution to measure the success of a criminal justice counter-trafficking intervention targeting child trafficking. The research sought to map prevalence but, as noted by its authors, a measurable change in prevalence may be due to other factors, such as law enforcement pressures that resulted in victims being shifted to new or less visible locations.²⁶

²³ United States Department of State, *Trafficking in Persons Report: 2010*, United States Department of State, Washington, DC, 2011, p. 405.

²⁴ See, for example, USGAO, *Human Trafficking: Better data, strategy, and reporting needed to enhance U.S. antitrafficking efforts abroad*, USGAO, Washington, DC, 2006; E Savona and S Stefanizzi (eds), *Measuring Human Trafficking Complexities and Pitfalls*, Springer Science, New York, 2007; D Feingold, ‘Trafficking in Numbers: The social construction of human trafficking data’ in P Andreas and L Greenhill (eds), *Sex, Drugs and Body Counts: The politics of numbers in global crime and conflict*, Cornell University Press, Ithaca, 2010, p. 46–74; H Ali, ‘Data Collection on Victims of Human Trafficking: An analysis of various sources’ *Journal of Human Security*, vol. 6, no. 1, 2010, p. 55–69.

²⁵ R Surtees, *Second Annual Report on Victims of Trafficking in South-Eastern Europe*, IOM, Geneva, 2005, p. 25.

²⁶ A Jones et al., *An Evaluation of the International Justice Mission’s “Project Lantern”: Assessment of five-year impact and change in the public justice system*, International Justice Mission, 2010, p. 6, 31.

The assumption about prevalence also works in reverse: that increases in prevalence are indicative of failure. However, as one study of impact evaluation has noted, success can also mean doing *less badly*.²⁷ It is not unreasonable to assume that, at least in some parts of the world, the rate at which individuals are being trafficked is increasing. Under such circumstances, the best that an intervention may be able to hope for is to slow down that rate.

Assumption 3: Impact and key success indicators (such as attitudinal change) can be measured accurately and within the life of an intervention

Assumptions and expectations about what can be measured (and when) are often unrealistic. Calls for interventions to demonstrate impact²⁸ often underestimate, or indeed completely overlook, many of the complexities involved, at least within the specialist area of criminal justice responses.

Data quality and accessibility: If evaluation design and implementation are compromised by missing data or poor analysis, the findings will be inadequate and likely irrelevant.²⁹ In many countries, vital information (for example, about rates of trafficking, number, type, quality of investigations, arrests, prosecutions, convictions, protection orders, etc.) is scarce, unreliable and not always verifiable. This severely compromises the capacity of criminal justice interventions to collect baseline information against which future change can be assessed.

²⁷ Center for Global Development, *When Will We Ever Learn? Improving Lives Through Impact Evaluation*, Center for Global Development, Washington, DC, 2010, p. 20.

²⁸ M Friedman, 'This story could have been written 10 years ago. We need to do more.' Rights Work: www.rightswork.org, online publication, 15 August 2011; A Jordan, 'More funding for impact assessments?' Rights Work: www.rightswork.org, online publication, 15 October 2010; GAATW, C Hames, F Dewar, and R Napier-Moore, *Feeling Good about Feeling Bad... A global review of evaluation in counter-trafficking initiatives*, GAATW, Bangkok, 2010.

²⁹ J Intili, et al., *An Evaluation Framework for USAID-Funded TIP Prevention and Victim Protection Programs*, Social Transition Team, Office of Democracy, Governance and Social Transition of the United States Agency for International Development (USAID/E&E/DGST), Washington, DC, 2009, p. 20.

Timing: Several criminal justice professionals interviewed questioned the assumption that impact could be measured, at least within the life of a project or immediately afterwards. They noted that trafficking cases can take years from reception of a complaint to case resolution in court. The results and impacts of interventions that seek to influence criminal justice responses can only fully be measured once the entire process has been completed and in respect to a substantial group of cases. When project objectives are cast, in the words of one evaluation expert, ‘at the upper end of the logic model’, impact becomes ‘virtually impossible to measure unless you put some sort of longitudinal study in place which lasts for a couple of decades’.

Measuring change in attitude and behaviour: Many externally supported criminal justice interventions seek to change the attitudes and behaviour of criminal justice personnel as well as its organisational culture. Such changes do not happen quickly. Any evidence to demonstrate change will likely only come from the way cases are investigated, prosecuted and adjudicated over an extended time period. In short, the true *impact* of capacity building interventions such as training is unlikely to be immediately discernible. One criminal justice adviser highlighted this obstacle, noting that changes in behaviour attributable to skills training in which he was involved were not detectable in counterparts or external observers until at least several years after such training commenced.

Other practical obstacles to measuring changes within the confines of a typical project should not be underestimated. The difficulties are neatly illustrated by one project that has invested heavily in following up law enforcement trainees to assess change in workplace behaviour and thereby move beyond reliance on the one-sided and frequently inconclusive feedback received from trainees themselves. Project staff involved in this evaluation experienced a range of practical difficulties in monitoring workplace performance. Supervisors were rarely available for consultation and, regardless, generally lacked the knowledge and skills to be able to adequately assess the performance and capacities of their subordinates on the relevant issues. In some instances, trained officers had conducted few, if any, trafficking investigations since undertaking the training, thereby preventing a comparison with past performance or behaviour. Compounding these problems was the fact that the basic data required to measure changes in performance or behaviour was often inaccessible or unavailable in a form that could be analysed.



Towards the Future

Recent calls for more rigour and transparency in evaluating the success or failure of counter-trafficking interventions are both welcome and overdue. The need for quality evaluations, including impact evaluations, felt across the development spectrum, appears to be especially acute in the area of criminal justice responses to trafficking. While human exploitation is an age-old phenomenon, this issue has only recently been identified as a priority for states and the international community. States have been developing and adapting their criminal justice responses on the run, often under strong political pressure, and principally through trial and error. Donors and implementing agencies have been operating in a similarly reactive way. This increases the risk of bad decisions and negative consequences. It also makes apparent the urgency of ensuring that robust systems for evaluating interventions are in place and functioning.

A review of the relevant literature confirms that it is much easier to call for more quality in evaluations than it is to actually craft or deliver concrete solutions. Discussions about evaluating counter-trafficking interventions need to move from the important first step of criticism and complaint about what is not being done well (or at all) to serious, informed engagement with obstacles and constraints, and how these can be addressed. A different approach also requires commitment to new levels of openness and transparency. Donors and implementing agencies in particular have a responsibility to contribute to an environment of learning and self-reflection that will help ensure good practices are replicated and poor ones discarded. The publication and dissemination of their evaluation reports should be seen as a critical first step to any serious engagement. It will also be important to recognise that, at least in development terms, many of the challenges of evaluating counter-trafficking interventions are not especially unique and there is considerable space for those working in this area to learn from the experiences and insights of other fields of work.

One of the main impediments to effective evaluations lies in the failure of states, the international community and the counter-trafficking sector to specify and communicate a common vision of what constitutes an effective criminal justice response to trafficking. For example, it is only rarely that success indicators will link to the increasingly sophisticated international legal and policy framework around trafficking that provides detailed and specific guidance on matters such as victims' right to justice and state obligations to exercise due diligence in investigating trafficking, prosecuting perpetrators and



protecting those who have been trafficked.³⁰ The absence of a unified vision, grounded in accepted international rules, manifests itself in the lack of clearly defined end-points that are typical of most criminal justice interventions. It also exacerbates complications such as the presence of multiple and divergent stakeholders, and difficulties in accessing reliable and verifiable data. Even more worryingly, the lack of an overarching vision allows mediocre or even harmful interventions to flourish and good work to go unrecognised and unrewarded. It is a collective responsibility to work towards articulation of this vision and to ensure accountability of those who are provided the resources to promote its realisation.

³⁰ For further explanation of this framework, see A Gallagher, *The International Law of Human Trafficking* (2010), especially at Chapter 7. One example of an explicit attempt to integrate international principles and standards into success criteria for counter-trafficking interventions in the criminal justice sector is provided by ASEAN (2011), *supra* note 10. See also AIM for Human Rights (2010), *The Right Guide: A tool to measure the impact of counter-trafficking laws and policies which, while not focusing specifically on either external interventions or the criminal justice response, provides an important insight into how evaluation can be modified by the integration of a human rights perspective.*



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The views expressed in this article are the authors' and should not be taken to reflect those of the organisations with whom they are or have been associated.



GRETA's First Years of Work: Review of the monitoring of implementation of the *Council of Europe Convention on Action against Trafficking in Human Beings*

Julia Planitzer

Abstract

The monitoring mechanism of the *Council of Europe Convention on Action against Trafficking in Human Beings* (CoE Convention) consists of an independent group of experts (GRETA) and a Committee of Parties. GRETA, which began work in 2009, develops questionnaires for States Parties, reviews their replies and conducts study visits. It then produces a report that is used by the Committee of Parties to make recommendations. This article analyses GRETA's work until November 2011 by assessing the available materials including the questionnaire, the three published replies of States Parties to the questionnaire and the five published final reports on the parties. The objective of the article is to examine the capacity of this process to contribute to enhancing the accountability of States Parties, and to consider whether the application of a human rights-based approach by the parties can, in fact, be effectively monitored. The article also considers the role of civil society in the monitoring process and the ways in which this could be enhanced.

Keywords: Council of Europe Convention on Action against Trafficking in Human Beings, implementation of human rights obligations, monitoring of human rights



I. Introduction

In Europe, it is widely agreed that, in order to respond effectively to trafficking in persons, ‘a holistic and integrated approach is needed which builds on the respect and promotion of human rights as its fundament’.¹ *The Council of Europe Convention on Action against Trafficking in Human Beings* (CoE Convention)² follows a primarily victim-oriented approach that is based on the recognition of trafficking in persons as a violation of human rights. The Convention entered into force in 2008. It includes a mechanism for monitoring the implementation by States Parties of their obligations under the Convention. Based on materials from five monitored States, this article identifies and discusses weaknesses of that monitoring mechanism. The analysis takes into account the GRETA questionnaire, the three published replies of parties to the questionnaire³ and the published final reports on the parties.⁴ Additionally, questions concerning the follow up of the implementation and the limited possibilities for the involvement of civil society in the monitoring process are discussed.

II. Monitoring Mechanism of the *Council of Europe Convention on Action against Trafficking in Human Beings*

The central mechanism of the monitoring process of the CoE Convention is GRETA: the Group of Experts on Action against Trafficking in Human Beings. GRETA commenced work in February 2009 and comprises 15 experts who are required to exercise their function independently and impartially. Civil servants are not barred from nomination; only persons holding decision-making positions within the government concerning

¹ Report of the EU Experts Group on Trafficking in Human Beings (2004) Brussels, . 63.

² CETS N° 197, adopted 3 May 2005, (hereinafter, CoE Convention).

³ Replies from Denmark (GRETA(2011)01), Bulgaria (GRETA(2011)2) and Georgia (GRETA(2011)6) to the Questionnaire for the evaluation of the implementation of the CoE Convention by the parties.

⁴ Report concerning the implementation of the CoE Convention by Austria GRETA(2011)10), Slovak Republic (GRETA(2011)9), Cyprus (GRETA(2011)8), Albania (GRETA(2011)22) and Croatia (GRETA(2011)20). This article analyses GRETA’s work until November 2011 concerning the first group of States Parties within the first evaluation round.

trafficking in human beings are ineligible.⁵ Nominated by States Parties, the members are elected by the political arm of the monitoring mechanism, the Committee of Parties.

GRETA undertakes its evaluations using three main sources: a questionnaire, which has to be answered by the State Party, information from civil society and subsidiaries, and if necessary, country visits. Based on these various sources of information, GRETA prepares its first draft report. The draft is forwarded to the State Party, which can comment on it. These comments have to be taken into account for the final report. The final report of GRETA is sent to the State Party, which can submit final comments. The final report is published together with the State Party's comments. Finally, the Committee of Parties may adopt recommendations for the State Party and request information about implementation of those recommendations. The evaluation process is organised in rounds, which last for four years each.⁶ Every round has a specific focus chosen by GRETA. Monitoring of the first group within the first round has almost been completed.

III. GRETA's Work in Practice: A review of the evaluation process and its opportunities and weaknesses

The monitoring process of the CoE Convention is unique in the field of trafficking in persons. A recent analysis of monitoring and evaluation mechanisms in the field of anti-trafficking confirms the relative paucity of independent or external evaluation.⁷ For example, the major international treaty on the subject, the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, does not mandate any external evaluation. The

⁵ Resolution CM/Res(2008)7 on rules on the election procedure of the members of the Group of Experts on Action against Trafficking in Human Beings (GRETA) (Adopted by the Committee of Ministers on 11 June 2008 at the 1029th Meeting of the Ministers' Deputies), Rule 3.

⁶ GRETA, Rules of procedure for evaluating implementation of the *Council of Europe Convention on Action against Trafficking in Human Beings* by the parties, Rule 2, Rules of procedure, THB-GRETA(2009)3.

⁷ C Hames, et al., *Feeling Good about Feeling Bad... A global review of evaluation in anti-trafficking initiatives*, Global Alliance Against Traffic in Women, Bangkok, 2010, pp. 10–11.

mechanism established under the CoE Convention does indeed qualify as an external evaluation mechanism: one that aims at compiling specific information on the integration of the human rights-based approach in actions taken by States Parties against trafficking in persons. Nevertheless, GRETA itself asks rather general questions on this issue which may make it difficult to assess whether this approach is implemented in all spheres of work against trafficking in human beings.⁸

The monitoring system of the CoE Convention can be usefully compared to the monitoring system established under the core UN human rights treaties.⁹ Common features are the existence of an independent expert body; the obligation on States Parties to submit a report to that body (in the case of the CoE Convention, a report containing answers to a questionnaire); and the issuing of concluding observations or recommendations in response to those reports. A clear difference between the monitoring systems, however, is that GRETA can conduct country visits¹⁰ without requiring specific permission from the State Party.¹¹ Additionally, GRETA elaborates its own detailed report while UN treaty monitoring bodies examine the State Party's published report and enters a constructive discussion with that State Party.¹² Under the CoE Convention, the input from the State Party is not published and there is no public dialogue between GRETA or the Committee of Parties and the State. Moreover, while the UN treaty bodies have generally encouraged and developed guidelines to civil society preparing so-

⁸ GRETA, Questionnaire for the evaluation of the implementation of the CoE Convention by the parties, GRETA(2010)1 rev, Section I.1 (hereinafter, GRETA questionnaire); C Hames, et al., p. 18.

⁹ For instance, the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1249 UNTS 13 (CEDAW), at Article 17-Article 22 and the Optional Protocol to CEDAW, 2131 UNTS 83; *Convention on the Rights of the Child*, 1577 UNTS 3 (CRC), at Article 43-Article 45; *International Covenant on Civil and Political Rights*, 999 UNTS 171 and 1057 UNTS 407 (CCPR), at Article 28-Article 45 and the Optional Protocol to CCPR, 999 UNTS 171.

¹⁰ Art. 38 (4) CoE.

¹¹ A Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, Cambridge, 2010, p. 476.

¹² M Nowak, *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, p. 97. See, for instance, Human Rights Committee, *Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights* (26 February 2001) (CCPR/C/66/GUI/Rev.2), G.1.

called “shadow” reports, GRETA has not done so. A further, important difference is that most of the UN human rights treaties permit individual complaints from individuals claiming violations of human rights to be received and considered by the relevant treaty body. The CoE Convention does not contain an individual complaints procedure as a further means of monitoring; consequently, GRETA is not endowed with this task.

The GRETA questionnaire

The evaluation process of the CoE Convention starts with the GRETA questionnaire, which aims to elicit an overview of the implementation of the CoE Convention by the State Party. As a consequence, the questions are fairly general. For example, the GRETA questionnaire asks States Parties whether trafficking in persons is considered a human rights violation in domestic law. Additionally, States Parties have to explain any special legal protection that exists under domestic law in cases of human rights violations.¹³ But the questionnaire does have gaps. For example, while the CoE Convention explicitly requires that parties promote a human rights-based approach in all prevention measures against trafficking in persons,¹⁴ the respective questions do not mention the human rights-based approach and only ask for details on ‘social and economic empowerment’ for disadvantaged groups.¹⁵ Similarly, while the CoE Convention requires a child rights approach in all anti-trafficking initiatives or actions,¹⁶ and also requires a number of child-specific actions, (such as conducting a risk assessment before returning a child),¹⁷ the questionnaire does not include such considerations. In summary, while the questionnaire is clearly an important tool, it should be strengthened through including more specific questions focusing on State Party implementation of their obligation to integrate an approach based on human rights as well as child rights.

¹³ GRETA questionnaire, Questions 4 and 5.

¹⁴ Article 5 (3) CoE Convention.

¹⁵ GRETA questionnaire, Questions 22 and 23.

¹⁶ Preamble, CoE Convention.

¹⁷ Article 16, para. 6, CoE Convention.

The replies of States Parties to the questionnaire

The replies of States Parties to the questionnaire could provide important insights. Although the CoE Convention does not pronounce on this point, GRETA decided that the responses must be confidential unless a State Party requests publication.¹⁸ Only three out of ten States Parties have decided to have their responses published. In comparison with the monitoring of the core UN human rights treaties, the decision to keep replies confidential is disadvantageous for civil society participation. Within the monitoring of UN human rights treaties, State Party reports are indeed published. For example, the *Child Rights Convention* (CRC) requires parties to make their reports under the CRC widely available in their own country when they are submitted to the monitoring body.¹⁹ As stated by the Committee on the Rights of the Child, ‘unless reports are disseminated and constructively debated (...), the process is unlikely to have substantial impact on children’s lives’.²⁰ Positive publishing practices are also evident in the context of other CoE conventions. For example, in respect of the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, although reports and comments of the parties are confidential, most parties have chosen to publish these documents.²¹ The confidentiality of State Party responses to the questionnaire hinders early public discussion at the national level. Additionally, if replies were published, civil society could be more focused in their reports to GRETA and in meetings with GRETA during a country visit. In short, States Parties should be encouraged, also by GRETA, to follow the example of Denmark, Bulgaria and Georgia, which have all published the replies.

A closer look into the small number of publicly available replies shows that publication has a positive impact on accountability of States Parties for their obligations under the CoE Convention. For example, States Parties are asked to indicate the budget that is allocated to prevention,

¹⁸ Rule 5, Rules of procedure, THB-GRETA(2009)3.

¹⁹ Article 44, para. 6, CRC and Committee on the Rights of the Child, CRC/GC/2003/5, 27 November 2003, General Comment No. 5, para. 72.

²⁰ Committee on the Rights of the Child, CRC/GC/2003/5, 27 November 2003, General Comment No. 5, para. 71.

²¹ See: CoE, The CPT in brief, retrieved 8 December 2011, <http://cpt.coe.int/en/about.htm>; and Art. 11 of *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CETS N° 126, adopted 26 November 1987.

assistance and protection measures.²² The published replies indicate concrete figures. Nevertheless, Denmark excludes amounts spent on prevention since the country is primarily a country of destination or transit and is therefore not spending money in this area.²³ The States Parties indicate how much is earmarked for the implementation of respective national action plans.²⁴ Publishing the allocated budget can support the public demand for increased transparency and accountability of public spending and would offer GRETA the chance to assess the efficiency of initiatives.²⁵ GRETA follows up on budgetary questions only partly, but welcomes increased budgets for activities against trafficking in human beings²⁶ and calls upon parties to dedicate appropriate funds for actions if there is no specific line in the federal budget.²⁷ Additionally, GRETA recommends that States Parties conduct periodic independent evaluations, for instance, in respect of national action plans in order to assess the impact of activities.²⁸

As mentioned above, the questionnaire does not include child-specific questions. In relation to the general question on the repatriation of trafficked persons, only Bulgaria described the return and repatriation of children; providing no information about the repatriation of men or women.²⁹ Denmark and Georgia do not include any information on this issue in their replies.³⁰

²² GRETA questionnaire, Questions 30 and 39.

²³ Reply from Denmark to the Questionnaire for the evaluation of the implementation of the CoE Convention by the parties GRETA(2011)01 (hereinafter, Reply from Denmark to the Questionnaire), pp. 23–24.

²⁴ For example, Georgia spends approximately Euro 300,000 (US\$ 403,844) for assistance and protection measures annually; Denmark earmarked Euro 183,000 (US\$ 246,377) for IOM which prepares the return of trafficked persons (three have been repatriated from Denmark in 2008, seven in 2009) and the Bulgarian budget of the National Commission for Combating Trafficking in Human Beings including regional centres and shelters is Euro 151,342.40 (US\$ 203,790.9).

²⁵ C Hames, et al., p. 16.

²⁶ Report concerning the implementation by the Slovak Republic, GRETA(2011)9, para. 97.

²⁷ Report concerning the implementation by Austria, GRETA(2011)10, p. 37.

²⁸ Report concerning the implementation by Croatia, GRETA(2011)20, p. 32.

²⁹ Reply from Bulgaria to the Questionnaire, GRETA(2011)2, p. 35. In 2008, 25 trafficked children returned to Bulgaria; in 2009, 16 children.

³⁰ Reply from Georgia to the Questionnaire, GRETA(2011)6, p. 85. Reply from Denmark to the Questionnaire, GRETA(2011)01, p. 31.

The questionnaire also requests detailed quantitative data, which would be an opportunity for securing important comparable data in Europe on trafficking in persons. However, the published replies show that the data provided is not complete. For example, all States Parties are required to provide information on compensation for trafficked persons and to indicate how many persons actually received any form of compensation. While States Parties publishing their replies explained the existing legal structure for receiving compensation, no further information (e.g. on cases settled or amounts of compensation provided) was given.³¹ The issue of compensation is usually closely linked to that of the confiscation of the assets of perpetrators. The question of the exact number of judgments leading to the confiscation of perpetrators' assets also remains unanswered.³² Another example is the obligation of States Parties to consider not punishing trafficked persons for their involvement in unlawful activities within the trafficking process ('non-punishment clause'). The general application of a 'non-punishment clause' is explained by States Parties. However, concrete information on how many persons actually benefitted from this is not given.³³ GRETA does seem to follow up missing data in the final reports: for example, recommending improved access to compensation for trafficked persons.³⁴ GRETA has also explicitly asked Cyprus whether there have been any cases of confiscation.³⁵ With regard to the non-punishment clause, GRETA has noted the need for further measures concerning its effective implementation.³⁶

³¹ GRETA questionnaire, Statistics on Trafficking in Human Beings, T11 and T12.

³² GRETA questionnaire, Statistics on Trafficking in Human Beings, T20, and GRETA(2011)01, p. 46 and 56 and GRETA(2011)2, pp. 50 and 60.

³³ GRETA questionnaire, Statistics on Trafficking in Human Beings, T22, and GRETA(2011)01, p. 46 and 57 and GRETA(2011)2, pp. 50 and 60.

³⁴ See, for example, the Report concerning the implementation of the CoE Convention by the Slovak Republic, GRETA(2011)9, p. 38 in which 'GRETA urges the Slovak authorities to take the necessary legislative and practical measures to ensure that compensation is made available to all victims of THB' (hereinafter Report concerning implementation by the Slovak Republic).

³⁵ Report concerning the implementation by Cyprus, GRETA(2011)8, para. 173.

³⁶ See, for example, the Report concerning the implementation by Austria, GRETA(2011)10, p. 40.

GRETA's reports on the States Parties

In addition to the replies of States Parties to the questionnaire, GRETA gathers information from various sources including civil society, as well as from its country visit. All this information is used in the making of the final report. As noted above, this article is based on five such reports. In respect of country visits, those reports show that these are typically conducted by two members of GRETA, accompanied by a member of the secretariat of the CoE Convention.

The reports follow the structure of the questionnaire, but not every question is addressed in the final report. For example, GRETA requires information about social and economic empowerment measures for disadvantaged groups vulnerable to being trafficked.³⁷ However, this issue is only discussed in the report on Slovakia—predominantly a country of origin of trafficked persons, according to Slovak authorities.³⁸ With respect to this issue, the Slovak report shows that GRETA insists on specific and detailed information and does not accept general or unspecific answers. It also examines the quality of the measures. For example, GRETA found that the provision of general information on a legal act on social services and the inclusion of an activity in the Slovak national action plan against trafficking in persons entitled ‘Strengthening of the existing socio-economic measures regarding risk groups of inhabitants against trafficking in human beings based on research outputs on the profile of the THB victims’, was not sufficient. GRETA requires more information on what exactly is planned, and recommends implementing more systematic and robust economic, social and educational measures.³⁹

Requests for detailed information seem to lead to detailed recommendations. Slovakia, for example, reported on a prevention campaign implemented in cooperation with the International Organization for Migration (IOM), and preventive work in schools and communities implemented by police officers. In commenting on these activities, GRETA stressed that it is ‘important that the measures go beyond the “criminal law” understanding of prevention of THB and

³⁷ GRETA questionnaire, Question 23.

³⁸ Report concerning the implementation by the Slovak Republic, GRETA(2011)9, para. 9.

³⁹ *Ibid.*, para. 66–67.

aim at creating sufficient awareness among people enabling them to make well-informed decisions concerning employment or migration offers'.⁴⁰ Concerning Austria, GRETA points out that further awareness-raising measures, especially focusing on child trafficking and trafficking for the purpose of labour exploitation, should be implemented and that trade unions and labour and tax inspectors should be targeted, among others.⁴¹

The issue of follow up—what happens once GRETA's report is finalised—is an important one. To date, the Committee of Parties has recommended that States Parties implement all proposals elaborated by GRETA in its report.⁴² In this respect, it is relevant to note that the CoE Convention's provisions on internal follow up of recommendations appear to be rather weak. According to Article 38(7), the Committee of Parties is only required to set a date for submitting information on the implementation of the recommendations 'if necessary'. The Committee so far has required every State Party to report back on the implementation of the recommendations within two years.

Inclusion of civil society in the monitoring process

The CoE Convention acknowledges the important role of civil society in many aspects of the national response to trafficking.⁴³ It follows that civil society should play a strong role in monitoring. GRETA invited Amnesty International, Anti-Slavery International and La Strada International to a hearing when preparing the first round of evaluation.⁴⁴ In all five final reports, it has stressed that information has also been received from civil society. Each report contains a list of non-governmental organisations that GRETA met during the country visit.⁴⁵

⁴⁰ *Ibid.*, para. 56–59.

⁴¹ Report concerning the implementation by Austria, GRETA(2011)10, para. 71.

⁴² Committee of the Parties to the CoE Convention, Recommendation CP(2011)1 (Austria), Recommendation CP(2011)2 (Cyprus), Recommendation CP(2011)3 (Slovak Republic), 6th meeting of the Committee of the Parties, 26 September 2011.

⁴³ See: *inter alia* Chapter VI of the CoE Convention.

⁴⁴ GRETA, First General Report on GRETA's activities covering the period from February 2009 to July 2011, GRETA, (2011)11, para. 62.

⁴⁵ Report concerning the implementation by Cyprus, GRETA(2011)8, p. 46; Report concerning the implementation by Austria, GRETA(2011)10, p. 41; Report concerning the implementation by the Slovak Republic, GRETA(2011)9, p. 40; Report concerning the implementation by Albania, GRETA(2011)22, p. 45; Report concerning the implementation by Croatia, GRETA(2011)20, p. 35.

Nevertheless, the possibilities for civil society in the monitoring process are restricted. First, information about whether trafficked persons themselves are consulted during the country visits was not provided in the reports. One may conclude that a consultation with victims did not take place throughout the monitoring process. Second, states can include civil society when preparing the reply to the questionnaire, but this is not mandatory.⁴⁶ Out of the three published replies, only Georgia included civil society in the preparation of its response.⁴⁷ Third, the replies are not required to be published, so commenting on the replies for civil society is difficult. In addition, unlike the international human rights treaty bodies, GRETA has not specifically encouraged shadow reporting in order to support its own information gathering, or provided guidance on how this should happen. Noticeably, only a small number of shadow reports were prepared during the first round⁴⁸ and these were not published on the official website of the CoE.

IV. Conclusion

The existing monitoring process including GRETA and the Committee of Parties allows, to a certain extent, civil society inclusion and, in comparison to other legal instruments regarding trafficking in persons, provides important opportunities for raising the accountability of parties. Nevertheless, the monitoring process needs to be developed further, with the active involvement of monitoring bodies, States Parties and civil society.

GRETA's next questionnaire should focus more specifically on human rights obligations of States Parties to the CoE Convention, with specific reference to their anti-trafficking efforts. It should include, for instance, questions on the non-discrimination principle or on the protection of children's rights. The confidentiality of the parties' replies not only lowers the chance of securing comparable data on trafficking in human beings in Europe, it also clearly impedes the participation of civil society in the monitoring process. Consequently, GRETA should encourage all parties to publish their replies.

⁴⁶ C Hames, et al., p. 17.

⁴⁷ Reply from Georgia to the Questionnaire, GRETA(2011)6, p. 5.

⁴⁸ See, for example, La Strada Moldova, *Evaluation of the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties*, La Strada, Chisinau, 2010.



Systematised shadow reporting would greatly support the effective monitoring of the CoE Convention and increase accountability of States Parties. GRETA should, therefore, publicly confirm that shadow reports are welcome, provide a basic structure for such reports and ensure they are published on its website. These steps could motivate more NGOs to provide valuable information. Civil society should continue its work after the formal monitoring process has been completed by using the adopted recommendations for advocacy and by monitoring the State Party's implementation of recommendations.

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Accountable to Whom? Accountable for What? Understanding anti-child trafficking discourse and policy in southern Benin

Neil Howard

Abstract

In Benin, anti-child trafficking discourse misrepresents the nature of youth labour migration, while anti-child trafficking policy fails to protect those “beneficiaries” in whose name it is officially designed. Despite this, both have remained stable for over a decade. This paper attempts to explain why. It argues that, in contrast to claims made by many other critiques of anti-trafficking work that policy makers are either ignorant or malevolent, here discourse and policy are hampered more by the conceptual, institutional and political structures within which they are developed and articulated by individuals, thereby ensuring discursive and policy stability despite inaccuracy and failure.

Keywords: child labour migration, child trafficking discourse, anti-trafficking policy, Benin

Neil: You've got a lot of experience in this field, haven't you?
Carl: Yeah, nine years, and all it's taught me is
how to navigate a bureaucracy.¹

Introduction

The story behind this paper begins in 2005. Fresh-faced and naïve, I travelled to Benin to start working with a child rights NGO on the topic of child trafficking. Well-versed in the standard horror stories, I quickly learnt, through meeting young labour migrants, “victims of trafficking”, and their communities, that all was not quite as it seemed. As with elsewhere in the world,² a disjunct existed between the way institutions *represented* and responded to “trafficking” and the “trafficked”, and the way the trafficked understood and represented themselves. My research has been designed to explore this disjunct, and has sought to ask what sustains it. Where answers often point to Machiavellian politicians uninterested in the lives of the poor, in what follows, I will offer a different analysis. I will argue that inertia, stability and resistance to change within anti-trafficking discourse and policy result from the discursive, institutional and political constraints within which they are elaborated. The paper begins with a background to the emergence of child trafficking as an issue for concern in Benin and explains the research I have conducted into it. It briefly identifies the gap between narrative and reality and that between current and optimal

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- ¹ All names of individuals, institutions and villages have been either changed or anonymised to protect the identity of informants. Details can be provided on request. Unless otherwise indicated, all translations from French are my own.
- ² See, for example, L Agustin, ‘Migrants in the Mistress’s House: Other voices in the “trafficking” debate’ *Social Politics*, vol. 12, no. 1, 2005, pp. 96–117; E Alber, ‘Child Trafficking in West Africa’ in A M Gonzalez, et al. (eds), *Frontiers of Globalization: Kinship and family structure in Africa*, Africa World Press, London, 2011, pp. 71–93; R Andrijasevic, ‘The Cross-Border Migration’ in R Andrijasevic (ed.), *Migration, Agency and Citizenship in Sex Trafficking*, Palgrave Macmillan, Basingstoke, UK, 2010; T Bastia, ‘Child Trafficking or Teenage Migration? Bolivian migrants in Argentina’ *International Migration*, vol. 43, no. 4, 2005; S Castle, and A Diarra, *The International Migration of Young Malians: Tradition, necessity or rite of passage?* School of Hygiene and Tropical Medicine, London, 2003; A de Lange, ‘Child Labour Migration and Trafficking in Rural Burkina Faso’ *International Migration* vol. 45, no. 2, 2007, 147–167; M Dottridge, ‘Introduction’ in M Dottridge (ed.) *Collateral Damage: The impact of anti-trafficking measures on human rights around the world*, GAATW, Bangkok, 2007.

policy. Subsequently, it grounds its analysis in the work of discourse theorists such as Norman Fairclough and Michel Foucault and development ethnographers such as David Mosse.

