

COLLATERAL DAMAGE

The Impact of Anti-Trafficking Measures on Human Rights around the World

Global Alliance Against Traffic in Women
2007

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Bandana Pattanaik
International Coordinator, GAATW-IS
Bangkok, Thailand 2007

Preface

Lessons From the Poetry of Departures*

The Global Alliance Against Traffic in Women (GAATW) dedicates this anthology to all those women who journey from their homes to find a future, with dreams in their eyes, fear and excitement in their minds at what awaits, and pain in their hearts at leaving loved ones behind, often very young loved ones. Many of them, indeed many of us, reach our destinations with relatively few mishaps, hurdles or detours. For many others, unfortunately, the journey leads to destinations and landscapes unsafe, unimagined and undesired. For some, the journey is arduously endless and the terrain consistently hostile.

It is especially to these migrant women,** who are in harm's way, that GAATW dedicates this anthology, as a tribute to their courage and endurance, and to their indefatigable spirit to prevail against all odds, in quest of a better future. Some may call these women trafficked, and sometimes we do too. But often the *poetry of departures*, rendered through notes of optimism, joy and pain, leads us to the traveller whose journey has not yet ended, has not yet led her to the destination she sought. Then the only enlightenment that can dawn on any well-meaning entity is: what can we do to remove hurdles and ease the way for this person, this trafficked migrant woman, in order for her to reach her destination and goal, safely?

There is nothing complicated or problematic about this simple wish to assist and prevent further harm. Nor should the response to it on the part of well-intentioned and honourable 'assisters' be complex and convoluted. And yet, sadly, it may turn out that the treacherous journey which the trafficked woman has endured so far due to the devious designs and greed of a trafficker may not end easily or quickly.

This anthology demonstrates in a small but compelling way that the road to hell may be paved with the best of intentions, and the trafficked woman may find herself literally 'from the frying pan into the fire'. She discovers that in trying to remove her from harm, her well-meaning advocate, be it the government, an NGO or an individual, who has come forward to assist and protect her, has actually done further harm and removed her even farther away from her desired destination. She discovers that in the name of protection she can be confined to a shelter under conditions which are no different from detention, or packed off 'home', back into the very same environment that she wished to leave behind, with its joblessness, poverty, conflict, abuse, or even a not-so-dire middling situation, which to her offered neither promise nor possibility of realising her life's full potential. She may find that some conditions have been attached to the assistance she is being offered. She is told that if she cooperates with the law to provide evidence against her trafficker, then she might be assisted and even allowed to stay on in the host country for a few weeks longer before being sent off home. She gets the clear message that 'home' is where she needs to be for her own good and that she is incapable of deciding what is best for her, even though she may be well past the age of majority. At any event, it is clear to this trafficked woman that if she identifies herself as a

* The travel writer Paul Theroux uses this term. According to him, enlightenment as a writer comes with the poetry of departures.

** GAATW strongly acknowledges that all migrants including men, women and children, often have their rights flagrantly violated or disregarded, and trafficking is a harm that affects all persons regardless of gender and age. However, in its work GAATW has centred the lived realities of migrant and trafficked women workers while understanding that gender as a category cannot be severed from other multiple identities which define women. Since the principal protagonists of GAATW's engagements have been migrant and trafficked women, they are especially profiled in this preface and collection.

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‘victim of trafficking’, she will eventually be sent home to be reunited with her misery once again. So she chooses not to identify herself as a ‘victim of trafficking’ – *in order not to become a victim of anti-trafficking*. GAATW dedicates this anthology to this woman as well, who knows what is in her best interest, and so continues to struggle in the hope that she will soon see light at the end of the tunnel.

This collection is being published as GAATW enters its teen years. The organisation is many years away from reaching the age of majority, yet there is one thing it has learnt even in its adolescence: the best interest of the women who are trafficked or vulnerable to trafficking, and indeed of all migrant women, can only be fully known and decided by the women themselves. And this principle is undoubtedly in the best interest of GAATW as well. We have come upon this realisation in its entirety and depth through a long and arduous journey as well. For GAATW, this small yet critical ‘enlightenment’ dawned through the finely textured ‘poetry of departures’ of migrant women.

GAATW’s own engagement with the issue of trafficking as well as with migrant women and the risks faced by them, have taught us over the years how to ‘centre’ the rights of the very women we advocate for and with whom many of our network members work directly. This is a learning which is ongoing; it is a journey with no end for time, as it passes, changes the conditions under which departures and journeys are undertaken by migrant women. We have learnt enormously from the anti-trafficking work of a number of actors, including governments and NGOs, who prescribed remedies to trafficked persons and migrant women, and imposed them with a rigour that allows no space for intervention, disagreement or alternatives. Paradoxically, this prescriptive strategy is also unleashed in the name of human rights. Most importantly, we have learnt from our own mistakes and from the experiments of GAATW members. This collection is a sample of our learnings.

The trajectories of migrant women’s lives compel us to reflect on certain issues that have informed our work for some time now. How is it that the project of globalisation and development appropriated migrant women’s labour and bodies on which the lofty goal of world progress could be brutally inscribed and a memory for the future etched? Did their joy and pain, their dreaming, struggling, finding and losing, have a place in the industrial and military projects of powerful nations and corporate regimes? And what is an audit for migrancy in these registers other than vagrancy? We ask these questions as they are vital to ‘centring’ the rights of trafficked and migrant women in our work. Even when the women narrate their experience of victimisation, they speak as vibrant actors and agents who, through their experiences, reinvent themselves and their strategies. Recognising the multilinguality of their narratives and their agential voice contributed to GAATW’s understanding that none other than the women themselves must spell out what is in their best interest and our task is to hear and amplify their voices.

A plethora of actors on the anti-trafficking terrain do their work from the perspective of human rights including those who bundle off the trafficked and migrant women back to where they came from in the name of protection. If diametrically conflicting approaches are garbed in the language of human rights, how then does a new player on the field address trafficking in the frame of human rights? This anthology provides an evidence base to a skeletal response to the above question – a response which we intuitively and experientially voiced but could only articulate with some authority after engaging in research. The research undertaken for this collection is a small step which augments the small steps taken by others. On the whole, a far stronger evidence base needs to be created. However, it does reinforce GAATW’s confidence to reassert that a human rights approach to trafficking is empty and meaningless if it does not place at the very core the voice and agency of trafficked and migrant women. This in effect implies, at the very least, acknowledging that women are the architects of their own future and know best what kind of a structure they would like to live in. We understand that this fundamental acknowledgment is the foundation block to centring the rights of trafficked and migrant women.

As researchers and activists, so long as we persist in denying migrant and trafficked women agency, intelligence and decision-making abilities, they will be routinely imaged and used as mute victims similar to the cut-out paper

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doll image which serves as the “ventriloquist’s dummy” through which others can assert their moral and political agendas.* Such a move to create a dummy might imply that collective histories of migrants have been colonised, and perceptions have been distorted by historical and contemporary narratives written by researchers who have sojourned among migrant women, be they sex workers, domestic workers or others, but who have displayed little insight into their realities and subjectivities.

If the migrant women’s voices are to be heard and heeded, then a sharper analytical perspective needs to be employed which goes beyond the template prescribed by the UN standards and even the human rights discourse. Through this research, an attempt has been made to frame analysis through the postcolonial lens to examine how subjects are constructed in legal and anti-trafficking discourses including the human rights discourse. In part, the tendency to readily assign an unequivocal victim identity to trafficked women could be seen to stem from the human rights discourse, which sees trafficked women as victims of gross human rights violations. For some, redress in narrow human rights terms might mean providing protection and assistance to the victims of the crime.

Migrant women, who might also be trafficked, combine multiple identities. They experience victimisation during the moment of their trafficking, but as migrants they continue to be agents, devising resistive strategies individually or collectively as subaltern subjects. Factored into their consciousness and identities is the global divide along lines of nationality, citizenship, religion, class, caste and race. Evicted from their own landscape due to a host of reasons, the transnational migrant subjects are constant visitors to a vanished geography but there is no break in their memories or experiences, and more importantly, in their perceptions. These transnational global citizens and resistive subjects carrying with them their postcolonial angst are anything but victims. Hence, tools of the postcolonial analytical framework which better encapsulates the multi-tiered realities, subjectivities and identities of this migrant subject, need to be actively brought and employed to the anti-trafficking terrain in order to fully ‘centre’ the migrant and trafficked woman in all her complexity. Further research at the regional level would reveal the complexities of competing discourses and agendas, and would better inform initiatives at the level of advocacy and programmes for GAATW and its network members.

A key question confronting us at the larger level is: how might we challenge the dominant agenda of globalisation and the disempowering role it ascribes to marginalised women, workers and communities? There is somehow a tacit acceptance across a broad spectrum of political opinion that there is no alternative to the dominant script of globalisation which ruthlessly fosters forces of market economy and undermines the power of states, communities and individuals. This larger question is not merely an intellectual one. It sits right at the core of any anti-trafficking, pro-migrants’ rights agenda. The empowerment of migrant women to move and work safely and with dignity entails grappling with this bigger question. And yet, could it be that a key factor that obliges many to conclude that there is no alternative to the imperatives of the market is the *a priori* assumption that existing social and economic relations and the political structures sustained by these relations cannot be dislodged and are therefore, sacrosanct? To further our understanding and practical engagement in the context of migration and labour frameworks, GAATW has initiated the move to forge stronger partnerships with migrants and labour rights advocates. These partnerships need to be strengthened. We do believe that our work on trafficking can also enrich the analysis and engagement of these groups.

GAATW has had a fairly substantial history of active engagement with various dimensions of anti-trafficking work, globally. The very genesis of GAATW lay in the acknowledgment of the need to engage politically with the issue of human trafficking by stepping into the trafficking debate with new tools – *the language of human rights*. In

* The term “ventriloquist’s dummy” is used by Anne McClintock to describe the politics around sex work in the introduction to a special section on sex trade in *Social Text*, no. 37, 1993.

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1984 when GAATW was launched, the dominant discourse on trafficking centred a ‘charity and welfare’ approach which emerged largely from a moralistic-protectionist agenda towards women and girls in the sex industry. Trafficking was equated singularly with prostitution, and the only strategy to stop trafficking was to abolish prostitution and ‘send the women and girls home’ or to enhance their skills by teaching them to sew or make jams and pickles.

GAATW entered the anti-trafficking discourse as a critical player and contributed to shifting the terms of anti-trafficking engagement as well as the anti-trafficking paradigm by introducing the tools of the human rights framework. Over the years, the organisation and its members have advocated: de-linking trafficking from prostitution by introducing the notion of forced prostitution as one of the purposes of trafficking; distinguishing trafficking from migration, irregular migration, and smuggling, while underscoring that trafficking cannot be seen outside of the migration context; expanding the definition of trafficking by representing it as a process and a cycle; expanding the outcomes of trafficking to include in addition to sexual exploitation, labour exploitation, forced labour, slavery-like practices and forced marriage; acknowledging that marginalised groups such as sex workers and undocumented migrants have suffered particular harms as a result of the deployment of the dominant anti-trafficking framework which has been routinely used to control and criminalise sex workers and irregular migrants; and acknowledging that anti-trafficking groups need to make strategic linkages with networks and organisations that represent migrants, sex workers, labour unions, and groups that challenge the dominant frameworks of globalisation and trade liberalisation. The Palermo Protocol or the UN Trafficking Protocol, which came into force in January 2004, carries a definition of trafficking which owes much of its complexities to the advocacy led and steered by GAATW at the global level. This advocacy was based upon the Global Report prepared by GAATW in conjunction with STV (Foundation Against Trafficking in Women) on precisely analysing and expanding the definition of trafficking.

GAATW’s journey has been long, sometimes difficult, but always meaningful. The lessons we have learnt have been invaluable. Our contribution to the struggle for the rights of migrant women by addressing the harm of trafficking has been based on these learnings. With this publication we are honoured to share once again our research findings with our allies and readers.

Dr Jyoti Sanghera

GAATW Board Member

Introduction

Mike Dottridge

Since a new UN convention on the issue of human trafficking was adopted in 2000, many hundreds of millions of dollars have been spent on efforts to stop people being trafficked. While the intentions behind this spending appear good, the effects of the ways the money has been spent have, in many cases, been much less positive. Both human rights defenders and others have been concerned that some initiatives to stop trafficking have proved counter-productive for the very people they were supposed to benefit. Indeed, this concern was so strong that, as early as 2002, in a set of guidelines issued about human trafficking and human rights, the United Nations (UN) High Commissioner for Human Rights noted that a key principle for all anti-trafficking measures was that they “shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally-displaced persons, refugees and asylum-seekers”.¹

This anthology reviews the experience of eight specific countries and attempts to assess what the impact of anti-trafficking measures have been for a variety of people living and working there, or migrating into or out of these countries. The eight are: Australia, Bosnia and Herzegovina (BiH), Brazil, India, Nigeria, Thailand, the United Kingdom (UK) and the United States (US). The chapters look specifically at what the impact has been on people’s human rights. Have significant numbers of people been able to exercise their human rights better as a result of the initiatives that have been taken (and the money spent)? Or have anti-trafficking initiatives had a markedly negative impact on many individuals’ human rights – not just traffickers, but others, precisely the people who are generally supposed to be helped by anti-trafficking measures, rather than to suffer as a result of them?

It is five years since then UN High Commissioner, Mary Robinson, emphasised to governments that anti-trafficking measures should not “adversely affect” human rights. She started with the principle that “the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims”.² Nevertheless, the priority for governments around the world in their efforts to stop human trafficking has been to arrest, prosecute and punish traffickers, rather than to protect the human rights of people who have been trafficked.

This approach is consistent with that adopted by governments over the past two centuries in the context of efforts to stamp out slavery, forced labour and slavery-like practices (of which trafficking is regarded as one): they have given higher priority, both in international agreements and national law, to declaring slavery and similar abuse illegal, than to spelling out how such forms of abuse are to be eradicated or how, when doing so, to safeguard the human rights of the individuals who have been subjected to abuse. Such individuals are victims of crime and of abuse of power, but their victim status routinely leads governments to treat them as powerless pawns. Rather than label them as ‘victims’ in this anthology, we consequently refer to them as ‘trafficked persons’.

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Many government agencies doubtless assume that the two objectives – enforcing the law and upholding human rights – amount to the same thing. However, in the case of human trafficking there is now substantial evidence that they are not. The evidence available suggests that especially marginalised categories of people, such as migrants, internally-displaced persons, refugees and asylum-seekers, have suffered unacceptably negative consequences and that anti-trafficking measures have been counter-productive for some of the very people they are supposed to benefit most directly.

The methods used to compile this report

Nine different authors were commissioned by the Global Alliance Against Traffic in Women (GAATW) to prepare the eight chapters in this anthology about individual countries. They were asked to review the laws of the country concerned, both laws concerned with trafficking and also others which have an effect on people who have been or might be trafficked (such as laws concerning immigration, employment and, quite specifically, sex work). They were also asked to review any publications which might contain information about the impact of these laws or indicate what was happening to trafficked persons who ended up in the hands of the police or in shelters run by the authorities or by non-governmental organisations (NGOs). In a few cases (such as Australia and Brazil), the authors interviewed government officials and others responsible for providing assistance to trafficked persons. However, the authors were not asked to interview individuals who have personal experience of the effects of anti-trafficking initiatives.

Fortunately, the findings of other researchers who have interviewed specific groups to find out the effects on them of anti-trafficking initiatives have already been published. As early as 2002, for example, researchers in one West African country (Mali) told the UN children's agency, UNICEF, about a wide range of negative effects for Malian children resulting from government initiatives two years earlier to stop children being trafficked to neighbouring Côte d'Ivoire (Castle and Diarra, 2002). The authors explained how 'vigilance committees' at village level to prevent child trafficking had ended up trying to stop *all* young people from leaving their villages under any circumstances, violating their right to freedom of movement. These and similar findings were available to GAATW's authors as they set out to assess the human rights impact of anti-trafficking measures.

The authors of the eight chapters are individuals with professional experience of anti-trafficking work themselves, or of related human rights work. Their initial findings were the subject of peer review by authors writing other chapters.

Each of the chapters describing a particular country is structured along similar lines. They start by considering what constitutes 'human trafficking' in the country concerned. Section 2 sets out the current legal framework concerning all aspects of trafficking (in relation to protection and assistance, prevention of human trafficking and the prosecution of suspected traffickers). In most countries, government agencies and NGOs have focused their efforts on cases of trafficking involving women or girls forced into prostitution. However, the scope of the anthology is not limited to trafficking for the purpose of forced prostitution, but also considers cases of trafficking for other forms of exploitation, as well as cases involving men and boys.

Section 3 focuses on the specific laws and policies of the government of the country in question and comments on the adequacy and implications of these. Section 4 addresses laws, policies and practices surrounding immigration

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or emigration and efforts to prevent the abuse of migrant workers, focusing on measures which have an effect on trafficking and which make it more or less difficult to traffic people, or which have an impact on individuals who have been trafficked (for example, leading to their rapid deportation).

Section 5 discusses the human rights impact of these laws and policies on the persons affected. It looks specifically at the impact on people who have been trafficked. It also looks at the impact on migrant workers in general (both before and after they migrate) and more specifically at the impact on migrant sex workers and non-migrant sex workers. Wherever information is available, it also looks at the impact on child migrants. No effort is made to assess whether the benefits of anti-trafficking policies outweigh the negative consequences. In every case, our argument is that the negative consequences are unnecessary: they are not an essential by-product of anti-trafficking efforts, but rather the result of negligence on the part of government and other actors.

In some cases, the concluding section 6 recommends measures to remedy the negative or counter-productive effects of anti-trafficking measures that have been identified in the chapter. All in all, the chapters suggest that a huge amount needs to be done to remedy these negative effects.

Definition of the term ‘trafficking in persons’

In November 2000, the UN General Assembly adopted the *Convention against Transnational Organized Crime*, a treaty expected to improve international cooperation in fighting crime, and two additional protocols, one concerning human trafficking and the other about people smuggling – the practice of helping people cross borders illegally in exchange for remuneration. These were adopted at a time when industrialised countries, in particular, had become more worried about irregular migration, not just about immigrants using forged documents or entering a country without passing via a border post, but also about those who enter a country legally and either overstay or find work without having a work permit.

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* is referred to in this anthology as the UN Trafficking Protocol, although it is sometimes also known as the ‘Palermo Protocol’, after the place where the first signings took place at the end of 2000. It has been described as “the first clear definition of trafficking in international law” (Weissbrodt and Anti-Slavery International, 2002, 18). It entered into force in December 2003.

Article 3 of the Trafficking Protocol defined human trafficking as follows:³

“(a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

“(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

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“(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;

“(d) ‘Child’ shall mean any person under eighteen years of age.”

The definition refers to three distinct elements:

1. a set of actions which involve recruiting or moving someone (“recruitment, transportation, transfer,” etc.);
2. the means by which those actions are carried out (“the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power”, etc.);
3. and a purpose, that is to say forms of exploitation for which people are recruited or moved.

In the case of people aged 18 and over, all three elements must be involved for a case to be considered one of trafficking. However, in the case of adolescents and children under 18, the coercive means mentioned in the definition (in 2 above) do not have to be involved: it is sufficient for an adolescent under 18 to be recruited (i.e. without being subjected to threats, deception, etc.) in order to be exploited for the case to be regarded as trafficking.

For most readers, the definition is not easy to navigate or understand. This is natural enough, as the wording was the result of long debates between the representatives of governments with quite different interests. However, the complexity of the definition has brought problems when it has been adopted word for word in national legislation and passed to law enforcement officials as an operational definition of a crime they are supposed to detect or prevent. In most contexts it does not function well as an operational definition for law enforcement agencies or others, such as immigration officials. They consequently resort to various shortcuts to enforce the law and, in doing so, often misapply or misinterpret the definition.

As the ‘purposes’ for which people are recruited are an intrinsic part of the definition of what trafficking involves, it is worth noting that they refer to a wide range of situations involving forced labour or slavery-like situations. They also involve the “exploitation of the prostitution of others or other forms of sexual exploitation”. There is no international definition of the term “sexual exploitation”, so countries can define and address this as they deem appropriate, leaving them a great deal of leeway. The term “exploitation of the prostitution of others” was defined in international law by the UN *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* (1949), known as the Suppression of Traffic Convention. It refers to cases in which a third person “exploits the prostitution of another person, even with the consent of that person” (Article 1.2),⁴ that is to say profits from the income of someone earning from commercial sex. The “exploitation of prostitution” refers to much more than cases of forced prostitution. However, as far as the UN Trafficking Protocol adopted in 2000 is concerned, when adults are recruited, the term “trafficking” refers to cases in which an individual who has already been subjected to one of the coercive means mentioned in point 2 above subsequently earns money from commercial sex for someone other than herself or himself, rather than to all cases in which a third person takes money from a sex worker.⁵

The official commentary on the significance of terms used in the UN Trafficking Protocol (known as the *travaux préparatoires*) explains that, “the Protocol addresses the exploitation of prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the [Trafficking] Protocol, which is therefore

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without prejudice to how States Parties address prostitution in their respective domestic laws.”⁶ In contrast, the earlier Suppression of Traffic Convention condemned prostitution explicitly, asserting in its preamble that, “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person”. For this reason, many sex workers and the organisations that represent them consider the Suppression of Traffic Convention to be an anathema. So too do many women’s rights organisations, including GAATW, considering that women are entitled to make informed decisions about their choice of livelihood. Others, however, argue that governments have a right and duty to control women’s (and men’s) sexual behaviour and to ban commercial sex or to punish those who pay for it.

The prejudice encountered by sex workers around the world goes far beyond anything provoked by a UN convention. It is closely linked to social norms and questions of morality. Consequently, religion and ideology play an important role too and conservative governments which want to impose social norms on others (rather than giving priority to encouraging people to exercise their human rights) have been powerful agents in ensuring that sex workers continue to be treated in a discriminatory way, as if they are less entitled to exercise their human rights than other categories of people.

What ‘anti-trafficking measures’ consist of

Trafficking in persons is a multi-dimensional problem, analysed and discussed from social, economic, criminological and other perspectives – and linked to issues such as gender, health, migration, development and economics (particularly the informal economy). Each perspective suggests different strategies to tackle trafficking and introduces different criteria for assessing the success of the measures taken (UNICEF and Terre des Hommes, 2006, 15). For example, in 1997 two authors who were working closely with GAATW at the time identified a range of different approaches which underpinned markedly different strategies to stopping people from being trafficked, labelling these the ‘human rights approach’, the ‘law and order approach’, the ‘migration approach’, the ‘moral approach’ and the ‘labour approach’ (Wijers and Lap-Chew, 1999, 190–209).

The UN Trafficking Protocol, initially debated by UN bodies concerned with transnational crime rather than social or economic issues or human rights, focuses on encouraging states to adopt and enforce laws against trafficking. It specifies a series of anti-trafficking measures they can take. These fall broadly into three categories:

1. Law enforcement measures to detect, prosecute and punish traffickers (and deter others).
2. Preventive measures to reduce the likelihood that trafficking occurs in the first place.
3. Protection measures, along with various forms of assistance, for individuals who have been trafficked.

The first category of measures, those linked to law enforcement, is obligatory for all states ratifying the Protocol. However, when it came to measures to protect people who are trafficked and to uphold their human rights, it is exceedingly weak, introducing a series of provisos in section II concerned with ‘Protection of victims of trafficking in persons’, such as “*In appropriate cases and to the extent possible under its domestic law*” (each State Party shall protect the privacy and identity of victims of trafficking, Article 6.1) and, “Each State Party *shall consider* implementing measures” (to provide for the physical, psychological and social recovery of victims of trafficking in persons, Article 6.3). Virtually all the other provisions in Article 6, which is concerned with assistance, are optional for ratifying states to implement, rather than being presented as rights for individuals who have been trafficked.

Human rights standards that states are obliged to respect in their anti-trafficking initiatives

There is a substantial corpus of international law that guarantees specific rights for people who have been subjected to human rights abuse (such as trafficked persons), as well as other specific categories of people. A considerable number of international instruments and recommendations from UN treaty-monitoring bodies relate directly to people who have been trafficked or others who are affected in a negative way by anti-trafficking measures. The main instruments are listed in Annexe 3, showing which instruments have been ratified or signed by the eight countries under review.

Taking these existing internationally-recognised standards into account, GAATW has organised trainings for anti-trafficking activists on human rights in the context of anti-trafficking efforts since 1996. It published a handbook entitled *Human Rights Action in the Context of Trafficking in Women* in 1997. In 1999 it issued, together with two other NGOs, the Bangkok-based Foundation for Women and the Washington DC-based International Human Rights Law Group (now Global Rights), a set of ‘Human Rights Standards for the Treatment of Trafficked Persons’.⁷ In 2001, the handbook was revised and reissued, together with the human rights standards, as *Human Rights and Trafficking in Persons: a Handbook*. While the minimum standards were compiled by NGOs, they were grounded in existing international law and provided a reference point for those who, from 2000 onwards, were concerned that the new UN Trafficking Protocol did not contain sufficient provisions to uphold the internationally-recognised human rights of trafficked persons and consequently did not encourage governments to place the human rights of trafficked persons at the centre of their counter-trafficking efforts.

Since 2000, a series of guidelines have been issued by intergovernmental organisations in an attempt to clarify what these rights are and to influence government policies, as well as practices in the non-governmental sector. The first, issued in 2002, has already been alluded to – the UN High Commissioner for Human Rights’ *Recommended Principles and Guidelines on Human Rights and Human Trafficking*. The High Commissioner’s Principle 3, that anti-trafficking measures “shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked...” is similar to the requirement that doctors and other health professionals should ‘do no harm’ to those they treat. Guideline 3 provides more detail on this point and urges governments, intergovernmental organisations and NGOs to monitor and evaluate “the relationship between the intention of anti-trafficking laws, policies and interventions, and their real impact” and to distinguish “between measures which actually reduce trafficking and measures which may have the effect of transferring the problem from one place or group to another”.⁸ The High Commissioner’s Guideline does not so far appear to have been heeded by many government agencies, nor indeed by many NGOs involved in anti-trafficking work.

Five of the UN High Commissioner’s 17 Principles concern protection for individuals who have already been trafficked. Other principles concern prevention, criminalisation (of acts which involved trafficking), punishment and redress. The High Commissioner’s 11 Guidelines go into more detail than the Principles, recommending, for example, that states (and where applicable, intergovernmental organisations and NGOs) ensure “that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons” (Guideline 6.6).

The UN High Commissioner’s Principles confirm that in cases involving children, their best interests “shall be considered paramount at all times” (Principle 10). The following year (2003) UNICEF issued guidelines of its

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own on how anyone under 18 suspected of having been trafficked should be protected and assisted. The *Guidelines for Protection of the Rights of Child Victims of Trafficking*⁹ cover 11 specific issues concerning children who have been trafficked, including the appointment of a guardian for each trafficked child, individual case assessment and identification of a durable solution that is in the child's best interests.

Other intergovernmental organisations have followed suit. In 2006, the UN refugee agency, the UN High Commissioner for Refugees (UNHCR), made its own contribution, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*.¹⁰ These guidelines point out that some people who have been (or may have been) trafficked have a well-founded fear of persecution and "may therefore be entitled to international refugee protection" (paragraph 12). The guidelines effectively instruct governments to examine "asylum claims lodged by victims of trafficking or potential victims of trafficking...in detail to establish whether the harm feared as a result of the trafficking experience, or as a result of its anticipation, amounts to persecution in the individual case" (paragraph 15). They go on to list a series of forms of abuse and severe exploitation which, the UNHCR maintains, "will generally amount to persecution" (*ibid.*) and consequently entitle the individual concerned to protection as a refugee.

It is doubtless significant that the adoption of the UN Trafficking Protocol was followed by the publication of numerous complementary guidelines by different UN organisations, mainly focusing on the rights of people who are believed to have been trafficked. In virtually all cases, these new standards have cited existing international law as their basis. Taken together, they comprise a significant new corpus of international 'soft law' standards. While states have not made explicit commitments to abide by these new standards, they have, in many cases, ratified the existing international instruments on which the new standards are based and can be held accountable for the efforts taken to respect them.

In some regions of the world, regional organisations have also adopted anti-trafficking instruments which go far beyond the UN Trafficking Protocol in seeking to uphold the rights of trafficked persons. The Council of Europe *Convention on action against trafficking in human beings*, adopted in May 2005, specifies in its preamble that, "all actions or initiatives against trafficking in human beings must be non-discriminatory, take gender equality into account as well as a child-rights approach". While the Convention puts particular emphasis on the rights of victims, in the context of prevention it also requires ratifying states to "promote a Human Rights-based approach and...use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes" to prevent trafficking (Article 5.3).¹¹

In the light of the actual actions by governments in the eight countries reviewed in this anthology, it is difficult to believe that most governments know what they are committing themselves to when they agree to use a 'human rights approach' or a 'rights based approach'. Practically speaking, a human rights approach places people who have been or might be trafficked at centre-stage and assesses strategies on the basis of their impact on those individuals. The approach involves identifying which individuals or groups of people are disproportionately more likely to be trafficked than others (mainly on the basis of the information available about individuals who have already been trafficked), analysing who is accountable for protecting them and recommending what measures are required to ensure that their human rights will be upheld and protected more effectively (in whatever country they happen to be in). This amounts to a radically different approach to the strategies described in the following eight chapters – or those being pursued in virtually every other country.

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Other regional standards and action plans explicitly commit governments to making it a priority to respect the rights of trafficked persons. Of course, there is also a specific UN convention dedicated to upholding the rights of migrant workers in general (the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted by the UN General Assembly in 1990 and which entered into force in 2003), although this has been ratified mainly by states from which people migrate and not by a single industrialised country receiving large numbers of migrants. Among the eight countries considered in this anthology, only BiH has ratified this Convention.

Alongside standards based on existing international law, intergovernmental organisations have also issued guidelines on good practice. These are based on the experience of the specialised agency concerned and represent a form of advice to governments, intergovernmental organisations and NGOs. For example, in 2004 the International Organization for Migration (IOM) issued a set of minimum standards concerning mental health care for people who have been trafficked.¹² The IOM's *Minimum Standards* aim to ensure that comprehensive and coordinated psychosocial care is available for trafficked persons from the time of their rescue and throughout their reintegration process. They also aim to provide a guiding tool for the range of organisations which run programmes in the field of combating trafficking. In 2007, the IOM published *The IOM Handbook on Direct Assistance for Victims of Trafficking*, summarising its experience and lessons learnt over the previous 13 years in which it had been involved in implementing counter-trafficking activities.¹³

In 2003, the World Health Organization (WHO) published a set of *Ethical and Safety Recommendations for Interviewing Trafficked Women*, containing 10 Guiding Principles for the ethical and safe conduct of interviews with women who have been trafficked.¹⁴ Many are also applicable to girls, boys and even adult men who have been trafficked.

This is a long list of standards based on international law that states have an obligation to respect when adopting policies concerning trafficked persons or measures to stop trafficking. While much energy has gone into spelling them out, however, comparatively little has been invested into either upholding them or monitoring compliance with them. In effect, systems set up by the international community simply are not working.

Principles for limiting the unacceptable side effects of anti-trafficking measures

Some anti-trafficking measures involve forms of protection which place restrictions on individual rights, notably on freedom of movement, for example, when trafficked persons are confined to shelters or detention centres, ostensibly for their own good, or teenagers are instructed not to leave their own village to look for work elsewhere, for fear that they might be trafficked. When it comes to establishing an appropriate balance between 'protection' and human rights and freedoms and between the rights of individuals in general and the measures taken to protect specific individuals or groups, comments issued by UN treaty-monitoring bodies are particularly relevant. General Comment 27 on Freedom of Movement, issued in 1999 by the Human Rights Committee, the treaty-monitoring body established under the terms of the *International Covenant on Civil and Political Rights*, helps clarify a principle which must underlie this balance:

Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which

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might achieve the desired result; and they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.¹⁵

The chapters below cite countless examples that indicate that the principle of proportionality has neither been respected, nor, apparently, even taken into account when restrictions have been imposed by government authorities in the name of preventing trafficking or protecting people who have been trafficked. Similarly, little care seems to be taken to ensure in trafficking cases that the action taken is “the least intrusive” of the available options. It may take years before UN treaty-monitoring bodies get around to reviewing specific examples of the measures that have been taken and call on specific governments to amend anti-trafficking measures which appear excessively restrictive. In the meantime, however, these need to be identified so that action can be started at national level to modify them.

In the case of children and young people aged under 18, the situation is somewhat more complicated, for, under international law (the UN *Convention on the Rights of the Child*, ratified by all but two states in the world), states are required to take action to protect children from a wide range of abuse, including all forms of physical or mental violence, injury or abuse (Article 19), economic exploitation (Article 32), all forms of sexual exploitation and abuse (Article 34), and “the abduction of, the sale of or traffic in children for any purpose or in any form” (Article 35).¹⁶ The many forms of protection involved have the potential to limit the extent to which children can exercise the rights guaranteed by the Convention. The Convention itself indicates how a balance should be found, by stressing that all actions concerning children must make the “best interests” of the child a primary consideration (Article 3) and that a child has the right to have his/her views listened to and taken into account in accordance with his/her age and maturity in any matter affecting him/her (Article 12). Significantly, however, the Committee on the Rights of the Child (set up by the Convention) has expressed concern that governments do not do enough to treat adolescents as “rights holders”.¹⁷

In the cases of trafficked children mentioned in this anthology (e.g. in Nigeria), it is clear that government agencies have paid no attention at all to the fundamental principles established in Articles 3 and 12 of the *Convention on the Rights of the Child*. Efforts to prevent adolescents from being trafficked seem likewise to have resulted in a wide range of young people’s other rights being subordinated to anti-trafficking measures which made no effort to take the principle of proportionality into consideration. Numerous prevention programmes have been based on an assumption that keeping adolescents in their home communities is a justifiable objective in itself, on the grounds that it enables children to continue attending school (thus, in theory, avoiding economic exploitation while enjoying their right to education). In contrast, a child rights approach suggests that priority should be given to making it safe for adolescents who leave home, not keeping them at home in an environment which may not automatically promote either their ability to exercise their human rights or their general wellbeing. Of course, a child rights approach also means working to improve children’s access to education, health care and protection from domestic violence (Dottridge, 2007, 37).

The Committee on the Rights of the Child, the treaty-monitoring body which pays particular attention to children, has outlined the factors that decision-makers must take into account when considering whether a child who is alone in a foreign country should return to her or his country of origin. This is the situation in which most children who have been trafficked from their own country to be exploited in another country find themselves. The Committee has pointed out that children may not be repatriated if “there are substantial grounds for believing that there is a

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real risk of irreparable harm to the child” in his or her own country. This, the Committee implies, means it is obligatory for the authorities of the country considering repatriating a child to carry out a risk assessment concerning the case of each individual child whose repatriation is under consideration and also to assess whether suitable care arrangements await the child in her or his country of origin, before going ahead with the repatriation.¹⁸ However, as any assessment carried out in a trafficked person’s home country has the potential to provoke prejudice against them or other problems, the agencies in both countries involved have a duty to ensure that an assessment is done in a way which does not cause further prejudice to the young person concerned.

It seems reasonable to suppose that a similar security assessment is vital for adults who have been trafficked. In the case of adults, the UN *Convention against Torture* (1984) requires states to ensure that no one is subjected to *refoulement* or repatriated to a country where they would face torture (by state officials or non-state actors, such as traffickers). The risk of trafficked people being tortured should, in principle, make it routine for government agencies to carry out risk and security assessments before anyone who has been trafficked is repatriated. In practice, as numerous chapters in this anthology make clear, repatriations take place in the absence of any risk and security assessments more often than not, leaving some people who have been trafficked in a vulnerable situation upon their arrival at an airport, station or port in their home country and at risk of being re-trafficked. It is clear too that when the law does stipulate that individuals who have been trafficked should be protected (and not summarily deported), law enforcement and immigration officials routinely get around this by categorising the individuals as ‘illegal immigrants’ rather than trafficked persons.

The challenge when working out what risks a trafficked person might face on return to their own country is to do so in a sufficiently sensitive manner to avoid causing any further prejudice to the person concerned. At the moment it is not clear that many countries have devised appropriate ways of doing this (indeed, perhaps not any). The lesson which trafficked persons undoubtedly drew early on from the way that government agencies reacted towards them, both abroad and at home, was that it was generally better to avoid having anything to do with government agencies, even if this meant that they had to organise their own journey home and face various potential dangers as a result. This alone is a major indictment of the way government agencies treat people who have been trafficked.

Assessing ‘human rights impact’

Establishing links of cause and effect is rarely an exact science. Looking for methods specifically to measure the impact of activities designed to enhance people’s ability to exercise their human rights, one author observed:

Understanding impact means not only finding numbers to quantify outcomes, but also understanding whether an approach is addressing the systemic causes of the abuse. A band-aid remedy may produce impressive numbers but never provide the cure; while the cure might not produce visible results immediately.¹⁹

While there are numerous international standards guaranteeing the rights of trafficked persons, as well as other international standards which assert that human rights may not be denied or curtailed inappropriately by anti-trafficking or other measures, few technical tools are available to help assess the impact of anti-trafficking measures (or related laws and policies) on people’s human rights.

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Some technical tools have been developed for assessing the ‘social impact’ of development projects. Some international human rights instruments require states to ensure that development initiatives do not impact in a discriminatory way on specific groups of people, such as indigenous peoples or minorities.

In the absence of any existing tools to help identify the impact of anti-trafficking measures or other similar government policies on individual human rights, the approach taken in this anthology has been to describe what the most obvious effects have been on a few key groups of people, particularly migrants, internally-displaced persons, refugees and asylum-seekers. The focus of this anthology is on people working (or seeking work) in the informal sector, often (but not always) away from home and in countries other than their own.

Consequently, the authors do not pay much attention to the prejudice caused by anti-trafficking measures to genuine criminals who harm migrants or put them into the hands of others who will do so. However, there is evidence from some regions that the label ‘trafficker’ has been used too loosely. In West Africa, for example, where people known as ‘landlords’ have traditionally helped both adults and children migrate to towns and find jobs, it is clear that denouncing such people as traffickers has contributed to reducing the protection they can give to their clients, rather than helping stop cases of exploitation. Similarly, in Brazil the patron-client relationships which govern many aspects of social life often provide protection to the ‘clients’ involved. Identifying traffickers therefore requires a more sophisticated process than denouncing the informal mechanisms that people around the world have put in place to help them migrate (legally or illegally) and get on in the world.

Some of the chapters in this anthology look in a general way at what the impact of anti-trafficking measures has been and try to assess whether they have contributed to reducing the number of people being trafficked. Some look in a quite theoretical way at what the obvious implications of current anti-trafficking laws or policies are, rather than focusing on individual cases. Yet others were able to obtain the nitty-gritty details about the effects on individuals and to assess specifically how anti-trafficking measures have affected the ability of a range of people to exercise their human rights. Of course, the most valuable source for finding out what these effects have been are the people concerned. In several countries GAATW’s researchers contacted organisations providing services to trafficked persons to obtain their views and those of their clients on the effects they thought anti-trafficking measures were having. Even this channel of information was closed to GAATW’s researchers in one country, Australia, where the authorities argued that the company providing services to trafficked persons (under contract to the government) could not answer questions. In this case, the very confidentiality with which the government cloaked some of its efforts to protect trafficked persons is being misused to prevent these efforts being open to scrutiny. In effect, they are a means of avoiding accountability.

The most obvious group of people who have been affected by anti-trafficking measures in every country are those who have been trafficked already and who have subsequently been affected by measures to protect or assist them (whether by a government or non-governmental agency) or by efforts to prosecute traffickers. However, the word ‘protect’ is used loosely here, for some measures which are supposed to protect trafficked persons have in fact exposed them to greater danger than would otherwise have been the case.

This group (of trafficked persons) includes both adults and children, recruited for a variety of forms of exploitation, some of whom have actually experienced exploitation and others who have been intercepted or who have sought help before being exploited. The very first way in which laws and policies have an impact on their right to protection, therefore, concerns the definition which the government of the country they are in has adopted or the

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criteria it has decided to use to assess who should be categorised as ‘trafficked’ and who qualifies for protection and assistance. Although international standards seem clear about who is to be categorised as a “trafficked person”, in many countries either a *de jure* or *de facto* definition is in use which only recognises women and girls who have been forced into prostitution as ‘trafficked’, excluding individuals who have been exploited in other ways and depriving them of their right to protection. For a while in the United Kingdom (UK), the criteria were more exclusive than elsewhere and meant that the authorities refused to provide assistance to someone who had allowed more than 30 days to go by after being forced into prostitution before contacting the police, as well as to women who had managed to escape from the control of traffickers before being put into forced prostitution.

The second group of people directly affected by anti-trafficking measures comprises the much larger numbers of migrants who travel away from home in order to make a living, both the millions who seek a living in other countries and those who do so within their own borders. Several chapters make clear that the risks and abuse inflicted on people travelling within their own country can be just as serious, particularly in large countries such as Brazil and India, even though public opinion in many regions associates ‘trafficking’ with the abuse of people travelling abroad.

In effect, most people who are trafficked have deliberately left home in order to make a living elsewhere: they are economic migrants. However, the outcomes of migration differ in the cases of trafficked persons and other migrants. Those who are trafficked end up in a situation analogous to slavery. Other migrants seek opportunities mainly in the informal sector and may end up in poorly paid jobs, but without being subjected to the same levels of coercion, deprivation of liberty and other severe abuse which are the hallmarks of trafficking (and also of forced labour and slavery). Nevertheless, the predicaments they find themselves in are similar and, as several chapters explain, the criteria used by government agencies to distinguish between the different groups often appear inappropriate and even discriminatory, for while efforts are nominally made to protect people from being trafficked, the main emphasis of most governments when it comes to migrants is to ‘control’ and limit migration and does not involve assisting or protecting migrants. Indeed, the narrow focus on trafficking seems in many countries to act as a justification for not taking action to end *all* the abuse to which migrant workers in the informal sectors of the economy are subjected.

A curious question, then, is why the governments who agreed to the UN Trafficking Protocol chose to put most of their focus on efforts to stop individuals being moved into situations in which they would be exploited, rather than putting more of their energy into stopping cases of exploitation from occurring at all. A message that comes across from many of the chapters in this anthology is that more efforts are being put into intercepting people who *may* be in the process of being trafficked (but may be just ordinary migrants), than into stamping out the various forms of exploitation listed in the UN Trafficking Protocol. Many anti-trafficking measures therefore prescribe penalties for intermediaries who recruit or move people from one place to another rather than penalising pimps or employers who exploit these same people once they have been trafficked, keeping them in some form of servitude or forced labour. It is chiefly migrant women and children who are seen to be affected most directly by anti-trafficking measures, for in many countries the very title of the UN Trafficking Protocol, which puts an emphasis on “women and children”, has persuaded the authorities that it is only women and children who risk being trafficked. In the crudest cases, in the name of preventing people from being trafficked, measures have been taken to stop them leaving their own communities or the area or country they live in. Depending on whether the prime targets of such measures are adult women or children, numerous women or children have been stopped from exercising their freedom of movement and their right to livelihood.