Setting the Scene

Human trafficking exploded as an issue in Benin with *the Etireno affair* in 2001. The Etireno was a Nigerian trawler used by people-smugglers to illegally transport Beninese and other West African children³ to Gabon. After a complex series of events involving law enforcement and diplomatic personnel from various countries, the ship and its passengers were left stranded at sea, prompting local child protection organisations to raise the alarm and the world's media to descend on the region in order to report on 'the slave ship' that heralded the uncovering of 'a modern-day slave trade'.⁴ Benin was quickly identified as an epicentre of the traffic in children, and the government responded by ratifying the UN Trafficking Protocol,⁵ opening its doors to an influx of anti-trafficking money, and jointly establishing various anti-child trafficking initiatives.

The definition of child trafficking in operation in the country broadly classes the crime as any part of the process of '(coerced) movement for the purpose of exploitation'. As per Article 3(c) of the Trafficking Protocol, a minor's consent to engaging in activities defined as 'exploitative' is deemed juridically irrelevant, such that these activities (and anything facilitating them) are thus always seen to constitute trafficking. Within both the Trafficking Protocol and Benin's national

³ Though I consider "children" and "childhood" to be situational concepts varying according to time, place, culture and social structure, amongst other things, the institutional literature and policy I am examining take "children" to be those under the biological age of 18 and "childhood" thus to be the period before one reaches that age. Since I am reflecting on the appropriateness of these institutional understandings and policies, I have decided to engage with them on their own terms, and have therefore used the same criteria throughout this study. In my study, however, I focused almost entirely on adolescent migrants, and the word "child" will be used interchangeably with "youth" unless otherwise specified.

⁴ *The Independent*, 18 April 2001, <http://www.independent.co.uk/news/world/africa/mystery-of-missing-children-as-slave-ship-docks-681766.html>.

⁵ *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime*, UN General Assembly, New York, 2000.

legislation, exploitation comprises a non-exclusive list of situations, including forced labour, slavery or servitude, but also, in Benin, work which ‘by its nature and/or the conditions in which it is exercised, may damage the health, safety or morals of the child’.⁶ This draws on the International Labour Organisation (ILO)’s related anti-child labour framework, according to which those activities deemed inherently exploitative include work in:

mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.⁷

In practice, this has led to the *de facto* criminalisation of most of the remunerated activity in which young people engage in Benin. My research into the appropriateness of this criminalisation and into the operation of anti-trafficking policy more broadly in Benin consisted of 14 months of multi-sited fieldwork, during which I interviewed more than 300 people and observed and worked with individuals and institutions at every level of the anti-trafficking policy chain. I focused at the institutional level on those bodies that are at the heart of producing and sustaining the anti-trafficking discourse in Benin, and at the forefront of forming and implementing anti-trafficking policy, both in Cotonou, Benin’s *de facto* capital, and throughout the country more widely. These bodies include: UNICEF and the ILO, from among the international organisations working in this field; the US Departments of Labour and of International Development, the Danish Development Agency, the EU and France, from the donor community; the Family and Justice Ministries, from within the Beninese government; and a collection of national and international child-focused NGOs operating in Benin.

At the community level, I concentrated my research entirely in the south of the country, principally because, in Benin, the “hub” of child labour, trafficking and exploitation has been widely identified as the

⁶ LOI N° 2006-04 du 05 avril 2006 *Portant répression des auteurs de traite et conditions de déplacement des mineurs en République du Bénin*, Cotonou: Présidence de la République.

⁷ Article 3 of International Labour Office, *Convention Concerning Minimum Age for Admission to Employment*, ILO, Geneva, 1973.

poor, agricultural Zou Department, from which teenage boys frequently leave to work in the gravel pits of Abeokuta in Western Nigeria and girls leave for domestic work in the major coastal cities. Within this department, two communes—Zakpota and Zogbodomey—have been identified as particularly affected by the above-mentioned phenomena. I thus selected four case-study villages, two from each commune, two with flagship “village child protection committees” and two without. In these villages, I used various participatory techniques, including principally open-ended individual and group interviews, the focus of which was on how people see their life-worlds, how they experience and view (hazardous) youth work and movement, and what they have to say about current anti-trafficking interventions. In total, I interviewed 109 adults and 61 adolescents from these villages. Additionally, I interviewed 15 adults and 28 adolescents from various other locations in southern Benin, during my Masters fieldwork in 2007. The current and former youth migrants I interviewed were predominantly male, since I was principally examining adolescent male labour migration to the gravel pits and surrounding areas in Nigeria; I did however interview a number of female former domestic servants in institutional care.

The data have been carefully coded and continually analysed with relevant actors over the course of the research’s unfolding and in subsequent return trips. Though my sample does provide a good cross-section of deep, qualitative data, it is not statistically representative and should not be read as such.

Narratives, Policies and their Discontents

The dominant institutional narrative around trafficking in Benin holds that trafficking is a major problem in the country and involves unsuspecting children being forced away from home and into exploitative work, largely as a result of pathological cause-factors, ranging from grinding poverty to the corruption of traditional practices and parental irresponsibility.⁸ This narrative is illustrated in the extract below, from an emblematic briefing paper written for the US Secretary of Labor, on the event of his visit to Benin as part of the US “war on trafficking”:

⁸ See: N P Howard, *Independent Child Migration in Southern Benin: An ethnographic challenge to the “pathological” paradigm*, VDM Verlag & Co., Saarbrücken, 2008; E Alber, ‘Child Trafficking in West Africa’ in A M Gonzalez, et al. (eds), *Frontiers of Globalization: Kinship and family structure in Africa*, Africa World Press, London, 2011, pp. 71–93.

Child trafficking is a multifaceted phenomenon in West Africa. It started with parents placing their children with relatives. That placement is called in Fon, one of southern Benin languages [sic], “vidomegon”. The culture of vidomegon, originally allowed more fortunate members of the community to receive the children of less fortunate members, in a climate of solidarity. The idea is that by confiding a less fortunate child in the home of someone who is better endowed economically, that child will be better taken care of. This practice is rampant all over West Africa. However, over time the practice has been abused by individuals who have sought financial rewards, resulting in a behavior where children are given to traffickers, who in turn sell them to agents in neighboring countries. Victims of this new practice are reduced to mere commodities that are bought, sold, transported, and resold according to market forces of supply and demand. Most trafficked children are threatened with physical and emotional abuse, and nearly all suffer from neglect or diseases. Poverty is one of the causes of child labor and trafficking in Benin.⁹

Against such a discursive backdrop, it should come as no surprise that anti-child trafficking policy is highly interventionist in Benin, with emphasis placed on the prevention of exploitative work by the preemptive thwarting of the migration seen to lead to it.¹⁰ Measures include the strengthening of border patrols, enhanced cooperation with Nigeria on trans-border surveillance, widespread anti-work and anti-movement “sensitisation” or “responsibilisation” campaigns, the promulgation of the *Law Regulating the Movement of Minors and Suppressing the Traffic in Children*, and the establishment of village vigilance committees expected to prevent youth labour migration at the village level.¹¹ Poverty is also addressed, though only through individualised schemes involving the promotion of apprenticeships.¹² Though tens of millions of dollars have been invested in these initiatives, my qualitative research with young labour migrants and their communities strongly suggests that they fail. Young people still

⁹ Briefing Paper for USDOL Secretary Chao: ‘Mission’s Intervention in the Fight Against Child Trafficking in Benin’, 17 November 2003.

¹⁰ MFE and ILO, *Plan d’Action National De Lutte Contre La Traite Des Enfants A Des Fins d’Exploitation De Leur Travail*, MFE and ILO, Cotonou, 2008.

¹¹ *Supra* note 8.

¹² N P Howard, ‘Promoting “Healthy Childhoods” and Keeping Children “At Home”’: Beninese anti-trafficking policy in times of neoliberalism’ *International Migration*, forthcoming.

migrate and they still work. Indeed, these extracts from my notes are indicative of the answers I received when I asked them whether people pay heed to anti-trafficking efforts:

Have some of you ever been away to do holiday work? Yes, every single one of us! That is what allows us to continue at school! You can go to Nigeria or Savé and earn 30,000 or 40,000 FCFA in a summer. **What work do you do?** In Savé, it is the land. In Nigeria, it is the land but also the quarries. **How is it?** It's hard but it's ok. **Do NGOs, white people or the government come here and say that it's bad?** Yes, loads. **Why?** Because they see that it can be hard, but they offer us no alternative. **What do you say to them?** When they come and speak to us, their words go in one ear and come out the other. We listen and then we ignore them.¹³

How do you go about getting around the authorities? They said the state has set up village committees all over the place, but these are corrupt. We can easily turn them and take kids away, no problem. There are also many paths that you can take towards and across the border and the state has no idea about them all. The police sit there and guard the ones they know about and so we just take the others. The state is really stupid. Sometimes we even take kids down to Cotonou and then, under the nose of Yayi Boni [Benin's President], we take them on a boat to Nigeria or Gabon.¹⁴

My research into community understandings of youth work and migration offers an indication of why this might be the case. In contrast to the institutional discourse which paints most work and migration as exploitation and trafficking, young labour migrants and their communities see their work and migration as both *necessary and highly constructive*. Central to this understanding is the well-founded belief that economic opportunity is concentrated away from the resource- and capital-poor village and that labour migration thus represents the only viable path to a better future, since it allows them to access money and bring it home. In the words of one adolescent former migrant labourer:

¹³ Boys in Interview with Group 14, Sehere Village, 14/5/2010.

¹⁴ Man in interview with Group 2, General Zou, 12/4/2010.



We don't have the same view [as the authorities]. We think that leaving can be good, especially as it is a way to find money, or to come back and put a roof on your father's house.¹⁵

In the absence of policies which directly target the very clear, structurally-influenced material underpinnings of youth labour migration in Benin,¹⁶ these views are unlikely to alter.

And Yet Things Remain Unchanged...?

Despite the inaccuracies within the trafficking narrative and the failures of trafficking policy, little has changed over the past ten years. The major questions posed by my research, therefore, are: how is it that discourse and policy can get it so wrong? and why have they not developed? Research from similar contexts identifies policy-maker ignorance or politicised malevolence as an explanation, suggesting that relevant actors either fail to understand ground-level realities or remain uninterested in addressing them.¹⁷ I believe this to be reductive. Indeed, it attributes too much agency to those in power and fails to take sufficient account of the power of the structures within which they operate. In this section, then, I seek to offer a more nuanced explanation for discursive and policy stability. I will do so by deploying discourse theory and by focusing on the importance of “orders of discourse” (and of powerful actors in structuring those orders) in framing and constraining both policy-maker understandings and policy choices.

¹⁵ Interview, Non School-Going Group, Tenga Village, 16/4/2010.

¹⁶ This will be further discussed below. See also N P Howard, 'Protecting Children from Trafficking in Benin: The need for politics and participation' Special Issue of *Development in Practice*, forthcoming.

¹⁷ See, for example, C Ausserer, 'Control in the Name of Protection: A critical analysis of the discourse of international human trafficking as a form of forced migration' in N P Howard and M Lalani (eds), 'The Politics of Human Trafficking' *St Antony's International Review (STAIR)*, vol. 4, no. 1, 2008; J Davies, 'How to Use a Trafficked Woman: The alliance between political and criminal trafficking organisations' *Recherches Sociologiques et Anthropologiques*, vol. 1, 2008, pp. 114–131.

Orders of discourse

According to Van Dijk, discourse is ‘an essentially fuzzy concept’ while, for authors such as Gee, it can include, at its most basic, any instance or form of communicative action.¹⁸ In more complex usages, the term also refers to systems of meaning and histories of multi-semiotic interaction. In this paper, I will be following theorists such as Fairclough and Foucault in understanding discourse as short-hand for ‘relatively stabilized configurations of discourse practices’,¹⁹ or ‘orders of discourse’,²⁰ by which is meant ‘systems of thought composed of ideas, attitudes, courses of action, beliefs and practices that systematically construct the subjects and the worlds of which they speak’,²¹ as well as being constructed by them. As Candlin explains, this denotes ‘a means of talking and writing about and acting upon worlds...which both constructs and is constructed by a set of social practices within these worlds, and in so doing both reproduces and reconstructs afresh particular social-discursive practices, constrained or encouraged by more macro movements in the overarching social formation’.²² In other words, discourse, as it is understood here, is a set of relatively stable, linguistically expressed *social understandings of phenomena*, continually (re)constituting and being (re)constituted by the practices of individuals within time and space. In this section, I will reflect on two of the core social understandings I believe to lie at the root of anti-trafficking narratives and anti-trafficking policy in Benin. These understandings are (western notions of) childhood and neoliberalism.

¹⁸ T A Van Dijk (ed.), *Discourse as Structure and Process*, SAGE, London, 1996, p. 1; J P Gee, *An Introduction to Discourse Analysis: Theory and method*, 2nd Edition, Routledge, New York, 2005.

¹⁹ N Fairclough, *Critical Discourse Analysis: The critical study of language*, Longman, New York, 1995, p. 2.

²⁰ M Foucault, *The Order of Things: An archaeology of the human sciences*, Routledge, London, 1969; *Discipline and Punish: The birth of the prison*, Gallimard, Paris, 1977; (1980a), ‘Prison Talk’ in C Gordon (ed.), *Power/Knowledge: Selected interviews and other writings 1972–1977*, Pantheon, New York, 1980a; ‘The History of Sexuality’ in C Gordon (ed.), *Power/Knowledge: Selected interviews and other writings 1972–1977*, Pantheon, New York, 1980b; ‘Truth and Power’ in C Gordon (ed.), *Power/Knowledge: Selected interviews and other writings 1972–1977*, Pantheon, New York, 1980c; ‘Two Lectures’ in C Gordon (ed.), *Power/Knowledge: Selected interviews and other writings 1972–1977*, Pantheon, New York, 1980d.

²¹ I Lessa, ‘Discursive Struggles Within Social Welfare: Restaging teen motherhood’ *British Journal of Social Work*, vol. 36, no. 2, 2006, pp. 283–298, p. 285.

²² In A Jaworski and N Coupland, *The Discourse Reader*, 2nd Edition, Routledge, London, 2006, p. 2.

Childhood

Within the anti-trafficking community working in and on Benin, a very particular notion of what childhood is and should be persists. In contrast to localised understandings of childhood and child development, the policy establishment here betrays a very rigid, westernised conception of childhood that centres on the belief that children are inherently vulnerable, that they are in need of protection from work, and that their development can only be guaranteed at home and at school. Gidi, for instance, is a senior Beninese government official. In one interview we conducted, she explained that as a result of her country's anti-trafficking work, 'people are finally understanding what it means to be a child'.²³ In her view, this meant a vulnerable school-goer who should be protected from work. Similarly, Veronica, a local-level Beninese official, argued that all people under 18 are children, they are still developing and therefore they must be prevented from migrating for work even if they want to.²⁴ Why, one may ask. Because, in the words of Cyril, Veronica's colleague: 'When we send children away, they end up missing out, so it's better if a child stays here. That way he has more chance of developing correctly, of becoming a man tomorrow.'²⁵

As has been argued extensively elsewhere,²⁶ though these understandings reflect norms which emerged in, and are particular to, the socio-historical and economic context of the industrialising/ industrialised West, they have become globalised through their centrality to the operations of international child protection institutions.²⁷ As such, they frame the (understandings of the) individuals and bodies working across the anti-child trafficking field. And, as Dorte Thorsen has argued in her work on anti-child trafficking discourse and policy in Burkina Faso, they are 'instrumental at policy-level in condemning adolescents' migration and attracting funding for

²³ Interview with Gidi, 11/3/2010.

²⁴ Interview with Veronica, 7/4/2010.

²⁵ Interview with Cyril, 7/4/2010.

²⁶ M Bourdillon, et al., *Rights and Wrongs of Children's Work*, Rutgers University Press, New Jersey, 2011.

²⁷ See: J Boyden, 'Childhood and the Policy Makers: A comparative perspective on the globalisation of childhood' in A James and A Prout (eds), *Constructing and Reconstructing Childhood: Contemporary issues in the sociological study of childhood*, Falmer Press, London, 1997, pp. 190–216; D Thorsen, '“If Only I Get Enough Money for a Bicycle!” A study of child migration against a backdrop of exploitation and trafficking in Burkina Faso' Occasional Paper, Centre for African Studies, University of Copenhagen, 2007.

projects aimed to “protect” and repatriate rural children and youth on the move’.²⁸ This has, of course, also been the case in Benin, where anti-trafficking strategy relies on attempts to keep under-18s at home and in school, and to criminalise work that is viewed through the lens of international norms as *de facto exploitative* and *de facto bad* for children.

Neoliberalism

The second major framing discourse in operation within Benin’s anti-trafficking world is that of neoliberalism. Whilst debate abounds as to what exactly neoliberalism constitutes, there is general agreement that it represents ‘a political philosophy of governance...premised on a mantra of market rationality and on the active encouragement of laissez-faire economic systems’.²⁹ It involves a reduction of the state’s role as service-provider and labour protector,³⁰ privatisation of state resources, the acceptance of pre-existing distributions of wealth and power, and the placing of responsibility for economic well-being firmly on the shoulders of the individual economic agent—in Foucault’s terms, the *homo economicus*, whose duty it is to maximise himself as a vehicle of capital and self-advancement.³¹

That such a philosophy underpins the work of the Beninese state and its partners in their fight against child trafficking is best illustrated by an examination of the way in which poverty—apparently the prime cause of trafficking—is understood and responded to in the country. Almost always, poverty is constructed as *a pre-existing, a-political fact that is just out there*. In the National Anti-Trafficking Plan of Action, there is no discussion whatsoever of why people are so poor that they apparently allow their children to be exploited, or which

²⁸ D Thorsen, *ibid.* p.7.

²⁹ K Mitchell, ‘Neoliberal Governmentality in the European Union: Education, training, and technologies of citizenship’ *Environment and Planning D: Society and Space*, vol. 24, 2004, pp. 389–407, p. 389.

³⁰ See, for instance, V Sewpaul and D Holscher, *Social Work in Times of Neo-Liberalism: A post-modern discourse*, Van Schaik, Pretoria, 2004.

³¹ G Burchell, et al., *The Foucault Effect: Studies in governmentality*, University of Chicago Press, Chicago, 1991, pp. 36–40.



relations of power underpin their poverty.³² Similarly, in my interviews with policy makers, only one of over a 100 institutional employees independently elaborated on Benin's poverty beyond simply acknowledging that it was a reality. Indeed, when I suggested that we take time to reflect on where that poverty comes from, reactions ranged from blank stares to periods of silence.

This is further reflected in the way in which anti-trafficking policy seeks to address poverty. Not only does it avoid directly targeting the structural underpinnings of youth work, movement and the poverty which frames it, but when it does “tackle poverty”, it does so through the individualised promotion of apprenticeships, school bursaries or family-based income generating activities. Poverty is thus conceived here as an issue of personal responsabilisation, with individuals moulded to become the self-sufficient, independent and market-oriented economic actors embodied by the *homo economicus* who adapts himself to pre-existing economic conditions.³³

Bringing power back in – vertical constraints

In his seminal discussion of *Critical Discourse Analysis*, Norman Fairclough follows Foucault in arguing that although structures and agents do interact in forming orders of discourse, we should not be blind to the fact that some agents have more power than others in setting and maintaining the stability of these orders. He writes:

The power to control discourse is...the power to sustain particular discursive practices with ideological investments in dominance over other alternative (including oppositional) practices....Power is conceptualized both in terms of asymmetries between participants in discourse events, and in terms of unequal capacity to control how texts are produced, distributed and consumed (and hence the shape of texts) in particular sociocultural contexts.³⁴

³² Ministère de la Famille et de l'Enfant (MFE) and ILO, *Plan D'action National De Lutte Contre La Traite Des Enfants A Des Fins D'exploitation De Leur Travail*, MFE and ILO, Cotonou, 2008.

³³ N P Howard, 'Promoting "Healthy Childhoods" and Keeping Children "At Home": Beninese anti-trafficking policy in times of neoliberalism' *International Migration*, forthcoming.

³⁴ N Fairclough, *op. cit.*, pp. 1–2.

Critical discourse analysis is thus a method for studying the ‘connections between language, power and ideology’, a means of deconstructing both ‘how power relations constrain and control productivity and creativity in discourse practice, and how a particular relatively stabilized configuration of discourse practices (“order of discourse”) constitutes one domain of hegemony’.³⁵ In the case of Beninese anti-trafficking policy, my research reveals very real exercises of power in both constructing and maintaining neoliberalism and western childhood as the base-level operative orders of discourse.

In the case of neoliberalism, this is again best illustrated by examining the way in which poverty is understood. In Benin, cotton is the major cash crop. It accounts for around 5 per cent of the GDP and almost 40 per cent of the country’s export receipts.³⁶ Unlike in many other contexts, it is principally a household industry and provides income for thousands of families, including in the area where I conducted my ground-level research. When prices are high, people benefit, with more farming children in school, less migration for work and small-scale household projects being realised. Apart from the spike recorded over the past few months, cotton prices have been at record lows for over a decade, in large part due to illegal US subsidies, recognised as culpable by the WTO in a case brought by Brazil to its Appellate Body.³⁷ Many policy makers know this. Yet, when asked why they do not therefore advocate a removal of subsidies as part of the fight against the poverty that underpins trafficking, they admit that doing so is either beyond their organisational capacity or *politically impossible*. Rose, for example, is a senior UN figure working in Cotonou. She explained that her institution could do nothing about such structural issues because it was ‘politically unacceptable’.³⁸ Matt, a key US government figure, said that while he would like to raise the issue, he was doubtful of success because there were ‘big interests to fight’.³⁹ Sandra, a senior donor government employee based in Benin, offered a similar assessment, after which I made the following notes:

³⁵ *Ibid.*

³⁶ OECD Sahel and West Africa Club Secretariat, *Economic and Social Importance of Cotton Production and Trade in West Africa: Role of cotton in regional development, trade and livelihoods*, OECD, Paris, 2005, p. 20.

³⁷ D A Sumner, ‘U.S. Farm Programs and African Cotton’ IPC Issue Brief 22, International Food & Agricultural Trade Policy Council, Washington, DC, 2007.

³⁸ Interview with Rose, 29/9/2009.

³⁹ Interview with Matt, 16/9/2009.

I asked about the structural focus she mentioned earlier. What does this entail? Are the subsidies mentioned? Yes, she said, the effects of this are taken into account, but only at the ground level. *They can't talk about the top level.* Their last reference is the national level, the government. I mentioned the hypocrisy of what westerners do and she said yes, *some of the foreigners here in Benin know that their policies cause poverty and trafficking. Many of them even want to change it, but they can't.*⁴⁰

In this policy world, then, discussion of the forces that create poverty is off-limits. As per the neoliberal order of discourse, pre-existing distributions of wealth and the relations of power that underpin them are taken not only as given but beyond questioning, with powerful actors ensuring that this remains the case.

The same is also true with the discursive order of western childhood. Though, as explained above, Benin's anti-trafficking legal framework demands the blanket abolition of work defined as exploitative, some policy makers are aware that this is impractical and accept that what constitutes exploitation will vary from place to place. Some therefore advocate the adoption of a *regulatory* as opposed to an *abolitionist* framework, based on the recognition that work can be positive for many children and that abolition often fails.⁴¹ Despite this, however, when I asked senior figures from the anti-child labour bodies fighting trafficking in Benin why they did not pursue a regulatory instead of an abolitionist line, I was told flatly that this was impossible because it did not fit with institutional discursive norms. What if children have no alternative but to migrate for work? I asked Handel, who had global responsibility for his organisation's anti-trafficking programme. 'It doesn't matter,' he responded, 'we cannot finance anything that disagrees with our normative framework. We have to be consistent with our positions even if children are working. If not, in twenty years, where will we be?'⁴²

⁴⁰ Interview with Sandra, 17/2/2010.

⁴¹ M Bourdillon, et al., 'Re-assessing Minimum-age Standards for Children's Work' *International Journal of Sociology and Social Policy*, vol. 29, no. 3/4, 2009, pp. 106–117.

⁴² Interview with Handel, 21/5/2009.

The need for representational harmony

Handel's rigidity points to a further issue of major importance. In this policy world, great emphasis is placed on the importance of *representational harmony*, such that policy and its justifying narratives are depicted as accurate, appropriate and coherent even where they are not. Thus Handel admitted to editing reports so that they fit with institutional discourse and organisational responses to poverty, portrayed as optimal even where they palpably are not. Why is this so?

Within the anthropological study of policy making and the ethnographic examination of international aid chains, authors such as David Mosse have argued that, in a top-down neoliberal policy world where "efficiency" is the major criterion for the spending of public money, it is crucial for actors to be able to represent what they do as a well-planned and well-executed success. This leads to a reluctance on the part of institutions to publicly question their pre-existing narratives, and results in staff-members moulding their representations of reality to have them conform to those narratives. It further results in bodies lower down the disbursement chain having to contort their representations in order to have them fit the terms defined by those above, while those above enforce representational stability so as not to lose the symbolic capital that they are able to translate into government funding.⁴³

In the case of trafficking in Benin, this can be illustrated with two examples. The first is the Etireno affair, which sparked the explosion of interest in trafficking in the first place. Abidi, a UN employee working in Cotonou at the time, explained that 'when the Etireno happened, it was a huge thing for us and *was amazing in terms of the mobilisation of resources*'.⁴⁴ Ayala, the former Beninese government minister responsible for children at the time of the crisis, concurred: 'Some bodies used this for their own ends, to attract funding and attention.'⁴⁵ As Alexia, an international NGO operative working in Benin, explained: 'In child protection, you have to be fashionable to attract funding.'

⁴³ D Mosse, 'Is Good Policy Unimplementable? Reflections on the ethnography of aid policy and practice' *Development and Change*, vol. 35, no. 4, 2004, pp. 639–671, p. 651.

⁴⁴ Interview with Abidi, 12/1/2010.

⁴⁵ Interview with Ayala, Cotonou, 13/3/2010.



Fundamentally, this means eschewing the political economy of poverty or the reality that sometimes children must take sub-optimal jobs for want of better alternatives, and instead promoting the narrative of innocent and enslaved children in need of rescue through individualised policy responses.

The second example concerns government behaviour. Jeremia, another UN employee with an intricate knowledge of the various political figures working in Benin, explained that the heavily anti-movement anti-trafficking law adopted by Benin's government was, in large part, the result of major pressure from a US embassy determined to see laws on the books as a sign of success in its push on the anti-terror and security agenda. Though many civil society representatives privately opposed the draconian nature of the law, arguing that it was un-enforceable given the mobility of the populace, US representatives were unmoved, and the Beninese government accepted that it needed to pass the law in order to ensure that the US would continue offering its bilateral assistance.⁴⁶ Beyond money, the Beninese government also derived symbolic, representational capital from the move. As Benin's senior civil servant working on trafficking explained:

The law allowed us to move from Tier 3 to Tier 2 in the US's ranking of countries [in terms of the quality of their anti-trafficking response] and it gave us a good image in Geneva, with the Commission on the Rights of the Child, and also with the donors.⁴⁷

By thus playing the game according to the rules of the discursive order established by those who sit above them in the hierarchical power and disbursement chain, actors lower down the pecking order are able to create and accumulate the symbolic capital which is subsequently cashed for the material capital that ensures their very institutional survival.

⁴⁶ Interview with Jeremia, 2/9/2007.

⁴⁷ Interview with Dibi, 10/3/2010.



Conclusion

When reflecting on accountability within anti-trafficking policy making as it operates in Benin, it is clear that those above do not answer to those below. Indeed, accountability does not operate optimally from policy maker to policy beneficiary. Rather, policy and its justifying narratives are accountable more to the institutional and political logics, imperatives and orders of discourse within which policy makers exist. This is not to suggest that Machiavellian explanations are sufficient; far from it. Policy makers frequently recognise the drawbacks of what they do—they are merely constrained by the system and those who pull its most influential levers from offering any meaningful alternative.

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The Road to Effective Remedies: Pragmatic reasons for treating cases of “sex trafficking” in the Australian sex industry as a form of “labour trafficking”

Frances Simmons and Fiona David

Abstract

Internationally, it is widely recognised that labour law and associated protections are a critical part of any comprehensive response to trafficking in persons. In this article, we argue that while Australia has taken some important steps to incorporate labour protection systems into the anti-trafficking response, there is still more work to be done. In particular, the federal, and state and territory governments have yet to take up the opportunity to link anti-trafficking efforts with initiatives aimed at improving the working conditions of workers in the sex industry. We suggest this reflects a common—but unjustified—assumption that “labour trafficking” and “sex trafficking” are distinct and different species of harm. As a result of this distinction, workers in the Australian sex industry—an industry where slavery and trafficking crimes have been detected— are missing out on a suite of potentially effective prevention interventions, and access to civil remedies. We argue that there is a need to provide practical and financial support, so that the national industrial regulator, the Fair Work Ombudsman, can work directly with sex worker advocacy groups, to examine opportunities and barriers to accessing the labour law system, particularly for migrant sex workers.

Key words: trafficking in persons, labour law, prostitution, sex work, labour trafficking, Australia.

Introduction

This article seeks to promote greater accountability in the design of anti-trafficking strategies by examining how the assumed distinction between “sex trafficking” and “labour trafficking” has shaped Australia’s response to trafficking. We argue that the practical consequence of treating “sex trafficking” and “labour trafficking” as separate species of harm is that workers in the Australian sex industry—an industry where slavery and trafficking crimes have been detected—are missing out on a suite of potentially effective prevention interventions, and access to effective remedies.

Internationally, the growing awareness of trafficking crimes occurring outside the sex industry has encouraged governments to look beyond the crime control paradigm that characterised early anti-trafficking initiatives, and to consider the critical role that labour law can have in changing the conditions in which workers become vulnerable to exploitation. Organisations including the International Labour Organization (ILO) and the Organization for Security and Cooperation in Europe (OSCE) have recommended legal and policy initiatives that focus on improving the working conditions ‘of workers who are vulnerable to forced labour but who are still able to act’,¹ as part of a comprehensive response to trafficking in persons.²

These approaches reflect a human rights approach to trafficking but also the reality that trafficking crimes rarely occur in industry sectors where labour standards regarding working hours, health and safety, wages and employment are routinely monitored and enforced. Trafficking crime tends to occur in sectors that are poorly regulated and “out of sight” in some way, whether this is because the context is a private home or property (as in the case of both domestic work and

¹ P Belser and B Andrees, ‘Strengthening Labor Market Governance Against Forced Labor’ in P Belser and B Andrees (eds), *Forced Labor: Coercion and exploitation in the private economy*, International Labour Organization, Switzerland, 2009, p. 123; see also, OSCE, *A Summary of Challenges on Addressing Human Trafficking for Labour Exploitation in the Agricultural Sector in the OSCE region*, 2009, <http://www.osce.org/cthb/37937> (discussing labour trafficking strategies) and International Labour Organization *International Labour Migration: A rights-based approach*, International Labour Organization, Geneva, 2010, pp. 262–263.