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It is adolescent girls and young women who have been the prime target for such measures, on the grounds that they are also the main target for traffickers who intend to deliver them into forced prostitution. Initially, in most cases, limitations have been placed on the freedom of movement of young women or other specific groups of people without any real thought being given to the implications. After almost a decade of such measures in Nepal, an evaluator called in to review the anti-trafficking programmes financed by a US NGO concluded that the measures taken to stop young women crossing Nepal's border into India were generally abusive (Hausner, 2005). She could see that there are a wide variety of legitimate reasons why girls and young women wanted to cross the border and why they should *not* be stopped from doing so. For example, a large number of Nepali women migrating to India were found to be moving to join their husbands, not for work, and, while rates of trafficking remained high, there was no evidence that women and girls migrating across the border were at greater risk of being trafficked than women who remained in their home villages.

Several chapters of this anthology make it clear that women migrants have been singled out in a discriminatory way. In some countries (Nepal and Nigeria), the discriminatory measure has been taken in their own country, before they leave. In others, it is upon their arrival in another country that young women are stereotyped as potential prostitutes or victims of traffickers (women arriving in Europe from Brazil and Nigeria). One other chapter (Australia) points out that men sometimes also lose out because they are rarely identified as having been trafficked, even when it is evident that they have been subjected to forced labour. Consequently, they are not entitled to the services which are made available to trafficked women. In addition to affecting women disproportionately to men, it is also clear that anti-trafficking measures cause more hardship to women who are poor than to women who are better off and better educated.

Besides trafficked persons and economic migrants, the third group affected severely by anti-trafficking measures are sex workers working in their own countries or abroad. In part, this is because some countries (such as India) still have a definition of trafficking which is based, not on the UN Trafficking Protocol adopted in 2000, but on the earlier UN Suppression of Traffic Convention. It is also because, even in countries which have ratified the UN Trafficking Protocol, either the law or instructions given to law enforcement officials imply that recruitment into sex work is generally tantamount to trafficking – even when it does not involve any acts of coercion or deception (such as Brazil). This is a legacy from the 1930s onwards, when many states adopted policies to punish anyone who recruited a woman or a girl into prostitution, even if this was with her consent, in line with international conventions adopted in 1933 and 1949.²⁰ As the UN Trafficking Protocol does not repeat the explicit condemnation of prostitution contained in the earlier UN Suppression of Traffic Convention, or suggest that prostitution should be stopped, it seems reasonable to suppose that sex workers should suffer less ill-effect from measures taken to implement the UN Trafficking Protocol than from measures taken under the terms of earlier international agreements. However, there is little evidence so far that this is the case. Indeed, the chapter on Brazil makes it clear that, even though the country has ratified the UN Trafficking Protocol, recent amendments to the law have nevertheless been based on the earlier UN Suppression of Traffic Convention, of which Brazil remains a state party.

The key findings of this report

Each chapter mentions numerous examples of laws or government policies which have negative consequences for some of the very people they are intended to benefit. It seems worth focusing here on three different types of

impact: first, of policies which make assistance and protection for trafficked persons conditional on cooperation with law enforcement officials; secondly, of anti-trafficking measures affecting migrants and others; and thirdly, the misuse of the concept of ‘trafficking’ to further the political agendas of governments. It then seems important to review the impact of a prevention campaign, which is mentioned in many of the individual chapters, conducted since 2001 in countries throughout the world by the United States government.

Making assistance for trafficked persons conditional on cooperation with law enforcement officials

In countries all around the world, access to assistance and protection for trafficked persons has been made conditional on their agreeing to cooperate with law enforcement officials, usually to provide them with statements which can potentially be used as evidence to prosecute suspected traffickers. Even in countries where a legal text guarantees that everyone suspected of having been trafficked will be protected (such as Bosnia and Herzegovina), law enforcement agencies have inveigled themselves into a position of deciding who gets access to their rights. This invidious approach is a negation of human rights. Furthermore, there is adequate evidence to show that, even if it delivers some short-term benefits for law enforcement, in the long term the practice of making assistance conditional on cooperation with law enforcement contributes to making trafficked persons suspicious of law enforcement agencies and unwilling to talk openly about their experiences, consequently hindering rather than helping with prosecutions.

Each of the industrialised countries mentioned in this anthology to which foreign nationals have been trafficked has made protection and assistance conditional in this way (i.e. Australia, UK and US). This means that demands are made on trafficked persons who, in many cases, are not physically, psychologically or emotionally equipped to provide assistance to investigation and prosecution. In Europe, recent research findings indicate that one-third of trafficked women experience memory difficulties for at least two weeks after leaving the control of traffickers, which affect their ability throughout this period to provide evidence about the most traumatic or hurtful events they had been involved in (Zimmerman, 2006, 21).

Cooperation with law enforcement officials potentially places the security of individuals who have been trafficked, or their close relatives, at risk, if their cooperation becomes known to their traffickers or their traffickers’ associates. Further, it means that decisions about whether and when to provide assistance to a trafficked person are based on factors that are not related to the rights of the person who has already been subjected to abuse, but on factors such as resource constraints or the best way to achieve a particular result in the courts. Indeed, it even makes a trafficked person’s rights and needs depend on the efficiency and personal inclinations of detectives and prosecutors: the chapter on the United States cites a case in which trafficked persons received no protection simply because prosecutors chose to prosecute the traffickers under state rather than federal law.

The thinking behind such conditionality is hard to understand from the points of view of either human rights or the administration of justice, for it appears to be completely at odds with all the other principles which underlie the ways that victims of crime and abuse are supposed to be treated, notably those set out in the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985),²¹ which states that, “Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means” (Article 14).

Some countries have tried to deal with objections to making assistance conditional by introducing short-term

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‘reflection delays’ for trafficked persons. These, it is felt, give individuals who have been duped, held captive, tortured, raped, brainwashed or conditioned in other ways to obey the people making money off them an adequate opportunity to regain control of their lives and make informed decisions about whether to put themselves or their loved ones at risk. However, the period of time for which trafficked persons are allowed to ‘reflect’ is generally shorter than the time which health professionals reckon their clients require to recover and to feel in control of their lives.²²

There are various reasons why this invidious form of pressure on people who have been abused is still tolerated by law enforcement officials and politicians. First, governments consider it a greater priority to stop illegal or irregular immigration than to provide essential assistance to victims of abuse; they argue that giving unconditional protection and assistance will open a new channel for false claimants to remain in their countries. This theme – that concerns about illegal immigration ‘trump’ any concerns which humanitarian politicians might be inclined to express about the way trafficked persons are treated – is one which comes up time and time again in different chapters.

Secondly, despite the definition of trafficking in persons adopted by the UN in 2000 and now incorporated into the law in many countries, law enforcement officials continue to equate ‘trafficking’ with prostitution, particularly sex work involving women from other countries. In the course of countless ‘rescue’ operations in red light districts, the ‘victims’ who are picked up by the police have not been trafficked, but turn out to be migrant sex workers who want to get back to earning money, rather than being protected from their employers, let alone repatriated. It is scarcely surprising that such people do not wish to testify against people who they regard as colleagues, rather than criminals.

Law enforcement officials evidently do face challenges in gathering the evidence they need to secure the conviction of traffickers. However, in practice, efforts to coerce people who have been trafficked and exploited into cooperating with them straightaway are almost bound *not* to generate evidence suitable for use in prosecutions. This is partly because many people who have been trafficked find themselves in a complicated predicament. They are not ‘pure victims’ who fit neatly into the UN Trafficking Protocol definition, but have agreed to cross borders illegally or to earn money illicitly; indeed, some are complicit in the trafficking of others. All this makes them wary of cooperating with law enforcement officials. Furthermore, some have been subjected to serious abuse and are suffering from post-traumatic stress syndrome at the very moment that they are asked to cooperate with the police or with prosecutors.

The solution to the challenge facing law enforcement officials, almost certainly, is to use alternative investigative methods to gather evidence and to guarantee trafficked persons an absolute right to protection and assistance and only to talk to them about providing evidence once they have recovered and feel safe.

The impact of anti-trafficking measures on other groups of people

The chapters in this anthology show that some efforts to prevent trafficking, along with numerous initiatives to secure the freedom of trafficked persons, have caused significant harm to others. The processes for identifying people who have been trafficked and for getting them out of the grips of those who are trafficking or exploiting them remain crude and often inflict unnecessary abuse on others. This is particularly the case as far as ‘raids’ on suspected brothels (or bars and other places acting as brothels) are concerned.

While some operations seem to be based on a government policy that ‘the ends justify the means’, the principles

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emphasised by the Human Rights Committee in its General Comment 27 on Freedom of Movement imply that there is an urgent need for anti-trafficking measures to be reviewed to reduce their ‘collateral damage’. This is particularly the case when prevention programmes try to prevent people from leaving their home communities or to dissuade them from migrating. When it comes to raids to secure the freedom of individuals who are suspected of being trafficked, national human rights institutions (government appointed ombudsmen and commissions) have already taken the first steps to stopping abuse. A workshop on trafficking organised in 2005 by the Asia Pacific Forum of National Human Rights Institutions expressed concern about abuses committed in the course of raids and recommended the development of procedural guidelines for raids and rescues to ensure that the human rights of trafficking victims are protected.²³ The workshop suggested, for example, that raids should not occur without adequate planning in advance for the protection and support of trafficked people and that adults suspected of having been trafficked during the raid should only be removed from their situation if they wanted to be.

The misuse of the concept of ‘trafficking’ to further political agendas

Governments and others routinely refer to their anti-trafficking work as ‘rights based’ or based on a ‘human rights approach’ when, even allowing for the fact that these concepts are not defined in international law, it is clear that their policies and approaches do not place respect for the human rights of trafficked persons at the centre. In practice, however, governments around the world have been exploiting the issue of trafficking to reinforce their own political agendas, at the expense of the interests of those who are trafficked or at highest risk of being trafficked. Anti-trafficking efforts have consequently had a negative impact in three distinct areas of government policy, concerning the status of migrants, women and sex workers.

Immigration

When announcing that ‘victims of trafficking have been rescued’, governments have taken advantage of the term *trafficking* to imply that the individuals concerned have been brought to the country concerned against their wishes and consequently have no wish and no right to remain there. By using the word *trafficking*, government officials claim they are ‘rescuing’ and helping trafficked persons, while in fact they take no notice of their wishes and forcibly repatriate them. The chapter on Nigeria mentions examples of forcible repatriations from Italy and also reports on the forcible repatriation in 2003 from Nigeria of 26 young adults from the neighbouring Republic of Benin, along with 48 adolescents aged 16 or 17, none of whom were given an option to remain in Nigeria or to seek alternative work there – even though a regional treaty recognises their right to do so. They were bundled out of the country along with a group of younger children who had all been working in the same place. Similarly, by labelling certain cases as ‘trafficking’, government officials imply that these cases do not involve a violation of ordinary labour rights and that organisations which conventionally play an important role in defending labour rights, such as trade unions, have no role to play in supporting them. This, in turn, has the effect of reducing the number of potential advocates for a trafficked person whose rights have been violated, thereby reducing the likelihood that she or he will be compensated or get access to justice.

A preoccupation with immigration is doubtless a major reason why so many industrialised countries appear to put more emphasis on initiatives to prevent trafficking in the countries from which migrants come than they have given to efforts to stop exploitation from occurring within their own frontiers (e.g. Australia financing initiatives in South-East Asia and the United Kingdom supporting initiatives in South-East Europe). The result, however, is that the

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patterns of exploitation, including forced labour, in these countries receive relatively little attention, while the risk of being trafficked is used primarily to deter people in poorer countries from migrating. There is already evidence that much alarmist anti-trafficking propaganda goes largely ignored by potential migrants (Limanowska, 2005, 31).

Gender

The discrimination against women and girls by the immigration services of industrialised countries has already been mentioned. Immigration services have stereotyped young women travellers from certain countries, such as Brazil and Nigeria, as potential sex workers or victims of trafficking and to use this as an excuse to impede their entry (and their freedom of movement). The stereotyping of women as victims of traffickers is so great that the authorities of industrialised countries overlook the possibility that men might be trafficked, and consequently exclude them from the services and protection that all victims of forced labour require.

In some developing countries, women from poor backgrounds have been denied the right to emigrate to seek manual jobs, while better off women with professional qualifications are allowed to work abroad. More generally, anti-trafficking initiatives reproduce assumptions about women as passive, incapable of decision-making and in need of protection. They provide a façade to deter the entry of certain categories of migrants. While claiming to protect the rights of women, they undermine the status and equality of women.

Sex work

Although an agreement was reached in 2000 about a definition of ‘trafficking in persons’ in the UN Trafficking Protocol, some governments still choose to define the term in other ways. This is particularly noticeable in South Asia, where a regional convention adopted two years after the UN Trafficking Protocol (the South Asian Association for Regional Cooperation [SAARC] *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, 2002) contains a definition of trafficking based on the earlier UN Suppression of Traffic Convention and is at odds with the definition in the UN Trafficking Protocol.

Other states which have ratified the UN Trafficking Protocol also still choose to put the emphasis on one particular form of exploitation (usually exploitation of the prostitution of others) in their anti-trafficking work, meaning that trafficking for other forms of exploitation receives little or no attention and that individuals who have been trafficked into forms of forced labour other than forced prostitution usually receive inadequate protection and assistance. Despite the provisions of the UN Trafficking Protocol, anti-trafficking measures are also still being used to justify a raft of measures which are aimed at suppressing sex work in general, rather than at the specific situations in which people are forced into prostitution.

Although anti-trafficking activists (including the supporters of GAATW) have good intentions, they have not succeeded in detaching the framework they have set up for preventing trafficking and protecting trafficked persons from a series of other, secret or less overt agendas. As a result, as the chapters show, the anti-trafficking framework has done little good for the trafficked person and great harm to migrants and women in the sex industry. Nowhere is this clearer than in the case of the country which launched a worldwide anti-trafficking crusade in 2001, the United States, which has had an impact on many countries around the globe.

The US government's worldwide campaign to prevent trafficking

Shortly before the UN General Assembly adopted the Trafficking Protocol, in October 2000, the US adopted the *Trafficking Victims Protection Act of 2000* (TVPA). This increased penalties for trafficking-related offences committed in the US. It also contained important provisions intended to encourage action by other governments. The US justification for pressuring other governments is said to be based on human rights principles:

The US Constitution (13th Amendment) prohibits slavery or involuntary servitude in the United States. We seek to ensure this basic standard in our efforts to combat trafficking in persons internationally (US Department of State, 2006, 41).

Undoubtedly, many of the initiatives which the US has financed in other countries since this Act was adopted have promoted respect for human rights. Between 2001 and 2006, the US government's own accounts indicate that more than US\$447 million was spent on such efforts (US GAO, 2007, 1), involving about 100 countries in 2005 alone. Details of the impact of the TVPA in the US itself are presented in the chapter that focuses on the US.

Like other governments, the US claims to have “a victim-centered approach to address trafficking, combining anti-crime and human rights objectives” (US Department of State, 2006, 22). However, at a practical level the approaches which the US has insisted that other governments take seem often to inflict an unacceptable cost on human rights. One such measure has been the US government's decision in 2003 not to fund any organisation which fails to explicitly condemn prostitution. The measure was contained initially in a 2003 US law concerned with funding for programmes around the world against HIV/AIDS and other diseases. In 2005, this was renewed in a measure entitled *Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking* (for details, see the chapter on the US). This policy prevents US government agencies, such as USAID, from funding an organisation set up by sex workers to defend themselves and also any work against HIV/AIDS or trafficking by an organisation which supports the legalisation of sex work. The measure was based on President Bush's policy of opposing commercial sex and disapproval of the legalisation of sex work anywhere in the world, a policy backed up by US claims that the legalisation of sex work encourages trafficking. This claim is disputed by many others. A US government office, the Government Accountability Office (GAO), has noted that the claim does not appear to be based on significant evidence:

For example, the 2005 Trafficking in Persons Report asserts that legalized or tolerated prostitution nearly always increases the number of women and children trafficked into commercial sex slavery, but does not cite any supporting evidence (US GAO, 2006, 25).

The US has also emphasised to other governments that priority should be given to prosecuting traffickers and presses them to inform US embassies each year of the number of such prosecutions. Although in theory the US approach towards the capture of traffickers and the release of their victims from captivity is supposed to make the “rights of victims paramount”, in practice the approach tends to ignore the principle of proportionality and comes close to giving the message that the ends (freeing trafficking victims) justify the means.

The TVPA contains a set of minimum standards for the elimination of trafficking in persons (listed in the chapter about the US), which the US authorities regard as applicable to the governments of all countries believed to have more than about a hundred victims of what the Act calls “severe forms of trafficking”. The Act lists 10 factors to

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be considered as “indicia of serious and sustained efforts to eliminate severe forms of trafficking in persons”. These are assessed once a year in a Trafficking in Persons report published by the US Department of State (the US TIP Report): the most recent edition was published in June 2007. This categorises countries into four groupings, from Tier 1 (fully compliant with the US’ minimum standards) to Tier 3 (not compliant). Being categorised as Tier 3 can trigger the withholding of non-humanitarian, non-trade-related assistance from the US. Tier 2 is divided into two categories, with a ‘lower 2’ known as the “Tier 2 Watch List” threatened with demotion (and with the possible withholding of assistance).

The US Government Accountability Office has criticised the criteria used for allocating countries into particular tiers, commenting that, “...in justifying the tier rankings for these countries, [the Department of] State does not comprehensively describe foreign governments’ compliance with the standards, many of which are subjective” (US GAO, 2006, 26).

Critics of the annual ranking note that Tier 3 includes various countries which are well known to have poor relations with the US and suspect this is the reason for their ranking, rather than because they have a serious pattern of human trafficking. The US TIP report for 2006 placed 12 countries in Tier 3. They included one long-term US ally, Saudi Arabia. However, they also included numerous countries which were notorious on account of their government’s poor relations with the US rather than because large numbers of their citizens are reported to be trafficked: Cuba, Iran, North Korea, Sudan, Syria and Venezuela (US Department of State, 2007, 42). These countries all remained in Tier 3 in the 2007 report, while the total number of countries in Tier 3 increased to 16. Several of the newcomers are regarded as US allies, such as Bahrain, Kuwait, Oman and Qatar. The explanation given in the 2007 report was that, “As with the last two Reports, this Report places several countries on Tier 3 primarily as a result of their failure to address trafficking for forced labor among foreign migrant workers” (*op. cit.*, 30). Of the eight countries which are examined in this anthology, two were ranked in Tier 1 (Australia and the UK), four were in Tier 2 (Bosnia and Herzegovina, Brazil, Nigeria and Thailand) and one was in the Tier 2 Watch List (India). The US itself is not the subject of a tier ranking.

Other have criticised the US Department of State for failing to categorise in Tier 2 or 3 certain countries which have a poor record for taking meaningful action to prosecute traffickers or to stop trafficking. A close US ally, the UK, which the chapter shows as having adopted confused policies over a number of years that leave some trafficked persons without protection or assistance, has nevertheless been consistently placed in Tier 1 by the TIP reports. In considering the tier rankings of countries in South Asia, GAATW’s authors noted that the Kingdom of Nepal was placed in Tier 1 in the 2005 TIP report, but has been ranked in Tier 2 in other years. The 2005 report noted: “Despite setbacks in other areas, Nepal has over the years made steady progress in its efforts to combat trafficking” (US Department of State, 2005, 163). During the following year, no major policy change or legal reform was adopted by the government as far as trafficking was concerned to lead to the country’s demotion in the 2006 report. The main change was political, for a civil war in Nepal came to an end, the dictatorial powers of a hereditary monarch were curbed and a multi-party government was appointed, which included Maoists. The only explanation for the change in ranking offered in the 2006 TIP report was that the Government of Nepal was failing to improve its anti-corruption efforts (US Department of State, 2006, 186).

The reactions of governments which are criticised in the TIP report evidently vary. From the US point of view, it appears positive that governments which were doing little to stop trafficking have been prodded into action. The US Government Accountability Office review of the TIP report’s impact observes that the governments of both

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Jamaica and Japan had initiated action as a result of criticisms voiced in the TIP report, noting that, "...the Japanese government responded to the report's criticisms by tightening the issuance of entertainer visas and ceasing the criminal treatment of trafficking victims" (US GAO, 2006, 28). However, it made no comment on whether migrant workers had experienced hardships as a result of the reduction in entertainer visas.

It is precisely these sorts of side effects which consistently go unreported and apparently unnoticed by all but the individuals whose lives are affected directly. As a result, neither the US nor any international body is currently engaged in monitoring whether such anti-trafficking measures are indeed proportionate to the abuse they are ostensibly trying to prevent. Equally relevant are the various efforts to stop either trafficking or various forms of exploitation at national level which have been dropped simply because they do not conform to the criteria proposed by US diplomats on the basis of the TVPA's requirements.

It seems that within the US administration there is inadequate awareness of what the real impact has been of either the annual TIP report or other anti-trafficking measures supported by the US. This concerns both the possible contribution they make to reducing the number of people trafficked and their other, more counter-productive effects. The US Government Accountability Office noted that the TVPA 2000 called for a US government task force "to measure and evaluate the progress of the United States and other countries in preventing trafficking, protecting and providing assistance to victims, and prosecuting traffickers" (*op. cit.*, 25). However, the GAO report in 2006 notes that no evaluation plan or government-wide performance measures had yet been developed to allow the US government to evaluate the overall impact of its anti-trafficking efforts abroad. It comments that,

...according to agency officials in Washington, D.C. and in the field, there is little or no evidence to indicate the extent to which different types of efforts—such as prosecuting traffickers, abolishing prostitution, increasing viable economic opportunities, or sheltering and reintegrating victims—impact the level of trafficking or the extent to which rescued victims are being re trafficked (*ibid.*).

In the US, the need for systematic evaluation of anti-trafficking measures has been recognised, albeit not by the main government department responsible for implementing the government's anti-trafficking policy. A report issued in July 2007 by the US Government Accountability Office was headlined, "Monitoring and Evaluation of International Projects Are Limited, but Experts Suggest Improvements" (US GAO, 2007). This constitutes a first step, perhaps, towards appreciating that anti-trafficking efforts have unintended effects and that action is needed to reduce 'collateral damage'.

Conclusions

This anthology indicates that a huge number of changes in anti-trafficking policies are needed around the world, to prevent them causing harm and to ensure that they contribute directly to the very people who are supposed to benefit – trafficked persons – being able to exercise their human rights fully. Until some of these changes are made, people who have been trafficked will continue to try and avoid being identified as victims of trafficking, suspecting that this may not be in their own best interests.

Of course, the conclusion mentioned already – that the anti-trafficking framework has done little good for the trafficked person and great harm to migrants and women in the sex industry – raises the question for human rights

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campaigners about whether it is even appropriate to try and reform government anti-trafficking strategies by seeking specific changes. Enabling the very people who are at highest risk of being trafficked to exercise their human rights fully requires an altogether different approach, one which shifts the emphasis to empowerment and participation.

However, to focus solely on an empowerment agenda would potentially mean allowing serious violations of human rights to continue unabated. It consequently seems vital to take a two-track approach, one which combines advocacy for positive change and empowerment with calls for reform and specific changes in government anti-trafficking measures, which would reduce the harm that these currently cause both to trafficked persons and other people.

The individual chapters of this anthology identify a large number of changes that are needed, so many that it is difficult to summarise them all. Here are ten steps which the chapters imply need to be taken in **every** country in order to identify the shortcomings and remedy them.

- 1. Use an evidence-based approach.** The chapters in this anthology demonstrate that it is important to take an evidence-based approach when adopting anti-trafficking measures and to ensure that the measures taken are both proportionate and appropriate to address the patterns of abuse known to be occurring. The corollary is that a 'one size fits all' approach (along the lines advocated by the US government) is not likely to work. In particular, in all the countries mentioned in this anthology, it would be appropriate to have a greater focus on detecting and stopping cases of forced labour and slavery-like practices, rather than focusing primarily on the *recruitment* of people into such forms of abuse, as this has led to measures being adopted that have a negative impact on a wide range of migrants.
- 2. Base policies on evidence collected from trafficked persons and other migrants who have experienced abuse** and also from others who have first-hand experience of the counter-productive effects of anti-trafficking and anti-immigration measures. In particular, involve workers in the sectors where forced labour and slavery-like practices are known to be common in identifying the measures likely to help stop these abuses (rather than treating them as objects who are neither consulted, nor considered to be part of any potential 'solution'). In general, this means moving such people from being the object (and often victim) of government policies to being the subject of them, partners with those in government agencies, who can help form policies which have, for too long, been developed by well-intentioned individuals who have little real understanding of the realities experienced by people living in poverty in general and migrant women in particular.
- 3. National human rights institutions should collect information in a proactive way about the impact of anti-trafficking measures and assess whether they conform to the principle of proportionality.** Alongside their role in monitoring respect for human rights by law enforcement agencies and other public officials, they should also assess whether specific guidelines are required to reduce the harmful effects of anti-trafficking measures on specific groups of people, such as the sex workers who are affected by raids on brothels carried out ostensibly to find people who have been forced into prostitution.
- 4. End the practice of making assistance to trafficked persons conditional on their agreeing to cooperate with law enforcement officials.** In every country mentioned in this anthology, people who have been trafficked and subjected to severe abuse are being prevented from getting access to the services and protection to which they have a right, on account of either laws or law enforcement agency

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practices which make assistance conditional on their agreeing to cooperate with law enforcement officials. This conditionality is incompatible with a human rights approach and steps should be taken to end it everywhere. Law enforcement agencies whose prime interest is to secure convictions of traffickers surely have an interest in ensuring that victims of crime and witnesses have their safety guaranteed and are offered the services they need as a first priority and could monitor whether adopting this approach increases or decreases the availability of evidence to prosecute traffickers.

5. **Monitor the implementation by law enforcement agencies and immigration services of laws concerning temporary or permanent rights to remain in a country for foreigners who have been trafficked.** Such monitoring is needed everywhere, whatever the provisions of the law concerning rights to remain in the country are. Remedial action should be taken by the government whenever there is evidence that law enforcement officials are systematically failing to correctly identify people who have been trafficked or are categorising them in such a way that they can be deported or given less protection or assistance. There seems to be a need in many countries to redesign the referral system for foreign men, women and children in such a way that all victims of abuse – regardless of whether they are willing to cooperate with a prosecution or not – have access to the assistance to which they are entitled.
6. **Repeal all legislation or regulations which allow for the detention of people who have been trafficked,** whether this is *de jure* detention by a law enforcement agency or *de facto* detention by an NGO, as described in the chapter about BiH or by the social welfare authorities as in Thailand. In the case of Nigeria, the referral system needs to ensure, as a matter of priority, that people who have been trafficked are not kept in detention (or in anything called ‘safe custody’ which is effectively a form of detention) in the same building as the people suspected of trafficking them.
7. **Governments should ensure that there are no obstacles to trafficked persons applying for asylum** and that people who have been trafficked from one country to another are informed of this option and the procedures to follow.
8. **Hold governments accountable and require them to review their procedures both for carrying out risk and security assessments prior to repatriation and for repatriating individuals** who may have been trafficked. This should help eliminate the likelihood that these individuals will be subjected to further harm (or stigmatised) upon their return home, or will be less able to exercise their human rights than would otherwise be the case.
9. **Inform foreign citizens who are believed to have been trafficked and who are put into shelters on a temporary basis in the country to which they have been trafficked systematically about the possibilities of getting assistance once they return to their home country.** They should be offered advice on how to contact NGOs in their home country that provide suitable assistance before they embark on their journey home. At the same time, they should not be coerced into making contact with organisations in their home country if they do not wish to do so. Whenever there is a clear pattern of individuals being trafficked between two specific countries, efforts should be made to coordinate the assistance provided in the two countries. This does not automatically depend on the two governments cooperating closely; it can also be brought about when NGOs in the two countries cooperate closely, whatever the state of relations between their two governments.
10. **Governments should eliminate any obstacles which inhibit migrant workers from exercising their right to freedom of association and to join or form trade unions.** They should take steps to

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ensure that migrant workers have a voice and can submit complaints about exploitation without having to fear reprisals from either their employer or from government agencies seeking to deport them. This in turn implies that governments should resolve the evident conflict in priorities between immigration policies that seek to exclude irregular migrants and anti-trafficking or anti-forced labour policies which seek to stop violations of human rights from occurring. Labour rights defenders should ensure that they too play a more proactive role in detecting cases of forced labour and slavery-like situations, whatever sector they occur in, and in supporting the efforts to obtain redress of the individuals who have been subjected to abuse. Removing obstacles to marginalised groups such as migrant workers and sex workers exercising their right to freedom of association is just one step on the road to empowerment, to creating an enabling environment in which people are helped by their governments to exercise their rights, rather than being the object of oppressive measures to stop trafficking, to stop exploitation or to stop irregular migration – in short, a series of bans which, in the name of protecting people, ultimately do not enable them to exercise their rights.

In the US, where more government money has been poured into anti-trafficking efforts than anywhere else, one key need has already been identified by the US Government Accountability Office: more and better evaluations and proper assessment of the impact of anti-trafficking programmes and projects, so that lessons are learnt and programmes are improved.

In the US and elsewhere, however, there are clearly ideological obstructions to adopting an evidence-based approach, as well as an unwillingness at government level to give due consideration to the negative impact that some anti-trafficking measures have on sex workers and others working in the informal sector. The campaign against the decriminalisation or legalisation of sex work has a strong voice in the US and claims that this is central to efforts to stop trafficking in women. It is consequently not sufficient to wait for human rights institutions or other government agencies to review the impact of anti-trafficking measures and to propose reforms. Everyone who has played a role in calling for action to stop human trafficking (and thousands of NGOs have jumped on this bandwagon in recent years) has a responsibility to contribute to this review and to press their government to act more responsibly.

Seven years after the UN adopted its Trafficking Protocol, it is high time that all levels of anti-trafficking work were evaluated and their impact assessed. Some commentators may argue that this anthology concentrates too much on the negative impacts of anti-trafficking measures and fails to sing the praises of what has been done well. By sifting through evidence in an objective way, independent evaluations and impact assessment can identify both positive and negative effects. Still, identifying the negative effects requires a special effort, particularly from organisations which are adept at putting a public relations ‘spin’ on their own achievements. A handbook for evaluation specialists (*Impact Assessment for Development Agencies, Learning to Value Change*, Oxfam GB with Novib, 1999) recommends that those responsible for monitoring and evaluation need to look, not just once, but twice for the possible negative effects of the programmes they evaluate. In the case of anti-trafficking programmes, as in many development initiatives, the people who are intended to benefit principally are routinely in an unequal power relationship with law enforcement officials, social service officials, NGO staff and others involved in administering programmes intended to help them. They are consequently frightened of criticising anything. The handbook advises:

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Deliberately set out to capture negative changes and to seek out those who might report it, particularly groups who are often disadvantaged such as women, minority groups, or people who have dropped out of the project (Roche, 1999, 52).

This anthology represents only a first step in the process now needed to collect and analyse evidence about the negative changes brought about by anti-trafficking initiatives. However, the evidence presented in the chapters is already sufficient to justify making numerous changes to existing anti-trafficking measures.

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ENDNOTES

- ¹ Principle 3 of the UN High Commissioner's *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Addendum to the Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN document E/2002/68/Add.1, 20 May 2002. The Recommended Principles and Guidelines were accessed on 1 May 2007 at www.ohchr.org/english/about/publications/docs/trafficking.doc.
- ² *Ibid.* Principle 1.
- ³ The full text of the UN Trafficking Protocol was available in April 2007 at <http://www.ohchr.org/english/law/pdf/protocoltraff.pdf>.
- ⁴ *The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* was accessed on 25 February 2005 at <http://www.unhchr.ch/html/menu3/b/33.htm>.
- ⁵ This is in contrast to cases involving children under 18, for in their case, whenever intermediaries or pimps recruit children to earn money for them from commercial sex, the case comes under the definition of trafficking in the Trafficking Protocol, whether their recruitment and subsequent employment involves any coercion or not.
- ⁶ Report of the *Ad Hoc* Committee on the Elaboration of the *Convention against Transnational Organized Crime* on the work of its first to eleventh sessions. Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations *Convention against Transnational Organized Crime* and the Protocols thereto, UN document A/55/383/Add.1, 3 November 2000, page 12, paragraph 64.
- ⁷ Accessed on 26 April 2007 at www.globalrights.org/site/DocServer/IHRLGTraffickingStandards.pdf?docID=204.
- ⁸ Guideline 3 of the UN High Commissioner's *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, op. cit.
- ⁹ UNICEF's *Guidelines for Protection of the Rights of Child Victims of Trafficking* were initially designed especially for South-Eastern Europe (2003). The original version was accessed at www.seerights.org. In 2006, a set of revised Guidelines were issued to be applicable to the entire world. These were accessed at www.unicef.org/ceecis/media/1231.html.
- ¹⁰ UNHCR document HCR/GIP/06/07, 7 April 2006, accessed on 9 May 2007 at www.unhcr.org/doclist/publ/3d4a53ad4.html.
- ¹¹ The Council of Europe Convention was accessed on 10 May 2007 at www.coe.int/t/dg2/trafficking/campaign/Source/PDF/Conv197TraffickingE.pdf.
- ¹² IOM, *The Mental Health Aspects of Trafficking in Human Beings. A Set of Minimum Standards*, compiled by Árpád Baráth, Anjali Da Victoria Lobo, Ruhija Hoxha-Beganovic, Philip D. Jaffé, Nnette Motus, István Szilárd, Diana Tudorache, Rossanka Venelinova, and Jacqueline Weekers, Budapest, 2004. The minimum standards are supported by a training guide: IOM, *The Mental Health Aspects of Trafficking in Human Beings. Training Manual*, compiled by Árpád Baráth, Edvard Hauff, Philip D. Jaffé, Gyöngyvér Jakab, Nnette Motus, István Szilárd, Diana Tudorache, Rossanka Venelinova, and Jacqueline Weekers, Budapest, 2004.
- ¹³ The IOM Handbook was accessed on 28 March 2007 at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/CT%20handbook.pdf.
- ¹⁴ The WHO Recommendations were accessed on 9 May 2007 at www.who.int/gender/documents/en/final%20recommendations%2023%20oct.pdf.
- ¹⁵ Paragraphs 14 and 15 of the Human Rights Committee's General Comment 27 (Freedom of movement, Article 12 of the *International Covenant on Civil and Political Rights*), UN Document CCPR/C/21/Rev.1/Add.9 (1999).
- ¹⁶ UN *Convention on the Rights of the Child*. Adopted by UN General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990. The text of the Convention was accessed on 20 June 2003 at www.unhcr.org.

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- ¹⁷ Committee on the Rights of the Child, General Comment No. 4 (2003), Adolescent health and development in the context of the *Convention on the Rights of the Child*, UN Document CRC/GC/2003/4, 1 July 2003.
- ¹⁸ Paragraph 27, Committee on the Rights of the Child, General Comment No. 6 (2005), ‘Treatment of unaccompanied and separated children outside their country of origin,’ adopted during the Committee’s 39th session, 17 May to 3 June 2005. General Comment No. 6 was accessed at www.ohchr.org/english/bodies/crc/docs/GC6.pdf.
- ¹⁹ Workshop on Measurement and Human Rights, July 6–8, 2006, Carr Center for Human Rights Policy, in collaboration with the Program in Criminal Justice Policy and Management Kennedy School of Government, Harvard University. Accessed on 15 May 2007 at www.ksg.harvard.edu/cchrp/programareas/impact.php.
- ²⁰ *The International Convention for the Suppression of the Traffic of Women of Full Age*, adopted by the League of Nations in 1933, required all states ratifying the Convention to prohibit, prevent and punish the trafficking of women for the purposes of prostitution, even when done with their consent. Earlier, in 1910, the *International Convention for the Suppression of White Slave Traffic* had imposed an obligation on ratifying states to punish anyone who recruited a girl who was below the age of majority into prostitution, whether it was with her consent or not (Weissbrodt and Anti-Slavery International, 2002, 19).
- ²¹ Adopted by UN General Assembly resolution 40/34 of 29 November 1985. Accessed on 16 May 2007 at www.ohchr.org/english/law/victims.htm.
- ²² An IOM Training Manual notes that, “Even when relatively ‘safe’ and out of the traffickers’ clutches, trafficked persons are generally observed to be anxious, frightened, and in a confused state. They are also often suspicious of any assistance initially provided, and worry about what awaits them from the time of their escape/rescue, during their stay at the transit centre up to their return home... Additionally from a mental health angle, an almost exclusive contact with the authorities (e.g. arrest, evidence giving, testifying in a criminal proceeding) may have negative psychological effects on a trafficked person. S/he may experience memory lapses, fear of law enforcement officials and deep insecurity about the future” (*The Mental Health Aspects of Trafficking in Human Beings, Training Manual*, compiled by Árpád Baráth et al, Budapest, 2004, page 39).
- ²³ Asia Pacific Forum of National Human Rights Institutions, Regional Workshop on Human Trafficking and National Human Rights Institutions: Cooperating to End Impunity for Traffickers and to Secure Justice for Trafficked People, Sydney, Australia, 20–23 November 2005.

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Australia

Elaine Pearson

1. Introduction

Australian government officials are careful to tell you that human trafficking does not mean simply trafficking for sexual exploitation, and that trafficking is not the same as migrants engaging in prostitution, or human smuggling. The *Australian Government's National Action Plan to Eradicate Trafficking in Persons* uses the definition as set out in the UN Trafficking Protocol.

Australia is one of the few countries where prostitution has been regulated or decriminalised (except in the states of South Australia and Tasmania) and, therefore, it is easier for officials to draw a distinction between sex workers and trafficked persons, rather than assuming that all migrant sex workers have been trafficked. However, most of the literature available deals with trafficking of Asian women into the sex industry in Australia. Women are mainly identified as coming from Thailand, and to a lesser extent, from the Republic of Korea (South Korea) and China. Children are not reported to have been trafficked into the sex industry in Australia. Some of the women from Thailand have worked in the sex industry before and were not deceived as to the nature of the work awaiting them in Australia. What makes these cases trafficking is that some of these women are effectively in debt bondage until they can repay their substantial debt. Estimates of the debts owed by women trafficked into Australia's sex industry range from 50,000 to 80,000 Australian dollars (equivalent to between US\$39,000 and US\$62,000). The new anti-trafficking laws in Australia tend to reflect this common trend of debt bondage.

The distinction between smuggling and trafficking is reasonably clear on an operational level, since the process of entering Australia for trafficked and smuggled migrants tends to be different. Smuggled migrants often come on boats or using false passports, whereas the majority of trafficked people have tended to enter Australia legally on tourist, student or work visas, but ended up in situations of exploitation akin to debt bondage or forced labour. However at the policy level, trafficking and smuggling seem to frequently be dealt with together. For instance, Australia has appointed an Ambassador on People Smuggling who is also responsible for human trafficking issues.

For a long time Australia has been known for its hostile migration policy, which also impacts on trafficking. Historically (from 1901 up until 1973), Australia had a racially discriminatory policy which favoured immigration from certain countries, infamously known as the "white Australia policy" or officially as the *Immigration Restriction Act, 1901*. This Act prohibited prostitutes, criminals and anyone under a contract or agreement from performing manual labour within Australia, with some limited exceptions (Department of Immigration and Multicultural Affairs,

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2006). Different immigration rules applied for migrants coming from non-European backgrounds: they suffered restrictions on the types of work they could perform and in terms of their ability to obtain permanent residency.

The white Australia policy was abolished in 1973, yet an attitude of hostility towards migrants, particularly from non-white countries still pervades. The Department of Immigration and Multicultural Affairs¹ (DIMA) has a “dob in line”, which encourages Australian citizens to report to DIMA ‘suspicious’ migrants whom they suspect to be working or living illegally in Australia. Regular migration to Australia is strictly controlled and it is difficult for low-skilled migrants to enter Australia for work. Those arriving in Australia without documents, by boat or air, often to claim asylum, are regarded as ‘queue-jumpers’ or ‘boat people’ rather than as people fleeing persecution, an image carefully cultivated by the Howard Government. Asylum-seekers face mandatory detention and, since 2001, offshore processing zones have been set up as a further measure to deter unauthorised arrivals. By way of example, in 2001, when a Norwegian container ship, the *Tampa*, rescued more than 400 asylum-seekers from a sinking vessel, it was refused permission to land on Australian soil. Instead, soldiers entered the ship and escorted the asylum-seekers to Nauru for processing. The Australian government defended its actions on the grounds of deterring people from coming illegally to Australia and rewarding those who use the ‘proper channels’ (Australian Associated Press, 2002). The event occurred close to a federal election and played on fears of the Australian public, blurring the line between terrorism, crime and irregular migration. As far as trafficking is concerned, there is a reluctance to broaden the scope of who is considered trafficked and to afford equal protection and rights to all victims.

Trafficking is generally not as significant a problem as in other countries. There may well be more individuals involved than the figure reported by the Australian government of 100 reported cases per year (Commonwealth of Australia, 2004, 2), simply because that figure does not seem to take into account cases of labour exploitation. Trafficking for forms of exploitation other than commercial sexual exploitation (such as exploitation in forced labour) has been identified by the authorities, but only isolated cases. Discussions with trade unions, however, suggest that severe labour exploitation of migrant workers, both those working legally and illegally in Australia, is a growing problem. These cases in sectors other than the sex industry have not been identified as trafficking, or followed up by the authorities, despite reports by the media and trade unions.

Trafficking numbers are low primarily due to the geographical isolation of the country, combined with a very strict immigration and border control. There are legal channels for migration into the sex industry, which reduces the need for migrants to depend on organised crime syndicates or traffickers. Migrant women wishing to work in the sex industry still need a relevant work visa or working holiday visa in order to do so. Therefore, trafficking still does go on, because unskilled people from developing countries find it difficult to obtain a work visa for Australia.

Over the last five years, Australia has developed a comprehensive anti-trafficking response, firmly rooted in the criminal justice system and the need to prosecute traffickers. The government considers trafficking a crime to be detected and punished by the criminal justice system. Victim protection is seen as a necessary part of that criminal justice response, rather than an unequivocal human right. Comprehensive services and rights to remain in Australia are available to those who are seen to be potentially useful to the authorities and who might or do possess evidence to prosecute traffickers. Even in terms of reintegration, more comprehensive assistance is provided to those willing to cooperate with Thai or Australian authorities. The Federal Department of Families, Community Services and Indigenous Affairs’ Office for Women sub-contracts services for trafficked persons through a

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public tender process. This was won by a private company, Southern Edge Training. The fact that victim services in Australia are privatised has various implications. In particular, it means that many smaller NGOs have been marginalised in the trafficking debate and there are hardly any government funds directed towards them.

This report is based on a literature review supplemented by a series of interviews carried out in Sydney, Melbourne and Canberra by two representatives from GAATW in September 2006 with government officials, police, trade unions, NGOs, academics and trafficked persons. The main agency that provided services to trafficked persons, Southern Edge Training, declined to be interviewed due to a confidentiality agreement signed with the Australian government. When GAATW sought authorisation from the Office for Women to interview Southern Edge Training, the Office for Women explained that Southern Edge Training was not authorised to disclose any additional information to that provided by the government, and therefore an interview with them was unnecessary. GAATW representatives wished to discuss practical issues surrounding victim protection in Australia and how the programme met the changing priorities of trafficked women, questions which the Office for Women could not answer. Inability to access this kind of general information suggests a lack of transparency on the part of both Southern Edge Training and the government. Without such information about how victim services actually work in practice, it is unclear whether they really adhere to internationally recognised standards or not.