² See also, E Pearson, *The Mekong Challenge, Human Trafficking: Redefining demand*, International Labour Organization, Geneva, 2005.

agriculture) or employment in the informal sector.³ This reality can be explained by reference to crime prevention theory. For example, Ekblom has argued that organised crime occurs when three variables are present: the presence of a motivated and capable offender, a suitable target (the victim), and a lack of empowered, capable oversight.⁴

Alongside criminal justice mechanisms, labour law has the capacity to address at least two of these three variables, by providing legal resources to empower the otherwise vulnerable target, and introducing a form of oversight (labour regulators) that differs from, but also complements, the role of criminal justice agencies. As the United Nations Special Rapporteur on Trafficking in Persons Joy Ngozi Ezeilo observed on her recent visit to Australia, ‘the lack of regulations and labour rights...[is] one of the key structural factors fostering trafficking in persons, whether for sexual exploitation or forced labour or domestic servitude or other services’.⁵

The Australian government has recently taken some important steps towards integrating a more labour-informed perspective into its anti-trafficking efforts. For example, in 2009, Australia’s national labour regulator, the Fair Work Ombudsman (FWO), began participating in the national Anti-People Trafficking Inter-Departmental Committee, a cross-governmental committee that implements national policy on trafficking. In 2011, the government gave nearly AU\$500,000 (approximately US\$512,000) in funding to a range of organisations including unions, an industry association, and the Australian Red Cross to undertake targeted awareness campaigns to combat ‘labour exploitation and trafficking’.⁶

³ See, for example, the discussion of the structural and regulatory factors that impact on vulnerability to exploitation of both domestic and sex workers, in B Anderson and J O’Connell, *Is Trafficking in Human Beings Demand Driven: A multi-country pilot study*, 15 IOM Migration Research Series 3, 2003, retrieved 7 March 2012, <http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/Anderson04.pdf>.

⁴ P Ekblom, ‘Organised crime and the conjunction of criminal opportunity framework’ in A Edwards and P Gill (eds.), *Transnational Organised Crime: Perspectives on global security*, Routledge, London, 2003, p. 248.

⁵ Joy Ngozi Ezeilo ‘The UN Special Rapporteur in Trafficking in Persons, Especially Women and Children concludes her country visit to Australia’ (media release, 30 November 2011), United Nations Human Rights, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11664&LangID=E>.

⁶ Anti-People Trafficking Interdepartmental Committee, Attorney-General’s Department, *Trafficking in Persons: The Australian government response: 1 July 2010-30 June 2011* (The Third Report of the Anti-People Trafficking Interdepartmental Committee), Australian Government, Canberra, 2011, pp. 9–10.

In this article, we argue that while this shift in focus is welcome, there is still more work to be done. In particular, the federal, and state and territory governments have yet to take up the opportunity to link anti-trafficking efforts with initiatives aimed at improving the working conditions of workers in the sex industry. We suggest this reflects a common—but unjustified—assumption that “labour trafficking” and “sex trafficking” are distinct and different species of harm. In our view, this distinction does not reflect the complex reality of women’s experiences of trafficking in the sex industry,⁷ nor does it reflect the legal reality that in Australia the majority of forms of adult sex work are either decriminalised or legalised. As a result of this distinction, workers in the Australian sex industry—an industry where slavery and trafficking crimes have been detected—are missing out on a suite of potentially effective prevention activities, and access to civil remedies.

Australia’s Evolving Response to Human Trafficking

The Australian response to trafficking has shifted and evolved over the past decade. Australia ratified the *United Nations Convention on Transnational Organized Crime* (UNTOC) in 2004⁸ and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime* (the Trafficking Protocol) in 2005.⁹ Since that time, Australia has invested more than AU\$84 million in anti-people trafficking measures¹⁰ and introduced a raft of criminal offences targeting trafficking, slavery, sexual servitude and debt bondage.¹¹

⁷ To date, all suspected victims of trafficking identified in the Australian sex industry are female.

⁸ *United Nations Convention against Transnational Organized Crime*, GA RES 55/25, UN GAOR, 55th session, 8 January 2001.

⁹ *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th session, 62nd pen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/25 (8 January 2001), annex II (*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*).

¹⁰ Australian Government, Attorney-General’s Department, *People Trafficking* (last updated 23 November 2011) retrieved 30 March 2012, http://www.ag.gov.au/www/agd/agd.nsf/Page/PeopleTrafficking_PeopleTrafficking.

¹¹ See *Criminal Code Act 1995* (Cth), Divs 270–1.

Initial efforts to address trafficking crimes focused on the plight of women trafficked into the sex industry.¹² This early preoccupation with sex trafficking is reflected in Australia's criminal justice statistics: to date, by far the majority of suspected victims of trafficking identified by the Australian authorities have been women from countries in the Asia-Pacific region who have been exploited in the sex industry.¹³ There have been 14 convictions under Australia's laws on slavery and human trafficking, but so far only two successful prosecutions of (non-sex industry) labour trafficking. This limited focus on the sex industry was also observed in recent research on (non-sex industry) labour trafficking.

There was...a noticeable lack of awareness among almost all participants, with the exception of those who worked daily on trafficking in persons issues, that the legal concept of "trafficking in persons" could be applied to contexts other than the sex industry.¹⁴

During a recent visit to Australia, the UN Special Rapporteur observed that '[t]here is a need to move away from the over-sexualising discourse on trafficking [in Australia]' and 'place equal emphasis on all forms and manifestations of trafficking'.¹⁵

While sex trafficking has monopolised the attention of Australian legislators, media, and the courts, the government has acknowledged, 'it is possible that women working in the sex industry are over-represented among statistics on identified victims of trafficking simply because other forms of trafficking are under-reported and under-

¹² Parliamentary inquiries into trafficking in Australia have focused on trafficking for sexual servitude. See, for example, Senate Legal and Constitutional Legislation Committee, *Inquiry into Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004*, Australian Government, Canberra, 2004; Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Trafficking of Women for Sexual Servitude*, Australian Government, Canberra, 2004. For an overview, see: M Segrave and S Milivojevic, 'Auditing the Australian Response to Trafficking' *Current Issues in Criminal Justice*, vol. 22, no. 1:63.

¹³ *supra* note 6, pp. 32–4.

¹⁴ F David, *Labour Trafficking*, Australian Institute of Criminology Research and Public Policy Series no. 108, AIC, Canberra, 2010, p. 48, <http://www.aic.gov.au>.

¹⁵ *supra* note 5.

researched'.¹⁶ This observation is supported by research, which confirms that there have been instances of both unreported and unrecognised trafficking crimes, involving the exploitation of domestic workers, cooks and chefs, unskilled labourers and agricultural workers.¹⁷

In 2007, the initial focus on sex trafficking shifted as the Australian government started emphasising that trafficking crimes can and do occur in a range of settings and contexts, whether in private homes or small businesses. At the national level, this shift in focus has been reflected in a number of concrete changes. In 2011, Australian Police Ministers replaced what was the 'National Policing Strategy to Combat Trafficking in Women for Sexual Servitude'¹⁸ with the more inclusive, and broadly focused 'Australian Policing Strategy to Combat Trafficking in Persons 2011-13'.¹⁹ The Australian Federal Police (AFP) specialist trafficking unit, which was previously called the Transnational Sexual Exploitation Team, has been renamed as the Human Trafficking Team.

In 2008, in the landmark case of *R v Tang*,²⁰ the High Court of Australia provided important judicial guidance on the meaning of slavery. While this case concerned five Thai women who were trafficked to Australia to work in conditions of debt bondage in the sex industry, it is apparent that slavery offences could apply to egregious forms of exploitation in other industries if the prosecution could establish the requisite elements of the offence.²¹ Indeed, the slavery offence had at that point already

¹⁶ Australian Government, *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections*, (Attorney-General's Department, 2010), para. [21] and also at [23] where the AGD notes that '[i]ncreasingly, Australian authorities are becoming aware of trafficking victims identified in sectors other than the sex industry, including in the agriculture, construction, hospitality, domestic services and recreation industries'.

¹⁷ Global Alliance Against Traffic in Women, *Collateral Damage: The impact of anti-trafficking measures on human rights around the world*, GAATW, Bangkok, 2007, pp. 46–48, retrieved 30 March 2012, <http://www.gaatw.org>; F David, *supra* note 14, p. xii.

¹⁸ Anti-People Trafficking Interdepartmental Committee, Attorney-General's Department, *Trafficking in Persons: The Australian government response: January 2004-April 2009*, Inaugural Report of the Anti-People Trafficking Interdepartmental Committee, Australian Government, Canberra, 2009, p. 8.

¹⁹ *supra* note 6, p. 18.

²⁰ (2008) 237 CLR 1.

²¹ M Cullen and B McSherry, 'Without Sex: Slavery, trafficking in persons and the exploitation of labour in Australia' *Alternative Law Journal*, vol. 34, no. 1, 2009, pp. 4–10; see also: J Jolly and A Schloenhardt, 'Honeymoon from Hell: Human trafficking and domestic servitude in Australia' *Sydney Law Review*, vol. 32, no. 4, 2010, pp. 671–92 (discussing Australia's evolving jurisprudence on slavery).

been used in the successful prosecution of two offenders found guilty of enslaving a domestic worker from the Philippines. However, although the *Criminal Code Act 1995* (Cth) (the Criminal Code) prohibits slavery and trafficking for forced labour, most of the existing offences in divisions 270 and 271 target ‘sex trafficking’, with specific offences prohibiting ‘sexual servitude’ and ‘deceptive recruiting for sexual services’.

At the time of writing, the federal government was seeking views on the introduction of stand-alone offence of forced labour, and replacing the existing offence of ‘sexual servitude’ with a broader offence of ‘servitude’.²² While it is beyond the scope of this paper to consider the merits of the proposed changes, they are intended to respond to concerns about problems with the operation in practice of the anti-trafficking response, and information about the nature of the crime itself and also ensure that Australia’s trafficking laws cover all forms of trafficking in persons.²³

Shift in Federal Focus Not Seen at State/territory Level

While the focus of the national anti-trafficking response has broadened to include all forms of human trafficking, the same cannot be said for responses at the state and territory levels. In recent years, trafficking has been the subject of an increasing number of state and territory inquiries and law reform efforts, typically in the context of debates about regulation of the sex industry. For example, in 2011, the Government of Western Australia announced it was drafting new laws to regulate the sex industry in that state. According to the announcement, the new system will be based on a system of licences,

²² Exposure Draft, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth).

²³ *supra* note 6, p. 5; The Hon Brendan O’Connor, Minister for Home Affairs and Justice, ‘The Government’s Response to People Trafficking’ (Speech delivered at the Parliament of the Commonwealth of Australia, Canberra, 24 November 2011), retrieved 29 March 2012, <http://www.ag.gov.au/peopletrafficking>. See also, F David and A Gallagher, Submission on Exposure Draft of the Crime Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012, retrieved 31 March 2012, <http://fionadavid.com/publications>.

both for business operators, managers and “prostitutes”.²⁴ Significantly, the reforms have claimed an anti-trafficking angle:

There will be restrictions on who can hold any type of license, which will include that the person must have reached the age of 18 years, and must be a permanent resident of Australia or an Australian citizen. Holders of student or other visas will not be able to lawfully act as prostitutes. This will enhance the state’s ability to police human trafficking.

In other words, people who come to Western Australia from other countries, whether on a working-holiday visa or a student visa (both of which provide limited work rights) can work as fruit-pickers, baristas, cleaning staff, nurses or indeed any other occupation but not as sex workers. This is despite the fact that it will be potentially lawful for Australian citizens and residents to work as sex workers in Western Australia, and for non-citizens to work in the sex industry in other states, provided they have work rights under their relevant visa category. To our knowledge, there has been no research or other evidence-based consideration of the question of whether an outright ban on non-citizens working in the West Australian sex industry will in any way reduce (or indeed increase) the risk of trafficking in that industry.

In recent years, state and territory inquiries into the regulation of the sex industry have become a forum for advocates to promote the ‘Swedish’ or ‘Nordic’ model (whereby the purchase of sex is criminalised), typically in the name of preventing sex trafficking crimes in that industry.²⁵ In 2011, an inquiry into the regulation of the sex industry in the Australian Capital Territory became the focus of a (ultimately unsuccessful) campaign to introduce the Swedish model in

²⁴ C Porter (Attorney General), ‘Prostitution Legislation Reforms’ (Statement by the Attorney General to Legislative Assembly, 25 November 2010), retrieved 31 March 2012, http://www.department.dotag.wa.gov.au/_files/prostitution_reforms_speech.pdf.

²⁵ For examples of submissions promoting the Swedish model, see: Coalition Against Trafficking in Women Australia, Submission No 28 to Standing Committee on Justice and Community Safety, *Inquiry into the Operation of the Prostitution Act 1992*, 17 March 2011; Australian Christian Lobby, Submission No 42 to Standing Committee on Justice and Community Safety, *Inquiry into the Operation of the Prostitution Act 1992*, April 2011.

that jurisdiction.²⁶ This followed a Victorian parliamentary inquiry into ‘people trafficking for sex work’ held in 2010, that examined various ‘demand-side strategies’. While the Victorian inquiry ultimately did not recommend the Nordic model, it did recommend the introduction of a new offence of knowingly or recklessly obtaining sexual services from a trafficked woman.²⁷ This was described as a ‘demand focused recommendation’ that ‘whilst not criminalizing the purchase of sexual services per se will act as a deterrent to men who may be tempted to knowingly purchase sex from trafficked women’.²⁸

It is not clear why the Victorian inquiry did not consider the relevance of existing criminal laws on sexual assault that should already cover situations where the evidence establishes that a customer either knowingly or recklessly had non-consensual sex with a trafficked woman. In our view, while sexual assault laws should apply to instances of non-consensual sexual intercourse wherever they occur, the relationship between women who have experienced trafficking and their clients can be complex and care should be taken not to introduce legislation that ‘may add to the already stigmatized and precarious situation’ of women trafficked into the sex industry.²⁹

Moreover, as we explore below, it is apparent that the experiences of women who have been trafficked into the Australian sex industry are diverse. In our experience, some identify the wrong they have suffered as labour exploitation, others as sexual exploitation, and still others as both. However, state and territory inquiries into the regulation of the sex industry, and concerns with criminality in that industry, are yet to seriously engage with the potential of labour law as a legitimate strategy for preventing trafficking. For example, the Victorian inquiry made thirty recommendations for reforms that it considered should be made in that state in order to address sex trafficking. However,

²⁶ See, e.g. Collective Shout, Submission No 43 to Standing Committee on Justice and Community Safety, *Inquiry into the Operation of the Prostitution Act 1992*, 31 March 2011. All submissions to the Inquiry are available for download at <http://www.parliament.act.gov.au/committees/index1.asp?committee=114&inquiry=994&category=14>.

²⁷ Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work*, June 2010.

²⁸ *Ibid.*

²⁹ OHCHR, UNHCR, UNICEF, UNODC, UN Women, and ILO, *Joint UN Commentary on the EU Directive on Human Trafficking—A Human Rights-Based Approach*, Report, 7 March 2012, p. 100.

not a single recommendation addressed the role of labour law in protecting sex workers from exploitation in the Victorian sex industry, despite the fact that the industry is legalised in that state. Instead, the inquiry appeared to rest on an assumed distinction between sex and labour trafficking, with the former involving ‘the treatment of women as commodities’, as distinct from ‘forced labour’.³⁰ In its final recommendations, the committee noted that ‘there is growing concern with regard to the nature and extent of other forms of human trafficking in Victoria, especially labour trafficking and trafficking for the purpose of marriage’. Accordingly, the committee recommended holding an inquiry into ‘human trafficking for reasons other than sexual servitude’.³¹

At the state and territory level, concern about trafficking criminality in the sex industry has provoked calls for tougher licensing regimes for brothels, despite the fact that there is no evidence-based research in Australia indicating that the incidence of sex trafficking can be attributed to either legalisation or decriminalisation of the sex industry.³² Indeed, research on the trafficking of women for sexual purposes has observed that the AFP has identified cases of sex trafficking in legal and illegal brothels and that several AFP agents consider ‘that this distinction had little relevance from the perspective of investigating trafficking’.³³ In this same research, it was also noted that clients of sex workers have been a source of information about trafficking crimes in Australia, and they have also acted as witnesses in prosecutions.³⁴

³⁰ *Ibid.* p. 2.

³¹ *Ibid.* p. xii (Recommendation 27).

³² See, Human Trafficking Working Group, TC Beirne School of Law, University of Queensland, Submission No 2 to Drugs and Prevention Crime Committee, *Inquiry into People Trafficking for Sex Work*, 22 October 2009, p. 20, retrieved 31 March 2012, <http://www.law.uq.edu.au/human-trafficking-reports-and-presentations>.

³³ F David, ‘Trafficking of Women for Sexual Purposes’ *Australian Institute of Criminology Research and Public Policy Series*, no. 95, Australian Institute of Criminology, Canberra, p. 34.

³⁴ *Ibid.* p. xiii, 25, 35, 45.

Assumption at the National Level that Sex and Labour Trafficking are Different

While the state and territory governments continue to focus on sex trafficking, the federal government is developing a more considered response to trafficking in all its forms, including labour trafficking. In 2011, the relevant national coordinating committee ‘maintained its focus on combating trafficking for labour exploitation’.³⁵ The government called for expressions of interest to undertake projects for education and awareness-raising on labour exploitation, and to provide advocacy and outreach to industries and groups that may be vulnerable to these crimes. This resulted in funding for projects involving the Australian Council of Trade Unions, the Australian Hotels Association, the Australian Red Cross, Asian Women at Work (an NGO focused on working with migrant women in low paid and precarious employment) and the Construction, Forestry, Mining and Energy Union. These are all positive developments. However, what is curious is the way that the response to labour trafficking is discussed in government reports and announcements, as if this is a new, separate and distinct issue to what had previously been the focus – trafficking involving exploitation in the sex industry.

Despite significant reforms, the Australian response to trafficking continues to be underpinned by a widely held and rarely challenged assumption that labour trafficking and trafficking involving exploitation in the sex industry cause distinct forms of harm. The assumption that sex trafficking and labour trafficking are separate species of harm is not unique to Australia. For example, in the United States, the legal definition of ‘severe forms’ of trafficking clearly distinguishes between ‘sex trafficking’ and trafficking of a person ‘for labour or services’.³⁶

The assumed difference between sex and labour trafficking is most readily apparent in Australia’s anti-trafficking laws. Under the Criminal Code, *sexual servitude* is a stand-alone offence, one of the elements

³⁵ *supra* note 6, p. iii, in the Minister’s Foreword.

³⁶ *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464, section 103(8). Severe forms of trafficking are herein defined to include (a) *sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age or* (b) *the recruitment, harbouring, transportation, provision or obtaining of a person for labour or services, through the use of force, fraud, coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.*

of which is a requirement of “commercial use” of the body. As such, this is an offence that is clearly directed at exploitation in the commercial sex industry; there is no comparable offence for sexual servitude in non-sex industry contexts.³⁷ Under the Criminal Code, *trafficking for the purpose of forced labour* is prohibited (there is presently no stand-alone offence of forced labour). However, forced labour is defined so as to specifically exclude labour of a sexual nature.³⁸

This assumed division between sex and labour trafficking flows through to the entire anti-trafficking response in Australia. In some contexts, the validity of this distinction is questioned, either directly or implicitly.³⁹ However, in other contexts, it appears that this distinction is simply accepted. For example, in its 2011 report on anti-trafficking activities, the Australian government reported on the Trivedi case, which involved the alleged exploitation of an Indian chef. It was noted in the report that this case was ‘significant as it is just the second prosecution for labour trafficking since the introduction of the trafficking offences into the *Criminal Code* in 2005’.⁴⁰ This is despite the fact that the overwhelming majority of convictions for trafficking-related offences have been perpetrated in the sex industry.

In our view, it is time to challenge the assumed distinction between labour and sex trafficking. In most Australian states and territories, the majority of forms of adult sex work are either decriminalised or legalised (although aspects of sex work are still criminal in some states and prostitution is illegal in South Australia).⁴¹ Further, the reported

³⁷ *Criminal Code Act 1995* (Cth), sections 270.4 and 270.6.

³⁸ Forced labour is defined as ‘the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats’ is either ‘not free to cease providing labour or services’ or ‘is not free to leave the place or area where the person provides labour or services’. The term “threat” means any threat of force, deportation or any other detrimental action unless there are reasonable grounds for that action (73.2(3)).

³⁹ *supra* note 14, pp. 5–6; E Jeffreys, ‘Anti-trafficking Measures and Migrant Sex Workers in Australia’ *Intersections: Gender and sexuality in Asia and the Pacific*, issue 19, 2009; see also some recent publications of the Australian government which refer to trafficking in various industries, including “sex work”, in information sheets for employers and employees about “labour trafficking” at <http://www.ag.gov.au/peopletrafficking>.

⁴⁰ *supra* note 6, p. 16.

⁴¹ For a summary of the regulatory frameworks regarding sex work in Australia, see: New South Wales Parliament, ‘Regulation of Brothels: An update’, NSW Parliamentary Library e-brief, November 2011, retrieved 31 March 2012, [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/Regulationofbrothels:anupdate/\\$File/E-brief.regulation+of+brothels.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/Regulationofbrothels:anupdate/$File/E-brief.regulation+of+brothels.pdf).

case law suggests that while not always the case, most women who have been subjected to trafficking crimes in the Australian sex industry had travelled to Australia intending to work in the sex industry.⁴² In these cases, it is the working and living conditions the women were required to engage in upon arrival that were found to be extremely exploitative: trafficked women work extremely long hours without pay under conditions of debt bondage where they are required to pay “debts” of between \$35,000 and \$56,000 to the “contract owner”.⁴³ They may feel unable to leave their place of work because of threats to family or fears that if they complain, they will be detained by immigration authorities and promptly sent home, while still having a significant debt owing to the people who organised their travel and employment in Australia.⁴⁴

For example, in the case of *R v Sieders; R v Somsri*,⁴⁵ four Thai women travelled to Australia intending to work in the sex industry. After they arrived, the women were exploited in a condition of “sexual servitude” (an Australian legal term). On appeal, the court observed that it was possible that all but one of the women made a deliberate choice in Thailand to undertake a debt bondage arrangement whereby each woman must work in the brothel to pay off \$45,000. Further, the women did not seem to have complained or done anything about seeking to free themselves from the conditions under which they worked, other than by diligent work over long hours to pay off the debt.⁴⁶ In finding it was still open to conclude that the women were in a condition of sexual servitude, the court noted:

The definition of sexual servitude [in the Commonwealth Criminal Code]...is concerned only with a very specific respect in which there is a limitation on the freedom of action of the person in question. A person can be free to do a multitude of different things, but if she is not free to cease providing sexual services, or not free to leave the place or area where she provides sexual services, she will, if the other condition of the section is met, be in sexual servitude.⁴⁷

⁴² *supra* note 35, p. 39 (For commentary on the reported cases up until 2008).

⁴³ See *Sieders v R; Somsri v R* (2008) 72 NSWLR 417 and *R v Netthip* [2010] NSWDC 159.

⁴⁴ *supra* note 35, pp. 30–32.

⁴⁵ (2008) 72 NSWLR 417.

⁴⁶ *Ibid.* 439 [142].

⁴⁷ *Ibid.* 425 [95].

In Australia, the publicly reported cases of sex trafficking have involved women who remain in exploitative situations sometimes because of physical constraints but also because of a complex matrix of factors including cultural and family obligations, cultural and linguistic isolation, shame and stigma about sex work, suspicion of authority and the belief that they owe a debt to their traffickers.⁴⁸ In these cases:

coercion and control has involved a range of subtle methods such as threats of violence, obligations to repay debt, isolation, manipulation of tenuous or illegal migration situations and a general sense of obligation.⁴⁹

It is noteworthy that a significant number of complainants in reported cases of sex trafficking have continued working in the sex industry, even after their period of servitude. For example, in the case of *R v Tang*,⁵⁰ where a brothel owner was convicted of using and possessing five Thai women as slaves, two of the complainants continued working in the sex industry free from debt bondage.⁵¹

We do not deny that sexual assault and sexual harms can be a consequence of trafficking involving exploitation in the sex industry. This is undoubtedly the case. However, unfortunately, sexual assault and sexual harms can also be the consequence of trafficking into other industry sectors. As recent research on labour trafficking in Australia has highlighted:

A focus on labour trafficking should not be allowed to obscure the potential for sexual violence to be part of a larger package of exploitation and abuse of migrant workers. Interview participants gave examples of domestic and agricultural workers who were physically and economically mistreated, as well as being sexually assaulted.⁵²

⁴⁸ See discussion of relevant cases in F David, 'Prosecuting Trafficking in Persons: Known issues, emerging responses' *Australian Institute of Criminology Trends and Issues*, no. 358, p. 4.

⁴⁹ *supra* note 35, p. 39. The concept of "psychological coercion" is captured in the phrase "an abuse of a position of power or vulnerability". See generally, United Nations Office of Drugs and Crime, *Model Law against Trafficking in Persons*, United Nations, Vienna, 2009, p. 22, retrieved 31 March 2012, http://www.unodc.org/documents/legal-tools/Model_Law_TiP.pdf.

⁵⁰ *R v Tang* (2008) 237 CLR 1.

⁵¹ *Ibid.* 13, para [12].

⁵² *supra* note 14, p. xi.



One example is the Kovacs case, involving the enslavement and repeated sexual assault of a domestic worker brought over from the Philippines, to work in the home and shop of Mr and Mrs Kovacs.⁵³

The experiences of women who have been trafficked into the Australian sex industry and in particular, the ways they experience that harm, are diverse. In our experience, some identify the wrong they have suffered as labour exploitation, others as sexual exploitation, and still others as both. Some women characterise their experience as a form of sexual exploitation where they had no real freedom to refuse to provide sexual services. Others may state that while they had the freedom to refuse customers or to provide certain services, their working conditions were exploitative with no payment for services and no provision for sick leave. In our view, it is important to respect the diversity of these experiences.

Pragmatic Reasons for Merging “Sex” and “Labour” Trafficking

Ultimately there are important pragmatic reasons for recognising that trafficking in the sex industry can result in both “labour” and “sexual” forms of harm. First, recognising that sex trafficking can involve labour exploitation may expand the opportunities for those who have experienced exploitation to obtain civil remedies. Second, this approach ensures that the benefits of labour trafficking prevention initiatives—which focus upon improving the availability and accessibility of labour law protection for vulnerable migrant workers—are made available to workers in the sex industry.

Remedies and compensation

When trafficking involving the sex industry is characterised as necessarily a problem of *sexual* exploitation, the remedies that may be available for labour exploitation may become invisible or inaccessible. As the Special Rapporteur on Trafficking in Persons has observed:

⁵³ *Ibid.* pp. 18–19.

[i]n some countries, for example,...labour proceedings are not an option for trafficked persons engaging in sexual services, as the provision of sexual services itself is illegal and thus not recognized as a form of employment to which labour protection applies.⁵⁴

In the Australian context, when women experience criminal exploitation in the sex industry, a range of civil remedies may be available, depending on the facts of the case, and the location. In the absence of a national compensation scheme for victims of crime, it is necessary to examine whether trafficked persons can claim compensation under one of the various state and territory victims of crime compensation schemes.⁵⁵ However, access to this remedy depends on the type of harm the victim has experienced and the eligibility criteria of the compensation scheme in state or territory where the crime occurred. In New South Wales, where most cases of trafficking involving exploitation in the sex industry have been identified, a trafficked person might be able to access criminal injuries compensation, provided they can show they have been subjected to sexual assault causing psychological injury.⁵⁶ If a trafficked person has not been sexually assaulted, payment of compensation is unlikely unless the trafficking crime resulted in permanent physical injuries, domestic violence or a severe psychological disorder.

Not all victims of sexual servitude will choose to characterise their experience as one of sexual violence. For example, a woman who has not been sexually assaulted but who has experienced debt bondage may want to recover unpaid wages and compensation for workplace injuries or hurt and humiliation. However, the potential for women to seek these sorts of remedies through industrial laws has yet to be fully examined.

⁵⁴ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, 17th Session, Agenda Item 3, UN Doc A/HRC/17/35, 13 April 2011, para 33.

⁵⁵ See *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victims Support & Rehabilitation Act 1996* (NSW); *Victims of Crime Assistance Act 2006* (NT); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas).

⁵⁶ *Victims Support & Rehabilitation Act 1996* (NSW), Sch 1, cl 6, 'Sexual Assault'.

For example, it is unclear whether the *Fair Work Act 2009* (Cth) (FWA), can provide meaningful remedies for sex workers seeking redress for even fairly basic time and wage matters, let alone more severe instances of exploitation. As the FWA does not protect independent contractors,⁵⁷ a critical question will be whether a sex worker can in fact be categorised as an employee and not a contractor. The application of the FWA to sex workers is yet to be tested but the authors are aware that the FWO is now investigating the claims of women who were allegedly trafficked into the sex industry.

Harnessing the benefits of labour trafficking prevention initiatives

Recent research on labour trafficking in the Australian context has highlighted the fact that substandard working conditions create the breeding ground for more serious forms of exploitation. As noted in the research: ‘instances of exploitation vary widely in nature and severity, ranging from simple time and wage matters, right through to clear-cut cases of slavery. However, it appears that in Australia, by far the largest number of cases of exploitation (broadly defined) fall somewhere short of slavery or trafficking in persons.’⁵⁸

Accordingly, it was concluded that: ‘to be relevant, Australia’s laws need to focus on not only the extreme forms of slavery and forced labour, but also on the more prevalent lesser forms of exploitative behaviour that nonetheless have serious consequences for the people affected. These lesser forms of exploitative behavior are arguably precursors to more serious criminal conduct and they contribute to the creation of an environment that tolerates various forms of exploitation.’⁵⁹

In our view, this logic applies just as readily to both sex and non-sex sectors. Long hours, restrictions on freedom of movement, the non-payment or underpayment of wages, unsafe working conditions, the failure to provide employees with written contracts or information

⁵⁷ While the rights of independent contractors are set out in the *Independent Contractors Act 2006* (Cth), the FWA does prohibit sham contracting (sections 357–9). The sham contracting provisions prohibit a person and/or company from engaging, or proposing to engage, a worker as an independent contractor where the worker in reality is, or would be, an employee.

⁵⁸ *supra* note 14, p. 49.

⁵⁹ *Ibid.* pp. 49–50.

about their rights at work, refusal to provide sick leave or annual leave are problems which are common to both sex and non-sex sectors where victims of trafficking have been identified. In the context of the sex industry, these problems may be compounded by the stigma that attaches to sex work and the misinformation or ignorance of the fact that sex work is legal in most parts of Australia. Migrant sex workers may also be afraid that if they are identified as such by Australian authorities, they will be deported and publicly exposed as sex workers, an outcome that could result in their prosecution in their home country. This seems to be a legitimate concern, given recent statements by the Government of South Korea that it will prosecute its nationals found to have been working in the Australian sex industry.⁶⁰

There is broad consensus that rights-based initiatives to improve access to labour law systems are a critical element of any strategy to prevent trafficking in non-sex sectors.⁶¹ Instead of proposals to criminalise industries where incidences of forced labour have been identified (such as domestic work, agriculture or construction), strategies to prevent labour trafficking tend to focus on improving the substandard working conditions ‘that are a potential breeding ground for more serious forms of exploitation’.⁶² It is time to apply this logic and link anti-trafficking efforts with initiatives aimed at improving the working conditions of workers in the sex industry.

⁶⁰ ‘Korea Threatens Nationals Working Here in the Brothel Industry’ Crikey, 6 December 2011, <http://www.crikey.com.au/2011/12/06/korea-threatens-nationals-working-here-in-brothel-industry/>.

⁶¹ A Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 439; International Labour Organization, *International Labour Migration: A rights-based approach*, ILO, Geneva, 2010, pp. 262–3; Organization for Security and Co-operation in Europe, *Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification-Prevention-Prosecution and; Prosecution of offenders, justice for victims* (2nd Occasional Paper), 2008, p. 36 citing Roger Plant, ‘[f]orced labour and human trafficking: the challenges ahead’ (Speech delivered at OSCE High-Level Conference, Vienna, 7–8 November 2005), explaining ‘[c]riminalizing forced labour is not enough....For an effective prosecution it is necessary to criminalize specific acts of coercion, while at the same time separately punishing substandard labour conditions. Of vital importance is that workers have access to labour tribunals and compensation, without running the risk of immediate deportation.’