2. Current Frameworks to Address Trafficking

Prior to 2003, the government's response to trafficking was similar to its response to people smuggling: in most cases, simply to remove trafficked persons back to their country of origin as quickly as possible. In September 2003, the Australian government committed significant resources of A\$20 million (US\$15.5 million) to combat trafficking over a four-year period. In June 2004, it provided more details on how the money was to be spent, by launching the *Australian Government's National Action Plan to Eradicate Trafficking in Persons*. The Action Plan has four main components:

- Prevention. Through overseas development assistance (see below), providing training to police officers overseas as well as establishing a senior migration officer post in Thailand to prevent trafficking.
- Detection and investigation. Through funding a 23-person Australian Federal Police (AFP) Transnational Sexual Exploitation and Trafficking Strike Team to improve investigations into trafficking. Also by strengthening AFP operations in relevant countries abroad, and improving Australian anti-trafficking legislation.
- Criminal prosecution. By amending the migration regulations to permit trafficked persons to stay in Australia and introducing new anti-trafficking legislation.
- Victim support and rehabilitation. Providing comprehensive victim support to those who are trafficked, especially witnesses permitted to remain, as well as reintegration assistance for trafficked persons returning to South-East Asia (more details are in section 3 below); and also providing training for police and immigration officers coming into contact with trafficked persons, and raising community awareness of the issue, especially amongst those working in the sex industry, and via the media to inform the general public (Commonwealth of Australia, 2004, 4).

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The government commits itself to these activities through what it calls a “whole of government approach”. This means the coordinated involvement of various government agencies working at all levels: federal, state and local. By way of example, at national level, an InterDepartmental Committee has been established involving all agencies connected to trafficking, i.e. Department of Immigration and Multicultural Affairs (DIMA), AFP, Office for Women, Attorney General’s Department, Director of Public Prosecutions, Department of Foreign Affairs and Trade, and the Australian Agency for Foreign International Development (AusAID). This InterDepartmental Committee meets regularly to exchange information, discuss the impact of various anti-trafficking activities, as well as updating other agencies on concrete cases.

In relation to Australian initiatives abroad, Australia has played a leading role in developing regional cooperation and exchange on measures to combat smuggling and trafficking through the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* (Bali Process), which began in 2002. Australia is the co-chair of the Bali Process, alongside the Government of Indonesia, and the Process involves some 50 countries across the Asia-Pacific region. The Department of Foreign Affairs and Trade appointed an Ambassador for People Smuggling who was also given a mandate on the issue of human trafficking. This Ambassador does not look at issues of trafficking or smuggling only within or to Australia, but how smuggling, trafficking and migration are more generally being dealt with in the region, and advocates “Australia’s interest in promoting effective and practical international cooperation to combat people smuggling and trafficking especially in the Asia-Pacific region” (Flanagan, 2006, 6).

AusAID funds various activities related to trafficking in South-East Asia. Most of the trafficking money has been spent on what the government terms ‘prevention’, though these activities are not directly related to prevent trafficking to Australia but as part of a broader development response. Activities aim to improve the criminal justice response to trafficking while ensuring adequate victim protection through Asia Regional Cooperation to Prevent People Trafficking and the second phase of this project, the Asian Regional Trafficking in Persons project, which currently works in Indonesia, Thailand, Myanmar, Cambodia and Lao PDR.

Australia also appears to see effective prevention largely as an issue of improving the law enforcement response to trafficking, and so the government supports collaboration between countries in order to improve the ability of other countries to detect cases of trafficking and improve their capacity to investigate and prosecute traffickers, and to protect trafficked persons largely in order to secure more effective prosecutions.²

3. Analysis of Relevant Laws and Policies

Criminal Laws

Australia’s legal response to trafficking has been formed in the last decade. The ratification of the UN Trafficking Protocol in September 2005 led to the Australian government introducing new offences of trafficking and debt bondage to cover some of the gaps in existing legislation. The new offences bring Australian legislation in line with the UN Trafficking Protocol. Prior to this, Australia had already introduced laws addressing trafficking into the sex industry, in the form of laws in 1999 to criminalise slavery and sexual servitude. However, there were few

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prosecutions of these offences. To cover the distinct crime of smuggling in persons, Australia introduced new smuggling offences in 2002.

All of these new offences have been reflected as amendments to Australia's *Criminal Code Act* (Commonwealth) (hereafter, Criminal Code), or in the case of the people smuggling offences, to the *Migration Act* (Commonwealth). The changes were adopted under federal law, rather than state law. As a point of note for foreign readers, Australia is a federation of six states (representing six former British colonies) and two territories. Under this system, power is divided between the federal (Commonwealth) government and the State and Territory governments. The federal government assumes responsibility for matters affecting the whole nation, and these issues are specified under the Constitution. It is possible for federal and state governments to make laws on the same issue, but where there is inconsistency, the federal law is followed.

Some states in Australia have introduced sexual servitude laws as well, however, till now no state has amended its state criminal code to make trafficking an offence. It is likely that this will happen in at least some states in the near future. Since 2005, when the new trafficking offences were added, Australia has a raft of measures throughout the Criminal Code with which to prosecute traffickers. However, serious gaps remain regarding the critical element of exploitation, since the thrust of the new trafficking provisions seems to be more on the aspects of movement. Australian criminal law still lacks offences of outright forced labour and exploitation, which might be an easier tool for the police and prosecutors to use than the current trafficking provisions.

Changes to the criminal laws were largely to bring Australia in line with its international legal obligations, and as part of the worldwide increased focus and response to the human trafficking issue. Media pressure was also a factor leading to these changes in law and policy – especially in drawing attention to the treatment of trafficked persons, and the need for victim protection (see section, Protection and Assistance to Trafficked Persons). The relationship between the United States and Australia in the wake of the 'war on terror' and the US Department of State's Trafficking in Persons Report also had a role to play.

Slavery and sexual servitude

The 1999 offence of slavery uses the UN definition of slavery from the Slavery Convention as its starting point, "the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised *including where such a condition results from a debt or contract made by the person*". The part in italics was added to the UN definition in Australia's law to deal with the prevalent phenomenon in Australia of so-called contract women. The term *contract women* is commonly used to describe trafficking of women into the sex industry under conditions of debt bondage. Slavery and slavery-related offences (section 270.3 of the Criminal Code) attract penalties ranging from 17 to 25 years' imprisonment.

Sexual servitude is defined as, "the condition of a person who provides sexual services and who, because of the use of force or threats is not free to cease providing sexual services or is not free to leave the place or area where the person provides sexual services". In this section, *threat* is construed widely enough to include not only threats of force but also threat to cause a person's deportation or an unreasonable threat of any other 'detrimental' action. Thus the threat is wide enough to include psychological coercion over a trafficked person and is in line with the UN Trafficking Protocol. Sexual servitude offences (section 270.6 of the Criminal Code) attract a penalty of 15 to 19 years' imprisonment.

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Deceptive recruitment

The 2005 legislative changes on trafficking also revised one of the 1999 offences regarding sexual servitude, the offence of “deceptive recruiting for sexual services” under Section 270.7 of the Criminal Code. Under the 1999 offence, deceptive recruiting was inducing someone to provide sexual services by deceiving them about whether they would provide services of a sexual nature or not. The 2005 amendment broadened the offence in scope to also cover deception as to the *nature* of the sexual services provided, for example, deceiving someone about their working conditions. As amended in 2005, deceptive recruiting also covers deception concerning the extent of freedom of movement, freedom to cease providing sexual services, the amount or existence of debt owed or the involvement of exploitation, debt bondage or confiscation of the person’s travel or identity documents.

In terms of proving deception, judges and juries can consider the economic relationship between the person and the alleged offender, verbal or written contracts or agreements made between them, and the personal circumstances of the victim, including legal status and ability to communicate in English and the extent of the person’s social and physical dependence on the alleged offender.

Trafficking

The new crime of trafficking in persons (under section 271.2 of the Criminal Code) has broken trafficking down into eight individual cross-border offences, each punishable by a maximum of 12 years’ imprisonment. Four of the eight offences deal with trafficking *into* Australia and the other four deal with trafficking *out* of Australia³ – so in essence, there are four different sets of circumstances used to characterise trafficking. Domestic trafficking is also covered in four separate offences, which use the same language and carry the same penalties as the cross-border trafficking offences.

The convoluted nature of the definition of trafficking in the UN Trafficking Protocol means that when it comes to defining offences related to trafficking in national law, it is quite reasonable and appropriate for offences related to trafficking not to be based narrowly on the UN Protocol definition. However, the result of the breaking down of trafficking into eight separate criminal offences is that the scope of these offences is slightly broader than that of the UN Trafficking Protocol’s definition. It is worth noting that the draft Bill on trafficking only contained two such scenarios, but others were added because the Legal and Constitutional Legislation Committee expressed concern that the proposed offences did not meet the requirements of the UN Protocol (McSherry, 2006, 7). Under the Protocol, for trafficking in adults to occur, there needs to be three core elements of facilitated movement (recruitment, harbouring etc.), plus means (deception, coercion, abuse of vulnerability etc.), plus exploitation or the intention to subject someone to exploitation (forced labour, servitude etc.). However, some of the Australian trafficking offences extend more broadly and cover only two of these elements without always requiring the third, and so there is a gap in requiring both the *means* involved (deception, coercion etc.) and *exploitation* to be proven. All of the standard offences concerning trafficking in persons (section 271.2(1)-(2C)) are punishable by imprisonment for up to 12 years. This report looks at only four of the offences, since the other four are simply ‘mirror’ provisions dealing with trafficking out of (rather than into) Australia.

Under section 271.2(1)⁴ of the Criminal Code, cross-border facilitated movement or receipt of a person accompanied by force or threats, resulting in a person complying to enter Australia is enough to constitute trafficking. This provision is broader than the UN Protocol definition of trafficking, in so far as there is no

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requirement that proof be presented that the ‘other person’ (the trafficked person) was subjected to exploitation or that there was an intention to subject her or him to exploitation (McSherry, 2006, 8). One reason it may have been left out is because such intention to subject a person to exploitation was considered too difficult to prove.

Section 271.2(1B) of the Criminal Code⁵ captures two of the three core elements of the UN Trafficking Protocol: the process of facilitated entry, plus the final element of exploitation, since one has to prove the person facilitating the entry is “reckless as to exploitation”. The definition of exploitation given in the Criminal Code Dictionary is in line with Article 3 of the UN Trafficking Protocol. Exploitation occurs where a person causes a victim to enter into slavery, forced labour or sexual servitude, or where there is unauthorised removal of organs. The requisite means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits, is completely absent.

Section 271.2(2) of the Criminal Code⁶ is more in line with the UN Trafficking Protocol because it involves the process of facilitated entry, plus deception⁷ about whether the person will provide sexual services, be exploited, be in debt bondage or whether the person’s travel or identity documents will be confiscated. This section of the law can be used to prosecute a trafficker who deceives a person into working in the sex industry, by making them believe they will be involved in some other form of work. It does not cover the situation of women who enter Australia knowing they will perform sexual services, but are deceived as to conditions. Such cases are covered under section 271.2(2B) below.

Section 271.2(2B) of the Criminal Code⁸ deals with trafficking for sexual services only. It includes facilitated entry and takes into account that there initially may have been some consent of the trafficked person to engage in sex work in Australia. The third element required for this offence to be proven is deception as to various key factors and conditions relating to the nature of the work, freedom of movement, and debt – all of which go to the heart of exploitation. This provision is in line with the UN Trafficking Protocol. However, it is unclear why section 271.2(2B) limits these conditions only to those who knowingly enter Australia to work in the sex industry, and why these provisions could not also be applied to people trafficked for labour, especially since sex work is recognised as work in most parts of Australia.

Under section 271.3, there is a separate offence of aggravated trafficking in persons for cases in which a trafficker subjects the victim to cruel, inhuman or degrading treatment, causes serious harm or danger of death to the victim, or is reckless as to that danger. This is punishable by 20 years’ imprisonment.

Trafficking in children

There is also a separate offence of trafficking in children (section 271.4 of the Criminal Code), punishable by 25 years’ imprisonment (three provisions dealing with trafficking into and out of Australia and within Australia). This section is in line with the UN Protocol’s definition of trafficking in children.

Debt bondage

Alongside the specific offences of trafficking introduced in 2005, is the new offence of debt bondage. Debt bondage is defined in the Criminal Code Dictionary as:

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The status or condition that arises from a pledge by a person:

- (a) of his or her personal services; or
- (b) of the personal services of another person under his or her control;
as security for a debt owed, or claimed to be owed, (including any debt incurred, or claimed to be incurred, after the pledge is given), by that person if:
(ba) the debt owed or claimed to be owed is manifestly excessive; or
- (c) the reasonable value of those services is not applied toward the liquidation of the debt or purported debt; or
- (d) the length and nature of those services are not respectively limited and defined.

The definition is based on the *UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956), (signed and ratified by Australia in 1958) with a short addition in italics, that the debt owed or claimed to be owed is manifestly excessive. The intent of the debt bondage offence is to cover both written and oral contracts with trafficked persons that are manifestly unfair, and to provide another tool in order to prosecute traffickers, where crucial evidence of deception or exploitation may be lacking.⁹

In determining a situation of debt bondage, the court or jury may consider the economic relationship between the first person and the second person; the terms of any written or oral contract or agreement between them or another; and the personal circumstances of the victim of debt bondage, especially legal status, ability to speak, write and understand English or the language in which the deception or inducement occurred, and the extent of the second person's social and physical dependence on the first person (section 271.8 of the Criminal Code).

Since the offence of debt bondage covers various situations broader in scope than trafficking, such as oral or written contracts where people are forced to work as a result of even moral or family obligations, debt bondage may be regarded a summary offence, and therefore the penalty for debt bondage, at only 12 months' imprisonment, is rather light.¹⁰

There is also an offence of aggravated debt bondage under section 271.9 of the Criminal Code, which deals not with the same aggravating circumstances as in the trafficking offences, but rather confusingly with debt bondage of trafficked persons below the age of 18, the punishment for which is two years' imprisonment.

Forced labour

Since forced labour is included in the definition of exploitation, it also merits its own definition within the Australian Criminal Code Dictionary. Forced labour is not defined in the exact terms used in the ILO Convention Number 29 on Forced Labour (1930), but as:

A condition when a person provides labour or services (other than sexual services) and who, because of the use of force or threats is 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 definition of forced labour is restricted only to forced labour in sectors other than the sex industry, presumably to avoid people being tried under sexual servitude and forced labour offences simultaneously. Interestingly, there

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is no general criminal offence of forced labour in the Criminal Code; it is only defined in relation to it being an element of exploitation – vital for the smuggling and trafficking offences.

Analysis of Investigation and Prosecution of Traffickers

Since the anti-trafficking offences were only introduced in August 2005, by the end of 2006 no one had yet been convicted of these crimes. According to press articles, the first individuals to be charged under the new offences in July 2006 were involved in two separate cases, one involving the trafficking of Thai women into the sex industry (Braithwaite, 2006), and the other pertaining to the trafficking of an Indian man to work in a restaurant under slavery-like conditions (Arlington, 2006).

From the introduction of the new slavery and sexual servitude offences in 1999 to the end of June 2005, DIMA had formally referred 126 people trafficking matters to the AFP for assessment, of which 116 involved sex trafficking and 10 involved trafficking for other forms of exploitation (DIMA, 2005a, and DIMA, 2005b, 96). By the end of October 2006, a total of 23 people had been charged with trafficking-related offences, with only four convictions under the 1999 slavery and sexual servitude laws (two for possessing or exercising control over a slave and two for possessing or exercising control over a slave and sexual servitude offences).¹¹

With regard to criminal trials, to the author's knowledge, as at November 2006, only five cases have been brought to trial using the 1999 offences. Of the three completed court cases, two have resulted in guilty verdicts, *Regina (Crown) v. Wei Tang* (in Melbourne) and a more recent joint trial initiated against defendants Yotchomchin and Sieders (judgment unavailable). The Wei Tang trial was initiated against two co-accused. The conviction was recorded against Wei Tang only, upon appeal. The other was acquitted and dismissed on all counts.

In terms of failed prosecutions, cases involving four accused were dismissed due to lack of sufficient evidence: *Regina (Crown) v. Kwok*; *Regina (Crown) v. Ong*; *Regina (Crown) v. Tan*; *Regina (Crown) v. Yoe* (Commonwealth Director of Public Prosecutions, 2006, 30). The jury acquitted or could not reach a verdict on the sexual servitude charges in the case against Sally Cui Mian Xu, Lin Qi and Ngoc Lan Tran in 2005.

*Regina (Crown) v. Wei Tang*¹²

The first jury conviction of slavery offences under the Criminal Code involved a female Chinese brothel-owner (Wei Tang) and five women brought from Thailand to work in a legal brothel, under conditions of debt bondage. The women, who testified as victim witnesses, had all worked in Thailand's sex industry and had consented to come and work in the sex industry in Australia. Each owed the defendant A\$45,000 (US\$35,000) for arranging the travel and work. They worked six days per week, earning nothing in cash. Their 'cut' of the earnings was 45 per cent but used entirely to pay back their debt. Only on the seventh day of the week, they were given an option of working and keeping the day's earnings for themselves. The brothel-owner had possession of their passports. Two of the women who testified had in fact paid off their debt in a period of seven to eight months, and continued to work in the brothel, whereas the other three women were arrested mid-contract. Interestingly, there were no allegations of the use of force, violence or deception to control the victims.

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The sentence of 10 years' imprisonment seems quite severe given the absence of force or deception and especially considering that the judge took note of the fact that the women were not maltreated. The trial is considered a landmark case, since previous prosecutions had failed due to a lack of understanding on the part of both the juries and judges of how modern slavery can exist without physical imprisonment, and in the form of psychological coercion and debt bondage. The Australian Federal Police noted that the increased focus on law enforcement and prosecutions was showing results:

The trials and increased law enforcement approach has had an impact because now you see the brothel-owners do pay the girls some money and usually give them back their passports; they now use more subtle forms of control. They might threaten the women with deportation but not with threats of violence. We don't tend to see cases now of physical violence being used against victims.¹³

However, since the time of writing the report i.e. in June 2007, the conviction against Wei Tang has been overturned. Her appeal was allowed on the grounds that the previous judge's definition of slavery (in his direction to the jury) needed to make it clear that Tang must be proved to have acted with the knowledge that she was dealing with victims as though they were (her) property (Gregory, 2007).

Obstacles to successful prosecutions

As mentioned above, the federal government has invested heavily in resources for the police to investigate crimes of trafficking, slavery and sexual servitude. The additional resources, as well as media attention on the trafficking issue, has meant an increased focus by the police on securing trafficking convictions. NGOs confirm that the investigation process is smoother as a result and that the AFP, in general, are sensitive to the needs and rights of victim witnesses. However, the number of successful prosecutions so far has been quite low – only four convictions in the seven years that the slavery and sexual servitude offences have been in force.

One of the main reasons for few convictions is still a lack of evidence to prosecute traffickers. Despite the new visa regime, few trafficked persons are willing to participate in the programme because of the way in which it is applied and closely ties residency status to the criminal justice process.¹⁴

Other reasons may include the fact that crimes of a sexual nature are difficult to prosecute successfully, and trafficking for sexual exploitation is no exception. A study by the Australian Institute of Criminology analysed a sample of 149 sexual assault prosecutions in Australia over the period 1999 to 2001. The study noted that 38 per cent of the cases were withdrawn from prosecution (due to victims being unwilling to proceed or prosecutors' discretion) and 33 per cent of the cases were finalised with a guilty plea, mostly through reduction of charges or sentencing (Lievore, 2004, 43). Of the mere 29 per cent of cases that proceeded to trial, only 38 per cent resulted in a guilty verdict (Lievore, 2004, 43). The reasons given for the low success rate were: lack of evidence, lack of credibility of the complainant, lack of scientific evidence because the woman had not reported the rape straight away, issues of consent, issues with the jury system and proof beyond a reasonable doubt, and the way in which judges direct juries.¹⁵ No doubt cases involving trafficking, particularly sex trafficking, face the same obstacles. Additional complexities of race and cross-cultural issues mean that convictions are extremely difficult to obtain.

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Incongruence between state and federal laws in Australia might pose further reasons for the few prosecutions to date. States are being strongly encouraged to adopt laws in line with the federal ones, and so far six states have adopted laws on sexual servitude, but none yet on trafficking. At the state level, prosecutions have been few. There have been efforts to train the state police alongside the Australian Federal Police on trafficking issues. However, the state police are less attuned to the issues of trafficking and are unlikely to identify labour cases as trafficking and refer them to the AFP.¹⁶

While there has been additional focus on training and resources for the police and investigations, less attention has been paid to training and resources for federal prosecutors. This is equally important, especially as the Director of Public Prosecutions had, until very recently, no experience of prosecuting crimes against people (involving victims), but only experience of prosecuting crimes against the state.¹⁷ More work is required with federal prosecutors and the Director of Public Prosecutions, as so far they have not been substantially involved in developing the anti-trafficking response.

The Director of Public Prosecutions has commented in a public inquiry that unsuccessful prosecutions were rather due to the fact that juries also were not used to these sorts of crimes and did not perceive the women involved to be victims (Commonwealth, 2005, 8). The police have also observed that prosecutors should call for testimony from expert witnesses on trafficking to describe the more subtle methods of control and coercion used by traffickers, as well as to explain to juries the cultural differences for victims from South-East Asia.¹⁸

Protection and Assistance to Trafficked Persons

Residency status for trafficked persons in Australia: the new visa regime

A new category of visas was established on 1 January 2004 to enable trafficked persons willing and able to assist with investigations or prosecutions of traffickers to stay in Australia. Previously, the Australian government had maintained its policy of immediate removal for most trafficked persons. With regard to a few prosecutions under the 1999 sexual servitude legislation, only 12 visas for suspected victims were issued in the period from 1999 until 31 December 2003 (DIMA, 2005a).

The second reason for the new visa measures was in response to intense media and community pressure and public outcry over the treatment of trafficked persons, especially their detention in immigration centres and swift deportation. The death of a Thai woman, Puongtong Simaplee, in an Immigration Detention Centre in 2001 raised serious concerns about inadequate care by the detention centre authorities and their failure to seek hospital treatment for a sick detainee before it was too late (Milovanovich, 2003, 13). At the inquest, facts emerged that the detention authorities had been told by Simaplee that she had first been trafficked into the sex industry at the age of 12. NGOs raised the issue of Simaplee being trafficked in order to provoke the court into recommending that detention staff should be trained to deal with victims of sexual violence and trafficking in a more appropriate manner (Milovanovich, 2003, 14). While no such recommendation was made, there was extensive publicity from the case about how a trafficking person could be brought into Australia, and when discovered by the authorities, detained and left to die. Another case of a wrongful deportation of an Australian citizen, Vivian Alvarez Solon, to the Philippines also added to the outcry about the policy of deporting trafficked persons. A government inquiry reported that fabricated evidence of Solon being a victim of trafficking was used to persuade her swift deportation to the Philippines (Comrie, 2005, 15).

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Only those victims of trafficking authorised to stay through the criminal justice visa regime qualify for specialised services and assistance from the government. These services are organised by the Office for Women, formerly under the Prime Minister's Office but now under the Department of Families, Community Services and Indigenous Affairs. The company Southern Edge Training that won the government tender for services provides individual case management for each trafficked person. By the end of August 2006, 65 women had received services from Southern Edge Training, 33 of whom were still receiving assistance.¹⁹

30-day Bridging Visa F

The 30-day Bridging Visa F is issued to suspected trafficked persons who are likely to have information useful to aid in investigations or prosecutions as determined by law enforcement officials. In the first phase of the 30-day Bridging Visa F, Southern Edge Training organises what it considers to be 'suitable' accommodation (usually in a hotel or serviced apartment close to the AFP), financial assistance for living expenses and access to counselling, medical benefits and legal services. Under this visa, the trafficked person has no right to work. Southern Edge Training has stated that this 30 days is a period in which trafficked persons can begin to take back control over their lives and decide whether they want to assist the authorities, remain in Australia or return home.²⁰ However, although the visa is for a maximum period of 30 days, it can, in fact, be revoked by authorities any time before then, if the victim is no longer of interest to the police.

Between 1 January 2004 and 30 June 2006, Bridging Visa F was granted to 52 adults, mostly Thai women working in the sex industry.²¹ Despite requests to the DIMA, no breakdown was provided regarding how many of the 52 visas were granted to trafficked persons in the sex industry and other work sectors, or by nationality or sex.

Criminal Justice Stay Visa

Once a Bridging Visa F expires, trafficked persons who choose to remain in Australia and assist the police in investigations or participate in a prosecution may be granted a Criminal Justice Stay Visa. These are requested by the police and authorised by the Attorney General's Department. By September 2006, 43 Bridging Visa F had been converted into Criminal Justice Stay Visas.²² The length of stay is granted for as long as the person is required to assist law enforcement authorities. For those under the Criminal Justice Stay Visa, Southern Edge Training provides assistance to secure long-term accommodation, access to medical benefits and legal services, employment and training (if desired) and to social support including English language training, budgeting skills, counselling and vocational training, where appropriate. Trafficked persons on this visa are permitted to work. They are entitled to a maximum of three appointments for legal advice through both phases of the programme (Office for Women, Fact Sheet: Support for Victims of People Trafficking). Additional advice on immigration issues is provided by DIMA officers, and on criminal matters through the Director of Public Prosecutions.

Witness Protection (Trafficking) (Temporary) Visa

The Witness Protection (Trafficking) (Temporary) Visa may be granted to trafficked persons after a person has held the Criminal Justice Stay Visa. This visa is issued by the Attorney General, certifying that the victim has made a major contribution to and cooperated closely with the prosecution of a trafficker *or* made a successful contribution

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and cooperated closely with an investigation in relation to which the Director of Public Prosecutions (DPP) has decided not to prosecute an alleged trafficker. The victim must not be the subject of any related prosecutions and the Minister for Immigration and Multicultural Affairs must be satisfied that the person would be in significant personal danger were he/she to return to the home country (DIMA, undated). Thus the test is quite stringent. By September 2006, not one Witness Protection (Trafficking) (Temporary) Visa had been granted, though several were in the process of being certified.

The visa regulations do not specify at which point in time the Witness Protection (Trafficking) (Temporary) Visa should be granted. However, the way it has been interpreted by the authorities is that the temporary visa is to be made available to victims after the criminal case in which they are cooperating has concluded (i.e. post-trial).

Witness Protection (Trafficking) (Permanent) Visa

A Witness Protection (Trafficking) (Permanent) Visa is available to those who have held the temporary visa for at least two years, provided they continue to meet the criteria for the Witness Protection (Trafficking) (Temporary) Visa (DIMA, undated).

Failure to provide attention to humanitarian and compassionate factors when authorising victims of trafficking to stay

As high-level officials of the Australian government frankly admit, the new visa system “certainly has an emphasis on cooperation with an investigation or a prosecution... we did not want a situation where the people could simply assert they have been trafficked, and thus provide a basis for remaining in Australia”.²³ Since the visas are tied to the criminal justice process, trafficked persons remain in a great deal of anxiety and stress because they have no long-term security as to whether they can remain in Australia.

Currently the Witness Protection (Trafficking) (Temporary) Visa is available only post-trial of the trafficker. This thwarts the aim of a *protection* visa, if the aim is to protect victims and afford them security. Instead, victims are left in a state of perpetual anxiety over whether they can remain in Australia, as the trial may last a number of years.

In the Wei Tang case, the women were removed from the brothel in May 2003. However in September 2006, not one of the women had obtained a temporary visa. For more than three years their situation has been precarious, staying in Australia on Criminal Justice Stay Visas and being allowed to work, but with no long-term security about their residence status.

This woman, X, gave evidence at two trials. However, she still has not got the visa. She has probably given enough evidence for 10 full solid days straight, has spent weeks with the police, it resulted in a conviction but she has not even been offered the Witness Protection Visa. The police say these temporary visas should be offered to anyone who cooperates. But these women have cooperated to the utmost and still they remain on Criminal Justice Visas.²⁴

The Refugee and Immigration Legal Centre (RILC) in Melbourne terms it *witness bondage*. RILC believes the

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restrictive application of the temporary visa is because the primary concern of the police is to secure successful prosecutions and this takes precedence over the rights and interests of the women concerned.

The police don't want to lose the case; therefore, everything else is secondary. They don't want the defence to use it to say it was an incentive for women to testify – so scared are they of losing a case that they will not offer effective witness protection. It is the most appalling misuse of a visa system that simply compounds the exploitation of the victim. The visa is meant to provide protection: in fact, it does the absolute opposite; it causes more uncertainty and more trauma for the victim.²⁵

None of the visas have any application process, where a lawyer or migration agent can apply for the visa on behalf of a victim; instead, they are initiated through the request of the police or in the case of the Witness Protection Visas, upon the invitation of the Attorney General (Burn, *Immigration Review*). This further disempowers a category of people who have already faced substantial insecurity and abuse at the hands of traffickers and who are in vital need of being put back in control of their lives, rather than dangling at the end of a government official's yoyo!

Article 7 of the UN Trafficking Protocol states: "State Parties must consider adopting legislative or other means to permit victims to stay in the country temporarily or permanently in appropriate cases and that they should give consideration to humanitarian and compassionate factors." Furthermore, Principle 8 of the High Commissioner for Human Rights' Recommended Principles and Guidelines emphasises that "...protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings".

The linking of services and residency status to the victim's potential usefulness in criminal investigations and prosecutions indicates that Australia does not adhere to international standards. It also means that only a narrow category of trafficked persons can access appropriate support. While those 'non-useful' trafficked persons may seek alternative means to stay in Australia, such as applying for a protection visa (asylum), such victims do not have the same access to the specialised services available to others who cooperate.

Protection visas and asylum

For those trafficked persons who do not want to testify, it is possible to make an application for refugee status, which in Australia is termed a protection visa. The Australian government's DIMA has stated in comments to the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) that trafficked persons who choose not to assist the police in investigating and prosecuting trafficking cases can still apply for a protection visa (CEDAW Summary of 716th Session, 2006, 3). Responding to a question by the CEDAW as to whether trafficked persons were made aware of this option, the Australian government's representative said that those who apply for asylum are entitled to legal advice, and victims are given legal advice about their immigration options. However, since independent advice is limited to a maximum of three appointments, it seems that few of those who are on Bridging Visa F have ever made an application for a protection visa. As the Refugee and Immigration Legal Centre notes,

Victims of trafficking are not generally regarded as refugees by the Australian government. There have been isolated cases of successful claims for protection... The government does not really

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support victims of trafficking getting protection visas. There has been no engagement of the government or statements on these issues. Few asylum applications are accepted on the basis of gender persecution. The Tribunal has quite an unsophisticated understanding of the Refugee Convention.²⁶

Reintegration assistance

Where trafficked persons are unwilling or unable to cooperate with authorities, they are generally repatriated to their country of nationality, unless they submit an application for a protection visa. Trafficked women repatriated to Thailand now benefit from a reintegration programme funded by AusAID, which works in collaboration with the International Organization for Migration (IOM) and the Royal Thai Government. According to AusAID, returnees can choose from three levels of support. Like the services for trafficked persons in Australia, the degree of support is dependent upon a willingness to collaborate with the authorities.

Trafficked persons who are willing to participate in the criminal justice process and to allow Australian agencies to share the information they have provided with officials from the Royal Thai Government can receive support from the Royal Thai Government, through the Thai Department of Social Development and Welfare. Those who are willing to cooperate with the Australian authorities if required, but are not willing to have their information shared with the Royal Thai Government, receive support from the Australian government and NGOs. Repatriated Thai women who do not want support are provided with 30 days worth of financial assistance, on the condition that they make contact with an NGO when they return to their home country. The aim of linking returnees up with NGOs is to ensure they receive information about training, additional funds and support, if they want it.

However, up till now, the main NGO assisting returnees in Thailand, the Foundation for Women located in Bangkok, has not received requests from any returnees from Australia. The numbers of victims identified are certainly small. According to figures provided by the Royal Thai Government Bureau Against Trafficking in Women and Children, by July 2006 there had been 34 victims of trafficking returned to Thailand from Australia over a period of four years (11 of these returned in 2005). These numbers are very low, whilst far higher numbers of migrant sex workers who are not identified as victims are removed each year. Various organisations on both ends of the sex work political spectrum believe that women trafficked into the sex industry indeed choose not to be identified as victims and would rather be simply deported as illegal migrants; there is no incentive for women who have suffered severe exploitation in the sex industry to claim they are trafficked.²⁷ Both the IOM and AusAID say the intention of the new programme is to target those women returnees who are not identified by the authorities as having been trafficked, through the wide dissemination of information materials in Thai in both Australia and Thailand and hoping that such women may contact Foundation for Women in order to obtain the basic level of assistance.²⁸

4. Laws, Policies and Practices on Immigration and to Prevent the Abuse of Migrant Workers

Since Australia has a strict border control policy, few trafficked persons are smuggled into Australia. Most trafficked persons enter Australia legally on a valid visa; however, they often breach the terms of that visa by

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engaging in work, be it in the service, construction, or sex industries, agriculture, domestic labour or other sectors. Migration to Australia is governed under the *Migration Act, 1958*. The Act prescribes the various visas which enable foreigners to come and live and work in Australia. For example, there are student visas and working holiday visas which permit migrants to work a certain number of hours per week, yet migrants sometimes work more than the permitted hours.

Although the white Australia policy was abolished some 30 years ago, its remnants continue to exist in more subtle forms. Like many other industrialised countries, Australia's migration policy tends to favour skilled migration from other medium and more developed countries (predominantly European). There are various procedures in place which have the effect of preventing unskilled and/or poorly educated workers from less developed countries from entering Australia. For instance, although limited unskilled work is permitted for adult migrants below the age of 30 under the working holiday visa, 15 of the 19 countries with whom Australia has reciprocal working holiday arrangements are European countries. The others are Hong Kong SAR (Special Administrative Region of the People's Republic of China), Japan, the Republic of Korea and Taiwan. Those applying for work permits are required to show they have sufficient funds for their stay, which prevents poor people from entering, or requires them to go into debt if they wish to do so. Women who are trafficked from Korea tend to enter either under working holiday or student visas.²⁹

Illegal Employment of Migrant Workers

In addition to tight legal restrictions regarding migrant employment, the government also views the issue of illegal employment, or working in breach of visa conditions, very seriously. However, while working illegally is an offence under section 235 of the *Migration Act*, there is no primary offence for employers or others who permit migrants to work illegally (Parliament of Australia, Migration Amendment, 2006, 3). Employers who hire irregular migrants³⁰ are never charged with the offence of concealing or harbouring 'unlawful non-citizens'. While there has been some discussion as to whether employers could be charged under section 11.2 of the Criminal Code for knowingly aiding and abetting commission of an offence, prosecutions under this section are extremely rare due to the evidentiary standards of proof and lack of witnesses (Parliament of Australia, Migration Amendment, 2006, 3). The difficulty with using such an offence to charge those who have exploited or trafficked workers is that the irregular migrant worker must also be prosecuted for the offence. In the trafficking context, using such a provision would therefore not be in accordance with international human rights standards, since victims should not be punished for crimes committed as a direct result of their trafficking situation (UNOHCHR, 2002, 8).

Hence, if an irregular migrant worker is *not* recognised to be a victim of trafficking, he or she is usually detained and then deported and sometimes subject to a fine, whereas there is no substantive penalisation of the employer. In such circumstances, employers are usually issued with a warning.

Employer Sanctions Bill (at time of writing still a Bill, now passed into a law in Feb.2007)

This gap in the law has been recognised, especially by Australian trade unions calling strongly for the penalisation of employers who exploit irregular migrant workers. In March 2006, a new federal bill was tabled to penalise employers, labour suppliers and others who knowingly or recklessly employ or supply illegal workers.

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Under the new offence, irregular workers will continue to be sanctioned, but so will employers. The new offence will criminalise both referring or employing a migrant worker without a work visa or being reckless to that fact. The punishment is two years' imprisonment and/or a fine. There is an additional aggravated offence where the worker is exploited and the labour supplier or employer knows, or is reckless to that fact. This is punishable by five years' imprisonment and/or a fine. For both of these offences, it is possible to simply pay a larger fine in lieu of the prison sentence and first time offenders may be given a written warning rather than be prosecuted.

Interestingly, the explanatory memorandum for the Bill says that one of the goals of the proposed law is "to capture non-traditional work-relationships found in the construction, taxi and sex industries where many illegal workers are found" (Explanatory Memorandum, *Migration Amendment (Employer Sanctions) Bill, 2006*, para. 4.4.9). The aim of this is to be broader than the traditional worker-employer relationships. So, for example, if a brothel-owner exploits an irregular sex worker, but tries to claim they only rent a room to her, rather than employing her, this work situation will be covered by the new law (Explanatory Memorandum, *Migration Amendment (Employer Sanctions) Bill, 2006*, para. 4.4.9). If the more serious (aggravated) offence under the Bill is adopted into law, it should fill a critical gap in terms of criminalising exploitation under the UN Trafficking Protocol.

Some trade unions such as the Construction, Forestry, Mining and Energy Workers Union (CFMEU), Australian Manufacturing Workers Union and the Liquor Hospitality and Miscellaneous Workers Union have drawn attention to the fact that documented migrants are also exploited and sometimes end up working in slavery-like conditions. These unions have assisted migrants by helping them change employers, filing cases against their employer for lost wages or workers' compensation or submitting complaints to the Human Rights and Equal Opportunity Commission. These unions have been willing to represent migrant workers, even if they are not members of the union, and some will even advise and assist undocumented workers. Some of the unions explained they had better working relations with DIMA, "because we help them out reporting illegals from time to time". The interest that trade unions have in protecting migrants from exploitation and abuse is due largely to their concern about migrants undercutting market rates for workers in different industries and therefore threatening the jobs of Australian workers. However, their efforts to protect migrant workers are noteworthy and should be applauded.

Migrating for 'Semi-skilled' Employment

While Australia does not have an unskilled foreign guest worker system in place, in fact improper use of the Temporary Business (long stay) Visa (subclass 457) or so-called '457 Visa' has filled this gap. For instance, there were 28,042 principal 457 Visas approved in the financial year 2004-05 (Australian Manufacturing Workers Union (AMWU), 2006, 37).

Officially, the 457 Visa allows approved employers to sponsor 'highly' skilled personnel to come to Australia to work for up to four years in sectors where there is a skills shortage. The sectors of employment range from more traditional 'white collar' work such as finance, education and property to 'blue collar' work such as catering, manufacturing, mining and construction (AMWU, 2006, 19). In 2001, the government abolished the requirement that the sponsored person's credentials need to be vetted by Australian accrediting authorities. Holders of the 457 Visa are paid the Australian minimum wage or the minimum authorised by the government, rather than the market rate, which is substantially higher in nearly all sectors. In reality, many migrants on 457 Visas, who

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possess qualifications in sectors such as hospitality, construction and aged care, are brought to Australia because they can be paid less than other workers and often end up performing low-skilled manual labour. Monitoring of worksites and employment conditions is negligible, and when it does occur, DIMA officials generally inform the employer beforehand. 457 Visa holders are permitted to change employers, but, after leaving a job, have only one month to find a new employer to sponsor them. Hence, there is a realm for exploitation of migrants on these visas, and cases of severe exploitation have been documented in the construction, hospitality and manufacturing sectors. While only some cases may be severe enough as to constitute trafficking, trade unions have noted a significant number of cases that seem to constitute debt bondage.

For instance, a printer, JZ from China was brought to Melbourne and owed A\$10,000 (US\$7,823) to his Australian employer, even after paying upfront A\$10,000 to a recruiter in Shanghai. After the employer made deductions for the debt owed, rent, tax and health benefits, JZ only earned A\$280 per week (US\$220), even though he worked 60 hours every week. He lived with other workers in a rundown house owned by the employer. JZ slept on a mattress on the floor of the scantily-furnished house which had no heating. After a year, JZ paid back the A\$10,000 but was told his work was not up to standard and so his contract was terminated and he was going to be deported. JZ contacted the immigration authorities and then contacted a local trade union that drew attention to his case.³¹

JZ's case indicates debt bondage under Australian criminal law. Despite being widely reported in the media (e.g. Bachelard, 2006), the case was not investigated by the AFP as a debt bondage offence. DIMA, although aware of it, did not seem to refer the case to the AFP. Government officials seem largely resistant to seeing the nexus between trafficking and migrant exploitation in industries such as manufacturing, construction and agriculture. As one AFP officer stated, JZ's case was not a case for the Transnational Sexual Exploitation and Trafficking Strike Team: "We don't deal with labour cases, we just don't have the resources, if we did we'd get all sorts of cases like from fruit pickers, there would be so many."

Migrating for Sex Work

In Australia, the sex industry is decriminalised in all states and territories except South Australia and Tasmania. Therefore, like all other forms of work, it is possible for migrants to enter and work illegally, such as by working whilst on a tourist visa. If they enter on a student visa, and are legitimately enrolled and studying an approved course, they are permitted to apply for work status for up to 20 hours per week. Such foreign students are permitted to work in any industry, including the sex industry. Some trafficked women enter under student visas, but do not study and are forced to work in the sex industry fulltime.

Deportation and Removal

Those deemed to be 'unlawful non-citizens' and working in breach of their visa conditions, not identified by immigration or the police as suspected victims of trafficking, are generally swiftly repatriated to their home countries. In the financial year 2004–05, 283 out of 290 migrant women found working illegally in the sex industry were deported, of whom 73 were from Thailand (DIMA, 2005b, 64). Such migrants may be placed in detention while awaiting removal.

Detention of Migrants

Any ‘unlawful non-citizen’ who is not immediately removed or deported is usually placed in an immigration detention centre. This includes those victims of trafficking who are unwilling or unable to cooperate with the authorities in investigations. Currently migrants who file claims for protection (i.e. asylum) and who are already in mainland Australia or awaiting removal, such as victims of trafficking, are generally kept in on-shore detention facilities, such as the Villawood Detention Centre.

Under section 209 of the *Migration Act*, all non-citizens are required to pay back to the Australian government the costs of detaining them. Costs vary according to the centre. Villawood Immigration Detention Centre near Sydney costs A\$111 (US\$86) per day and Maribyrnong Immigration Detention Centre (near Melbourne) costs A\$248 (US\$193) per day (DIMA, 2004). Non-citizens who are detained generally cannot return to Australia after their removal/deportation for three years, and not without making prior arrangements with DIMA to repay the costs of their detention (Rost, 2005, 25). Whilst not always enforced, this aims to deter those who have violated immigration laws from returning to Australia. A prominent Australian Queens’ Counsel and human rights advocate, Julian Burnside, has commented on Australia’s unique detention billing system:

Section 209 of the Migration Act holds that a person held in immigration detention is liable for the costs of their detention. It is a remarkable thing that an innocent person, who is incarcerated, is made liable for the financial cost of his own incarceration. No other country on earth makes innocent people liable for their own detention (Rost, 2005, 25).

Even those who successfully obtain temporary or permanent visas have been forced to pay back their detention costs (Parliament of Australia Senate, 2006, 206). There is no exception made for those who have been wrongfully detained, such as trafficked persons. Despite the fact that a Senate committee recommended that there be a presumption against imposing these costs on non-citizens, unless there has been an abuse of process or act of bad faith on the part of the applicant (Parliament of Australia Senate, 2006, 207), nothing had changed by the end of 2006.