⁶² F David, *Labour Trafficking*, Australian Institute of Criminology Research and Public Policy Series No. 108, AIC, Canberra, p. xii, <http://www.aic.gov.au>.



Conclusion

The assumption that sex trafficking and labour trafficking are distinct and different species of harm has shaped Australia's early efforts to address trafficking and continues to influence state and territory inquiries into the regulation of the sex industry. Despite political concern about sex trafficking, inadequate attention has been paid to providing people who are vulnerable to exploitation in the sex industry with the legal tools to avoid, challenge or contest coercive and abusive practices before they develop into situations of criminal exploitation.

At the time of writing, the Australian government is seeking to change Australia's anti-trafficking laws to replace the existing offence of "sexual servitude" with a broader offence of servitude and a stand-alone offence of forced labour. A bill introduced into the Australian parliament seeks to introduce new offences of forced labour and servitude cover trafficking in sex and non-sex sectors.⁶³ This would remove what we consider is an artificial and unhelpful distinction between "sex" and "labour" trafficking crimes, and focus instead on the nature of the conduct—criminal exploitation—wherever it occurs.

Just as reform of the criminal law is important, proper attention should be paid to the potential for labour law to reduce the vulnerability of workers to extreme forms of exploitation and provide remedies to the victims of such abuses. The authors are aware that labour law frameworks have been successfully used in Australia to seek recovery of unpaid wages and out-of-court settlements for persons who have allegedly experienced trafficking crimes in non-sex industry contexts.⁶⁴ At present, it is unclear if similar remedies are available for people who have experienced trafficking crimes in the sex industry.

In our view, there is a need for further research to identify and understand the challenges that sex workers will likely face in accessing protection under Australia's national labour law and state and territory workers' compensation schemes. We recommend that the Australian government provide practical and financial support, so that the national

⁶³ Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth).

⁶⁴ See, for example, *Fryer v Yoga Tandoori House* [2008] FMCA 288, para [22].



industrial regulator, the FWO, can work directly with sex worker advocacy groups, to examine opportunities and barriers to accessing the labour law system, particularly for migrant sex workers.

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Using Human Rights to Hold the US Accountable for its Anti-Sex Trafficking Agenda: The Universal Periodic Review and new directions for US policy

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Abstract

Since the passing of the *Trafficking Victims Protection Act of 2000*, anti-trafficking efforts have grown in funding, political strength, and popular-culture appeal in the United States and globally. Particularly influential in shaping anti-trafficking policy in the United States are anti-prostitution advocates who are primarily concerned with rehabilitating sex workers and eradicating sexual commerce. Simultaneous to the development of prohibitionist anti-trafficking and anti-prostitution efforts in the US, movements for sex worker rights

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have also grown in strength and visibility, influencing a variety of cultural, academic, and public health arenas. While sex worker activists have widened the dialogue around sex workers' rights, their perspectives have not until recently been acknowledged by US policy makers. In this article, we first trace the recent social histories of both the new prohibitionist and the sex worker rights movements in the United States. Next, we describe the unprecedented collaborative activist process by which a human rights agenda for US-based sex workers was introduced and approved at the United Nations Human Rights Council through the Universal Periodic Review (UPR) process. We follow with an analysis of how the UPR process highlights the ongoing importance of the global human rights community for bringing a diversity of marginalised voices—including those of sex workers—to the attention of US policy makers. We conclude with an assessment of the unique policy reform opportunities and challenges faced by sex worker and human rights activists as a result of this historic moment.

Key Words: human rights, sex work, United Nations, Universal Periodic Review, United States, trafficking.

It is critical that the government work to systematically involve sex workers in policy decisions that affect them. Specifically...eliminate federal policies that conflate sex work with human trafficking, investigate and prevent human rights abuses perpetrated by state agents against sex workers, and examine the impact of criminalisation on our communities.

Darby Hickey, activist for sex worker
and transgender rights¹

Racing to the United Nations

At 8 am on 18 March 2011, Darby Hickey² was sprinting through the gates of the Palais des Nations in Geneva, Switzerland. She had been

¹ Quote from Darby Hickey's speech to the UN Human Rights Council, 18 March 2011.

² Darby Hickey is a member of the Best Practices Policy Project, <http://www.bestpracticespolicy.org>.

nominated by a broad coalition of activists³ to represent the face and voice of the US sex workers' rights movement. Her mission was to secure one of ten available civil society speaking slots at the UN later that day.⁴ The event would mark the conclusion of the US's first Universal Periodic Review (UPR) at the United Nations Human Rights Council, where the US received 228 recommendations from its global peers for improving its human rights record. These recommendations touched on a range of issues including the death penalty, racial profiling, the rights of indigenous peoples, immigration policy, and gay, lesbian, bisexual, transgender (GLBT) rights.⁵ One of these recommendations (#86) was made by member state Uruguay, urging the US to: 'ensure access to public services paying attention to the special vulnerability of [sex] workers to violence and human rights abuses'.⁶

With the help of Sandeep Prasad, a Canadian human rights adviser with the international network the Sexual Rights Initiative (SRI), Hickey was able to secure the tenth and final speaker's seat.⁷ Hickey and her colleagues knew that during the UPR meeting later that afternoon, the US would make official its new position that: 'No one should face violence or discrimination in access to public services based on sexual orientation or their status as a person in prostitution.' Thus, just hours after her dramatic race to the Palais des Nations, Hickey was addressing the United Nations Human Rights Council. In her prepared

³ This broad coalition (which included the four authors of this article) took on the name of "Human Rights for All" for the purpose of responding to the Universal Periodic Review process, <http://www.humanrightsforall.info>.

⁴ Speakers in this forum must be affiliated with a UN accredited NGO. Hickey was invited by the Sexual Rights Initiative and member group, Action Canada for Population and Development.

⁵ Human Rights Council, Working Group on the Universal Periodic Review, Ninth session, *Draft report of the Working Group on the Universal Periodic Review: United States of America, A/HRC/WG.6/9/L.9*, HRC, Geneva, 1–12 November 2010.

⁶ The full recommendation reads: 'Undertake awareness-raising campaigns for combating stereotypes and violence against gays, lesbians, bisexuals and [transgender people], and ensure access to public services paying attention to the special vulnerability of [sex] workers to violence and human rights abuses.' The translation of Uruguay's recommendation uses the terms "transsexuals" and "sexual workers". In our advocacy response, we inserted the terms "transgender people" and "sex workers" which more accurately reflect terms used in the US.

⁷ The process of winning one of ten opportunities set aside for non-governmental organisations (NGOs) to respond to the UPR of the United States involved a literal race against scores of other hopeful participants. As an official NGO delegate with a permanent pass to the UN, Prasad was able to forgo slow security screenings. This pass, along with a borrowed bicycle, enabled Prasad to secure the tenth available seat, which he then gave to Hickey.

remarks, Hickey congratulated the US on its decision and urged the US to ‘involve sex workers in policy decisions that affect them’.⁸

The day of Darby Hickey’s speech and the US’s unprecedented commitment to uphold the human rights of all sex workers was one of celebration for sex worker activists and allies in the United States, as well as for global advocates of sexual health, justice, and human rights. Yet, because the UPR does not yet include standards of accountability for policy change, as of this writing the victory remains largely symbolic. Furthermore, while the current Obama administration has signalled a potential turn away from sensationalistic Bush-era rhetoric around “sexual slavery”—turning instead towards issues of labour and human rights—current governing institutions have retained their premise that all forms of sexual labour should be criminalised. This article evaluates the political-cultural context of the US’s first Universal Periodic Review, describes how sex worker activists and allies quickly coalesced around the UPR, and assesses the current trafficking and sex work policy reform opportunities and challenges facing sex worker, labour, and human rights activists.

Politicising Trafficking; Demonising Sex Work

Eight years prior to Hickey’s address to the UN, President George W. Bush also spoke to a UN audience about sex work issues. But in stark contrast to Hickey’s framing of the needs of sex workers within social justice and human rights principles, Bush deployed dichotomous images of good and evil, referring to “sex trafficking” (and, indeed all sexual commerce) as a ‘special evil’.⁹ This designation of sex work and prostitution as evil has deep historical roots in the US and (as discussed later), opened the way for anti-prostitution groups to equate

⁸ Many of Hickey’s US colleagues watched her presentation live via webcast. Archived video of Darby Hickey’s speech, as well as that of Harold Koh and others available at [http://www.un.org/webcast/unhrc/archive.asp?go=110318#pm2_\(UN Human Rights Council, Sixteenth session, at the Palais des Nations in Geneva, Switzerland. 36th Plenary Meeting, Archived video, Friday 18 March 2011.\)](http://www.un.org/webcast/unhrc/archive.asp?go=110318#pm2_(UN%20Human%20Rights%20Council,%20Sixteenth%20session,%20at%20the%20Palais%20des%20Nations%20in%20Geneva,%20Switzerland.%2036th%20Plenary%20Meeting,%20Archived%20video,%20Friday%2018%20March%202011.))

⁹ ‘There’s a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of [the] sex trade see little of life before they see the very worst of life, an underground of brutality and lonely fear. Those who create these victims and profit from their suffering must be severely punished. Those who patronize this industry debase themselves and deepen the misery of others.’ George W. Bush addressing the UN General Assembly on trafficking, 23 September 2003.

prostitution and sex work with trafficking.¹⁰ Bush's speech was lauded by many religious and social conservatives, including anti-prostitution feminists who shared his distaste for sex work and other forms of sexual commerce.¹¹ As detailed below, Bush's commitment to ending "sex trafficking" created new opportunities for the US federal government to criminalise prostitution, which previously had primarily been policed at the state and local level. This approach also contributed to the process by which many US policy makers came to conflate prostitution with trafficking, a misconception that has had significant effects globally.

Developing the UN Protocol

It is clear that anti-prostitution activists (who in recent years have re-positioned themselves as "new abolitionists"¹²) have dominated the anti-trafficking discourse in the United States in the past decade. However, contemporary concern about trafficking in persons at the level of the UN has not been influenced by anti-prostitution activists to the same extent. For example, concerns about human trafficking voiced at the UN since the 1990s were propelled at least in part by human rights-based alarm over egregious forms of global labour exploitation.¹³ Additionally, early discussions at the UN were informed

¹⁰ See: J Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution reform and anti-trafficking law and policy' *University of Pennsylvania Law Review*, vol. 158, no. 1655, 2010, pp. 1655–1728; R Weitzer, 'The Social Construction of Sex Trafficking: Ideology and institutionalization of a moral crusade' *Politics & Society*, vol. 35, no. 3, 2007, pp. 447–475.

¹¹ According to feminist-identified anti-trafficking activist Donna Hughes: 'by supporting the abolitionist work against the global sex trade, he (Bush) has done more for women and girls than any one other president I can think of'. K Lopez, 'The New Abolitionist Movement: Donna Hughes on fighting sex trafficking', *National Review Online*, 26 January 2006, retrieved September 2011, <http://old.nationalreview.com/interrogatory/hughes200601260824.asp>.

¹² This reframing of prostitution can be located within a long genealogy of anti-sex work strategies. See: K Lerum, '12-Step Feminism Makes Sex Workers Sick: How the state and the Recovery Movement turn radical women into "useless citizens"' *Sexuality & Culture*, vol. 2, 1998, pp. 7–36.

¹³ However, as Ann Gallagher - who in 1998 and 1999 acted as the representative to Mary Robinson, the then UN High Commissioner for Human Rights for a series of intergovernmental "Vienna Process" meetings on trafficking - explains: "...the end result (of the "Vienna Process") confirmed the harsh truth that these negotiations had never really been about human rights. Any victories on our side were both hard won and incomplete" (p. 791). See: A Gallagher, 'Human Rights and Human Trafficking: Quagmire or firm ground? A response to James Hathaway' *Virginia Journal of International Law*, vol. 49, no. 4, 2009, pp. 789–848.

by poorly documented fears about the role of organised crime in human trafficking.¹⁴ Researchers have now clarified that a deeper set of structural issues caused by powerful institutions and transnational corporate interests were in fact in play, including the devastating impact of global economic restructuring policies connected (ironically) to the UN's affiliated agencies – the World Bank, the International Monetary Fund (IMF), and the World Trade Organization.¹⁵

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the UN Trafficking Protocol) (2000) created an understanding of trafficking in persons as a set of human rights violations applicable to any labour sector. This Protocol also supersedes earlier international documents such as the 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* that focused on the criminalisation of prostitution.¹⁶ However, the influence of anti-prostitution advocates who lobbied to narrow the focus of the Protocol to trafficking into the sex sector is evident in the document's specific reference to the 'exploitation of the prostitution of others or other forms of sexual exploitation'. Subsequent implementation by States Parties has, at times, included anti-prostitution measures even though the UN Interpretive Note to the Protocol itself indicates that the Protocol is neutral on the issue of prostitution. The following section describes

¹⁴ Segrave, Milivojevic, and Pickering critique the criminal justice focus of global anti-sex-trafficking policies, which frame the issue in terms of crime as opposed to labour and human rights. Furthermore, they critically address the notion that large-scale "organised crime" is responsible for sex trafficking (as evidence suggests, that is more likely to be "crime that is organised" rather than "organised crime"). See: M Segrave, S Milivojevic, et al., *Sex Trafficking: International context and response*, Willan Publishing, Devon, UK, 2009, pp. 9–10.

¹⁵ As many labour scholars and economists have noted, labour exploitation and the development of "sweat shops" is often rooted in "supply side" economic and structural factors such as globalised markets and Structural Adjustment Programmes (SAPs). The conditions that came with the IMF and World Bank loans meant that nations were forced to retract spending in numerous sectors and local economies, and this, coupled with incentives for multinational corporations to invest outside of their borders, meant that poverty increased and an increasing number of people found themselves faced with exploitative working conditions. See: J Stiglitz, *Globalization and its Discontents*, W.W. Norton, New York, 2002; S Sassen, 'Global Cities and Survival Circuits' in J Radway (ed.), *American Studies: An anthology*, Wiley-Blackwell, West Sussex, 2009.

¹⁶ A Jordan, *UN Trafficking Protocol: An imperfect approach*, Program on Human Trafficking and Forced Labor, Center for Human Rights & Humanitarian Law, 2010, retrieved September 2011, <http://rightswork.org/wp-content/uploads/2011/09/Issue-Paper-1.pdf>.

how one UN member state, the United States of America, came to see prostitution as an activity that is intrinsically inseparable from human trafficking.

The US legislative response to trafficking

The *Trafficking Victims Protection Act of 2000* (the TVPA) and subsequent reauthorisation acts (TVPRA) are a central part of the US's federal response to trafficking both within the country and through international mechanisms created by this legislation. The TVPA emerged from two separate and oppositional strands of proposed legislation and advocacy. One series of bills—which considered trafficking as an issue affecting any labour sector—had its genesis in the work of liberal Senator Paul Wellstone (D-MN) and the efforts of human rights advocates concerned primarily with women's rights. Another series of bills—which focused on “sexual trafficking” and prostitution—began as a result of the efforts of conservative Representative Chris Smith (R-NJ), who had worked with anti-prostitution constituencies to develop the “Freedom From Sexual Trafficking Act” introduced on March 25, 1999. Under pressure to adopt a compromise, a definition inclusive of men, women, and children into both sex and non-sex sectors was accepted and incorporated into the TVPA.¹⁷ What is striking here is that although some inspiration for the TVPA came from human rights advocates' concerns about labour abuse, both efforts lacked recognition of sex worker rights perspectives.

After more than a year of intensive debate about the exact nature of the problem concerning trafficking, the final compromise legislation contained different definitions for the criminal law and for other non-criminal areas of law, such as immigration, social services, and foreign aid. The non-criminal law portion of the law defines ‘severe forms of trafficking’ as either: 1) ‘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 2) ‘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 subjection to involuntary servitude, peonage, debt bondage, or slavery’.¹⁸

¹⁷ Chuang, p. 1678.

¹⁸ U.S. Department of State, *2009 Trafficking in Persons Report*, U.S. DOS, 2009, pp. 6–7, retrieved September 2011, <http://www.state.gov/documents/organization/123357.pdf>.

By separating sex trafficking from other forms of labour trafficking, the TVPA reinforced the traditional—and distinctly anti-feminist—notion that actions involving “sex” and “intimacy” cannot be considered “real work”.¹⁹ Furthermore, the decade following the passing of the TVPA in 2000 has been marked by intense political advocacy from well-funded conservative groups who have incrementally defined trafficking as prostitution.²⁰ By 2005, the official US position had locked in on this conflation, stating that ‘prostitution is inherently harmful for men, women, and children, and that it contributes to the phenomenon of trafficking in persons’.²¹ Since the turn of the 21st century, prohibitionist efforts have continued to grow in funding, political strength, and popular-culture appeal in the United States and globally. Because others have written extensively about this movement and its history,²² we turn next to examining a few significant impacts.

A Trail of Damaging Policies

Since the early 2000s, anti-prostitution policies at the federal level have translated into increasingly aggressive state and local-level policing of sex workers and their customers. US jurisdictional law allows the federal and state governments to adopt trafficking laws while policies and policing around prostitution are controlled by state and local laws, and by federal law when it crosses borders. The conflation

¹⁹ While feminists vary on their perspectives on sex work, most feminists agree that “women’s” labour is traditionally intimate (and hence denigrated) labour. For a critical overview of the politics of intimate labour including sex work, see: E Boris, R S Parrenas (eds.), *Intimate Labors: Cultures, technologies, and the politics of care*, Stanford University Press, Stanford, CA, 2010.

²⁰ P Saunders, ‘Prohibiting Sex Work Projects, Restricting Women’s Rights: The international impact of the 2003 U.S. Global AIDS Act’ *Health and Human Rights*, vol. 7, no. 2, 2004, pp. 179–192.

²¹ J Huckerby, ‘United States of America’ in Global Alliance Against Traffic in Women (ed.) *Collateral Damage: The impact of anti-trafficking measures on human rights around the world*, GAATW, 2007, p. 231, retrieved January 2012, <http://www.gaatw.org>.

²² See, for example: L M Augustin, *Sex at the Margins: Migration, labour markets and the rescue industry*, Zed Books, London, 2007; E Bernstein, ‘The Sexual Politics of the “New Abolitionism”’ *Differences: Journal of feminist cultural studies*, vol. 18, no. 3, 2007, pp. 128–151.; W Chapkis, ‘Soft Glove, Punishing Fist: The Trafficking Victims Protection Act’ in E Bernstein and L Schaffner (eds.), *Regulating Sex*, Routledge, New York, 2005.; Chuang, pp. 1655–1728.; G Soderlund, ‘Running from the Rescuers: New U.S. crusades against sex trafficking and the rhetoric of abolition’ *National Women’s Studies Association Journal*, vol. 17, no. 3, 2005, pp. 54–87; Weitzer, p. 447.

of trafficking and prostitution policy, however, has allowed for federal dollars to be used locally for anti-prostitution purposes. Anti-trafficking raids, such as Operation Cross Country held annually since 2006, have resulted in the arrest of many sex workers nationwide using federal anti-trafficking dollars.²³ Additionally, conservative policy makers and anti-prostitution lobbyists claim that arresting clients helps victims of trafficking by “ending the demand” for sex work. Funding from United States federal law against trafficking (through reauthorisations of the TVPA) has enabled state and local law enforcement to aggressively ‘investigate and prosecute buyers of commercial sex’.²⁴ Similarly, these same funding sources have encouraged States to introduce new “domestic anti-trafficking laws” that frame all prostitution as a form of trafficking, and include higher penalties for buying sex from a trafficked person, even in the absence of evidence that the person had been trafficked. Such approaches have done nothing to reduce and, in many cases, have increased the human rights violations of sex workers.²⁵

Policies that increase the already intense criminalisation of sex workers disproportionately scrutinise and punish the most disenfranchised, increase the economic and social marginalisation of both the providers and the purchasers of commercial sex,²⁶ and create new ways to penalise men, women, and transgender people of colour and immigrants.²⁷ Sex workers of colour are often singled out by law enforcement, thus

²³ See, for example: S Murphy, ‘Five Arrested in US Sting at Marriott’ *The Boston Globe Online*, 21 February 2009, retrieved September 2011, http://www.boston.com/news/local/massachusetts/articles/2009/02/21/5_arrested_in_us_sting_at_marriott/.

²⁴ *Trafficking Victims Protection Reauthorization Act of 2005*, section 204.

²⁵ See: Sex Workers Project, *Use of Raids to Fight Trafficking in Persons*, SWP, 2009, retrieved September 2011, http://www.urbanjustice.org/pdf/publications/Kicking_Down_The_Door_Exec_Sum.pdf. Based on interviews with self-identified trafficking victims, this report recommends a rights-based (rather than a law-enforcement based) approach to identifying and assisting trafficking victims.

²⁶ See, for example, the sidebar ‘Eliminating the Demand for Victims of Sexual Exploitation’ in U.S. Department of State, *2005 Trafficking in Persons Report*, U.S. DOS, 2005, retrieved September 2011, <http://www.state.gov/documents/organization/47255.pdf>; M Shively, K McLaughlin, et al., *Developing a National Action Plan for Eliminating Sex Trafficking*, ABT Associates, 2005, retrieved September 2011, http://web.multco.us/sites/default/files/documents/developing_a_final_action_plan_to_eliminate_sex_trafficking.pdf.

²⁷ See: Best Practices Policy Project, Desiree Alliance, Sexual Rights Initiative, *Report on the United States of America: 9th Round of the Universal Periodic Review*, BPPP, 2010, retrieved September 2011, http://www.bestpracticespolicy.org/downloads/FinalUPRBPPP_Formatted.pdf.

violating the US Constitution, international standards against discrimination and treaties such as the Committee on the Elimination of Racial Discrimination and the International Covenant on Civil and Political Rights.²⁸ Furthermore, economic marginalisation due to the deep impact of racism in the United States means that people of colour make up the majority of sex workers in public spaces, and are relentlessly targeted by the police in their efforts to clear the streets.²⁹ Arrest and subsequent conviction for prostitution-related offences intensifies the homelessness or housing precariousness experienced by people from low-income communities because people with criminal records are barred from accessing, or may lose, their public housing.³⁰ Although health and human services scholars support pragmatic, evidence-based approaches, such as harm reduction services for sex workers³¹ and programmes that attend to the needs of migrant labourers,³² public and political discourse has been dominated by high-profile trafficking hype, such as the wild, unfounded claims that the World Cup and Superbowl are responsible for an increase in child sex slavery.³³

Internationally, the United States has become the world's largest exporter of detrimental sex work policies, which have been shown to be both damaging to sex workers' health and human rights and inefficient in resolving labour abuses. Foremost is the anti-prostitution loyalty oath or "anti-prostitution pledge", a requirement that

²⁸ Andrea Ritchie, former Director of the Sex Workers Project, personal communication, 22 December 2009.

²⁹ See: A L McArdle, *Zero Tolerance: Quality of life and the new police brutality in New York City*, SSRN Elibrary, 2001; L Sausa, J Keatley, et al, 'Perceived Risks and Benefits of Sex Work among Transgender Women of Color in San Francisco' *Archives of Sexual Behavior*, vol. 36, no. 6, pp. 768–777.

³⁰ Best Practices Policy Project, Desiree Alliance, Sexual Rights Initiative, p. 1.

³¹ Epidemiologist and scholar Elizabeth Pisani has written extensively on how evidence-based harm-reduction interventions are stymied by politics and ideology. See: E Pisani, *The Wisdom of Whores: Bureaucrats, brothels, and the business of AIDS*, W. W. Norton & Company, Inc, New York, 2008.

³² The National Asian Pacific American Women's Forum (NAPAWF) is a leader in the US in calling for comprehensive immigration reform as a precondition for addressing human trafficking. See: National Asian Pacific American Women's Forum, *The Nexus Between Human Trafficking and Immigration*, NAPAWF, 2007, retrieved September 2011, http://napawf.org/wp-content/uploads/2009/working/pdfs/Trafficking_and_Immigration.pdf.

³³ A Jordan, 'Fact or Fiction? What do we really know about human trafficking?' Issue paper 3, Center for Human Rights & Humanitarian Law, American University, 2011, retrieved September 2011, <http://rightswork.org/wp-content/uploads/2011/09/Issue-Paper-3.pdf>.

organisations seeking funding for international HIV/AIDS work from the President's Emergency Plan for AIDS Relief (PEPFAR) and for anti-trafficking programme funding from the US Agency for International Development (USAID), adopt a policy against sex work. This policy has led to defunding of evidence-based services and a widespread chilling effect amongst service providers in terms of working with sex workers.³⁴ Additionally, the tier ranking system associated with the Department of State's yearly Trafficking In Persons (TIP) report—where countries are graded according to how aggressively they are deemed to be in tackling trafficking—has sparked misguided crackdowns on sex workers in countries seeking to secure a better TIP rank.³⁵ A related concern around the organisation of the TIP system is its emphasis on criminal justice outcomes (e.g. higher arrest rates) rather than human rights outcomes (e.g. increasing access to safe living and working conditions) as a measure of success.³⁶

The Sex Workers' Rights Movement

Simultaneous with the development of prohibitionist anti-trafficking and anti-prostitution efforts in the US, movements for sex worker rights have also grown in strength and visibility, impacting a variety of cultural, academic, and public health arenas. Organising for the rights of sex workers—a term attributed to San Francisco activist Carol Leigh³⁷—can be traced in the US since the early 1970s to organisations such as COYOTE (Call Off Your Old Tired Ethics), the North American Task Force on Prostitution, Prostitutes of New York (PONY) and the San Francisco-based Prostitution Task Force. A central feature of these collective movements was to promote wider societal recognition of

³⁴ A Crago, *Our Lives Matter: Sex workers unite for health and rights*, Open Society Institute, 2008, retrieved September 2011, http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/ourlivesmatter_20080724/Our%20Lives%20Matter%20%20Sex%20Workers%20Unite%20for%20Health%20and%20Rights.pdf.

³⁵ South Korea, for example, partly as a response to the Tier 3 placement, passed a new “anti-trafficking” law in 2004 called the Sex Trade Prevention Act. This Act led to the widespread arrest of women who did not want to leave prostitution; over 2000 women sex workers took to the streets of Seoul in protest. See: S Cheng, ‘Korean sex trade “victims” strike for rights.’ *Asia Times*, 2004, retrieved September 2011, <http://www.atimes.com/atimes/Korea/FL22Dg01.html>.

³⁶ See: M Segrave, M Milivojevic, et al., p. 204.

³⁷ C Leigh, *Unrepentant Whore: The collected works of Scarlot Harlot*, Last Gasp, San Francisco, 2003.

prostitution and other forms of sexual commerce as legitimate work. However, by the second part of the 1990s, even though organisations for the rights of sex workers continued to exist, national-level activism had almost vanished.³⁸

The sex worker rights movement was reborn in the 2000s, driven by the increasing repression of sex workers post-9/11 and further fuelled by new efforts to end trafficking as a result of the TVPA and the ongoing “war on drugs”.³⁹ Increases in law enforcement powers in the wake of September 11, 2001 fostered a climate of limited police accountability and brought new waves of systemic police abuse for many sex workers.⁴⁰

In 2003, the Sex Workers Outreach Project USA (SWOP USA), a national campaign style organisation was co-founded by Robyn Few with other activists. Few explains:

We were looking into the future and seeing that a lot more people were going to be arrested and we needed to be prepared for that. The federal government was coming down on us. Prostitution was not even related to federal law but the whole human trafficking approach allowed the federal government to find ways to crack down on prostitution.⁴¹

³⁸ One reason for this was the ongoing impact of HIV/AIDS on sex worker communities. Many sex worker organisers joined gay men in a fight to have HIV/AIDS recognised as a health crisis. Some leaders were lost to the illness and many community representatives were burnt-out by the 1990s by the intensity of these struggles. Interview with Carol Leigh, founder of BAYSWAN, convener of the Sex Worker Film and Arts Festival and well-known advocate for sex worker rights, by Penelope Saunders, 12 September 2011.

³⁹ Leigh, *op. cit.*; The number of people in state prisons for drug-related activity has increased exponentially over the past twenty years. See: Justice Policy Institute, *Pruning Prisons: How cutting corrections can save money and protect public safety*, JPI, 2009, retrieved February 2012, http://www.justicepolicy.org/images/upload/09_05_REP_PruningPrisons_AC_PS.pdf; ACLU, *Break the Chains*, Brennan Center for Justice, *Caught in the Net: The impact of drug policies on women and families*, ACLU, 2005, retrieved 5 February 2012, http://www.aclu.org/files/images/asset_upload_file431_23513.pdf.

⁴⁰ A Ritchie, J L Mogul, *In the Shadows of the War on Terror: Persistent police brutality and abuse of people of color in the United States*, Report prepared for the United Nations Committee on the Elimination of Racial Discrimination on the occasion of its review of the United States of America’s 2nd and 3rd Periodic Report to the Committee on the Elimination of Racial Discrimination, 2007, p. 33, retrieved February 2012, <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN15.pdf>.

⁴¹ Interview with Robyn Few, by Penelope Saunders, 9 September 2011.

Other activists who had previously been working individually found ways to network. In the fall of 2004, a conference on prostitution and sex work organised at the University of Toledo, Ohio, resulted in an ad hoc organising meeting for key activists sowing the seeds for the formation of the Desiree Alliance and the Best Practices Policy Project (BPPP). The following year, an international conference, the XXX Forum, organised in Montreal in May 2005 provided another opportunity for capacity and community building. Stacey Swimme, who went on later to co-found the Desiree Alliance (and who met the \$pread magazine⁴² collective and other key US groups in Montreal for the first time), recalls: 'I was inspired by XXX because it was so clear that every other country was so much more organised than we were in the US. It also affected me to think that I had to go to Canada to meet sex workers from the East Coast.'⁴³

In 2005, advocates from numerous organisations convened to establish the Desiree Alliance to create national spaces for the expression of sex worker rights. The first Desiree Alliance conference, organised around the theme of Re-visioning Prostitution Policy, was held in Las Vegas in July 2006. This conference was the first national convening for sex worker rights in almost ten years. Energised activists returned home to continue their work, challenging issues such as zero tolerance and prostitution free zones (PFZs) policies;⁴⁴ they also began to analyse the impact of anti-trafficking policies and to organise some small-scale responses.⁴⁵

⁴² \$pread Magazine was launched in 2005 by Rachel Aimee, Rebecca Lynn, and Raven Strega. The magazine aimed to illuminate the sex industry and was by and for sex workers. Interview with Rachel Aimee, co-founder of \$pread Magazine, by Penelope Saunders, 12 September 2011.

⁴³ Interview with Stacey Swimme, 8 September 2011.

⁴⁴ See, for example, campaigns against PFZ and related anti-prostitution policies organised by the Alliance for a Safe and Diverse DC beginning in 2005 and resistance against PFZ and "drug-free zones" in Portland in the same period through to 2010. Alliance for a Safe and Diverse DC, *Move Along: Policing sex work in Washington, DC*, Different Avenues, 2008, retrieved September 2011, <http://dctranscoalition.files.wordpress.com/2010/05/movealongreport.pdf>.; E Koyama, *Surviving the Witch-hunt: Battle notes from Portland's 82 Avenue, 2007–2010*, Confluere Publications, Portland, Oregon, 2010.

⁴⁵ In early 2006, for example, the Desiree Alliance, SWOP USA, Best Practices Policy Project, the Woodhull Freedom Foundation, BAYSWAN and local service providers in the District of Columbia organised to raise awareness of the problematic inclusion of "end demand" programming in the *Trafficking Victims Protection Reauthorization Act*.

Another strand of organising against repression wrought by anti-trafficking approaches and heightened policing emerged from harm reduction organisations, local service providers and communities of colour. Many coming from these sectors did (and do) not embrace the term “sex work” as a way of describing their engagement in sexual commerce.⁴⁶ Some service providing organisations such as the St James Infirmary and Different Avenues were participating in the early formation of groups such as the Desiree Alliance, but many others were formulating their approach to rights within other movements for reproductive justice and against police misconduct.⁴⁷ These groups took leadership in challenging issues that sex worker rights organisers found difficult to negotiate, such as the impact of anti-trafficking policies on marginalised communities of youth.⁴⁸ They also questioned narrow interpretations of decriminalisation and other remedies which were being proposed by some of the newer sex worker activist groups.

Despite growing support and networking across rights-based organisations and between communities of activists, access to mainstream policy makers under the Bush administration was impossible. Andrea Ritchie, attorney at Streetwise and Safe in New York, notes that: ‘People had a siege experience under Bush. Trafficking became a tool for pushing back on a wide range of groups. There was no way that we could engage in direct advocacy in Washington.’ Stacey Swimme concurs with this assessment: ‘What happened with the sex workers was similar to what happened with other social movements under Bush. This was the realisation that under Bush we could not achieve any federal victories. We focused locally instead and what we did locally was community building and alliance building...This period of community and alliance building has really paid off and is part of our success with the UPR.’⁴⁹

⁴⁶ Interview with Andrea Ritchie, Streetwise and Safe, by Penelope Saunders, 14 September 2011.

⁴⁷ Ritchie, *op. cit.*

⁴⁸ INCITE! Women of Color Against Violence, ‘No Simple Solutions: State Violence and the Sex Trades’, 22 April 2011, retrieved September 2011, <http://inciteblog.wordpress.com/2011/04/22/no-simple-solutions-state-violence-and-the-sex-trades/#comments>.

⁴⁹ Swimme, *op. cit.*

The UPR moment

The Universal Periodic Review is a relatively new procedure created by the United Nations Human Rights Council (formerly the Human Rights Commission). The purpose of the UPR is to publicly examine the human rights record of all UN member States. During each four-year cycle, all States will be reviewed. For each member state being reviewed, the Human Rights Council selects three rapporteurs (referred to as the troika) to facilitate the review process. The evidence under review may consist of national reports, information provided by independent human rights experts, treaty bodies and other UN entities, and “shadow reports” from NGOs and other national human rights institutions.⁵⁰

In 2010, the current human rights record of the US was to be reviewed.⁵¹ In February 2010, the Sexual Rights Initiative (SRI), a global coalition of organisations which aims in part to reframe sexual rights at the level of the Human Rights Council,⁵² sent out a call for applications from organisations from countries under review (including the US) to write reports regarding reproductive rights, sexual diversity, sexuality education, and HIV/AIDS. A human rights adviser to the Best Practices Policy Project forwarded this call from SRI to organisations in its US network which are aligned with sexual rights and justice for people in the sex trade. BPPP applied to write a report in partnership with the Desiree Alliance on human rights abuses experienced by sex workers in the United States. The report—developed with extensive consultation across organisations working for the rights and well-being of sex workers, people in the sex trade and related communities—was one of

⁵⁰ United Nations Office of the High Commissioner for Human Rights, *Basic Facts About the UPR*, OHCHR, 2008, retrieved September 2011, <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx>.

⁵¹ Between 2008 and 2011, the Human Rights Council’s Universal Periodic Review hosted its first round of reviews, which consisted of 12 review sessions, each of which focused on 16 UN member States. The US was reviewed during the 9th session (in 2010). The following link lists each member state by their review session: <http://www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf>. The second round of UPR sessions will commence between 2012–2016. Retrieved January 2012.

⁵² While the SRI helped bring sex work issues to the UN table, this process was also facilitated by more than three decades of activism and scholarship around the concepts of sexual health and rights on a domestic (US) and global scale. See, for example: A Miller, C Vance, ‘Sexuality, Human Rights and Health’ *Health and Human Rights*, vol. 7, no. 2, 2004, pp. 5–15; S Correa, R Petchesky, et al., *Sexuality, Health and Human Rights*, Routledge, New York, 2010.

a handful chosen by the SRI to proceed to developing a full report for submission to the UN Human Rights Council. This report constituted the first national statement of the status of the human rights of sex workers in the United States.⁵³

In November 2010, two members of the BPPP, Penelope Saunders and Darby Hickey, were invited by the SRI to be present in Switzerland during the first UPR meeting for the United States. Saunders and Hickey joined dozens of other US representatives in Geneva to discuss human rights violations in the US with members of the UN Human Rights Council. Many of these members were interested in speaking with Saunders and Hickey, including the delegation of Uruguay, which subsequently proposed recommendation #86.

For the next three and a half months (leading up to early March 2011 when the US would announce its response to the UPR recommendations), sex worker rights advocates in the US pushed themselves beyond what they had previously thought they could achieve. They formed a working group named Human Rights for All (HRFA),⁵⁴ which engaged in a series of coordinated high-leverage organising activities that included: the development of a “call to action” addressed to the US government (signed by more than 150 academics, public health leaders, and supporting organisations including national and international human rights groups); the garnering of support from high-profile leaders in the fields of health, criminology, and women’s rights; the development of a policy brief tailored to the US federal government context, including a refined set of policy-amenable recommendations; and an educational

⁵³ Best Practices Policy Project, Desiree Alliance, Sexual Rights Initiative, p. 1.

⁵⁴ This work required substantial time, effort, creative vision, patience, and collaboration across many state lines and time zones. Core members of Human Rights for All, including the authors of this article, laboured at times around the clock under conditions of severe time limitation. The learning curve for most of us was very steep, especially regarding writing for and speaking to policy makers, but also in learning how to work together across diverse personalities and positions (made more challenging by the need to do so via email and phone rather than face-to-face). In order to “win” with the UPR, we knew we needed to work quickly and efficiently while forging alliances with people in positions of institutional power. But in order to “win” in the longer run as a movement, we knew we needed to place the voices and needs of a diversity of sex workers at the center of the effort and to honour principles of transparency and consensus building. While the experience was invaluable for learning how to create change by reaching for allies across diverse sectors of society, our process was by no means perfect. Our reflections on how to best accomplish this balance of short-term/longer-term goals are ongoing.

campaign to inform congressional leaders about the critical issues sex workers face and offer some potential viable solutions.⁵⁵

Reframing sex work for federal officials

The process of trying to convince State Department officials to understand sex work as a domestic human rights issue, and not simply an issue of human trafficking and crime, posed a number of challenges. We describe three here:

First, because of the persistent misperception in the US that most or all sex workers are victims of “trafficking”, advocates needed to clearly define the difference between human trafficking and sex work to policy makers. By doing so, they could then illuminate for officials why it is a problem that US policies against sex work and human trafficking mistakenly stem from the same logic (unlike, for example, policies around trafficked farm labour vs. voluntary farm labour).

Second, federal policy reform around reducing violence and human rights abuses against sex workers is particularly difficult to institutionalise due to the US governance structure in which power is divided and shared between the central (federal) and state or local governments. In other words, even if the State Department changed its understanding of sex work and human trafficking, this would not automatically translate into legal changes at the state or local level.⁵⁶

⁵⁵ K Lerum, P Saunders, et al., *Reducing Violence against Sex Workers: What are the policy options?*, Human Rights for All, 2011, retrieved September 2011, http://www.humanrightsforall.info/uploads/Policy_Brief_FINAL.pdf.; Human Rights for All, *Call to Action Letter to Harold Koh, Michael Posner, David Sullivan and David Busby*, Human Rights for All, 2011, retrieved September 2011, http://www.humanrightsforall.info/uploads/Sign_on_Letter_031311_10pm-1-2.pdf.

⁵⁶ As outlined in the Constitution, the US government is based on the principle of federalism, in which power is divided and shared between the central (federal) and state or local governments. In the past, the federal government has demurred when confronted with the evidence of gross human rights violations against sex workers, citing state authority over policing and local law enforcement issues. Criminal prohibition of sex for money and surrounding activities exists in most States (with the exception of some counties in the state of Nevada). Some forms of sex work, such as exotic dancing, may not be prohibited by state legislation but they are always regulated by state and municipal policies. Sex work that occurs in public spaces is also often policed under legislation prohibiting loitering, public nuisance, trespassing or “failure to obey” a police officer’s directive to move along. Despite politicians’

Third, while police violence and criminalisation were (and are) the most pressing human rights concerns for sex worker rights advocates in the US, advocates realised that they could not address sex workers' rights with US lawmakers without also engaging in dialogue around current anti-trafficking measures. Therefore, in developing messages that would resonate in meetings with House and Senate representatives and the State Department, advocates needed to underscore the negative impact that trafficking measures have on human rights in the US. For example, they drew attention to the ways that federal anti-trafficking funding streams have *increased* (rather than decreased) law enforcement abuse on sex workers at city and state levels.⁵⁷ At the same time, due to federal funding restrictions for such research in the US, building this case with systematic research evidence (as opposed to anecdotal stories) is an ongoing challenge.⁵⁸

Connecting with federal officials

In February 2011, advocates met with Senate and House representatives and their staff to raise awareness about UPR recommendation #86, and the need for the US to accept the recommendation in its report to the UN.⁵⁹ Advocates also managed to meet with State Department representatives including Harold Koh, senior legal adviser to Secretary of State Hillary Clinton and head of the US delegation to the UN Human Rights Commission for the UPR. While these meetings took considerable effort for advocates to arrange, they were facilitated by the mandate provided by the UPR to engage in open dialogue with members of civil society. State Department officials

preference for local control, policing and law enforcement has and can be affected by federal regulations. For example, state and local police departments have been federally ordered to alter their hiring and training policies to ensure that women and ethnic/racial minorities are given access to jobs in these agencies. Federal regulations can also affect state government control of policing through fiscal federalism, or grants-in-aid programmes.

⁵⁷ See: Sex Workers Project, *Use of Raids to Fight Trafficking in Persons*, SWP, 2009, retrieved September 2011, http://www.urbanjustice.org/pdf/publications/Kicking_Down_The_Door_Exec_Sum.pdf. Based on interviews with self-identified trafficking victims, this report recommends a rights-based (rather than a law-enforcement based) approach to identifying and assisting trafficking victims.

⁵⁸ See: Weitzer, p. 447.

⁵⁹ Although the UPR is a matter of the State Department, and not an issue to be voted on by Senate and House representatives, advocates felt that the UPR process was an important educational opportunity for federal lawmakers who vote on domestic legislation, such as the TVPA.

took this UN mandate seriously, and repeatedly articulated to human rights activists their intent to demonstrate to their global peers how the US is a model for how to best engage with civil society during the UPR process.

In their messages to representatives of the House and Senate and State Department, advocates stressed that policies must be accountable to reliable evidence and assessment. To address this need, they urged representatives to build ‘capacity for human rights through research and dialogue’.⁶⁰ In addition, advocates urged the US government and Congress to ‘[m]odify or eliminate existing federal policies that conflate sex work with human trafficking and prevent sex workers from accessing services such as healthcare, HIV prevention and support’. Advocates also recommended the revocation of the anti-prostitution loyalty oath (instructing the Department of Justice to cease its appeal of litigation challenging the oath), and proposed that sex workers should be included in the US National HIV/AIDS Strategy regarding prevention and harm reduction efforts.⁶¹

For the first time since the rebirth of the sex worker rights movement in the 2000s, advocates carrying clear and well-developed messages had gained access to senior policy makers and elected federal officials. During these meetings many policy makers initially assumed that advocates had come to raise concern over “sex trafficking”; some were initially unable to grasp the idea that non-trafficking related human rights abuses were faced by the constituents represented by Human Rights for All.⁶² These meetings illustrated the extent to which “sex trafficking” had come to be understood by policy makers in

⁶⁰ To date, the US still lacks adequate and rigorous assessment of the human consequences of its own anti-trafficking policies both on a domestic and a global level. See Global Alliance Against Traffic in Women, *Collateral Damage: The impact of anti-trafficking measures on human rights around the world*, GAATW, 2007, pp. 18-21, retrieved September 2011, http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf. Sweden—another global leader in aggressive anti-prostitution policies—has also been critiqued for its dearth of rigorous assessment of its policy impact. See: A. Jordan, *The Swedish Law to Criminalize Clients: A failed experiment in Social Engineering*. Center for Human Rights & Humanitarian Law, April 2012, retrieved June 2012, <http://rightswork.org/wp-content/uploads/2012/04/Issue-Paper-4.pdf>

⁶¹ For the full list of recommendations, see: Lerum, et al. (2011), *op. cit.*

⁶² D Barlin, Human Rights for All, communication by email, September 14, 2011.



Washington, D.C. as the central issue encompassing all human rights questions in regards to prostitution. However, these meetings also demonstrated the intellectual openness of some current officials to broaden their understanding of the issues at hand – especially when presented with meticulous evidence and when supported by a broad coalition of respected activists, scholars, and health officials.

As a result of these successful connections across many lines of difference (both within the Human Rights for All coalition and between the HRFA advocates and federal officials), the messages delivered by the activists instigated a series of both personal and political transformations. Most notably, in early March 2011 the US released report to the United Nations in which the government officially accepted recommendation #86, stating: *No one should face violence or discrimination in access to public services based on sexual orientation or their status as a person in prostitution.*⁶³ As we describe next, this remarkable and historic statement by the State Department has opened up a new set of opportunities and challenges for sex worker activists.

Current Opportunities and Challenges

The UPR process highlighted the ongoing importance of the global human rights community for bringing a diversity of marginalised voices—including those of sex workers—to the attention of US policy makers.⁶⁴ It is our contention that the US State Department's acceptance of recommendation #86 is an indication of the ability for organised sex workers and their allies to press for change.⁶⁵ Recommendation

⁶³ U.S. Department of State, *U.S. Response to the UN Human Rights Council Working Group Report*, U.S. DOS, 10 March 2011, retrieved September 2011, <http://www.state.gov/j/drl/upr/157986.htm>.

⁶⁴ While the geopolitical diversity built into the UPR process is crucial for facilitating the raising of new issues, so too can this diversity inhibit the raising of others. For this reason, the work of transnational coalitions, such as the SRI, are critical for the successful framing of marginalised issues at the level of the UN.

⁶⁵ This potential is also borne out by other significant recent victories won by sex workers at state and local levels, including the overturning of the sex offender law in Louisiana. See: J Flaherty, 'Sex offender registration for sex workers ends in Louisiana' Louisiana Justice Institute, 28 June 2011, retrieved September 2011, <http://louisianajusticeinstitute.blogspot.com/2011/06/sex-offender-registration-for-sex.html>.

#86 is itself limited in what it calls for—framing human rights abuses in terms of basic respect under the law and access to social services.⁶⁶ However, a broader human rights strategy around sex work (e.g. one that also includes labour rights, immigrant rights, and sexual rights) has the potential to chip away at the hegemonic understanding of sex workers as people who must be rescued, saved, and/or reviled.

During the eight years of the George W. Bush administration, progressives working on HIV/AIDS treatment and care, reproductive rights and human rights found themselves as outsiders in Washington, D.C.; meanwhile, conservative feminists and the religious right were provided open access to influence policy.⁶⁷ The election of President Obama led to great hope that key policies in these areas would return to being based on scientific evidence, best practices and human rights standards. Obama initially pushed back on some of the most retrogressive sexual and reproductive policies implemented under Bush,⁶⁸ but over time progressives have been disappointed on many issues.

In regards to anti-trafficking policies, the Obama State Department has indicated an openness to policy change but has also left a great deal of the Bush approach intact. The administration has publicly rejected an absolute link between trafficking and sex work, stating that, ‘prostitution by willing adults is not human trafficking regardless of whether it is legalized, decriminalized, or criminalized’.⁶⁹ However in 2010, after a temporary suspension of the US appeal, Obama defended the anti-prostitution loyalty oath by continuing to pursue appeals of an injunction won by US-based international aid organisations preventing the application of policy to their organisations.⁷⁰ Even

⁶⁶ Additionally, when accepting recommendation #86, the US State Department also shied away from the term “sex work” (which would have implied recognition of sex work as work) opting instead for the term “prostitution”.

⁶⁷ Saunders (2004), *op. cit.*

⁶⁸ For example, in early 2009 Obama rescinded the global gag rule on abortion.

⁶⁹ See the sidebar ‘What is not Trafficking in Persons’ in U.S. Department of State, *2010 Trafficking in Persons Report*, U.S. DOS, 2010, retrieved September 2011, <http://www.state.gov/documents/organization/142979.pdf>.

⁷⁰ In mid-2011 a federal appeals court ruled that United States cannot force US-based groups seeking international HIV/AIDS funding to denounce sex work. This decision from the U.S. 2nd Circuit Court in New York upholds a lower court decision in favour of the Alliance for Open Society International (AOSI), Pathfinder International, the Global Health Council and Interaction. See: K Kade, ‘Anti-Prostitution Pledge Ruling Corrects Misguided, Harmful Policy’ Jurist - Hotline, 22 July 2011, retrieved September 2011, <http://jurist.org/hotline/2011/07/kristy-kade-prostitution-pledge.php>.

though these US-based organisations have again prevailed in court, the anti-prostitution loyalty oath continues to remain in effect for the vast majority of organisations seeking PEPFAR funding worldwide under terms almost identical to those imposed under the Bush administration.⁷¹

Despite the mixed bag presented by the Obama approach to anti-trafficking policies, advocates for sex workers' rights were delighted when, some months after the US accepted recommendation 86, US Secretary of State Hillary Clinton used the term "sex worker" during a speech. Commenting on the achievements of international development work for rights at a celebration of LGBT Pride Month co-hosted by the State Department and Gays and Lesbians in Foreign Affairs Agencies, Clinton reported: '[o]ur colleagues are meeting with human rights activists, health authorities, youth activists, sex workers, the full range of people who are involved in and working to protect LGBT people's rights and lives'.⁷² This statement combined with the acceptance of recommendation #86 indicates that central figures in the State Department are, for the first time in more than a decade, prepared to dialogue about the rights of sex workers.⁷³

⁷¹ In 2009, small changes were made to the wording of the policy under the Obama administration which did not substantially change its operation. N Wittlin (nd), 'US Funding for HIV/AIDS', <http://www.sxpolitics.org/?p=3445>. President Obama cannot rescind the anti-prostitution loyalty oath as he rescinded the global gag rule on abortion because the loyalty oath is enshrined in legislation, the 2003 Global AIDS Act. The loyalty oath can only be removed by an act of Congress. See: 'Don't expect a revolution Barack Obama may differ little from George Bush in his approach to Africa' *The Economist*, 12 March 2009, <http://www.economist.com/node/13279006>.

⁷² P Starr, 'Clinton: Meeting With 'Sex Workers' Is 'People-to-People Diplomacy at Its Best' *CNS News*, 28 June 2011, retrieved September 2011, <http://cnsnews.com/news/article/clinton-meeting-sex-workers-people-people-diplomacy-its-best>.

⁷³ Clinton has long avoided any public statement of sex work since she was publicly attacked for being "pro-prostitution" during the development of the UN Trafficking Protocol in 2000 by Concerned Women for America and Republican senator Jesse Helms. At that time, Clinton was co-chair of the President's Interagency Council on Women and the US delegation to the UN Crimes Commission where the Trafficking Protocol was under development. She had been part of efforts to include a definition of trafficking that included all labour sectors, rather than prostitution only. See: J Doezema, *Sex Slaves and Discourse Masters: The construction of trafficking*. 2004 doctoral dissertation, pp. 146–7. Available online at: <https://docs.google.com/a/uw.edu/viewer?a=v&q=cache:AP8kN2qN8zsJ:myweb.dal.ca/mgoodyea/Documents/Migration%2520studies/Sex%2520slaves%2520and%2520discourse%2520masters%2520-%2520The%2520historical%2520construction%2520of%2520trafficking%2520in%2520women%2520Doezema%25202004%2520DPhil%2520Thesis%2520ISD.doc+jo+doezema+sex+slaves+and+discourse+masters+the+historical+>

Holding the US accountable to Human Rights Principles

We are now in a historic moment when human rights and sexual rights are beginning to be introduced into frames of both sex work and human trafficking.⁷⁴ For the first time in more than a decade, sex workers in the US are finally gaining political ground. Cracks have appeared in the almost hegemonic US approach to trafficking in persons. And perhaps for the first time in US history, sex workers and their allies have developed workable recommendations for change on the federal and international level.

Advocates recognised early on in the UPR process that translating the rhetorical success of the UPR into tangible policy results would require decades of work. The UPR process gave rise to an active working group of sex worker rights advocates who have continued to collaborate with working group members beyond organising around the UPR. Advocates with the BPPP have committed to maintaining a presence in Washington, D.C. with a dedicated policy consultant monitoring and analysing related policy actions, including the Washington, D.C. policies on Prostitution Free Zones. The process has also inspired other advocate working group members to generate more collaborative-based research on sex work issues and to address the dearth of quality data available.

The pre- and post-UPR processes discussed above represent small victories for the range of individuals involved in sexual commerce as well as their allies and activists. We now face a unique opportunity—afforded by a global mandate of the United Nations—to begin systematically implementing human rights principles into research, activism, and policies regarding both sex work and human trafficking. In his concluding statement to the Human Rights Council, Harold Koh,

construction+of+trafficking+in+women+Doezema+2004&hl=en&gl=us&pid=bl&srcid=ADGEESiymMEJ8TvrQnjAfEb2a-YevZkQ_d0mvjyOkVy-3QRZA5anbBB6zauCP_4ufx-_ohMrb4bkS6Cc5H-9vqjg6LOIZJu9TEloSo08-Pn06N2T08kd bZyb4v4DImh7qHKgSabqDFzN&sig=AHIEtbSkTZVNNn8eUDsJsW27zf1MftiUsg, Retrieved June 2012. See also: J Doezema, *Sex Slaves and Discourse Masters: The construction of trafficking*, Zed Books, London, 2010.

⁷⁴ See: Center for Health and Gender Equity, Center for Human Rights and Humanitarian Law at American University Washington College of Law, *Human Trafficking, HIV/AIDS, and the Sex Sector*, Human Rights for All, CHANGE and Center for Human Rights and Humanitarian Law AUWCL, 2010, retrieved September 2011, <http://www.genderhealth.org/files/uploads/change/publications/hivaidsandthesexsector.pdf>.

Legal Adviser of the State Department, stated that, ‘this is an ongoing process leading to concrete policy and self conscious change’. Sex work activists and researchers in the fields of sexual and reproductive health, human rights, and justice must continue to work together—along with our international allies—to hold US governing and policing institutions accountable to human rights principles for all people engaged in sex trade work.

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A Lie More Disastrous than the Truth: Asylum and the identification of trafficked women in the UK

Abigail Stepnitz

Abstract

This article explores the impact that nationality can have on a person's experience of being identified as a victim of trafficking in the UK. Responses to individuals and disparities in rates of recognition depending on nationality are cause for great concern. The rhetoric and the response to women who have experienced trafficking varies considerably depending upon the citizenship, residency and documentation status of the individual, particularly highlighting the differential treatment of trafficking cases of British women, European Union nationals, and third-country (non UK, non EU) nationals, the majority of whom are also asylum seekers. This differential treatment is played out in multiple ways, many of which result in women's inability to realise procedural and substantive rights. The article examines the use of official "identification" mechanisms that place women into the administrative category of "victim", and the central role of the asylum system in all areas of UK anti-trafficking responses.

Key words: trafficking, asylum, re-victimisation, women's rights, discrimination

This above all, to refuse to be a victim. Unless I can do that I can do nothing. I have to recant, give up the old belief that I am powerless...A lie which was always more disastrous than the truth would have been. The word games, the winning and losing games are finished; at the moment there are no others but they will have to be invented, withdrawing is no longer possible.

– Margaret Atwood, *Surfacing*¹

The response to human trafficking into and within the United Kingdom is a complicated and yet incomplete combination of strategies, interventions and rhetoric, focused predominantly on immigration control and crime reduction, with support to individuals and prevention of exploitation as convenient outputs but not drivers of policy or practice. The introduction of human rights-based approaches has only emerged over the last decade, with discussions about the rights and entitlements of the trafficked beginning in earnest only in the last two years. Within the overall UK approach to human trafficking lies a stratified and often discriminatory system, largely reliant on rhetoric and practice taken from responses to immigration. For example, the understanding of trafficking, the identification of victims² and their treatment varies greatly depending on the immigration, documentation and residency status of the person involved. This is particularly so for individuals with the dual identity of trafficked person and asylum seeker. The fact that the UK Border Agency (UKBA) “asylum case owners”—the persons who review individual cases and make decisions on behalf of the Secretary of State—also hold the sole responsibility for determining the victim status of the majority of applicants means that many of the concerns highlighted in the agency’s response to asylum claimants also arise in relation to victim status determinations.

¹ Margaret Atwood, *Surfacing*, Virago Press, London, 1976.

² For the purposes of this article, a “victim of trafficking” will refer only to those persons who have been formally recognised as such by the government of the United Kingdom and placed in that administrative category. All other trafficked persons in the UK, regardless of their position with regard to the government will be referred to as trafficked persons, trafficked people or persons who have been trafficked.

Asylum Responses and the “Culture of Disbelief”

Concerns about the treatment of women in the asylum system have been raised by several organisations and legal representatives, and has most recently been confirmed by the UKBA itself following an internal audit.³ In January 2011, the NGO Asylum Aid published *Unsustainable*, the first piece of substantial research into women’s experience of the asylum system. The report concluded that: ‘[W]omen were too often refused asylum on grounds that were arbitrary, subjective, and demonstrated limited awareness of the UK’s legal obligations under the Refugee Convention.’⁴ Many of the UKBA’s decisions proved to be ‘simply unsustainable’,⁵ and 50% were overturned when subjected to independent scrutiny in the immigration tribunal. When Asylum Aid informed UKBA of the findings, the agency confirmed internal data also shows that a disproportionately high percentage of women refused asylum are granted some form of leave at appeal. According to Asylum Aid, however, ‘the UKBA has stressed that these are provisional figures, but has also agreed to analyse this data further and has put in place an internal working group to explore implementation of the report’s recommendations’.⁶

Concerns about deeply entrenched disbelief of asylum applications have also been raised by another prominent NGO, the Refugee Council, in response to the UKBA leaving asylum seekers in limbo for several years.⁷ In 2010, an internal UKBA whistleblower made public the practices of the Cardiff office.⁸ Louise Perrett, who worked as a case owner in 2009, asserted that staff kept a stuffed gorilla, a “grant monkey”,

³ Independent Chief Inspector of the UK Border Agency, *Asylum: Getting the balance right? A thematic inspection: July–November 2009*, OClUKBA, London, 2010, p. 19.

⁴ Asylum Aid, *Unsustainable: The quality of initial decision-making in women’s asylum claims*, Asylum Aid, London, 2011, p. 5, retrieved 31 November 2011, <http://www.asylumaid.org.uk/data/files/unsustainableweb.pdf>.

⁵ *Ibid.*, p. 54.

⁶ *Ibid.*, p. 5.

⁷ Jonathan Ellis, Refugee Council Director of Advocacy stated in a press release: ‘It is imperative that asylum seekers have adequate support and early access to good quality legal advice to pursue their case, but the culture of disbelief among UKBA caseworkers must also be eliminated.’ Press release, Refugee Council response to report on work of UKBA and asylum seekers left in limbo, 11 January 2011.

⁸ BBC News, ‘Whistleblower’s claims about Cardiff asylum office’, 3 February 2010, retrieved 28 November 2011, http://news.bbc.co.uk/1/hi/wales/south_east/8496759.stm.

which was used to humiliate officers who approved asylum applications. Following an internal UKBA investigation, the “grant monkey” was confirmed to exist, though determined by the agency to be “benign”. Following this exposure, the UKBA committed to improvements such as an overhaul of the Agency’s approach to credibility issues, starting with new training interventions and an increase from 20% to 50% of decisions made in Cardiff being assessed against an external quality assurance matrix.⁹ Finally, the Independent Asylum Commission (IAC) has reported consistently that such a “culture of disbelief” or “culture of refusal” is perceived by observers and applicants alike as prevalent in the Home Office decision-making environment, and possibly even encouraged by legislation such as Section 8 of the 2004 *Asylum and Immigration (Treatment of Claimants) Act*, which gives case owners a long list of factors which must be seen as damaging credibility.¹⁰ The Independent Race Monitor has also noted that negative public discourse on immigration and asylum can impact decision makers by encouraging caution and suspicion¹¹ and has, in the past, noted a high appeal success rate for applicants originating from African countries.¹² This environment presents particular challenges and concerns for a system designed to identify victims of trafficking, especially those who also claim asylum.

Unfortunately to date, there has not been any comprehensive evaluation of the impact that victim identification in an immigration context has on the overall process or the claimants themselves. Therefore, this article analyses the experiences of victims of trafficking supported by

⁹ UKBA, *Louise Perrett Investigation Report Summary*, Home Office, London, 2011, retrieved 2 December 2011, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/investigation-louise-perrett/investigation-report.pdf>. Note that the full report has not been made publicly available.

¹⁰ *Immigration and Asylum (Treatment of Claimants) Act 2004*, section 8: ‘In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant’s credibility, of any behaviour to which this section applies. (2) This section applies to any behaviour by the claimant that the deciding authority thinks – (a) is designed or likely to conceal information, (b) is designed or likely to mislead, or (c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.’

¹¹ M Coussey, *Annual Report 2005/6 of the Independent Race Monitor*, 2006, <http://www.ind.homeoffice.gov.uk/6353/aboutus/fourthreportofindependentra1.pdf>.

¹² *Ibid.*, p.16.

the Poppy Project,¹³ drawing on other empirical data including the publicly available national figures for identification of victims of trafficking.

UK Trafficking Responses in Context

Trafficking is, inter alia, an immigration crime.
—Damien Green, Minister of State (Immigration), Government of the United Kingdom¹⁴

The above quote from the UK Minister responsible for immigration, a portfolio that includes trafficking in human beings, is reflective of the tendency of UK policy and practice to reduce a complex human rights violation to a simple immigration problem. When the UK signed the United Nations Trafficking Protocol in December 2000 (though it would not be ratified until 2006), there were no substantial legislative or policy responses to trafficking in persons. The first identified UK priority was updating the criminal and immigration legislation accordingly, an approach that would set the tone for UK priorities with regard to trafficking for the foreseeable future.

The UK legislative framework

In 2003, the *Sexual Offences Act* introduced the crime of trafficking into (within, or out of) the UK for sexual exploitation,¹⁵ a clumsily-worded offence that requires that a person be moved into, within or out of the UK for the purposes of exploitation *and* that the exploitation consists, at a minimum, of the commission of another relevant sexual

¹³ The Poppy Project was funded by the UK Home Office until 2011. Since July 2011, it has been funded independently. The Poppy Project delivers support and/or accommodation to female victims of trafficking. It has, as of this writing, received over 2000 referrals and supported more than 750 women. Access to the project is dependent on a woman meeting certain criteria based on the international definition of trafficking. In accordance with the CoE Convention, women accessing Poppy Project services are not required to cooperate with authorities as a condition of receiving support and accommodation, but are supported to do so if and when they choose.

¹⁴ Quote from an address to the UK anti-trafficking organisations, 8 September 2011.

¹⁵ *Sexual Offences Act 2003, sections 57–59*, HMSO, London.

offence listed in the Act, such as rape, sexual assault or exploitation in prostitution. In 2004, the *Asylum and Immigration (Treatment of Claimants) Act* introduced a new offence of trafficking people for exploitation,¹⁶ which creates an offence only if someone has been moved into, within or out of the UK, for the intention of exploitation as defined in Article 4 of the European Convention of Human Rights, and if it can be demonstrated that the person was subject to force, fraud or deception.

No official process existed, however, to formally establish whether or not someone was a victim of trafficking. Identification was left to specialist non-governmental organisations (NGOs) such as the Poppy Project or to judges in either the immigration appeals or criminal justice system who often commented in their judgments on whether or not they believed that a witness or claimant was genuinely a victim of trafficking.

Formalising Identification, Codifying Discrimination

For many trafficked people, the experience of going through the immigration and criminal justice systems has horrific consequences. Those who enter the UK illegally must regularise their stay via the immigration system to access any assistance. Many are advised to seek asylum on the basis of their experiences, and until 2009 those who accessed government-funded support via NGOs were only offered support contingent on their willingness to cooperate with law enforcement. In 2008, after mounting pressure from the NGOs to recognise the limitations in such a system, the UK ratified the *Council of Europe Convention on Action against Trafficking in Human Beings* (CoE Convention), a key piece of international legislation that creates important and specific obligations on the state, particularly with regard to victim protection. The Convention came into force on 1 April 2009.