5. The Human Rights Impact of Laws and Policies

Failure to Identify Cases of Trafficking Outside the Sex Industry

From 1999 until the end of June 2005, 159 individuals were identified as suspected victims of trafficking by DIMA and/or AFP (DIMA, 2005b, 96). Of this number, only 7.5 per cent of the victims (12 individuals) were in sectors other than the sex industry (DIMA, 2005a). This is despite the fact that irregular workers are far more commonly found in sectors such as hospitality, agriculture, manufacturing, retail trade and construction than in the sex industry.³²

The vast majority of visas issued to trafficked persons are issued to Thai women in the sex industry. Despite increasing media attention on cases where migrant workers have been severely exploited,³³ there is a failure by

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police and immigration officials to investigate labour abuse cases as trafficking in industries other than the sex industry. The majority of the trafficked persons identified by unions are men. The following are four such case examples that have been documented by trade unions:

SK³⁴

SK, aged 17, was recruited from the Cook Islands to work in Australia in the construction industry. Since the Cook Islands are a Protectorate of New Zealand, SK has a New Zealand passport and does not require a work permit to work in Australia. When he was recruited, SK was promised he would earn the standard Australian wage and that his employer was 'a good man'. For the 18 months that SK worked for his employer, he was subjected to severe beatings on a regular basis. He was punched repeatedly in the head, hit in the face and on the head, at times with a hammer. He was forced to work 12 hours per day, six days per week and paid A\$50 (US\$39) per month. He was warned that if he tried to escape, his employer would find him and kill him. Although SK had some freedom of movement, he did not try to escape because he was afraid of his boss and wanted to get paid.

When SK eventually managed to escape, he sought medical treatment for his injuries and filed a complaint at the local police station. The beatings were so bad that SK has suffered blindness in one eye, partial deafness, a broken jaw, nose and teeth, scarring and neurological damage. The police charged SK's employer with grievous bodily harm but did not offer SK any other assistance. SK's mother flew over from the Cook Islands to help her son. Through the Cook-Islander community in Sydney, SK's family came to know of a trade union, the CFMEU, which helped him to file workers' compensation claims and claims for his lost wages, as well as accommodation and vocational training. The complaint was filed with the police, but SK's family has received little information about the progress of the case.

SM³⁵

SM was brought from South Africa on a fraudulent business or 457 Visa. He worked 11- to 12-hour days, six days per week, but earned no wages. He slept on a piece of cardboard in the laundry of his boss' apartment. A fatal accident killed his employer and one of the other South African workers. SM was rushed to hospital. Six hours later, he was on a plane back to South Africa after the wife of the dead employer visited him.

GS³⁶

GS was a chef in the Philippines. He paid 100,000 pesos (US\$2,500) to a recruiter to arrange work in Australia legally on a 457 Visa. GS was promised an annual salary of A\$39,100 (US\$30,500), but the contract stated he would only receive A\$29,182 (US\$22,800).

When GS and his wife arrived in Australia with other workers from the Philippines, they were sent to Canberra instead of Sydney, which was where they had been told they would work. In Canberra, they worked in three different restaurants and lived together in the same house. They had to work as kitchenhands, not chefs, for a minimum of 60 hours a week for A\$400 (US\$313). When one of the other workers asked his employer to release him from his contract so he could look for another job, his employer told him, "I paid A\$6,000 (US\$5,000) for you and I haven't made enough out of you to let

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you go yet... you still owe me A\$3,000 (US\$3,500), so I need to make at least that before you can go.” They were not paid for overtime and, in some instances, were not permitted meal breaks. When GS tried to complain that the conditions were not what he had agreed to, he was threatened with deportation. So he contacted the Philippines Embassy and DIMA for advice.

Soon after going to DIMA, four men kidnapped GS and confiscated his passport. They warned others: “This is an example to the rest of you! GS is being deported.” GS escaped but none of the men were charged with kidnapping or any other offence. Soon after, GS and his wife returned to the Philippines.

JK³⁷

JK from Korea was working in a plastics factory. He lived at the factory and worked up to 18 hours a day, seven days a week. He was told he would be paid A\$10 (US\$7.8) per hour but often worked excessive hours that he was never paid for. He never received annual leave, sick pay, superannuation or overtime pay. JK lost his fingers in an accident at work, but his employer refused to call an ambulance, and so he sought assistance from strangers. The employer then tried to have him deported.

SK and GS were high-profile cases which received significant attention in the mainstream Australian media. In total, these four cases alone involve at least 14 possible trafficked persons.³⁸ However, not one was questioned by the police to verify if this might be the case. While most of these individuals may not need a Bridging Visa F, as they were able to remain in Australia on other terms, neither were they offered any of the package of services heralded by the government for victims of trafficking.

When questioned about whether such cases identified by trade unions might indeed be cases of trafficking, the InterDepartmental Committee responded, “If people have access to the unions, then it is generally not a trafficking case.”³⁹ In other countries, trafficking cases are indeed identified by unions or workers in the same industry who notice suspicious or exploitative behaviour in a workplace. Having access to a union, especially where it takes place after a worker has left the place of exploitation, does not automatically make someone less likely to be trafficked.

This is not to say all labour cases are routinely ignored. One case identified and promptly acted upon by the AFP involved an Indian man recruited and forced to work in a restaurant. The employer has been charged with trafficking and slavery offences. Prompt action in that case may have been due to the intervention of a prominent national human rights organisation.

The Right to Safe and Adequate Shelter and not to be held in detention

The policy changes in 2004 enabled those identified as possible victims and regarded as useful to the authorities to access accommodation that is not in detention centres. Some commentators have noted, “Ultimately unless trafficking victims make good witnesses the door to victim support services stays closed: detention and removal

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remain the reality” (Burn and Simmons, 2006, 7). According to NGOs working with trafficked women, it is not uncommon for some trafficked persons unwilling or unable to cooperate with the police to be sent to detention centres while awaiting deportation.⁴⁰

Burn and Simmons cite the example of one woman trafficked into the sex industry in Sydney (Burn and Simmons, 2006, 6). She eventually escaped from the brothel with the help of a client. She has been in Villawood Detention Centre twice in one year. The first time, she was identified as a potential trafficking witness and released from detention under the new Bridging Visa F before being granted a Criminal Justice Stay Visa. Despite divulging all she knew and identifying alleged traffickers, the AFP stated this evidence was simply not enough and an AFP officer drove her back to Villawood (Burn and Simmons, 2006, 6). This example indicates that appropriate housing and services were actually withdrawn from someone who was trafficked but deemed no longer useful to the authorities. The right acknowledged under international human rights standards to safe and adequate shelter is evidently not recognised in practice in Australia.

The government provided little information about the accommodation provided to those trafficked persons who do cooperate with authorities. According to the police and NGOs, accommodation is generally more than adequate in terms of the physical level of comfort, and tends to be in hotels or serviced apartments in the Bridging Visa F period. The service provider, Southern Edge Training, liaises with the AFP to ensure the environment meets both the needs of the client and any security measures judged necessary by the AFP.⁴¹

There is a question over whether hotel accommodation is really appropriate for those escaping severe exploitation and abuse, such as trafficked persons. Although physically comfortable, it is also isolating and not entirely culturally appropriate to stay alone. Some organisations dealing with trafficked women report that women feel insecure and anxious as a result of being left alone for long periods.⁴²

It is also not in the Asian way of thinking for women to be left alone to stay in a hotel like that. I wouldn't be surprised to hear that women put up in a hotel would flee after a few days – it is not the right type of environment.⁴³

A more empowering solution would offer people choices over the type of accommodation they would like to stay in, shared or alone, with or without cooking facilities. Furthermore, the accommodation provided is not organised in cooperation with NGOs, which is recommended in the UN High Commissioner for Human Rights' Recommended Principles and Guidelines (UNOHCHR, 2002, 14).

The Right to Appropriate Services (adequate physical and psychological care and legal assistance)

The Department of Families, Community Services and Indigenous Affairs document inviting organisations to tender to provide services to trafficked persons states:

Australian victim support programme is one of the first of its kind in the world. Governments in a number of countries fund NGOs that work with victims and provide some forms of assistance to victims. There are very few case management schemes and the level of support does not match that which is provided in Australia (Department of Family and Community Services, 2005, 2).

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Providing services to trafficked persons through the use of a private company, Southern Edge Training, certainly appears unique. Purely from a financial perspective, the programme is very generous and seems to offer autonomy to women. However, from a human rights perspective, it is difficult for the government to substantiate the claim that this means that the services are indeed better or even on a par with those provided in other countries where the services are provided by NGOs.

Those on the visa programme are entitled to access medical care and psychological and legal assistance. Southern Edge Training acts as a referral service and consists of individual case managers who are assigned specific cases (of victims) according to their geographical location. It does not have offices in each state; assistance is provided on an individual basis. As a result, the quality of the services seems to be largely dependent upon the individual case manager assigned to each case. Case managers encourage their clients to be independent, which may work well for some victims of trafficking but not for others. Whilst some victims are given appropriate levels of support, others seem to have insufficient services and protection to meet their needs.

Limiting legal assistance to a maximum number of three appointments throughout the entire process is very restrictive. Few trafficked persons will seek independent access to legal representation unless they happen to be aware of legal aid organisations that can assist them. After three appointments, victims tend to be referred to lawyers selected by DIMA, who are unlikely to give independent immigration legal advice.

No information was available on the quality of medical or psychological assistance provided. Regarding general case management issues, various organisations which had contact with women using the services of Southern Edge Training were concerned about the lack of sensitivity or inappropriate conduct of some staff, as well as other issues related to their lack of independence, being a government contractor.⁴⁴ For instance, one case manager allegedly asked a victim to pay for her costs herself and told her she would be reimbursed upon presenting receipts.⁴⁵ This does not seem an appropriate way to deal with someone without any money and who has been a victim of debt bondage.

Although trafficked persons have a 24-hour telephone number to contact their case manager, many women from South-East Asia would not generally do this unless their predicament became extremely serious. “It is not the way of most Asian cultures to call a stranger with your problem in the middle of the night. The women do not want to be a bother – they don’t have the sense that it is their right to call. Generally, the case workers have the right intentions but they lack cultural understanding and treat victims as if they are Australians with a certain level of knowledge about how things work here.”⁴⁶

Southern Edge Training was selected to provide these services in part due to its experience in assisting released prisoners and sex workers leaving the industry to find new forms of employment. They specialise in reintegration programmes for marginalised groups, vocational training and employment.⁴⁷ Southern Edge Training has also in the past provided training to security firms. Whilst vocational training and employment assistance are undoubted strengths of the company, it faces challenges in providing some more specialised services to women who have been trafficked. The government could encourage Southern Edge Training to work systematically with those in the community who have expertise in dealing with migrants and victims of trafficking or sexual violence. While contacts have occurred on an *ad hoc* basis, they could be strengthened and promoted.

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The Office for Women stated there had been no specific challenges in providing services to victims and that the programme is meeting the needs of trafficked persons.⁴⁸ Any analysis of victim services will remain somewhat incomplete if it is not complemented by interviews with the service provider or clients. It also reflects a lack of transparency in the system for managing victim protection. Some fear Southern Edge Training's reporting obligations to DIMA further compromise the company's independence and its ability to prioritise the rights of trafficked people.⁴⁹ One reason cited for prohibiting Southern Edge Training from discussing victim protection issues is to prevent any possible interference in the ongoing criminal prosecutions of traffickers and not wanting to compromise the security of the witnesses.⁵⁰ This seems to be an overly cautious and weak justification by the Australian government. It seems more likely that it is meant to avoid criticism of the programme and how it works in practice.

The Right to In-court Evidentiary Protection

In the trials that have taken place thus far, trafficked women giving evidence have, in general, been protected adequately. The trial process is explained to them by their case managers and, if they wish, they are shown the courtroom before they give testimony.⁵¹ They are usually accompanied to and from court by a social worker or case manager, though exceptions occur. In one instance, a trafficked person giving testimony allegedly travelled alone to the courthouse, from the secure accommodation to the courtroom using public transport.⁵² In another case, it was reported that women were staying very close to the courthouse and so it would have been easy for them to be followed on their way home and threatened. Victim witnesses giving testimony have not had their names released to the press, but have given testimony in open court. As is the case in other sexual crimes, the character of the witnesses is often called into question, such as the fact that they had previously been a sex worker.

Impact on Sex Workers and Migrant Sex Workers

Decriminalisation and legalisation of the sex industry reduces exploitation

The state government of New South Wales (which encompasses Sydney) has reported that the decriminalisation of sex work has reduced levels of exploitation of women who had previously worked for illegal and organised crime syndicates. As a result, the government reports that migrant women working in the sex industry enjoy safer working conditions and increased access to health services (Flanagan, 2006). Findings of a research study which compares the circumstances of Chinese and Thai sex workers in Australia in 1993 and 2003, before and after the sex industry was decriminalised in New South Wales support this.⁵³ The study showed a marked increase in safe sex practices, better education levels amongst Chinese and Thai sex workers and a decrease in sexually transmitted diseases (Pell et al, 2006, 157). Fewer women were working 'on contracts' i.e. in debt bondage (a reduction from 27.5 per cent in 1993 down to 9 per cent of the sample in 2003)⁵⁴ and the majority of sex workers were working in legally registered brothels or workplaces in 2003. Additional questions in the 2003 survey found that, among the 165 women who were questioned, 87.5 per cent were recruited into sex work through their own efforts, 4.8 per cent paid an agent in Australia, 2.4 per cent paid an agent in their own country and 4.2 per cent paid an agent both in Australia and at home. This suggests that by 2003, organised recruitment and trafficking of migrants into sex work in Australia was perhaps not as prevalent as claims by some organisations that approximately 1000 women are trafficked into the country each year (Project Respect, 2004, 2).

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Decriminalisation and legalisation of the sex industry in Australia has meant sex worker outreach groups are able to provide advice on issues to migrant women in the sex industry much more easily, such as information about laws, health and safety. As a result, it is easier to identify and assist those in trafficking or exploitative situations. Those who wish to move out of the sex industry can obtain information about their options and be linked with support groups, education courses or skills training programmes.

Repressive anti-trafficking measures negate the positive impacts of decriminalisation

Since the heightened government attention to trafficking which began in 2003 with media outrage over the Puongtong Simaplee case, sex worker outreach groups have reported an increased targeting of the sex industry by law enforcement officials, which has unfortunately had the effect of reducing the benefits that decriminalisation offered in terms of safer work conditions and health standards for migrant sex workers.

Government attention to trafficking, as far as sex workers are concerned, has meant increased immigration raids on brothels, harassment of Asian sex workers in particular and disruption of their work. Three sex worker organisations providing outreach to migrant sex workers stated that non-trafficked migrant sex workers working legally in Australia have been wrongly detained in raids at workplaces under the suspicion that they are trafficked.⁵⁵ Sex workers who are Australian citizens of Asian descent have also been subjected to increased harassment.

Brothels that employ Asian women have repeated, concentrated, disruptive visits from DIMA. They maintain they are not employing anyone who is forced, but it doesn't matter. The receptionists don't want to work there because of the raids, the clients don't want to go to such places, so a lot of brothels closed and only offer escort services. More women are now cut off completely; they have no one to negotiate for them, no system of protection like in brothels. Outreach workers have little access to women... The less experienced workers cannot talk to more experienced ones to know the tips of how to work safer, how to deal with bad clients and they are uninformed about what is the law and their rights. Women are unable to negotiate and not empowered, the clients have more power.⁵⁶

Those hardest hit by the anti-trafficking raids are migrant sex workers working illegally. A sex workers' service provider in Melbourne, Resourcing Health and Education in the Sex Industry (RHED), points out that undocumented workers are now more mobile, frequently moving to different cities in order to avoid detection. For outreach workers providing information to sex workers, this makes it more difficult to gain the women's trust. "Prior to 2003, we knew a lot of sex workers and brothel-owners well. They would confide in us and tell us if there was a woman who was being exploited or needed help, but they don't do that anymore."⁵⁷ Although raids are one way of identifying trafficked women, police can also obtain information in other ways, such as from clients or outreach workers who visit sex workers. The repressive response of law enforcement is reported to have made it harder for groups such as Sex Workers Outreach Project and RHED to identify women in exploitative working conditions.⁵⁸

Those who are 'unlawful non-citizens', i.e. without the visa rights to be working in Australia, have their visas cancelled and are deported – as has happened to some 283 out of 290 women identified as working illegally during raids in the year 2004/05 (DIMA, 2005b, 64). According to Scarlet Alliance, a national sex workers

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association, most of these women had little or no legal advice or support, little or no access to services and no ‘cooling off’ period, i.e. no access to the 30-day Bridging Visa F.

Increased raids have made migrant women working in the sex industry go ‘underground’, working in unregistered brothels or for escort services. As Scarlet Alliance states, “Our current legislative frameworks, by the creation of a criminal and underground industry, are providing more power to those agents who make such migration arrangements to exploit these women” (Scarlet Alliance, 2004, 10).

Impact on Migrant Workers (more generally)

With the spotlight on disrupting trafficking into the sex industry, there has been less impact of anti-trafficking policies on other migrant workers. This is because law enforcement officials have made virtually no attempts to detect trafficked workers in other industries, despite some cases of severe exploitation being identified.

An important question to consider in this context is whether and how migration policies contribute to trafficking. While the 457 Visa is meant to secure some level of protection for migrant workers, in fact, it can make it difficult for workers to leave exploitative work conditions, since the visa ties workers closely to their employers. This was so in the case of GS and other Filipinos working in Canberra restaurants. DIMA regulations state that one of the conditions for holders of the 457 Visa is that they must not stop working for the employer specified on their visa.⁵⁹ While it is possible for workers to change employers within 28 days of their visa status being revoked by their employer-sponsor (i.e. due to dismissal or resignation of the worker), in practical terms it can be difficult for workers to find a new employer willing to sponsor them and pay the costs of that sponsorship in the short timeframe. Unions report that DIMA officials have been unhelpful when addressing such situations.

We asked them to investigate the Filipino workers’ claims, and to permit them to change jobs because they were being exploited. DIMA refused. They said they can’t do that. They can’t rush off and investigate the case, just because the unions allege this is happening. They were antagonistic and obstructive. They said the Filipinos can leave their jobs, but they will have to be deported. Only when it became a big media story did they come kicking and screaming to do something about it.⁶⁰

Trade unions commonly use the media to draw attention to such cases in order to pressurise DIMA officers to take action. Following media pressure, DIMA did inspect one of the worksites (though informing the employer the day before) and eventually granted the remaining workers permission to change employers. A report commissioned for DIMA surveying holders of the 457 Visa also found that several migrants felt their employers had exploited them by violating their contract or had taken advantage of their temporary status that is dependent on the employer’s sponsorship, and the migrants were therefore liable to threats of withdrawal of that sponsorship if they made complaints (Khoo et al, 2005, 19 and 29). One way of overcoming this would be to permit migrants who have suffered exploitation or underpayment a longer time period in which to find a new employer.

One of the positive aspects of Australia’s industrial relations policy is that there are reasonably strong protections for workers and simple procedures to claim lost wages and compensation. The procedures are fairly open, transparent and fast. Although there have been significant efforts to weaken trade unions under the Howard

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Government, trade unions in Australia are still remarkably strong when compared with other countries, and therefore their efforts to protect migrant workers have had a significant impact.

Unions have had some success in obtaining monetary compensation for migrant workers who have been exploited and/or injured at work, by lodging claims through the Office of Workplace Services (for wage complaints) and Workcover (for occupational health and safety and workers compensation); for instance, in the case of GS and the Filipino workers, for underpayment of wages, and in the case of SK, for workers compensation.

6. Conclusion

Australia's geographical isolation not only impacts upon its relatively small trafficking problem, it also has an impact on the extent to which the Australian government is influenced by others in the international community on the issue of trafficking. The Australian media has been noted throughout this report as the most significant pressure group that has provoked officials into taking action on cases and also to adopting anti-trafficking policies and practices. Influence by the international community has had significantly less effect, though the notable exception would be Australia's relationship with the United States. There is less regular engagement on issues of migration with other industrialised countries of destination (in Europe and North America) owing to a lack of common borders. In its region, amongst Asian and Pacific countries, Australia tries to position itself as a leader (for example, through the Bali Process). In terms of victim protection, the lessons learnt from other countries, while often reflected by NGOs and advocates on behalf of trafficked persons, have not been followed in Australian government policies.

Australia is ranked in Tier One of the US Department of State's Trafficking In Persons Report as a country which meets the minimum standards in combating trafficking. Its reported figure of less than 100 persons trafficked per year may have more to do with removing itself from the Report altogether, than reflecting accurately the scale of the problem or the extent to which Australia respects international standards with respect to people who have been trafficked. The Bush Administration's global anti-prostitution agenda does not seem to have had much impact on Australia's sex industry laws. Since the US government considers Australia an ally in the 'War on Terror', perhaps it has not sought to cause tension by trying to influence Australia in terms of changing its policies on prostitution.

Even if the Australian government does not engage closely with the international community and other countries on trafficking, it is certainly very sensitive to criticism. While it was cordial and prompt in responding to requests by GAATW's representatives and meetings at a federal level, there was a reluctance to facilitate contacts with those working directly with trafficked persons, in order to avoid 'mixed messages' coming from the government. Privacy and security of women who have been trafficked has also been used as an excuse to avoid criticism of government policies and further avoid openness and transparency.

The government could do more to ensure that community groups working on trafficking are an effective part of its anti-trafficking response and assistance programmes. The procedure of tendering to provide services to victims and for a national awareness raising campaign seems to favour larger consulting or private companies

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over smaller NGOs and service providers. This indicates that various NGOs and service providers with expertise on the issue have been sidelined.

Few organisations work directly with trafficked persons in Australia, but a number do advocate for victims' rights. It is difficult for NGOs in Australia to obtain funding to work on trafficking, either to provide services or to organise advocacy or research. As a result, some NGOs and academics have become very territorial about the information they acquire about specific cases of trafficking and are unwilling to share information with each other or with outsiders. Anti-trafficking advocates, as everywhere, are further split according to ideological differences concerning prostitution. Recently, however, there have been efforts to bring religious communities, sex workers groups and anti-trafficking and migration advocates together for strategic advocacy. Trade unions are yet to join this fray.