It clearly identifies the importance of a rights-based approach and the need to guarantee gender equality.¹⁷ To assist all states parties with

¹⁶ *Immigration and Asylum (Treatment of Claimants) Act 2004*, section 4, HMSO, London.

¹⁷ Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, CETS 197, Article 1, 16 May 2005, retrieved 26 August 2011, <http://www.unhcr.org/refworld/docid/43fded544.html>.

its implementation, the Organisation for Security and Cooperation in Europe (OSCE) developed the concept of a centralised National Referral Mechanism (NRM), a tool that was intended to ensure states could be compliant with the identification and victim care obligations in the Convention.¹⁸ Whilst the NRM is not a CoE Convention requirement, it is generally agreed to be a useful tool to help states meet their obligations.

According to the OSCE, the basic function of the NRM is to allow designated “first responders” or persons likely to encounter a potential victim of trafficking, such as the police, immigration officials, specialist NGOs, and social services to make a detailed referral, listing the indicators of trafficking to a “competent authority” who then makes an initial assessment as to whether it is reasonable to believe that this person may be a victim. In the UK, this decision is known as the “reasonable grounds” decision. It grants the individual protection from removal for a minimum of 45 days as well as access to support arrangements, as detailed by Article 12 of the Convention which sets out victims’ rights to material and psychological assistance.¹⁹ During the 45-day “recovery and reflection period”, the competent authority is required to undertake a comprehensive assessment of the individual’s claim, in conjunction with other involved professionals, which will allow them to reach a “conclusive grounds decision”, determining finally if a person is a victim of trafficking, and whether or not, owing to their circumstances, they should be permitted to remain in the UK temporarily. The explanatory report of the Convention explains the envisaged role of these important decision makers:

*Victims frequently have their passports or identity documents taken away from them or destroyed by the traffickers. In such cases they risk being treated primarily as illegal immigrants, prostitutes or illegal workers and being punished or returned to their countries without being given any help. To avoid that, Article 10(1) requires that Parties provide their competent authorities with persons who are **trained and qualified in preventing and combating trafficking in human beings and in identifying and helping victims, including children, and***

¹⁸ Office for Democratic Institutions and Human Rights, *National Referral Mechanisms: Joining efforts to protect the rights of trafficked persons*, Organisation for Security and Cooperation in Europe, Warsaw, 2004.

¹⁹ *Council of Europe Convention on Action Against Trafficking in Human Beings*, Article 12.

*that they ensure that those authorities cooperate with one another as well as with relevant support organisations....It is essential that these have people capable of identifying victims and channelling them towards the organisations and services who can assist them...*²⁰

Decision-making authority within the UK's NRM is vested in two competent authorities, divided according to immigration status. For those who are UK or European nationals, decisions are made by the UK Human Trafficking Centre (UKHTC), which is part of the Serious Organised Crime Agency. Not only are these claims not contributing to UK immigration statistics, but it is important to note that positively identifying European nationals often does not create a financial obligation that otherwise would not exist. As nationals of EU states, many of these individuals would be entitled to material assistance such as housing and income support regardless of their status as a victim of trafficking. They could not be removed from the territory if they are found not to be victims.

Non-EU nationals, regardless of their documentation status, have their claim evaluated by the UK Border Agency. Critically, individuals who are both asylum seekers and claiming to be trafficked will have both decisions made by the same immigration official. According to the guidance published for both asylum case owners who encounter victims of trafficking and competent authorities who will make NRM and/or asylum decisions, the two systems are intended to run in parallel.²¹ Concerns have been raised about how the asylum system should respond to a person in the 45-day recovery and reflection period. Support providers advocate waiting for the end of the period before a person goes through a complicated and re-traumatising interview, but in reality many people claiming both trafficking and asylum are given no time to recover and will be interviewed before any decision is made. Not only does this confuse and conflate the two processes in the mind of the individual and the decision maker, but it means that individuals who should be able to use their proof of reasonable grounds status to assist them in accessing rights and entitlements are unable to do so for months or even years at a time.²² Many NRM and asylum decisions

²⁰ *Ibid.*, Explanatory report at paragraphs 128–130. Emphasis added.

²¹ UK Border Agency, *Guidance for the Competent Authorities*, UKBA, London, 2010, p. 31.

²² Poppy Project, Report to the UK Ministry of Justice (Personal communication by e-mail, 8 April 2011).

made simultaneously use the exact same text and often NRM decisions will include sections such as “risk on return”, a critical element of asylum decision making that is not at all essential in determining trafficking. Asylum claims are based on an individual’s well-founded fear of persecution in their home country: the risk they face upon return. A person may have been trafficked out of circumstances that do not meet the threshold for asylum, but still be in need of immediate assistance to recover from abuses experienced in the UK. The absence of refugee status cannot legally exclude them from accessing that support. Use of language related to risk on return encourages use of the wrong kind of information to make a trafficking decision, especially when that information suggests that a person should not remain in the UK.

There is no appeal process for any NRM decision; the only way to legally challenge a decision is via judicial review at the High Court. Judicial review is an arduous and complex process and, given a lack of understanding of the NRM amongst the judiciary, it is rare that applications to the High Court are even accepted let alone successful. If judicial review fails, the only recourse is to the European Court of Human Rights.

The tables below show the official NRM statistics as collected and published by the UK Human Trafficking Centre in March 2011.²³ Table 1 shows the breakdown in NRM decisions of EU (**but not UK**) nationals from 1 April 2009 to 31 March 2011. EU nationals were assessed as presenting “reasonable grounds” of having been trafficked at the initial stage in 93.8% of cases; 85.5% were conclusively determined to be victims of trafficking. For UK nationals, the numbers are even higher, with 96.1% (of 52 cases) assessed as presenting “reasonable grounds” of having been trafficked at the initial stage and 91.8% conclusively determined to be victims of trafficking.

All NRM statistical data, whether or not it involves an immigration/ asylum component, is collected and analysed by the UKHTC. Only information regarding nationality, age, exploitation type and gender of those entering the NRM is published, as well as the outcome of

²³ UKHTC, *National Referral Mechanism Data*, SOCA, London, 2011, retrieved 13 April 2011, <http://www.soca.gov.uk/about-soca/about-the-ukhtc/national-referral-mechanism/statistics>.

TABLE 1

Reasonable and conclusive grounds decisions made for EU national cases from 1 April 2009 to 31 March 2011

Nationality	Referrals as at 31/03/11	Reasonable Grounds Decisions					Conclusive Grounds Decisions				
		Not considered	With-drawn	Negative RG	Positive RG	% Positive RG	Not Considered	With-drawn	Negative CG	Positive CG	% Positive CG
Belgium (disputed)	1			1		0.00					0.00
Bulgaria	7			1	6	85.71				6	100.00
Czech Republic	68		9	2	57	96.61	3		3	51	89.47
Estonia	2			1	1	50.00				1	100.00
Hungary	23		1		22	100.00	2			20	90.91
Latvia	7		1		6	100.00				6	100.00
Lithuania	24		1	2	21	91.30			6	15	71.43
Poland	19		9		10	100.00	1		1	8	80.00
Slovakia	59		3	4	52	92.86	3		8	41	78.85
Romania	77	1	6	4	66	92.96	2		5	59	89.39
Spain	1				1	100.00			1		0.00

claims. It is impossible to know exactly what percentage of non-EU nationals also claim asylum, but data collected by the Poppy Project provides some insight.²⁴ From 1 April 2009 to 31 March 2011, 418 non-EU women with credible accounts of trafficking were referred to the Poppy Project. Of these women, 181 were able to provide information about their immigration status (all women are asked, but many are unsure about their own status at point of referral). Out of the 181 women, 168 were either claiming asylum or had been refused. An additional seven women had not claimed asylum but expressed an intention to do so. Therefore, of the 181 cases, 175 women, or 96.6% were also in the asylum system. The overwhelming majority of those claims are still outstanding, but longer-term data collected by the Poppy Project suggests a refusal rate at initial decision of 75–80%. Of these, however, 89% are overturned at appeal and some form of leave to remain is granted.²⁵

²⁴ This estimate is based on an analysis of information held on Poppy Project service users referred between 1 April 2009 and 31 March 2011. All data held by Poppy Project, London.

²⁵ *Ibid.*, Based on data collected between March 2003 and August 2011, a total of 792 cases.

TABLE 2

Reasonable and conclusive grounds decisions made for non-EU nationals from 1 April 2009 to 31 March 2011

Region of Origin	Referrals as at 31/03/11	Reasonable Grounds Decision					Conclusive Grounds Decision				
		No Decision	With-drawn	Negative RG Decision	Positive RG Decision	% Positive RG	No Decision	With-drawn	Negative CG Decision	Positive CG Decision	% Positive CG
Asia	369	27	11	126	208	62.84	69	3	73	63	30.29
Africa	613	46	10	266	291	47.47	67	2	88	134	46.05
Europe (Non EU)	56	4	2	16	34	60.71	9	1	7	17	50
Americas (& Caribbean)	13	0	0	5	8	61.54	1	0	2	5	62.5
Indian Sub-Continent*	90	4	0	20	66	73.33	23	0	16	27	40.91

*India, Pakistan, Bangladesh

Table 2 shows the outcomes of NRM decisions for non-EU nationals, many of whom will receive asylum refusals based on the same decision-making process.

The tables confirm that positive decisions for non-EU nationals are significantly lower than that of EU and UK nationals. The average positive reasonable grounds decision rate for UK and EU nationals is 89.4%, compared to 61% for non-EU nationals. In relation to final determinations of trafficking status, the comparison is even starker with an average of 82.8% of UK and EU nationals conclusively accepted to be victims while the average for non-EU nationals is only 45.9%.

The following sets out UK Home Office statistics on asylum claims for the same regions as of end 2010.²⁶ Average rates of initial identification are approximately 22.6%, but importantly when those individuals who were not granted at initial decision lodged an appeal, an average of 24.6% of those claims were also found to be credible. As mentioned above, it is the same case owners who make decisions in both types of claim, a decision that has been found to be incorrect or legally

²⁶ Home Office, Monthly asylum application tables, December 2010. Table of number of applications received for asylum in the United Kingdom and a table of pending applications received for asylum since April 2006. Available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/asylum-app-dec-2010?view=Standard&pubID=866000>.

TABLE 3

Region of Origin	Applications in 2010	2010 Asylum Outcomes*								
		Granted Asylum	Granted HP	Granted DL	Refused	% Granted Initially	Appeal Lodged	Appeal Allowed	Appeal Dismissed	% Granted at appeal
Asia (Including Indian SC)	7272	637	18	835	6262	20.1%	3858	776	2753	20.1%
Africa	6601	1915	40	491	5132	37.1%	3009	897	1829	29.8%
Europe (Non EU)	650	77	4	46	550	19.5%	270	62	172	23%
Americas (& Caribbean)	427	28	4	27	357	13.8%	125	32	71	25.6%

*Published by the Home Office in September 2011

indefensible in a significant percentage of appeals. This may indicate that if an appeals mechanism were in place for the NRM, we may see greater rates of overall recognition for victims of trafficking.

Experiences and Outcomes of Trafficked Persons Claiming Asylum

No comprehensive evaluation of the asylum outcomes of trafficked people is possible, as government records are not kept in a way that would permit the necessary data analysis. This means that the only way that such evaluations can be done is by groups or legal representatives working with individuals navigating both systems.

However, this is much more than a statistical problem. The Poppy Project has collected several examples of cases where violence against women in the context of trafficking-related exploitation has been dealt with inappropriately in both systems. For example, in the case of Ms B, an Indian woman exploited in forced labour and who also experienced sexual violence at the hands of her exploiter, the NRM decision stated:

It is noted that you have highlighted numerous incidents of non-consensual sex [...] and some instances of violence. [...] Although this experiences [sic] are extremely unpleasant it is considered that this treatment [...] does not amount to trafficking in your case.²⁷

In Ms B's case, her claim of trafficking was based on a situation of forced domestic labour. Her experience of rape was reflective of a type of abuse experienced in that situation. Victims of trafficking report experiencing physical and sexual violence in addition to their exploitation in forced labour.²⁸ NRM's comment on her experience of sexual violence is offensive. Referring to rape as 'unpleasant' is entirely inappropriate. Even if it was felt that experiencing rape was not an indicator of trafficking, it is still a human rights violation that should be responded to with respect and consideration.

In this case, the initial asylum refusal was overruled at appeal where the judge accepted claims of trafficking and rape, thereby rendering the NRM refusal meaningless.

Ms C, an Albanian national, received a decision that stated she could not be believed because she was 'significantly aware of the pricing structure'²⁹ in the brothels where she was exploited.

Official UK Border Agency guidance on assessing whether someone is a victim of trafficking states:

Victims of trafficking may be reluctant to go into much detail about the full facts of their case...interviewing officers should phrase their questions carefully and sympathetically, but should keep in mind the need to get as full an account as they can, while at the same time taking care not to cause undue distress....The first task is to assess the material facts of the asylum claim, giving appropriate weight to all the evidence, oral or documentary.³⁰

It would seem that having regard for the trauma someone has experienced comes second to assessing the material facts of their claim. Similarly, competent authorities are told that victims may be

²⁷ UK Border Agency, NRM Reasonable Grounds Decision (Personal communication by fax, 15 May 2009).

²⁸ A Stepnitz, *Of Human Bondage: Trafficking in women and contemporary slavery in the UK*, Poppy Project, London, 2009, p. 27.

²⁹ UK Border Agency, NRM Reasonable Grounds Decision (Personal communication by letter, 22 September 2010).

³⁰ UK Border Agency, *Victims of Trafficking: Guidance for frontline staff*, UKBA, London, 2010, p. 23.

unable or unwilling to go into excessive detail about their experiences of exploitation, yet then makes unhelpful assumptions when determining credibility, such as in the example below:

Your description of how you escaped the brothel is contradictory and vague in your asylum interview. You do not remember where the house was located, you do not know the name of the man who helped you to escape, you do not remember the name of the train station you went to after escaping. Whilst it is noted that you were relatively new in this country when these events unfolded, it is considered that you would have some memory of such basic details given the significance of these events and their impact upon you....You explained this by saying you were “stressed and not thinking.” You (sic) explanation is not accepted....Consequently your evidence about the alleged escape from your abductors is not accepted.³¹

Conclusion and Recommendations

It is clear that women who have been trafficked and are claiming asylum in the UK are experiencing significant difficulty being identified correctly and therefore accessing their rights and entitlements. These identification problems mean that many women cannot access housing, medical care, education and safety. Consistently high refusal rates of persons from certain groups reinforce stereotypes about regions and countries of origin, which impact on decision making and likelihood of a police investigation or prosecution. All these, in turn, have an impact on prevention work. The UK cannot possibly effectively prevent trafficking or assess threats based on a biased and unrealistic information base. Both the asylum and NRM systems are designed to provide necessary protection to people who have experienced, or are at risk of, serious human rights violations. As noted above, widespread concerns about the ability of the asylum system to properly determine credibility are very relevant to the NRM as well. Unless significant work is done to improve the identification mechanism, educate decision makers effectively, extract trafficking from the asylum system and

³¹ UK Border Agency, NRM Reconsideration (Personal communication by e-mail, 15 February 2011).

focus on the rights of individuals over immigration outcomes, the UK will continue to use systems that are not ideal, sending a message to perpetrators, trafficked people and the global community that the UK does not take trafficking seriously.

Recommendations for Government Action:

Trafficking

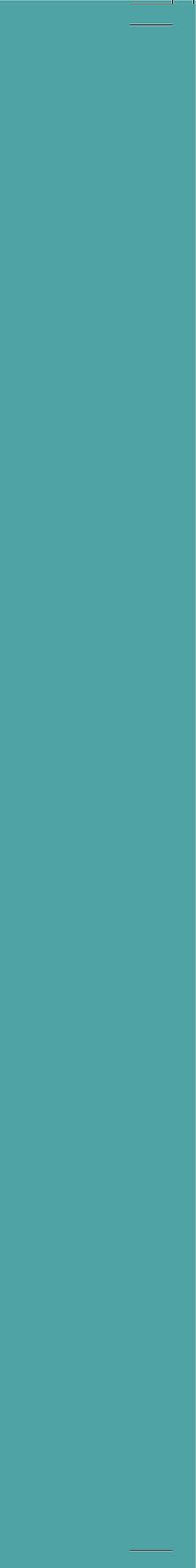
1. Review the National Referral Mechanism and separate it from the asylum system to ensure that the NRM:
 - a. is genuinely multi-agency, placing identification and support, not immigration status, at the centre of decision making
 - b. carries a right of appeal to an independent body, comprised of multi-agency staff
 - c. ensures that asylum decisions are not made by the same individuals who make NRM decisions
2. UKHTC, UK Border Agency, in collaboration with support professionals, to publish guidance and provide training for first responders and decision makers that effectively and accurately reflect the CoE Convention definition of trafficking and instruct those working with trafficked people on appropriate application thereof.
3. UKHTC and the UK Border Agency to publish quarterly statistics that actively seek to understand any overlap occurring between the asylum and NRM systems.
4. Ensure that “dip sampling” of decisions examines linked decisions and that changes in one decision (i.e. overturning of a negative NRM decision) is reflected in any related asylum decision.
5. Appoint an independent anti-trafficking rapporteur to oversee identification, decision making, collaborative working and data collection. The rapporteur should possess statutory powers to request information from law enforcement, UKBA, social services, be required to work collaboratively with NGOs, and be accountable to Parliament.

Asylum

1. UK Border Agency to fulfil all obligations with regard to non-discrimination and equality to ensure that all individuals are able to benefit equally from the public services they provide.
2. Ensure that female asylum applicants are provided with the option of a female case owner, who will carry the case from beginning to end whenever possible, and that female interpreters are available at interviews.
3. Ensure that case owners making decisions on asylum claims in which trafficking issues have been raised:
 - a. Understand the application of the Refugee Convention, international and regional human rights law, the CoE Convention on Action Against Trafficking in Human Beings and other relevant documents
 - b. have a thorough understanding of relevant domestic policy and legislation and have access to specialist advisors
 - c. treat applicants with respect and dignity, conducting interviews with an appropriate regard for the trauma experienced
 - d. are able to identify signs of vulnerability and trauma and respond accordingly
 - e. do not base decisions solely on assumptions, speculation about an individual's experience, or alternative theories that have no basis in fact
 - f. work with all involved professionals regarding trafficking issues, including seeking input from law enforcement or prosecution where relevant.

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DEBATE SECTION





Sex Trafficking, Law Enforcement and Perpetrator Accountability

Holly Burkhalter

Abstract

In theory, everyone - except for criminals involved in their exploitation - agrees that children must not be in the sex industry and further, that those who prey on them must be prosecuted and punished. Virtually every country in the world has adopted national laws prohibiting the commercial sexual exploitation of children. International law is clear on this point, as well. Yet, when governments - and NGOs working with them - take action to extract children from commercial sex venues, common ground on protecting children from abuse can quickly erode with concerns about the efficacy of police intervention, the possibility of collateral harm to consenting adult sex workers or a decrease in access to HIV-prevention and related health services. The author argues that healing this divide must come through the reform of local police - and that, without the participation of law enforcement, there can be no long-term protection for children vulnerable to trafficking and related exploitation. In this article, human rights practitioner Holly Burkhalter argues that healing this divide must be accomplished through the reform of local police - and that human rights advocates, local governments and others seeking to combat trafficking cannot achieve long-term, sustainable protection for children without the involvement of law enforcement.

Key Words: trafficking, children, law enforcement, accountability, impunity, protection, “raid and rescue”



In 2010, reports indicated that, Cambodian military police rounded up sex workers in random sweeps and kept them in jail - often abusing them - until their pimps paid bribes to secure their release.¹ In the same year, the Cambodian anti-trafficking police identified and rescued 21 trafficking victims from brothels and arrested 17 suspected perpetrators.

These two factual descriptions of police behaviour towards adults and children in the sex industry *in the same country* help explain why human rights advocates disagree passionately about the role of police operations in securing relief for sex trafficking victims. Sex worker advocates support local groups that deny police access to brothel neighbourhoods. Anti-trafficking advocates, for their part, demand that the police enforce the law by removing children and forced adults from commercial sex venues and arresting and prosecuting pimps, brothel owners and traffickers.

The consequence of this tension over the role of law enforcement in commercial sex venues is that rescue for children on the one hand and harm reduction for non-coerced adults on the other are now seen by some partisans on both sides of the divide as mutually exclusive.

As an international human rights activist with 30 years in the field, I have never seen this tension with respect to any other human rights abuse. Whether the crime is rape, genocide, domestic violence, labour slavery or war crimes, human rights advocates have always demanded victim protection and perpetrator accountability. I am not aware of any other case in which human rights organisations have demanded a virtual zone of impunity for perpetrators, where laws may not be enforced and victims are denied protection.

The fact that some human rights activists take this position with respect to children in prostitution can perhaps be explained by their conviction that no law enforcement at all in commercial sex venues offers better protection for vulnerable women and children than poor law enforcement.

¹ Human Rights Watch, *Off the Streets: Arbitrary detention and other abuse against sex workers in Cambodia*, July 2010.



It is vitally important to heal this divide between human rights advocates. The solution, I believe, is in the reform of local police. So long as malicious police prey on vulnerable women in the sex industry and are themselves complicit in trafficking of children, they will not be seen as the solution, but the problem. And indeed, under those circumstances, they are.

We need a replicable model of professional policing where the rescue of children and arrest of perpetrators is carried out without harming non-coerced adults co-mingled with them. Fortunately, several promising models are currently being tested, studied and replicated.

One example is in Cambodia itself. When International Justice Mission (IJM) began working in Cambodia in 2002, the open sale of pre-pubescent girls for sex was wholly tolerated by authorities. There were virtually no arrests and convictions of those who sold children as young as four to sex tourists. The police, including the special anti-trafficking unit, were complicit in the exploitation of children. In 2002, for example, the unit “rescued” a number of minor Vietnamese girls from Phnom Penh brothels, and then promptly arrested them for immigration violations. Some of the girls were taken from the police station and returned to the brothels by the police themselves.² This is a perfect example of abuses committed in the context of supposed “rescue” that has generated cynicism about the possibility of a legitimate law enforcement response to the crime of sex trafficking.

Yet nine years later, things are very different in Cambodia’s sex industry. While police investigators still occasionally find a 13 or 14-year-old in a massage parlour or brothel, the routine sale of young children on the streets of Phnom Penh, Siem Reap and other cities has ended. Over 100 trafficking perpetrators have been convicted and jailed; deterrence is growing throughout Cambodia. Politics still plays a toxic role in the protection of perpetrators: witness the December 2011 official pardon and release of three European pedophiles convicted of raping dozens of boys and girls. On the other hand, Cambodia recently charged and convicted four perpetrators, including a high-level police officer on corruption charges for their protection of brothels offering girls for sexual exploitation. It is the first time, to my knowledge, that

² Human Rights Watch, *Cambodia: Young trafficking victims treated as criminals*, 23 June 2002.

Cambodian police have been willing to go after one of their own for such crimes in that nation.

What has been the impact of the increased police activity in brothel areas on non-coerced adult sex workers? IJM staff and contacts in Phnom Penh and elsewhere in Cambodia have not seen increased abuses in the context of *legitimate* law enforcement. The police unit responsible for the vast majority of children rescued and perpetrators apprehended since 2003, the Anti-Human Trafficking and Juvenile Protection Task Force (AHTJP) of the Cambodian National Police has carried out the rescue of sex trafficking victims and the apprehension of perpetrators without abusing non-coerced adults in the same establishments.³ When reports emerged of random sweeps and other police misconduct towards non-coerced adults in 2010, IJM contacted the sex worker union Women's Network for Unity (WNU) in order to learn whether AHTJP police were involved in the abuses. The AHTJP were not specifically identified in any of the complaints and denunciations of police misconduct.

The takeaway from Cambodia is that it is possible to conduct effective and humane law enforcement to rescue children from prostitution without abusing non-coerced adults in the sex industry. The reason this is possible is because of the professionalism and leadership of the AHTJP.

Notwithstanding this outcome, International Justice Mission has received criticism for collaborating with the police to rescue children from prostitution.

In a *University of Pennsylvania Law Review* article characterising IJM as “neo-abolitionist”, author Janie Chuang posits that rescue does more harm than good to victims, who, she writes, might find it preferable to remain in the brothels.⁴

³ The specialised anti-trafficking unit in Phnom Penh prior to this time was not dependably professional, as seen in the unit's response to the 2002 case mentioned here. However, the author is of the view that, under the leadership of General Bith Kim Hong, who assumed command of the AHTJP in 2007, the unit has become highly professional and respectful of human rights, not only on IJM-assisted cases but child sexual exploitation cases generally.

⁴ J Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution reform and anti-trafficking law and policy' *University of Pennsylvania Law Review*, vol. 158: 1655 at p. 1716.

Journalist Noy Thrupakew, who authored a two-part critique of International Justice Mission in *The Nation Magazine*, found fault with police activity to remove children as young as five and six years old from brothels in Cambodia in 2003. Thrupkaew writes: ‘Those [children in prostitution] who remained or returned to Svay Pak faced an additional challenge: according to Sainsbury, pimps believed that local HIV-education and social work NGOs had aided IJM and the police, and after the raids cut off the groups’ access to the women and barred them from providing care.’⁵

Her criticisms encapsulated those most common of child rescue and of IJM, suggesting that increased police activity angered brothel owners and pimps, who retaliated by reducing the access of health service providers to women and children in the sex industry.

What is interesting about this view is that anti-trafficking NGOs (in this case, IJM) and the police are blamed for the presumed disruption in services, not the brothel owners and pimps who are actually responsible. The accompanying demand is that IJM and the police should not rescue children because of the possibility that criminals who sell them for sex will become angry and impede the work of service providers, or at a minimum, weigh the risks of diminished health services when determining whether to take minors out of brothels. This view suggests that there is some level of backlash by brothel owners against health workers that would justify leaving the children to their fate.

Contrary to the claims of critics, IJM is supportive of health services for all who need them, including consenting adults in the sex industry, though we cannot control the response of frustrated brothel owners when they lose their youngest money-makers. Thankfully, it does not appear to be an actual problem: despite efforts to obtain confirmation of the allegations that child rescue puts consenting adults at risk, I have not seen credible reports of diminished service in brothel areas where IJM has been active, much less health data to support the claims.

Nonetheless, the spurious notion that child rescue from brothels increases the risk of HIV for adults has been damaging to the work of child protection. Human Rights Watch, for which I served as Washington Director and Advocacy Director from 1983 to 1996, has

⁵ N Thrupkaew, ‘The Crusade against Sex Trafficking’, *The Nation*, 5 October 2009.

published numerous reports on sex trafficking and, in the past, has always called for law enforcement to free victims and hold perpetrators accountable.⁶ Yet when I consulted HRW about IJM's planned anti-trafficking programme in Cebu, the Philippines, antipathy to law enforcement on the grounds that it would undermine AIDS prevention was so strong that researcher Joe Ammon urged the organisation to drop the plan altogether and fund a sex worker union.⁷

The most serious criticism of police activity in commercial sex venues derives from police abuse against sex workers. A 2009 report by the Open Society Institute, *Rights Not Rescue* describes gross abuses of the rights of men, women, and transgendered people in the sex industry in southern Africa. Violence is often associated with brothel raids or street sweeps in which sex workers are both lawfully or unlawfully arrested and detained. In South Africa, there were reports of police using rubber bullets and spraying sex workers' genitals with pepper-spray.⁸

Such abuses cry out for perpetrator accountability, including jail time for police who assault, rape, and otherwise abuse sex workers.

Although IJM does not work in the countries covered in the OSI report, our experience in Cambodia and the Philippines suggests that encouraging the police to enforce anti-trafficking laws and remove coerced adults and minors from commercial sex venues does not inevitably lead to violent abuse of sex workers.

IJM's programme in Cebu, funded by the Bill and Melinda Gates Foundation in 2007, offered IJM the opportunity to commission an independent prevalence baseline before starting its collaboration with local authorities. The baseline study indicated that upwards of six per cent of those being offered for sex in brothels, massage parlours and karaoke bars were minor girls. In addition, before launching casework activities, IJM engaged in extensive consultation with local NGOs and

⁶ See, for example, Asia Watch (now Human Rights Watch) and Women's Rights Project, *A Modern Form of Slavery: The trafficking of Burmese women and girls into brothels in Thailand*, 1 February 1994.

⁷ *Ibid.*

⁸ J Arnott and A-L Crago, *Rights not Rescue: Female, male, and trans sex workers' human rights in Botswana, Namibia, and South Africa*, Open Society Foundations, June 2009, http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/rights_20090626/rightsnotrescue_20090706.pdf.



government health workers who provide HIV prevention and other services to women in the sex industry. We also met with sex workers themselves to discuss the issue of police abuse as well as access to health care.

Over the next three and a half years, the Philippines National Police in Cebu worked with IJM to investigate the commercial sexual exploitation of children and prosecute perpetrators. IJM also collaborated with the Philippines Department of Social Welfare and Development to provide expert care, schooling and job placement for the minor girls (under the age of 18) removed from the brothels. IJM social workers also offered assistance to adult women who were collaterally affected when brothels or bars they worked in were closed for offering children for exploitation.

Throughout the project, IJM conducted quarterly focus group meetings with service providers and collected data from government clinics that serve sex workers. The data indicated no decrease in the number of women receiving services during this period of vastly increased law enforcement operations in the area.

Moreover, IJM's interlocutors observed no increase in abuses by police against adult sex workers in the project area. Police misconduct is highly unlikely in IJM-assisted operations for several reasons. First, IJM provides extensive training to police with whom we collaborate. Proper treatment of non-coerced adults is emphasised, including clear orders to treat all those in a commercial sex venue under investigation, including non-coerced adults, with respect. Second, IJM protocols call for the organisation's own social workers and lawyers to accompany the police on operations. This accompaniment has many benefits. It benefits the children being removed from commercial sex venues because they are assisted by female social workers, who accompany them throughout the legal process thereafter and secure high quality after-care services. The presence of IJM also minimises the possibility of unprofessional actions by the police, who know what the protocols are and follow them.

Within the first three years of the project, 225 trafficked girls and women were rescued and 87 suspected traffickers arrested. An independent prevalence survey at the end of three years revealed a 79

⁹ A Jones, R Schlangen and R Bucoy, *An Evaluation of the International Justice Mission's "Project Lantern": Assessment of five-year impact and change in the public justice system*, 21 October 2010. <http://www.ijm.org/sites/default/files/resources/120610-Project-Lantern-Impact-Assessment-AJ.pdf>.

per cent drop in the availability of minors for sex in commercial establishments.⁹ The success of the Cebu model contributed to a decision by the Philippines government to replicate the model with IJM in two other locations starting this year.

There are several factors that contributed to these welcome outcomes. The most important was the government's creation of the Regional Anti-Trafficking Task Force (RATTF) in July 2009, which underwent extensive training, mentoring and monitoring by IJM. Prior to its creation, the Philippine National Police had a policy of transferring officers between units and jurisdictions on a regular basis, and carefully trained leaders were frequently moved away from the area after developing anti-trafficking expertise. Once this unit was created, the skills stayed on location. There were still occasional shakedowns and sweep-type operations during this period, but not by the special unit and not under the auspices of legitimate anti-trafficking operations.¹⁰

Specialised anti-trafficking units and excellent training—particularly in collaboration with external human rights advocates—equip law enforcement to do its duty to protect and rescue children and trafficked adults and prosecute perpetrators, without causing collateral harm. One of the few IJM cases in which law enforcement treatment of non-coerced adults did not meet IJM standards is itself a clear example of the value and necessity for close collaboration between human rights advocates and local law enforcement. In 2003, the Thai police conducted an anti-trafficking operation based on unassailable information provided by IJM about the sexual exploitation of children in a brothel. However, IJM investigators, lawyers and social workers were not permitted to accompany the police on the rescue operation. In fact, IJM was not even informed that the operation took place. Police identified and removed seven minor trafficking victims, whom IJM assisted, but they also identified a number of Burmese illegal immigrants whom they subsequently deported, in accordance with Thai law.

Had IJM been permitted to directly support law enforcement prior, during and after the operation, our staff could have reinforced the critical need to separate immigration enforcement from child protection actions. Authorities have the right to enforce national immigration law, but it should never be done in the context of child rescue operations. Law enforcement officials' first duty must be to rescue

¹⁰ The Philippines government has entered into a Memorandum of Understanding with IJM, which will be replicating the Cebu model in collaboration with regional anti-trafficking units in Manila and Central Luzon in 2012.

the victims of sex trafficking in situations in which children are co-mingled with illegal migrants; effective partnership between the police and NGOs can help ensure that all individuals impacted by a police operation are treated fairly and with dignity.

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Notwithstanding the professionalisation of police forces and the inroads they have made in combating sex trafficking in some countries, abuse and exploitation of sex workers and protection payment and kickbacks by brothel owners to corrupt police continue to be the norm in many places.

A small number of sex worker unions or associations have played an important role in reducing harm to sex workers. Humanitarian NGOs have reported that sex worker groups have secured such gains as education for their children and access to health services and bank accounts. HIV/AIDS activists have rightly pointed to the important role that sex workers can and do play in protecting themselves and their customers from disease exposure by insisting on consistent condom use.¹¹

As a result, some supporters of this work are proposing the services of sex worker groups for something very different: law enforcement. In Thailand, for example, the Thai sex worker organisation EMPOWER issued a report protesting a 2003 police operation that removed seven minor girls from a brothel in Chiang Mai, stating: ‘Currently women who work in entertainment places have their own methods of assisting trafficked women, those being forced to work, and those under 18 years.’¹²

Likewise, the DMSC sex worker union in Kolkata runs 33 “Self-Regulatory Boards” (SRBs) that reportedly patrol its red-light district and come to the immediate assistance of girls who are underage or of those coerced into the sex trade.¹³ The union strongly opposes police intervention in

¹¹ See, for example, World Health Organization, ‘Thailand’s new condom crusade’, 2010, <http://www.who.int/bulletin/volumes/88/6/10-010610/en/index.html> among many others.

¹² *A report by Empower Chiang Mai on the human rights violations women are subjected to when “rescued” by anti-trafficking groups who employ methods using deception, force and coercion*, June 2003.

¹³ A-L Crago, *Our Lives Matter*, Open Society Institute, 2008. http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/ourlivesmatter_20080724

the Sonagachi red-light district and has physically interfered with efforts by anti-trafficking police to bring minor girls out of brothels it controls.

The activities of organised sex workers to themselves protect children in brothels are commendable. But these rescue efforts alone have not eradicated the sexual exploitation of minors. In Kolkata, for example, minors are clearly available for sex in the area organised by DMSC.¹⁴ That should not be surprising: sex worker associations cannot deter violent, criminal activity by organising and registration alone. Nor do they—or can they—play a role in apprehending traffickers, pimps and brothel owners who sell children, much less see them brought to justice under the law.

Critics of a law enforcement approach to combating trafficking do not offer sex worker unions as a substitute for perpetrator apprehension. As a matter of fact, they have not offered *any* alternative to police operations to apprehend perpetrators and bring them to justice. That is because there are none. Except in cases of war criminals indicted by the International Court, perpetrator accountability—including perpetrator apprehension, prosecution, conviction and punishment—is the exclusive domain of a country’s public justice system.

We are left with the question: *Can we dispense with perpetrator accountability altogether and eliminate trafficking in the sex industry?* IJM’s answer is: Absolutely not. Judicial accountability and punishment is crucial for deterring and ending the crime of trafficking - as it is for deterring and combating every violent crime. Individuals who become rich off the bodies of women and children are not restrained in the slightest by the threats of fines, the pleadings of sex worker unions, or public education to teach girls about trafficking. Traffickers are in the business to make money; without the deterrence of potential trial and imprisonment, they have no incentive to deprive themselves of the significant income to be generated from trafficked women and children. IJM has found in every country where we have worked that lesser penalties, such as fines, are meaningless to perpetrators who can easily absorb those costs into business operations that are enormously profitable.

¹⁴ N D Kristof, ‘Sex Trafficking in India’, *New York Times*, 29 June 2007.



If sex trafficking is an economic crime, it is also a violent crime. All women, men and children in the commercial sex industry are vulnerable to assault, rape, torture and death. Children and forced adults are especially vulnerable, as they must be subdued and compelled to endure repeated rape. Removing the police from red light areas will eliminate one potential source of violence against adults and children in the sex industry—abusive officers themselves—but they are far from being the only source of harm. Women, men and transsexual people in the sex industry report that they are in constant danger of violence from customers, pimps, brothel owners, madams and traffickers.¹⁵ If the police are absent, there is no possibility of protection from *any other source* of violence and abuse. And there will be no protection against those who traffic in the sale of children for sex.

Police complicity in sex trafficking and violence against sex workers is not inevitable, nor is it incurable. Training, specialised units, strong political pressure from donor governments, reformers within local government, public demand for enforcing anti-trafficking laws, and NGO oversight are working real changes in the availability of children for sex in Cambodia and the Philippines.

We need something similar with respect to police violence against sex workers. Police must be trained and monitored and they must be prosecuted when they commit crimes against sex workers. Prompt and humane response to reports of violent abuse by others, such as customers and pimps, must be the norm; holding sex workers harmless for crimes committed against them is essential.

The Open Society Institute describes an example of such an approach in Walvis Bay, Namibia:

Sex workers in Walvis Bay reported very few instances of violence perpetrated by police officers. Furthermore, police addressed sex workers' concerns by helping them with clients who refused to pay or who became abusive. The fact that sex workers can turn to the authorities for assistance reduces the perception that sex workers are easy targets.¹⁶

¹⁵ K Shannon, PhD and J Csete, PhD, 'Violence, Condom Negotiation, HIV/STI Risk Among Sex Workers' *Journal of the American Medical Association*, vol. 304, no. 5, 2010, 573–574.

¹⁶ J Arnott and A-L Crago, *op. cit.*



Child rescue advocates should use their contacts with the police to demand an end to harassment and abuse of sex workers. For example, IJM conveyed serious concern to high-level contacts within the Cambodian police about the abuses committed against adult sex workers last year. Moreover, IJM's police trainings use protocols that "do no harm" to non-coerced sex workers in the course of apprehending perpetrators and rescuing children and trafficked adults.

For their part, sex worker advocates should end their denunciation of legitimate law enforcement to remove children from commercial sex venues. Sweeps and shakedowns and indiscriminate raids by the police are not the same thing as professional enforcement of the law and rescue of trafficking victims. It is wholly appropriate to condemn the former. It is not appropriate to denounce and undermine the latter.

Professionalisation of the police will take time, but it is attainable. In the meantime, children and trafficked adults being raped for profit should not have to wait until police everywhere in the world have been pronounced good enough to protect them.

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Accountability and the Use of Raids to Fight Trafficking

Melissa Ditmore and Juhu Thukral

Abstract

Accountability in anti-trafficking efforts is a crucial but often overlooked aspect of deciding whether such efforts are truly rooted in a human rights framework. In a rush to help, and inspired by sensationalised views of what human trafficking is, many campaigns actually harm the very people they are supposed to assist. Law enforcement raids are one such effort, as they do not take into account the very different power dynamics between the actor engaging in the raid, and the person who is subject to the raid. Data from the United States suggests that raids conducted by local law enforcement agencies are an ineffective means of locating and identifying trafficked persons. Research also reveals that raids are all too frequently accompanied by violations of the human rights of trafficked persons and sex workers alike, and can therefore be counterproductive to the underlying goals of anti-trafficking initiatives. Findings suggest that a rights-based and “survivor-centred” approach to trafficking in persons requires the development and promotion of alternative methods of identifying and protecting the rights of trafficked persons which prioritise the needs, agency, and self-determination of trafficking survivors. They also indicate that preventative approaches, which address the circumstances that facilitate trafficking in persons, should be pursued over law enforcement based responses.

Keywords: trafficking, mobility, migration, law enforcement, raids, US



Introduction

Trafficking in persons, in all its forms, is a severe human rights violation. It requires well-planned and targeted solutions rooted in the needs of communities. These solutions must address the problem of force, fraud, or coercion in different labour sectors. A truly effective approach to human trafficking involves efforts that respect the human rights and voices of trafficked persons, and also holds government and well-meaning private actors accountable when they engage in prevention and interventions. But too often, anti-trafficking policy is built on emotional responses and can cause serious, unintended damage that drives trafficked persons further into the shadows.

Accountability of all actors is crucial because there are great power dynamics at work in anti-trafficking approaches and attempts at assistance. This paper will make the argument and provide supporting evidence that one of the clearest examples of misguided anti-trafficking efforts in the United States is the anti-trafficking raid, usually aimed at those working in the sex sector who may appear trafficked to outsiders without information on the conditions of work. A person in a coercive situation, not necessarily aware of his or her legal rights, typically fears and does not trust law enforcement agents. Research conducted by one of the authors has documented the ways that law enforcement approaches to human trafficking can fail trafficked persons, including through arrest, detention, and prevention of contact with the trafficked person's family.¹ However, most services and legal protections that trafficked persons can access in the United States are related to efforts to cooperate with law enforcement. This prioritises raids and prosecution-oriented legal procedures rather than rights-based, survivor-centred approaches necessary for full recovery from a trafficking experience.

This research demonstrates that raids should be used only as a last resort. Raids conducted in the United States require quick and unexpected action, and, in the anti-trafficking context, they are rarely executed on the basis of in-depth investigation that elicits reliable evidence and witness testimony. While government and community members claim to be taking action on trafficking, victims are often harmed in the process because raids are invariably traumatic and often

¹ M Ditmore, *The Use of Raids to Fight Trafficking in Persons*, Sex Workers Project, New York, 2009, <http://www.sexworkersproject.org>.

have strong negative effects on victims and their legal status (including deportation and interference with the ability to work and earn money). In addition, potential traffickers may never be held accountable due to a lack of evidence against them. Raids often do not result in strong testimony against perceived traffickers. Consequently, raids do not promote accountability of governments, traffickers, or communities.

In addition to law enforcement raids, numerous well-meaning “Good Samaritans” engage in anti-trafficking raids, either in cooperation with law enforcement or on their own. Such efforts are extremely dangerous for trafficked persons. Private actors and organisations meaning to help often do not have the experience or expertise to identify whether people have actually been trafficked, and they rarely have the capacity or expertise required to offer high-quality legal and social services to those who have been trafficked or who were caught in a raid.² Critiques of law enforcement raids are relevant to those conducted by private actors. In fact, because there is even less opportunity for oversight and accountability, raids by private actors not involved with local law enforcement may be even more dangerous.

Background

Law enforcement raids have served as the US government’s primary means of identifying victims of trafficking in persons.³ While there have been some successes, law enforcement based approaches to trafficking have led to the identification of very few trafficked persons.⁴ The failure of law enforcement raids to successfully locate, identify, and refer large numbers of trafficked persons in the United States to supportive services may result from the fact that these raids are driven by, and sometimes indistinguishable from, efforts to curb prostitution and other forms of sex work. Government funding streams reflect, in

² United Nations Population Fund (UNFPA), *Thematic Task Team on Migration and Mobility in the Context of HIV and Sex Work* in preparation for the 1st Asia and the Pacific Regional Consultation on HIV and Sex Work, 12–15 October 2010 in Pattaya, Thailand.

³ United States Government Accountability Office (US GAO), *Human Trafficking: Better data, strategy, and reporting needed to enhance US anti-trafficking efforts abroad*, US GAO, Washington, DC, 2006.

⁴ P Meyer, ‘Three Paths to Dallas: How three South Korean women made it to Dallas spas’ *The Dallas Morning News*, 7 May 2006, <http://extrablog.dallasnews.com/>.

particular, the conflation of trafficking with prostitution. Funding made available under the *Trafficking Victims Protection Reauthorization Act of 2005*⁵ (TVPRA) focuses on grants to state and local law enforcement to investigate and prosecute buyers of commercial sex.⁶ As a result of this funding, local law enforcement agencies have sought federal funding for ‘anti-trafficking task forces’ which, in theory, are made up of local and federal law enforcement personnel alongside social and legal service providers, but which in reality can simply be vice squads by another name. One study found that ‘some local task forces have focused exclusively on prostitution, making no distinction between prostitution and sex trafficking and not pursuing labour trafficking cases’.⁷ These reports demonstrate that prioritising the policing of prostitution distorts the goal of anti-trafficking interventions meant to identify and respond to coercion and abuse. It also undermines the identification of trafficked persons, especially in domestic, agricultural, and service sectors. The way in which funding is allocated and disbursed has specific consequences. In this case, funding arrangements to law enforcement often exacerbate a lack of accountability by government actors who have not operated on a credible or common understanding of the definition of trafficking.

Methodology

In-depth interviews were conducted with 46 people in the United States, including immigrant sex workers and trafficked persons who have experienced raids or otherwise had contact with law enforcement, along with service providers, attorneys, and law enforcement personnel. The identities of all individuals interviewed for this report were protected. All names used in this paper are pseudonyms.

The data collected from this small-to-medium sample is extremely rich and represents one of the first efforts since the passage of the

⁵ *Trafficking Victims Protection Reauthorization Act of 2005*, Pub. L. No. 109-64, 119 Stat. 3558 (2005) (codified as amended in scattered sections of the U.S.C.)

⁶ See: Global Alliance Against Traffic in Women, *Collateral Damage: The impact of anti-trafficking measures on human rights around the world*, GAATW, Bangkok, 2007; Women’s Commission for Refugee Women and Children, *The US Response to Human Trafficking: An unbalanced approach*, Women’s Commission for Refugee Women and Children, New York, 2007, http://www.womencommission.org/pdf/us_trfkg.pdf.

⁷ *Ibid.*, Women’s Commission for Refugee Women and Children.



Trafficking Victims Protection Act to give voice to the experiences and perspectives of trafficked persons and sex workers who have experienced anti-trafficking raids.

Fifteen women who experienced law enforcement operations relating to trafficking in persons or sex work were interviewed in 2007 and 2008 in New York City. Participants were recruited among immigrant sex workers and trafficked persons, as they were most likely to have experienced law enforcement interventions relating to trafficking in persons. Participants were referred to researchers by two New York City-based social service agencies and one sex worker organisation. With the exception of one, all interviews were conducted with translators. Some participants had lived or now live in other parts of the United States. One participant has since returned to her native country.

Legal and social service providers from around the country were interviewed, including attorneys and social workers from 18 agencies in 14 locations in seven states, including the Northeast, Southeast, Southwest, Midwest, West Coast and Washington, DC. While the majority of service providers worked exclusively with trafficked persons, 5 of the 26 worked exclusively with sex workers, whether they entered the trade by choice, circumstance, or coercion.

Five law enforcement personnel from across the United States were interviewed. The term “personnel” is used to protect the identities of those with whom we spoke. Two people in law enforcement declined to be interviewed, and both indicated that no one in their departments would be permitted to participate in this study.

Demographic data including age, place of origin, and ethnicity were collected from the 15 trafficked persons interviewed but not from law enforcement or social and legal service providers.

The responses were analysed to identify recurring themes. A “grounded theoretical analysis” approach⁸ was used, in which macro-level principles and concepts related to trafficking were linked to micro-level examples provided by participants. This was accomplished by

⁸ J A Wasserman, J M Clair, and K L Wilson, ‘Problematics of Grounded Theory: Innovations for developing an increasingly rigorous qualitative method’ *Qualitative Research*, 9, 2009, pp. 355–382.

identifying micro-level recurring themes within the data. Themes identified are reflected in the findings below.

This analysis of qualitative data addresses accountability in greater depth and focus than the original report for which this data was collected. More basic information and additional analysis was included in the full report, *The Use of Raids to Fight Trafficking in Persons*, released by the Sex Workers Project at the Urban Justice Center in 2009.⁹ The full report includes the interview protocols. This project was conducted in accordance with ethical research principles, and an ethical review was conducted and approved by a cooperating NGO in New York City.

Findings

Experiences of trafficked persons and sex workers

It was 6 AM. They knocked at the door, I thought it was the landlady and I didn't ask and I opened the door. It was dark in the hall and the flashlight was in my eyes, I was so scared, I didn't know they were police, they didn't say they were police and I tried to close the door and they pushed it open....Then I realised this is not a joke, we will have serious problems....I was thinking, the police! Now we're doomed because the trafficker will kill us now!

— Vida, trafficked domestic worker

The place was not a jail. It was a hotel, but in the hotel, we were closed in for a week, and couldn't leave...we couldn't do anything. Then I went to a shelter for women. After about a week...I was worried about myself—my future, what was going to happen...[I felt] bad. Very stressful. I had headaches. It's kind of difficult to talk about, because I felt a lot of stress. I had a lot of headaches. It made me feel like I wanted to cry. I didn't want to eat.

— Marta, who does not identify as having been trafficked

⁹ Ditmore, *op. cit.*

They were wearing guns and uniforms, and it made me very scared. They didn't tell us anything. They treated us like criminals during the arrest and it was scary.

– Lily, picked up in vice and anti-trafficking raids

The women interviewed for this report immigrated to the US from Asia (2), Eastern Europe (5) and Latin America (8). Fourteen of 15 participants had been recognised by the US government as trafficked at the time of the interview.

Of the 15 participants who had experienced engagement with law enforcement, 12 had been involved in sex work, working in venues including brothels, strip clubs and massage parlours. Seven of the 12 had engaged in sex work before coming to the United States, five in prostitution and two as exotic dancers. Some were in coercive situations before entering the United States, while some were not. Two worked in the legal sex industry in the United States, one as a dancer, the other in a venue for sadomasochistic play in which no illegal conduct occurred. Three of the 15 participants were employed in other sectors, including domestic work.

The experiences of the participants were varied, and included federal anti-trafficking raids and raids by the local police, with some women experiencing both kinds of raids. Seven of the 15 women had been picked up in federal anti-trafficking raids. Nine of the 15 women had been arrested in local police raids. Two women interviewed had experienced raids by both local police (vice squads and anti-prostitution raids) and federal agents (anti-trafficking raids).

Some women reported multiple arrests in raids by local police. The number of arrests by local police experienced by individual women ranged from one to ten. None of the 15 women interviewed had been identified as trafficked by local law enforcement following a raid, despite the fact that seven of these nine women identified as trafficked. Only one had been asked whether she was coerced into sex work following arrest by local law enforcement.

While 14 out of 15 interviewees were eventually recognised as victims of trafficking by the US government, not all those later recognised as victims of trafficking identified as such at the time of being involved in a police raid. Five of the seven women picked up in federal anti-trafficking raids believed that they had been trafficked. Three of the five who believed that they had been trafficked at the time of their experience with a federal raid were not involved in sex work. The two



women out of the five women who believed that they were trafficked and had engaged in sex work were held in immigration detention for weeks before identifying themselves to law enforcement as trafficked. One woman was jailed on a prostitution conviction after a raid, until her defense attorney recognised that she might have been trafficked.

Numbers of raids and arrests experienced varied by race and ethnicity. In this study, Latinas experienced the greatest numbers of arrests, typically related to prostitution, followed by Asian women.

Overall, participants reported that raids were chaotic and often traumatic events which left them frightened and confused, with no sense of what was happening or would happen to them. They made it quite clear that they did not understand who was conducting the raid (other than government agents), what its purpose was (other than to arrest and deport them), or what the outcome might be.

The women interviewed expressed a variety of opinions on the use of raids as an anti-trafficking tool and the role played by the raid in obtaining their freedom. Participants who did not identify as trafficked uniformly objected to the raids. Many who were identified as trafficked resented their experiences during raids. Jin, who was arrested in a local police raid, expressed anger at having been pistol-whipped, and said that she would eventually have left on her own, because she expected to be released by her trafficker within days of the raid in which she was arrested.

Josefina, who was coerced into prostitution and was identified as trafficked as a result of a federal anti-trafficking raid, said that she would have left on her own if she had known of a safe place to go. Although Ofelia knew of no other way to escape her situation, she nevertheless described the raid and her subsequent detention as “terrible”. Another woman said that she would have preferred to leave her situation by leaving with a co-worker rather than being rounded up in a raid. Additionally, six of the women interviewed for this report who identified as trafficked left trafficking situations after and independent of their involvement with law enforcement. They reported receiving help from a variety of people, including clients and co-workers at sex work venues, who recognised that they were in coercive situations and stepped in to offer help. These six women who left on their own after their involvement with law enforcement subsequently approached law enforcement on their own behalf, and cooperated in the prosecution of their traffickers.



Three women who were not trafficked into sex work, but rather into other labour sectors including domestic and home-based work, faced severe isolation. Such isolated workplaces present specific challenges to anti-trafficking efforts. Tatiana said, ‘Everyone I knew was in the same situation.’ Zora said, ‘There was no one to help us.’ These women were located, removed from their coercive circumstances, and recognised as trafficked persons after federal raids following in-depth investigations. Vida described the raid as frightening and reported that she experienced disrespectful treatment, but she also said that she appreciated the benefits and the immigration status offered to certified victims of trafficking.

These three women—who, notably, were not trafficked into sex work, but into other labour sectors that have not been the focus of current anti-trafficking initiatives in the United States—could not conceive of any other way they would have been able to leave their coercive situations. However, they still reported that the method used—a law enforcement raid—did come at a cost to themselves.

Two other participants were taken in for questioning after two law enforcement agents knocked on their doors as part of an in-depth investigation into suspected trafficking. Based on the women’s descriptions of events, this approach appeared to be far less chaotic and had fewer traumatic impacts than a full-on raid. Indeed, one of the women contrasted this experience positively with an anti-prostitution raid she had experienced. However, the law enforcement agents questioned the women involved without an attorney present.

Perspectives from law enforcement

The nature of the crime and the nature of the victims make raids not effective. What level of evidence do you need? You need a victim to be willing to open up and tell you...I don't see raids being a consistently effective tool. The best situation is if you know there's a problem.

— Law enforcement personnel

It's such an overwhelming situation, and why would they trust us?

— Law enforcement personnel



Law enforcement personnel interviewed for this study described the procedures, positive outcomes, and challenges of anti-trafficking raids, expressing mixed views about the efficacy of raids as anti-trafficking tools.

Four of the five law enforcement personnel interviewed had been on-site during raids. The fifth had worked with people caught up in raids who the government thought may be victims. Two of these five were very critical of the use of raids, noting that people who experience raids are often not good witnesses in subsequent anti-trafficking investigations and prosecutions because they are distrustful of law enforcement. One of the five believed raids produced both good and bad results, while two spoke in favour of raids.

At least one law enforcement employee reported experiencing symptoms associated with secondary trauma.

Law enforcement personnel described difficulties gaining the trust of people who had been victimised and who were subsequently detained. However, they reported that raids were useful for the following reasons: to locate and identify witnesses for law enforcement efforts; to dismantle criminal networks; and to remove victims of abuse from terrible situations. In theory, they believed that raids lead to the delivery of services and assistance to trafficked persons.

The perspectives of law enforcement personnel differed from those of trafficking survivors and sex workers in that their primary focus was the successful initiation of criminal prosecutions and the willingness of trafficked persons to serve as witnesses. The extremely divergent perspectives of raids held by law enforcement and people affected by raids, including trafficked persons, highlights an extreme gap in accountability to the very persons law enforcement efforts are intended to assist. Nevertheless, law enforcement personnel indicated that criminal justice procedures are less likely to be successful where trafficked persons are intimidated by law enforcement actions.

Perspectives from service providers

The raids that I'm most familiar with have taken place in the wee hours of the morning, usually in a person's home, not in their place of work, and it's been really frightening. They initially believe it's because they are undocumented, and then later, in the moment in high drama, they realise [that law enforcement agents] are after the victims

because of prostitution, and then it becomes frightening because their families don't know they were involved in prostitution...Usually in the raids I've been told about the law enforcement officer playing tough before explaining that law enforcement believes the women are victims. One client described...that on the way to the station, an ICE agent said, 'You shouldn't be in this country anyway,' and she said later, 'How dare you! You have no idea how I got here!' And she had been trafficked and had the feeling of humiliation and powerlessness.

– Case worker from Northeastern United States

By the time that we talked to any of the women in any of these cases, they had already been interrogated at least once if not more, and based on those interrogations, maybe a second or third, their entire future is determined. They aren't informed about their rights in a way that a reasonable person would believe. I arrest you, handcuff you, fingerprint you, interrogate you and then tell you that you have these rights.

– West Coast attorney for trafficked persons

Social service providers and attorneys interviewed generally asserted a belief, based on their own experience, that the use of raids to combat trafficking in persons is inherently not premised upon the needs of trafficked people but rather on the goal of prosecution. Accountability to the victims of crime was reported to be diminished in the service of prosecution. Service providers emphasised that raids are chaotic events during which the people directly targeted have little understanding of what is happening. They cited trauma and detention as common consequences of raids targeting persons who had been or were suspected of being trafficked. Service providers also noted that treatment during raids bears directly upon whether a person who has been detained will speak frankly about his or her experiences, or will self-identify as having been coerced or otherwise abused.

Social workers and attorneys, and particularly those who have been present at or following a raid, spoke strongly against raids. All 26 service providers stated that they did not receive referrals of trafficked persons as a result of local police vice raids, suggesting that such raids do not result in the identification of trafficked persons. All service providers interviewed reported that federal anti-trafficking raids can lead to the deportation of many people before they can be properly screened for trafficking, and that law enforcement did not consistently



follow up on a trafficked person's willingness to cooperate with investigations or provide the necessary support for applications to adjust immigration status and for benefits and assistance.

Service providers reported that there does not appear to be a standard procedure for identifying trafficked persons following federal anti-trafficking raids or local law enforcement vice raids, leading to widely divergent treatment of people caught up in such raids. For example, vice raids can lead to revolving door arrests for prostitution, while immigration raids can lead to detention and deportation, and in some cases to the eventual identification of trafficked persons. Service providers further stated that law enforcement agents use interrogation techniques, often involving intimidation, that are entirely incompatible with an approach that prioritises the rights and needs of trafficked persons.

Social service providers in the United States said their clients experienced symptoms of trauma after raids, and noted that, in addition, raids can uproot trafficked persons from their ethnic communities, and also effectively render them homeless and without possessions. Some people picked up in raids, especially those who earned living wages, experienced severe economic hardship as a result. Many trafficking survivors were alienated from law enforcement by their experiences of raids and did not speak about their situations, at least initially. Others, including those who were trafficked by their husbands or partners, did not self-identify as trafficked persons following raids. Service providers described that the trauma of raids and the requirement of subsequent cooperation with law enforcement have long-term effects on trafficked persons and people who do not self-identify as trafficked. The traumas described by service providers included physical violence (for example, one trafficked woman interviewed had been knocked unconscious with a pistol during a raid) and emotional trauma because they did not understand what was happening (some believed they were being kidnapped, some believed they would be raped by the police).

Service providers reported that the majority of trafficked persons who accessed their services were not identified as a result of raids. One supervisor with a national organisation said, 'Ninety percent of our cases are not from raids, not even law enforcement identified'. In many cases, people often leave trafficking situations with the help of co-workers and clients. This was reported frequently about people trafficked into the sex industry.



Discussion and Recommendations

This study finds that persons found in raids describe raids as traumatic, lacking procedures to identify trafficked persons, and a lack of follow-through by law enforcement on assistance to trafficked persons. These findings point to a failure of accountability. This failure is particularly acute with respect to trafficked persons and others who have been caught up in raids.

It is clear that other approaches to locating, identifying, and assisting trafficked persons are necessary. Such approaches, particularly if based on meeting the needs, protecting the rights, and supporting the self-determination of trafficked persons, may prove to be a more effective response to trafficking in persons.

Alternative methods of locating and identifying trafficked people in isolated workplaces, such as private homes, could include the following: strengthening and closely monitoring labour protections for domestic workers; increasing awareness of protections available to undocumented workers and trafficked persons; and empowering immigrant communities to identify and intervene appropriately in trafficking situations. Community members seeking to assist potentially trafficked persons have an important role to play: to share information about legal rights that are available to all; to be aware of what trafficking conditions may look like; and to report concerns to qualified anti-trafficking organisations which have expertise in identifying and serving trafficked persons from a survivor-centred approach. The broader community should also be supported to ensure they are able to help in identifying potential trafficking situations and responding appropriately or calling law enforcement in emergency situations. Well-meaning individuals have helped trafficked persons leave their situations with referrals and introductions to qualified and survivor-centred service providers. Expanding the responsibility for identification and protection could lead to positive outcomes without violating the rights and dignity of trafficked persons that can accompany a raid.

The experiences of people who left trafficking situations without the intervention of law enforcement agencies suggest that these alternative ways of reaching trafficked persons can be useful. Specifically, increasing awareness among sex workers and immigrant communities of resources available to trafficked people would enable more trafficked people to leave coercive situations without the necessity and trauma of law enforcement intervention. Such an approach could be led and implemented by people familiar with sex work or work in other sectors



where trafficking is prevalent, such as domestic work, agricultural labour, and service sectors. Other leaders in these efforts could include individuals who have experienced trafficking, social service providers, and immigrant rights advocates. Women interviewed for this report described being helped by people they knew, including clients and co-workers, who recognised that they were in coercive situations and stepped in to offer help. Because they left trafficking situations in a non-coercive manner, avoiding the trauma associated with a law enforcement raid, they were more prepared to cooperate with law enforcement in the prosecution of their traffickers. Ultimately, an approach that recognises and supports the rights, agency, and self-determination of trafficked persons is likely to produce better outcomes for trafficking survivors—the people to whom anti-trafficking efforts should ultimately be accountable.

Accountability can also be improved by ensuring that the government provides unconditional access to services and assistance to trafficked persons, rescinding the present requirement that trafficked persons be willing to cooperate with law enforcement. Allocating funds to organisations involved in empowering immigrant communities and workers in informal economies would help protect these vulnerable groups and support their efforts to seek redress for coercion. More vigorous enforcement of labour laws (which largely apply to everyone in the United States, including undocumented migrants and trafficked persons) is recommended to combat debt bondage and other violations.

As raids have generally not led to the identification of trafficked persons, it is necessary to consider ways in which the current poor identification rates can be improved. The training of immigration officials, judges, defense attorneys, and prosecutors to identify and make appropriate referrals for trafficked persons is crucial.

Our findings confirm a number of gaps and weaknesses that could be remedied to increase accountability by law enforcement agencies. For example, it is evident that vice raids are not effective anti-trafficking measures and should not be used. Solutions relying on in-depth investigations and voluntary cooperation should be prioritised. For example, the experiences of women who described being approached by law enforcement outside of a raid demonstrate that this type of engagement is an effective mode of contact, and that raids can be used as a measure of last resort. In fact, raids should be supplanted with in-depth investigations in which the cooperation of trafficked persons is voluntary and their rights are fully protected. Law enforcement agencies could increase accountability by ensuring that people with knowledge of trafficking situations are able to come



forward without fear of arrest or removal from the country. Once people who may have been trafficked are identified, accountability to victims of crime could easily be increased by following through on working with attorneys, advocates, and service providers to ensure the best outcome for trafficked persons.

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“We have the right not to be ‘rescued’...”*: When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers

Aziza Ahmed and Meena Seshu

Abstract

This paper highlights the impact of raid, rescue, and rehabilitation schemes on HIV programmes. It uses a case study of Veshya Anyay Mukti Parishad (VAMP), a sex workers collective in Sangli, India, to explore the impact of anti-trafficking efforts on HIV prevention programmes. The paper begins with an overview of the anti-trafficking movement emerging out of the United States. This U.S. based anti-trafficking movement works in partnership with domestic Indian anti-trafficking organisations to raid brothels to “rescue and rehabilitate” sex workers. Contrary to the purported goal of assisting women, the anti-trafficking projects that employ a raid, rescue, and rehabilitate model often undermine HIV projects at the local level, in turn causing harm to women and girls. We examine the experience of one peer educator in Sangli to demonstrate and highlight some of the negative consequences of these anti-trafficking efforts on HIV prevention programmes.

Keywords: HIV/AIDS, sex work, trafficking, prostitution, health, India, anti-trafficking

* SANGRAM, *Bill of Rights*, 2010.



Part I. Introduction

This paper highlights the impact of raid, rescue, and rehabilitation schemes on HIV programmes. It uses a case study of Veshya Anyay Mukti Parishad (VAMP), a sex workers collective in Sangli, India, to explore the impact of anti-trafficking efforts on HIV prevention programmes. The paper begins with an overview of the anti-trafficking movement emerging out of the United States. This US anti-trafficking movement works in partnership with domestic Indian anti-trafficking organisations to raid brothels to “rescue and rehabilitate” sex workers. Contrary to the purported goal of assisting women, the anti-trafficking projects that employ a raid, rescue, and rehabilitate model often undermine HIV projects at the local level, in turn causing harm to women and girls. We examine the experience of one peer educator in Sangli to demonstrate and highlight some of the negative consequences of these anti-trafficking efforts on HIV prevention programmes.

Methodology

This paper is the result of a “human rights fact-finding”.¹ A human rights fact-finding is a methodology used within the human rights community for the purposes of documentation and advocacy. The methodology employs interviews and focus group discussions, often in partnership with communities affected by the human rights violations being investigated. In this case, the documented rights violations were products of the raid and rescue industry that is active in Sangli, Maharashtra.

Meena Seshu, the co-founder of Sangram, conceptualised this fact-finding in an effort to document the impact of raids and rescues on the sex workers collective and on HIV programmes for sex workers. Aziza Ahmed contributed legal expertise and conducted secondary research on the raid and rescue industry. In the course of the human rights fact-finding, the authors worked with members of the collective to investigate and interview key informants, including police officers, lawyers, and members of the collective. All information contained in this paper is available in the public record and in secondary academic research. KB, whose story is documented below, is a leader in the

¹ D F Orentlicher, ‘Bearing Witness: The art and science of human rights fact-finding’ *Harvard Human Rights Journal*, vol. 3, 1990, pp. 83–136.

VAMP collective and was active in the fact-finding and documentation of her case and of the impact of raids and rescues on the lives of sex workers in Sangli and the related impact on HIV programmes.

Theoretical framing

This paper uses several frameworks developed by legal scholars to understand the impact of anti-trafficking programmes and the related conflation of sex work and trafficking on HIV projects. In the analysis section of the paper, we also turn to public health literature to explain the impact of the raid, rescue, and rehabilitation methodology on sex workers.

Professor Janie Chuang has documented the rise of neo-abolitionism, a US based movement of feminist abolitionists, conservatives, and evangelical Christians to end trafficking globally.² Despite common knowledge that trafficking can occur in many labour sectors, the majority of attention by neo-abolitionists is given to trafficking in the sex sector. The motivations of these various anti-trafficking sub-movements differ considerably. Professor Janet Halley and her co-authors examine the rise of abolitionist feminism in particular, highlighting its growing influence in the context of international legal regimes.³ Feminist abolitionists are often driven by the “dominance” feminist perspective that all sex work is trafficking and is thereby coerced. This idea is premised on a larger notion of women’s lack of agency in sex.⁴ The work of sociologist Elizabeth Bernstein places the anti-trafficking movement inside in the context of carceral feminism

² J A Chuang, ‘Rescuing Trafficking from Ideological Capture: Prostitution reform and anti-trafficking law and policy’ *University of Pennsylvania Law Review*, vol. 158, 2010, pp. 1655–728.

³ J Halley, P Kotiswaran, H Shamir, & C Thomas, ‘From the International to the Local in Feminist Legal Responses to Rape, Prostitution/sex work, and Sex Trafficking: Four studies in contemporary governance feminism’ *Harvard Journal of Law and Gender*, vol. 29, no. 2, 2006, pp. 335–424.

⁴ For a description of the dominance feminist position on sex work, see the discussion of J Halley, P Kotiswaran, H Shamir, & C Thomas, ‘From the International to the Local in Feminist Legal Responses to Rape, Prostitution/sex work, and Sex Trafficking: Four studies in contemporary governance feminism’ *Harvard Journal of Law and Gender*, vol. 29, no. 2, 2006, pp. 335–424; See also K Abrams, ‘Sex Wars Redux: Agency and coercion in feminist legal theory’ *Columbia Law Review*, vol. 95, 1995, pp. 304–376. (‘Proponents of dominance feminism stressed the unrecognized pervasiveness of sexualized domination in many venues of women’s lives; they also highlighted the role of this domination in shaping social views of women and women’s conceptions of themselves.’)

- or the rightward shift of feminist organisations that offers increasingly punitive solutions including the use of criminal law as a means to end trafficking.⁵ Bernstein's work demonstrates how this rightward shift is part of a growing culture of militarised humanitarianism by the United States. The current coalitions acting to end sex trafficking emerge from a long history of abolitionism fuelled by "White Slavery": the myth of young white women forced into prostitution. This precedent movement that emerged in the 19th century provides the contours of current anti-trafficking campaigns.⁶ Fuelled by the trope of the captured young sex slave who cannot escape her trafficker neo-abolitionists have become increasingly reliant on raids, rescues and rehabilitation as a primary method of fighting sex-trafficking.

While this paper draws specific attention to the involvement of US funded organisations and agencies in the raid, rescue, and rehabilitate industry as an international force, it is important to note that many of these projects are implemented by Indian national abolitionist organisations. While there is no comprehensive data available on the abolitionist movement in India, our own interviews and research demonstrate the active engagement of these organisations in abolitionist work and the receipt of funding and support directly from international funding agencies and religious groups.⁷

Part II. Drivers of the International Anti-Trafficking Movement: The influence of the US government and civil society

The US Anti-Trafficking Movement

The United States is a key force in the push to end trafficking internationally. The US Agency for International Development Office of Women and Development has provided a total of 528 million dollars to anti-trafficking projects since 2001.⁸ The neo-abolitionists played

⁵ E Bernstein, 'The Sexual Politics of the New Abolitionism' *Differences*, vol. 18, no. 3, 2007, pp. 128–151.

⁶ J Doezema, *Sex Slaves and Discourse Masters: The construction of trafficking*, Zed Books, New York, 2010.

⁷ Consulate General of the United States, Kolkata, 'U.S. Grants \$600,000 to Anti-Trafficking Initiatives in Eastern India', retrieved 9 November 2011, <http://kolkata.usconsulate.gov/wwwhipr040706.html>; See also Apne Aap, retrieved 9 November 2011, <http://apneaap.org/index.php>.

a key role in demanding the government to address trafficking through funding, programming, and monitoring country progress towards anti-trafficking. Further, the government through the State Department Office to Monitor and Combat Trafficking in Persons (TIP Office) instituted a range of disciplinary and regulatory measures for countries that did not meet required standards of laws, policies, and programmes and restrictions on US government funding both within and outside the US.⁹

Relevant to this paper, in particular, was the introduction of neo-abolitionist language into US funding for HIV/AIDS. The 2003 President's Emergency Plan for AIDS Relief (PEPFAR), like the *Trafficking Victims Protection Act* specifically states that 'no funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking'.¹⁰ This language is known as the anti-prostitution loyalty oath (APLO). PEPFAR's 15 billion dollars made the US government the largest bilateral donor on HIV and AIDS and, in turn, a heavy hand of influence on the future of the ability of sex workers to respond to the HIV epidemic. The APLO has facilitated access to funding for organisations that are willing to sign the pledge. Further, it has promoted the US abolitionist agenda, extended support to projects seeking to criminalise aspects of the sex industry and bolstered organisations seeking to raid, rescue, and rehabilitate.

The "Raid, Rescue, and Rehabilitate" Industry

So I set off with the IJM [International Justice Mission]¹¹ investigator (who wants to remain anonymous for his own safety) into the alleys of the Sonagachi red-light district one evening, slipped into the brothel, and climbed to the third floor. And there were Chutki and three other girls in a room, a pimp hovering over them. Perceiving us as potential customers, he offered them to us....The Kolkata police agreed to raid the brothel to free the girl. I.J.M. told them the location of the

⁸ United States Agency for International Development, Trafficking in Persons, retrieved 30 September 2011, http://www.usaid.gov/our_work/cross-cutting_programs/wid/trafficking/index.html.

⁹ J A Chuang, *op. cit.*

¹⁰ United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, §2, 117 Stat. 711, 716 (2003) (current version at 22 U.S.C.A. §§7601(23) (West 2010)).

brothel at the last minute to avoid a tip-off from police ranks. The police casually asked us to lead the way in the raid since we knew what Chutki looked like and where she was kept...So along with a carload of police, we drove up to the brothel and rushed inside to avoid giving the pimps time to hide Chutki or to escape themselves.¹²

The raid, rescue, and rehabilitate scheme refers to a process by which brothels are raided by the police or NGO workers, women are removed from brothels (rescued), and then placed in a rehabilitation facility. Raids are typically conducted by police officers at the behest of local and international organisations seeking to rescue and rehabilitate sex workers. The International Justice Mission, described in the New York Times op-ed by Nikolas Kristof above, is the recipient of over US\$ 900,000 from the government.¹³ In a recent evaluation, USAID detailed IJM's raid and rescue process in detail:

IJM employs two methods for rescuing victims, one is brothel raids in cooperation with the police, and the other is the "buy-bust" operation. In the latter, undercover agencies attempt to purchase the services of an underage girl. Once the perpetrator accepts the money, the police who are watching and waiting, step in and arrest them. These raids and "buy-busts" are targeted at perpetrators discovered through information provided by undercover operatives.¹⁴

¹¹ The International Justice Mission states that it is a "human rights agency that brings rescue to victims of slavery, sexual exploitation, and other forms of violent oppression." The website of IJM states the core commitments of the organisation to "restore to victims of oppression the things that God intends for them: their lives, their liberty, their dignity, the fruits of their labor." Although IJM has been praised and supported by some as illustrated by the quote here from NYTimes op-ed writer Nikolas Kristof, many others have critiqued the work of IJM. For a critique of IJM, see: J A Chuang, op. cit.; E Bernstein and J R Jakobsen, 'Sex, Secularism, and Religious Influence in U.S. Politics', retrieved 10 December 2011, <http://www.opendemocracy.net/5050/elizabeth-bernstein-janet-r-jakobsen/sex-secularism-and-religious-influence-in-us-politics>; N Thrupkaew, 'The Crusade Against Sex Trafficking', retrieved 10 December 2011, <http://www.thenation.com/article/crusade-against-sex-trafficking>.

¹² N Kristof, 'Raiding a Brothel in India', retrieved 30 September 2011, <http://www.nytimes.com/2011/05/26/opinion/26kristof.html>.

¹³ Boston.com, 'USAID Contracts with Faith Based Organizations', retrieved 14 March 2012, http://www.boston.com/news/special/faith_based/faith_based_organizations.htm.

¹⁴ USAID, *International Justice Mission Anti-Trafficking Program in Cambodia: Assessment 2006*, retrieved 14 March 2012, http://pdf.usaid.gov/pdf_docs/PNADG806.pdf.

The raid and rescue is the first part of the process. Heavily reliant on local police, raids are often violent not only for those accused of being traffickers but also for the sex workers themselves. This has been documented in numerous contexts including Southern Africa,¹⁵ Eastern Europe,¹⁶ and India.¹⁷ The insistence on using the police in the context of raids and rescues has been pushed by neo-abolitionists despite evidence of police violence against sex workers. The level of violence experienced by sex workers in the context of raids (both for the purposes of arrest and rehabilitation) was noted by the World Health Organization and the Global Coalition on Women and AIDS in 2005 Informational Bulletin on violence against women:

However, both trafficking and violence against trafficked women need to be understood more broadly in the context of migration, and examined separately from sex work. At the same time, it is important to note that in several countries, certain activities such as rescue raids of sex establishments have exacerbated violence against sex workers and compromised their safety. For example, research from Indonesia and India has indicated that sex workers who are rounded up during police raids are beaten, coerced into having sex by corrupt police officials in exchange for their release or placed in institutions where they are sexually exploited or physically abused. The raids also drive sex workers onto the streets, where they are more vulnerable to violence.¹⁸

The final step for anti-trafficking organisations is often rehabilitation of women in the sex industry. Rehabilitation programmes are run either by non-governmental organisations including churches, or are government programmes. The commonly told trope of the rescued woman ends here—she is now in the safe hands of the state or an NGO who will rehabilitate her, find her a new source of employment, and at some point release her from the rehabilitation home. In reality, this is not the way the story typically ends. Often, sex workers are taken into rehabilitation programmes where they are kept in jail-like

¹⁵ J Arnott, A L Crago, *Rights Not Rescue: A report on female, male, and trans sex workers' human rights in Botswana, Namibia, and South Africa*, Open Society Institute, 2009.

¹⁶ Sex Workers Advocacy Network, *Arrest the Violence: Human rights abuses against sex workers in Central and Eastern Europe and Central Asia*, 2009.

¹⁷ World Health Organization, *Violence Against Women and HIV/AIDS: Critical intersections*. Information Bulletin Series, 2005.

¹⁸ *Ibid.*

conditions, may experience abuse, and then are eventually released. Rehabilitation programmes have come under increased scrutiny by public health bodies and sex worker organisations concerned for the health and safety of women removed from brothels. Documented extensively by sex worker projects and human rights organisations (and often acknowledged by the anti-trafficking programmes and police), rehabilitation programmes often undermine the very purpose of their existence given the high rates of violence experienced by women in rehabilitation homes, the return of women to sex work (perhaps due to a lack of employment opportunities otherwise), and after being detained for extended periods of time disrupting their everyday existence.¹⁹

To illustrate the harm of raid, rescue and rehabilitation schemes in India, we turn to the case of VAMP in Sangli where anti-trafficking efforts driven by abolitionists have severely undermined programmes recognised for their success in addressing the HIV epidemic.

Part III. The Case of VAMP in Sangli, India

About VAMP

Approximately 2.5 million people in India are living with HIV.²⁰ Sex workers are amongst the groups most affected by the HIV epidemic in India. There are 17.1% female sex workers in the state of Maharashtra who are HIV positive. A survey conducted in four states found that the prevalence of HIV amongst sex workers is approximately 14.5%.²¹

In 1992, Sangram initiated a 5000-person sex worker collective called VAMP in Sangli that mobilises and empowers sex workers to address the various challenges faced by the sex worker community. The early

¹⁹ G Soderlund, 'Running from the Rescuers: New US crusades against sex trafficking and the rhetoric of abolition' *Feminist Formations*, vol. 17, no. 3, 2005, pp. 64–87; C Overs, 'Caught between the Tiger and the Crocodile: The campaign to suppress human trafficking and sexual exploitation in Cambodia', retrieved 2 February 2011, http://www.aidslex.org/site_documents/SX-0046E.pdf.

²⁰ UNAIDS, India, retrieved 4 December 2011, <http://www.unaids.org/en/regionscountries/countries/india/>.

²¹ B M Ramesh, S Moses, et al. 'Determinants of HIV Prevalence among Female Sex Workers in Four South Indian States: Analysis of cross-sectional surveys in twenty-three district' *AIDS*, vol. 22, suppl. 5, 2008, pp. S35–44.

inspiration for the movement came from the impact of HIV on the sex work community.²² The programme distributes around 470,000 condoms a month.²³

A central component of the work of VAMP revolves around delivering HIV information, care and support, and ensuring that sex workers are able to access treatment services. VAMP staff and leaders are the recipient of numerous accolades and awards for a demonstrated impact on the lives of individuals in Sangli living with and at risk for HIV including by the US government.²⁴ Despite the public acknowledgment of their success as an HIV programme Sangram and VAMP are subject to the swinging political pendulum of US foreign assistance. The rise in influence of the neo-abolitionists and the existence of the APLO, for example, brought VAMP under the scrutiny of the US government for providing sex worker services.²⁵ Despite the simultaneous accolades, Sangram was publicly accused of trafficking women and girls. VAMP also became the target of a locally operated and internationally funded raid and rescue industry set out to quell the political mobilisation of sex workers in Sangli.²⁶ This confluence of forces, the targeting of Sangram by neo-abolitionists and the increasing focus on the organisation by local and international anti-trafficking organisations exemplifies of the negative consequences of how un-interrogated anti-trafficking initiatives can cause serious harm to a successful HIV programme.

²² Association for Women's Rights in Development, 'The VAMP/SANGRAM Sex Workers Movement in India's Southwest', retrieved 29 February 2012, http://www.google.com/url?sa=t&rct=j&q=vamp%20sangram%20awid&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fawid.org%2Feng%2Fcontent%2Fdownload%2F117347%2F1335451%2Ffile%2FCTW_VAMP_Movmnt_ENG.pdf&ei=cqRPT8b_BoPg0QHNoMDqDQ&usq=AFQjCNF42F5tt2-OOT9YJsJcWVv4jiO5VQ&sig2=sFFiKtUq3Wy5Fh46_85e7g.

²³ USAID, AIDStar: SANGRAM Collective, retrieved 30 September 2011, http://www.aidstar-one.com/focus_areas/gender/resources/case_study_series/sangrams_collectives.

²⁴ USAID, AIDStar: SANGRAM Collective, retrieved 30 September 2011, http://www.aidstar-one.com/focus_areas/gender/resources/case_study_series/sangrams_collectives#tab_7; Human Rights Watch, Human Rights Watch to Honor Indian AIDS Advocate, retrieved 4 December 2011, <http://www.hrw.org/news/2002/11/06/human-rights-watch-honor-leading-indian-aids-advocate>.

²⁵ M Souder, 'Letter to the Honorable James Kounder', 6 October 2005.

²⁶ Y Pawar, 'Rogue NGO Separates Mother from Baby for 9 Days', *DNA Sunday*, November 20, 2011; See twitter profile of Freedom Firm, 26 August 2011 and 8 August 2011; See Rescue Foundation website, retrieved 3 October 2011, <http://www.rescuefoundation.net/newsletter.html>; CASAM, *Who Stole the Tarts*, September 2009, p. 15. ('A US-funded Christian NGO regularly initiates police raids on a powerful collective of sex workers in Sangli. Many of the women are devadasis and extremely articulate about their rights. Clearly the

Given VAMP's focus on HIV programmes and its politicisation under US funding on HIV through PEPFAR, this case study will focus on the impact anti-trafficking organisations have on destabilising the HIV response at the local level. The case study focuses on the story of KB²⁷ a leader in the VAMP collective, peer-educator, and brothel owner who is being prosecuted under the *Immoral Trafficking and Prevention Act* (ITPA).²⁸ ITPA is the primary legislation addressing sex work and trafficking.

The story of KB illustrates how arrests and prosecution affect sex work communities and destabilise HIV programming for sex workers, in turn harming the women who ITPA aims to help. KB's case is not an example of an exceptional use of the ITPA. Rather, it is the routine nature of KB's prosecution under the ITPA that manages to result in enormous disruption of HIV programming that makes this case worth documenting. It is also important to note that almost any act in the sex sector can be construed to be criminal and prosecuted given the broad language of the ITPA.

aim is two fold: to silence and quell the political mobilisation of these women and eradicate the customary practise of the devadasi. The raids do not distinguish between those who do sell sex and those who do not. Since they are planned and executed under the auspices of rescuing 'minors', any young woman who is found in the house of a sex worker is presumed to have been trafficked. In these raids these women are arrested despite most being above the age of legal consent.")

²⁷ Real names have not been used to protect the confidentiality of the individual.

²⁸ Sex work and trafficking in India is governed by several legislative and constitutional frameworks including Article 23 of the Indian Constitution that prohibits traffic in human beings, the *Immoral Traffic in Persons Prevention Act of 1986* (ITPA), and the Indian Penal Code 1860 which contains provisions against the trafficking and slavery of women and children. ITPA, the primary legislation addressing sex work and trafficking, is the more recent manifestation of the Suppression of Immoral Traffic in Women and Girls Act of 1956 passed shortly after India became a signatory to the United Nations *International Convention for the Traffic in Persons and of the Exploitation of Women* in 1950. Interpretations of the impact of the ITPA have varied from an understanding that it tolerates prostitution by not criminalising the sexual intercourse itself but criminalising all other aspects of sex work including seducing for the purposes of prostitution, keeping a brothel, detaining a woman for the sake of prostitution, or living off the earnings of a prostitute. Sex worker organisations contend that the language of the ITPA conflates sex work and trafficking as the ITPA has actually resulted in the arrest of many sex workers, particularly prior to the amendment change in 2009 that removed solicitation of sex work as a crime.

The ITPA came about as a more recent iteration of the *Suppression of Immoral Traffic in Women and Girls Act (SITA)* of 1956. SITA was passed shortly after India became a signatory to the *United Nations International Convention for the Traffic in Persons and of the Exploitation of Women* in 1950 (Convention on Trafficking).²⁹ The Convention on Trafficking has a direct reference to older international agreements on white slavery - producing a continuous link between the laws under the sex industry in India today and the historic antecedents of a broader discourse of white slavery.³⁰ KB's arrest in Sangli is the product of these laws, ITPA in particular, that emerge out of the historical and current international conventions and raids occurring at the encouragement of domestic anti-trafficking organisations empowered by an international anti-trafficking movement. KB's story demonstrates how one HIV peer educator can become ensnared in the politics of international abolitionism operating at a local level.

International forces, local consequences: The case of KB

KB is a leader in the VAMP collective. A former sex worker, and now brothel owner and HIV peer educator, she plays a key role in encouraging sex workers to participate in the collective, fight against client violence, and change the attitude of the police towards sex workers. Although challenges remain, it is through the leadership of KB and others like her that the local police in Sangli have begun to respond more effectively to the needs of sex workers. This is a shift away from a more punitive approach initially taken by the police. Through ongoing advocacy the sex workers maintain a delicate relationship with the police.

KB's fate changed when she was approached by RA and her mother in 2010 with two requests: RA sought employment in a brothel and needed a loan of 10,000 rupees for a medical procedure. KB gave RA the loan and allowed her to work off the loan interest-free as part of her stay in the brothel. RA was 18 years old at the time. VAMP policies do not allow an individual younger than 18 to work as a sex worker in the brothel. RA paid off the loan as agreed and continued to work in the

²⁹ P Kotiswaran, 'Preparing for Civil Disobedience: Indian sex workers and the law' *BC Third World LJ*, vol. 21, 2001, pp. 161–241.

³⁰ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 21 March 1950.

brothel splitting her earnings with the brothel owner. It is important to note here that due to formal banking systems being inaccessible to sex workers, savings and loan schemes between sex workers are very common and often serve as a means of both security and credit.

During this time a local Christian organisation heard that a transaction had taken place in which KB had loaned money that would be repaid by sex work. A raid was planned. According to sex workers who were in the brothel at the time of the raid, a man posing as a client came in and asked for a girl. RA was produced for him and the man began to have a sexual encounter with RA. At some point, he left RA to signal to the police who were near the brothel that he had in fact found a minor there. The police raided the brothel, arrested KB, and took RA to the juvenile home. As described by the sex workers who were present on the scene, the raid itself was violent with the police dragging the women out by their hair. When the government hospital certified that RA was an adult, the magistrate transferred her from the juvenile home to the government correctional facility. RA's age was verified through a bone scan that is frequently used by the courts to determine whether or not sex workers are minors in the context of court proceedings. Despite her legal capacity as an adult and her desire to be released, she remained in a correction home under the auspices of rehabilitation for several months. The correction home where RA was purportedly rehabilitated is a locked home located an hour away from Sangli. Women who are awaiting permission to be released by the court occupy the home. The rehabilitation activities vary from encouraging employment in cleaning services at the local hospital to marrying the girls to men that visit seeking wives. The facility denied permission to VAMP activists to visit RA on repeated occasions.

While it is unclear how this abolitionist organisation is funded, interviews with local police as well as KB's lawyers indicate that much of the funding and support for organisations conducting raids and rescues in Sangli come through international sources. In fact, this is clear when one visits the websites, twitter, or facebook pages of the international and local organisations who often post messages after a raid to highlight the success of rescuing women from the brothels, many of which are located in Maharashtra.³¹ The following announcement containing false information appeared on the website of the

³¹ See twitter profile of Freedom Firm, 26 August 2011 and 8 August 2011; See Rescue Foundation website, retrieved at 3 October 2011, <http://www.rescuefoundation.net/newsletter.html>.

organisation that facilitated the raid resulting in KB's arrest and RA's detainment:

Efforts made by Indian Rescue Mission (IRM), a Christian organisation, helped Indian police track an International Sex Racket being run by Indian pimps with tentacles in major Indian metros and with audacious plans to expand it internationally... This comes within a week of police action upon the tip off received by IRM in rescuing a minor girl forced into prostitution in a red light area in Sangli district Karnataka State on December 11, 2010.³²

Although RA is an adult, the photo accompanying the press release is one of a crying girl who looks to be approximately four or five years old.³³

KB was charged under sections 3,4,5, and 6 of the ITPA that penalise keeping a brothel, living off the earnings of a sex worker, procuring or taking a person for the sake of prostitution, and detaining a person in a place where prostitution is taking place.³⁴ KB was released from detention a few days after her arrest but her case is pending before the courts. The framing of KB's charges in the context of the ITPA reveals the larger conflation of sex work and trafficking that facilitates the arrest of sex workers (despite a purported desire to rescue sex workers) and is used to target leaders in the sex work community whose actions can be construed to be in violation of the ITPA.

The impact of the raid, rescue and rehabilitate model on HIV programmes in Sangli

The routine and common occurrence of raids and rescues severely disrupt the lives of sex workers and the work of HIV programmes. This is certainly the case with KB and RA. Both have experienced state custody, KB is subject to ongoing prosecution and awaits her trial, while RA was displaced in a correction home an hour away awaiting

³² J Philip, *Indian Rescue Mission's Recent Rescue of a Minor Girl, Helps Indian Police Uncover an International Trafficking Racket*, Indian Rescue Mission, 3 January 2011.

³³ *Ibid.*

³⁴ Interview with Lawyer, Aziza Ahmed, 29 March 2011.

release. Their stories, common to the lives of sex workers in Maharashtra, tell a larger tale about the detrimental effects of raids and rescues on HIV programmes and services at the local level. This section seeks to highlight the primary negative consequences of this and other raids on the health and well-being of sex workers in Sangli.

First, the raids themselves may have a negative impact on sex workers' lives. The violent and disruptive raids mean that clients do not come to the brothel areas.³⁵ This doesn't result in stopping sex work (as perhaps hoped by the abolitionists who push for criminalisation of clients) but drives it underground as sex workers begin to seek out clients. Driving sex work underground results in sex workers taking greater risks with their safety and health in their engagement with clients. In the brothels where VAMP works, sex workers are less prone to client violence because they take care to report violent clients to the others and then work to exclude those clients from brothel areas. This provides a safety mechanism premised on trust and cooperation. The ongoing raids disrupt such systems of safety and self-governance established by sex worker collectives.

Second, the unrelenting raids on brothels that are structured to facilitate the delivery of HIV programmes have a detrimental impact on a well-established public health principle: that the collectivisation of sex workers reduces HIV risk.³⁶ For example, with the assistance of VAMP, sex workers have developed a means of monitoring condom use and encouraging HIV testing. In one brothel area, sex workers collect used condoms and count them in order to match it with the number of clients a sex worker has. Where there is a discrepancy, the sex worker is encouraged to go for an HIV test immediately and then again a few months later. If the sex worker tests HIV positive, she joins a community of sex workers who care for and monitor the health of sex workers living with HIV.³⁷ These mechanisms of care and support established by sex workers have resulted in a de-stigmatisation of HIV

³⁵ Interview with KB, Aziza Ahmed, 31 March 2011.

³⁶ K Shannon and J Csete, 'Violence, Condom Negotiation, and HIV/STI Risk Among Sex Workers' *The Journal of the American Medical Association*, vol. 304, no. 5, 2010, pp. 573–4; FHI/UNAIDS, 'Best Practice in HIV/AIDS Prevention' *Collection 82* (Bunmi Makinwa & Mary O'Grady eds., 2001), <http://www.fhi.org/en/HIVAIDS/pub/guide/bestpractices.htm>; K Shannon and J Csete, *op. cit.*; K M Blankenship, R Burroway, and E Reed, 'Factors Associated with Awareness and Utilisation of a Community Mobilisation Intervention for Female Sex Workers in Andhra Pradesh, India' *Sexually Transmitted Infections*, vol. 86, suppl. 1, 2010, pp. 169–75.

³⁷ Focus group with sex workers, Aziza Ahmed, March 31, 2011.

and support infrastructure necessary for women living with HIV. The raids and rescues disrupt the support systems often based on interpersonal relationships and trust. During the raid and during KB's time in state custody, any HIV prevention activities that KB was involved in came to a halt.

Third, the arrest and detainment of sex workers in jails, remand homes, and rehabilitation centres often disrupt HIV care and expose individuals with HIV to tuberculosis and other diseases often rampant in closed confined settings. This is of extreme concern given the high numbers living with HIV. The remand homes, rehabilitation centres and jails are not equipped to address the treatment and health needs of sex workers living with HIV. Even where the settings are not violent, the programmes are often problematic. The home in which RA was held, for example, arranges marriages for the girls as a rehabilitative exercise.³⁸ Often when VAMP knows that a sex worker living with HIV has been taken to a remand home, rehabilitation site, or arrested, they attempt to locate her to ensure she is getting HIV medication. In many cases, attempts to locate sex workers to ensure that HIV care is continued fail because women and girls who are rescued flee rescue homes or because VAMP staff is not allowed to meet and inquire about her well-being.

Fourth, violence against sex workers at the hands of the state during raids, rescues, arrests, in remand homes and rehabilitation centres is well-documented.³⁹ Despite this, organisations employing a raid, rescue, and rehabilitate scheme rely heavily on the police. This has two primary impacts: first, it subjects the sex workers to violence at the time of the raid as well as in state custody; second, where organisations like VAMP have effectively altered their relationship with the police to be able to call on them for support, these anti-trafficking efforts undermine this new and often delicate engagement.

Finally, the conflation of sex work and trafficking undermines the innovative and effective anti-trafficking efforts by sex workers who see the difference between sex work and trafficking. A recent study

³⁸ Conversation with staff of home, Aziza Ahmed, 30 March 2011.

³⁹ C Overs, 'Caught between the Tiger and the Crocodile: The campaign to suppress human trafficking and sexual exploitation in Cambodia', retrieved 2 February 2011, http://www.aidslex.org/site_documents/SX-0046E.pdf.



of over 3000 female and 1300 male sex workers in India found that the majority of females entering sex work did so independently.⁴⁰ VAMP sex workers effectively identify underage girls in brothels because they are the first to encounter them. After identification, they work to get them into safer living conditions. This has proven to be an effective process because the underage girls' first point of contact may be other sex workers. Working directly with sex workers is an effective alternative to the raid and rescue model.

Part IV: Conclusion and Recommendations

This case study demonstrates how the conflation of sex work with trafficking at the international and local level, encouraged by the neo-abolitionist movement inside the United States, impacts HIV programmes at the local level. Increased funding for abolitionist forces and decreased funding for sex workers, inspired by the APLO amongst other U.S. initiatives, has tipped resources away from sex worker projects. In the town of Sangli, the ongoing presence of internationally supported abolitionist groups impacts the capacity of VAMP to implement HIV programmes. Further, the reliance on the raid, rescue, and rehabilitation scheme has proven to be both harmful to sex workers and detrimental for public health projects.

In order to effectively address the HIV epidemic amongst sex workers and truly end coercive practices in the sex industry, it is necessary to learn from the success of effective programmes. VAMP provides a model for anti-trafficking efforts as well as HIV prevention among sex workers. The lessons are clear: allow for the participation and leadership of sex workers in projects and programmes; learn from the local organisations who remain consistently on the ground and work every day within the nuances of the state-sex worker dynamic; and allow for sex workers to define the terms of their engagement in projects and programmes designed to assist sex worker communities.

⁴⁰ R Sahni and V Shankar, *The First Pan-India Survey of Sex Workers: A summary of preliminary findings*, retrieved 1 March 2012, <http://sangram.orgDownload/Pan-India-Survey-of-Sex-workers.pdf>.



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