Although the recent efforts of the Australian government to deal with trafficking are to be commended, far more needs to be done. The government's weakest link is its narrow identification of those deemed suitable for assistance. The perspective of government officials from a range of departments has seemed to suggest that someone is a victim of trafficking only if they can prove it through a criminal prosecution. This is an extremely small quintile of cases. Imagine if the same methodology were to be applied in rape cases – that all victims of sexual assault must be willing to accuse their rapist in court in order to receive appropriate medical assistance and counselling! Such an approach would clearly not be an adequate way of protecting the rights of the women involved and would be rejected by both feminists and many others in Australia's electorate. However, women trafficked to Australia from abroad do not have a stake in the country's political system and their rights can be ignored with impunity.

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ENDNOTES

- ¹ The department responsible for immigration has undergone various name changes in recent years. Before DIMA it was called the Department of Multicultural and Indigenous Affairs (DMIA). In January 2007, DIMA changed its name again to Department of Immigration and Citizenship (DIAC).
- ² See for example, the explanation of prevention in the Briefing on the AusAID Response to Human Trafficking, 6 September 2006, provided to GAATW: “Preventing the trafficking of women and children involves a range of activities – warning potential victims about trafficking activities, enhancing countries’ capacity to enable investigations to be carried out successfully, ensuring the existence of appropriate and effective laws to enable suspected offenders to be charged, and ensuring that investigating and prosecuting agencies are appropriately trained and resourced to enable successful prosecutions to be achieved.”
- ³ In the case that Australian citizens or residents are trafficked, or indeed if Australia was used as a transit country for transporting victims to another country, such as New Zealand. For simplicity, this section refers only to the four provisions of trafficking *into* Australia, since the out-of-Australia provisions mirror the substantive language exactly regarding what constitutes the offence, the only change being “entry to” or “exit from” Australia.
- ⁴ Section 271.2 (1A) uses the same terms to address trafficking from Australia.
- ⁵ Section 271.2 (1C) uses the same terms to address trafficking from Australia.
- ⁶ Section 271.2 (2A) uses the same terms to address trafficking from Australia.
- ⁷ In Australian criminal law, the word *deceive* is defined as “to mislead as to fact (including the intention of any person) or as to law, by words or other conduct”.
- ⁸ Section 271.2 (2C) uses the same terms to address trafficking from Australia.
- ⁹ Interview, InterDepartmental Committee, Canberra, 7 September 2006.
- ¹⁰ Interview, InterDepartmental Committee, Canberra, 7 September 2006 (response by AFP).
- ¹¹ Written email communication, AFP as part of joint InterDepartment Committee response, received 21 December 2006.
- ¹² All facts of the case from the judgment *R v. Wei Tang* [2006] VCC 637.
- ¹³ Interview, AFP, Melbourne, 14 September 2006.
- ¹⁴ Confirmed in the interviews with Refugee and Immigration Legal Centre, Scarlet Alliance, AIDS Council of New South Wales and Project Respect.
- ¹⁵ Interview, Australian Institute of Criminology, Canberra, 7 September 2006.
- ¹⁶ Interview, Anti-Slavery Project, Sydney, 5 September 2006 and Interview, Scarlet Alliance and AIDS Council of New South Wales (ACON), Sydney, 5 September 2006. For instance, in the case of a Cook Island youth trafficked into the construction industry and suffering repeated beatings by his employer, when reported to the New South Wales State Police was not identified as a case of trafficking. No referral was made to the AFP. The case was charged as grievous bodily harm, and even to date, despite significant media attention on the case, actions by trade unions and support from a human rights organisation, no action has been taken to consider the case as one of trafficking.
- ¹⁷ Interview, Human Rights and Equal Opportunity Commission, 6 September 2006 and Interview, Brimbank Melton Community Legal Centre, Melbourne, 14 September 2006.
- ¹⁸ Interview, AFP, Melbourne, 14 September 2006.
- ¹⁹ Office for Women, written communication, 5 September 2006.

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Rowe, J., Victims of Trafficking Care and Support Program, Southern Edge Training, Power Point Presentation.

Interview, InterDepartmental Committee, Canberra, 7 September 2006 (response by DIMA).

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DIMA Executive Coordinator, Border Control and Compliance Division in Commonwealth of Australia, Official Committee Hansard, 2005, 12.

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Interview, Refugee and Immigration Legal Centre (RILC), Melbourne, 14 September 2006.

Interview, Refugee and Immigration Legal Centre (RILC), Melbourne, 14 September 2006.

Such as Resourcing Health and Education in the Sex Industry, Anti-Slavery Project and Project Respect.

Telephone Interview, AusAID, Bangkok, 20 November 2006 and Telephone Interview, IOM, Bangkok, 24 November 2006.

Likewise, Australia has a slightly different reciprocal Work and Holiday arrangements in effect with Iran, Thailand and Chile. This requires applicants to show they have sufficient funds for their stay and return home, be able to speak English at a functional level and hold relevant academic qualifications (minimum tertiary degree) as well as a letter of approval from their government agreeing to their stay in Australia. They can stay for one year and work for an employer for a maximum period of three months, and also study or train for up to four months. Due to these more stringent requirements, women trafficked from Thailand rarely go through these channels.

In this report, the term *irregular migrant* refers not only to those without documents, but those without the authorisation to work in a country, in accordance with the UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990).

Interview, Australian Manufacturing Workers Union, Melbourne, 14 September 2006 and various press articles e.g. Bachelard, 2006.

Personal and other services (i.e. sex industry) only comprise 7.5 per cent of the total number of irregular workers apprehended by DIMA in the fiscal year 2004/5 (DIMA, 2005b, 60).

See for example, Bachelard, Michael, "Underpaid, sacked, evicted: guest workers who have had enough", *The Age*, 6 September 2006.

All names given in the case studies are fictitious in order to protect the privacy of the people involved. Source: Interviews with SK, SK's mother and CFMEU, Sydney, 15 and 18 September 2006, and supporting documentation such as filed police report.

Source: "Death Sites Under Construction," Workers Online, Issue No. 326, 29 September 2006.

Source: Interview, Liquor, Hospitality and Miscellaneous Union, Canberra, 6 September 2006 and supporting documentation filed to the Australian Capital Territory Human Rights Office.

Source: Interview, Construction, Forestry, Mining and Energy Union, Sydney, 8 September 2006 and supporting documentation.

The number of 14 is a very cautious estimate. SK was one of five Cook Islanders exploited by his employer; GS was one of twenty Filipinos brought to work, of whom at least six seemed to endure forced labour conditions; SM was one of two South Africans plus JK, the Korean.

Interview, InterDepartmental Committee, Canberra, 7 September 2006.

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40 According to Scarlet Alliance, AIDS Council of New South Wales (ACON), Anti-Slavery Project and Australian
Catholic Religious Against Trafficking in Humans.

41 Written communication from Office for Women, Canberra, 5 September 2006.

42 Interview, Australian Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006, and Interview,
Anti-Slavery Project, Sydney, 5 September 2006.

43 Interview, Australian Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006.

44 Such as AIDS Council of New South Wales (ACON), Anti-Slavery Project, Australian Catholic Religious Against
Trafficking in Humans, Project Respect, Refugee and Immigration Legal Centre and Scarlet Alliance.

45 Interview, Australian Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006.

46 Interview, Australian Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006.

47 Rowe, J., Victims of Trafficking Care and Support Program, Southern Edge Training, Power Point Presentation.

48 Written communication from Office for Women, Canberra, 5 September 2006.

49 GAATW Interview, Georgina Costello, New York, 12 September 2006.

50 Interview, InterDepartmental Committee, Canberra, 7 September 2006.

51 Interview, AFP, Melbourne, 14 September 2006.

52 Interview, Refugee and Immigration Legal Centre (RILC), Melbourne, 14 September 2006 and Interview, Australian
Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006.

53 Legalisation occurred in 1995 in New South Wales.

54 The sample size in the 1993 survey was 91 sex workers and in the 2003 survey was 165 sex workers.

55 Interview, Scarlet Alliance and AIDS Council of New South Wales (ACON), Sydney, 15 September 2007.

56 Interview, Scarlet Alliance and AIDS Council of New South Wales (ACON), Sydney, 15 September 2007.

57 Telephone Interview, Resourcing Health and Education in the Sex Industry, Melbourne, 22 September 2006.

58 Telephone Interview, Resourcing Health and Education in the Sex Industry, Melbourne, 22 September 2006.

59 <http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employee.htm>

60 Interview, Liquor, Hospitality and Miscellaneous Union, Canberra, 6 September 2006.

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Bosnia and Herzegovina

*Barbara Limanowska**

1. Introduction

After the war ended in 1995, Bosnia and Herzegovina (BiH) in South-Eastern Europe became one of the countries with the highest number of identified cases of trafficking in women for the purpose of sexual exploitation. The main pull factor was the presence of the UN peacekeeping forces and being on the migration route from Eastern Europe (Moldova, Ukraine, Romania and Bulgaria) to Western Europe.

BiH has signed the UN *Convention against Transnational Organized Crime* and both its Protocol to Prevent, Suppress and Punish Trafficking in Persons and its Protocol against the Smuggling of Migrants by Land, Sea and Air, ratifying them in February 2002. Provisions of the law relating to trafficking and human smuggling in BiH are entirely in harmony with the provisions of the UN Trafficking Protocol.

2. Current Legal Framework

Criminal Law

Trafficking, according to the BiH Criminal Code, can be punished by a prison term of between one and 10 years. Trafficking organised by a group of people can be punished by imprisonment for a term of not less than 10 years or long-term imprisonment. Child trafficking can be punished by imprisonment for a term of not less than five years.

However, the understanding of the definition of trafficking on the ground is not always in compliance with the Criminal Code definition. On the one hand, there is no recognition in the law that people might be trafficked and subjected to forced labour, in and from BiH, other than for the purpose of sexual exploitation. Also, trafficking of children for begging is not recognised as such. On the other hand, all cases of migrant prostitution are perceived

* The information used in this article was collected during the author's work for the Office of the UN High Commissioner for Human Rights (OHCHR) in Bosnia and Herzegovina. The author is grateful to the OHCHR for permission to use this data and to all other organisations and institutions in BiH for sharing information used in this chapter.

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to be cases of trafficking and recently local prostitutes who have been abused by their pimps or requested assistance from NGOs for other reasons have started to be called ‘victims of trafficking’.

As part of the reform of the legislation, in 2003, the UN Office of High Representative in BiH introduced the state level *Criminal Code* and *Criminal Procedure Code* and the *Law on Protection of Witnesses under Threat and Vulnerable Witnesses*. The new legal framework came into force on 1 March 2003. The second phase of reform was the harmonisation of the *Entities’ Criminal Legislation*, finalised in July 2003 and adopted at state level.¹ Due to the concerns raised by the Office of the UN High Commissioner for Human Rights (OHCHR) in BiH, and other international organisations and local NGOs, amendments to the country’s Criminal Code, which entered into force in January 2005,² include amendments to the criminal offences of trafficking and related crimes and smuggling in persons. Those amendments have entirely altered previous Articles 186³ and 189⁴ and brought them into line with the UN Trafficking Protocol.

Law on Protection of Victims

The current anti-trafficking provisions that relate to protection and assistance originated in the *Temporary Instructions on the Treatment of the Victims of Trafficking* issued in 2002.⁵ Subsequently they were used to create the basis for the *Rulebook on conditions and procedures of entry and residence of foreigners* which entered into force in February 2005.⁶ This *Rulebook* is the by-law of the *Law on Movement and Stay of Aliens and Asylum*,⁷ which relates to the following: the entry of foreigners into the country; issuing visas at borders; residence of foreigners; temporary residence permits; permanent residence permits, foreigners’ identity cards, sticker for the granting of residence permits, cancellation of residence permits, registration of residence permits, registration and cancellation of residence and change of address.

Another by-law of the *Law on Movement and Stay of Aliens and Asylum*, issued in May 2005 by the BiH Minister of Security, is the *Instruction on procedures for expulsion, detention and tributaries for expenses of detention and expulsion of foreigners from Bosnia and Herzegovina*.⁸ This *Instruction* prescribes the procedure for voluntary or forced expulsion of foreigners from BiH and other issues linked to expulsions, which are also used in cases of trafficking.

Amendments to the *Law on Protection of Witnesses under threat and vulnerable witnesses* entered into force in January 2005.⁹ This law has strengthened protection of witnesses in criminal proceedings (Article 1) by stipulating that witnesses under threat and vulnerable witnesses have a right to legal aid and to support from social welfare services. It also states that these measures are applied only with the consent of the witness and in the best interests of the witness. The law has introduced additional measures which secure non-disclosure of the witness’ identity as well as a series of other measures.

While the *Law on Protection of Witnesses under threat and vulnerable witnesses* prescribes protection of witnesses only in criminal proceedings, the *Law on Witness Protection Program*, from 2003, offers more options to the protected witnesses. Witnesses and their family members can be protected not only during a trial, but also after the criminal proceedings, if they face a risk to their life, health or freedom.¹⁰ The law also states that protection measures should also be implemented in relation to foreign witnesses present in BiH.

Other Laws¹¹

Other laws which relate to protection, assistance and/or prevention of human trafficking, according to the *Report on Trafficking in Human Beings and Illegal Immigration in BiH*, include *Strategy for Integrated Management of Borders* and the *Law on Foreigners' Affairs Service* that entered into force in July 2005.

Agreements on Readmission with Denmark, Norway, Romania and Sweden were concluded in 2005. Similar agreements were expected to be signed in 2007 with other countries in the region, including Albania, Bulgaria, Macedonia, Moldova and Turkey. In April 2005, the Ministry of Security signed *Protocols on Cooperation and Securing of Adequate and Safe Accommodation and Protection of Foreign Victims of Trafficking* with five NGOs – Forum for Solidarity (running two shelters in Gračanica and Sarajevo), Lara (with a shelter in Bijelina), •ena BiH (Mostar), La Strada (Mostar) and Medica Zenica (Zenica). The Protocols regulate rights and obligations of cooperation in accordance with the *Rulebook on Protection of Foreign Victims of Trafficking*. Under the Protocols, the NGOs are obliged to provide accommodation and health-related services to the foreign and local victims of trafficking accommodated in their shelters. The activities are financially supported by international donors and by the Ministry of Security.

Also, in June 2005, the Ministry of Security and the IOM's Mission to BiH signed a *Protocol on Cooperation* related to the implementation of programmes and projects to combat trafficking. These include the protection of victims of trafficking, institutional capacity building of the Ministry and other institutions in BiH, prevention activities, as well as implementation of activities concerning the voluntary repatriation of trafficked persons to their countries of origin.

Governmental Structures and National Plan of Action

In an attempt to better coordinate anti-trafficking activities, the Council of Ministers, during its session on 17 July 2003, adopted the *Decision on Procedures and Ways to Coordinate Activities Suppressing Trafficking in Persons and Illegal Migration* which established the function of State Coordinator for Combating Trafficking in Human Beings and Illegal Migration in BiH.¹² The responsibilities of the State Coordinator include:

- Coordinating activities relating to human trafficking with relevant domestic and international institutions;
- Directing the activities of, and establishing contacts with, other ministries at the state and entity level;
- Initiating meetings with all organisations and institutions involved in the suppression of human trafficking and illegal immigration and for collecting all relevant information for the purpose of preparing reports, and, crucially, for monitoring the implementation of the National Plan of Action (NPA) against Trafficking.

The decision also obliged the Minister of Security, the Minister of Human Rights and Refugees, the Minister of Foreign Affairs, the Minister of Justice and the BiH Prosecutor to appoint state officials for the coordination of competencies within relevant ministries. It also obliged the State Coordinator, in cooperation with the appointed officials from the ministries and the Office of the Prosecutor of BiH to prepare, follow up and implement the NPA and to make quarterly suggestions on measures for its improvement; to organise and chair meetings with domestic and international organisations and institutions involved in activities combating human trafficking; and to harmonise programmes and projects that are part of the implementation and goals of the NPA.¹³

3. The Implementation of Laws and Policies

Identification and Assistance to Foreign Victims of Trafficking

In September 2002, BiH took part in a coordinated police action against trafficking and illegal migration called Operation Mirage, organised by the South Eastern European Co-operative Initiative (SECI), tasked with the coordination of the regional law enforcement cooperation in the whole region of South-Eastern Europe. Before Operation Mirage, local NGOs met with the representatives of the SECI and the Stability Pact Task Force against Trafficking (SPTF) to discuss their involvement in the action and the possibility of providing assistance to the victims identified during the operation. The NGOs called for the creation and use of clear protective measures for everyone who was identified as a victim of trafficking, which would ensure protection of their rights during and after the operation, as well as the standardised procedures and proper behaviour of law enforcement agencies. As a result, the *Temporary Instructions on the Treatment of the Victims of Trafficking* (generally referred to as the *Temporary Instructions*), were drafted by the Ministry of Human Rights and Refugees, with the assistance of the OHCHR and local NGOs.¹⁴ The Ministry distributed the *Temporary Instructions* to police stations before Operation Mirage started, instructing the police to use them during the operation. Five NGOs signed a Memorandum of Understanding with the Ministry to establish the rules of cooperation during Operation Mirage and to ensure the implementation of the proposed measures.

The *Temporary Instructions* were based on the following principles:

- All persons found in places in which illegal activity might be taking place are given the status of a protected person for a period of up to 10 days. During this period it is necessary to determine the identity of such persons and whether or not they have been trafficked.
- A protected person is immediately accommodated in a shelter (safe house) run by a local NGO, which has signed a protocol of cooperation with the Ministry for Human Rights.
- If it is determined that the person has been trafficked, the person is automatically given temporary residence for humanitarian reasons for a period of up to 3 months, which can be extended under certain conditions.
- Children under 18 who are victims of trafficking should receive special protection and treatment.¹⁵

The lessons learnt from Operation Mirage led to a general consensus that the *Temporary Instructions* on referral and assistance to the victims of trafficking were a necessary component of anti-trafficking legislation. As a result, the document that established the procedures for identifying foreign victims of trafficking in BiH has been developed as a by-law to the *Law on the Movement and Stay of Foreigners and Asylum – the Rulebook on Protection of Aliens Victims of Trafficking in Persons*.¹⁶ However, due to the general character of the *Rulebook* and an unclear division of responsibilities among the various institutions involved, it proved to be difficult to implement. Therefore, in July 2005, the State Coordinator for Combating Trafficking in Human Beings and Illegal Migration in BiH called for a meeting in the town of Vlasica to develop a set of instructions clarifying and helping to implement the *Rulebook*, known as the *Vlasica Procedures*.¹⁷

The Rulebook on the Protection of Aliens Victims of Trafficking in Persons

According to the *Rulebook*, the officials authorised to conduct interviews with the victim and assess whether the person is a victim of trafficking are the “authorized officials of the organizational unit of the Ministry of Security”.¹⁸

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These authorised officials of the Department for Foreigners are obliged to assess the following before taking a person to a shelter:

- Self-identification (as someone who has been trafficked);¹⁹
- Place and conditions where a foreigner, a potential victim of trafficking, was found;
- Deprived of personal liberty;
- Psycho-social condition;
- Age, especially if it concerns persons under 18 years of age;
- Way and purpose of entry to BiH;
- Status, movement and stay of person in BiH;
- Possession of travel document;
- Possession of financial resources;
- As well as other circumstances relevant for a valid identification.²⁰

Anyone who is reckoned to be a potential victim, upon their consent, should be transferred to a shelter and “given the status of a protected person for a period of 15 days.”²¹ There is no reference in the *Rulebook* to the possibility of placing a person in a shelter without her or his consent.

Everyone who is placed in a shelter is “entitled to the right to temporary stay for humanitarian reasons of a duration of up to three months for the purpose of protection and assistance for recovery and return to the country of origin.”²² The decision to grant temporary residence for three months is made by “the competent organizational unit of the Ministry of Security”,²³ when a victim lodges a request for an extension of temporary stay.

According to the *Rulebook*, the main institution responsible for the identification of foreign victims of trafficking and deciding about issuing temporary residence is the Department for Foreigners – an institution responsible for the implementation of the *Law on the Movement and Stay of Foreigners and Asylum*. However, according to the *Vlastic Procedures*, the decision about the status of the potential victim is taken by the prosecutor and no reference is made to any role for the NGOs in the process of identification and self-identification.

The Vlastic Procedures

The Vlastic Procedures were developed to interpret the *Rulebook* and to create standard procedures for the agencies involved in the process of identification and assistance of victims of trafficking along the lines of the National Referral Mechanism procedures developed in other countries in the region. According to them, while there are several possible forms of identification, the procedures to be followed by the institutions involved after preliminary identification should be the same. In the case of identification by an NGO, this NGO is obliged to inform the Department for Foreigners or the prosecutor/police and the NGO Vasa Prava (Your Rights),²⁴ which has signed an MoU with the Ministry of Security and which offers legal assistance to *all* victims of trafficking. In the case of the identification by the police or prosecutor, the police have to inform the Department for Foreigners and the NGO Vasa Prava.²⁵ Further steps are the same:

- The Department for Foreigners, in cooperation with the police, decides in which shelter the potential victim of trafficking should be accommodated.
- The Department for Foreigners submits to the shelter a written request for the placement with the victim’s written approval.

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- When the victim's approval for placement in the shelter is lacking, the police/prosecutor has to include in the request information that the person is accommodated in accordance with Article 68 of *the Law on the Movement and Stay of Foreigners and Asylum*.²⁶
- Within 15 days of the placement, the prosecutor should inform the Department for Foreigners "in a form of evaluation or recommendation" whether there is a need for a temporary residence permit on humanitarian grounds to be issued.
- If the prosecutor determines that there is no need for a temporary residence permit, the Ministry of Security proceeds with applying its procedures according to the *Law on the Movement and Stay of Foreigners and Asylum*.
- The prosecutor should also inform in writing to the Ministry of Security about the cessation of the need to extend a temporary residence permit for the victim.
- If the victim does not wish to be returned voluntarily to the country of origin, or habitual residence, the Ministry of Security shall conduct an expulsion procedure, in accordance with the *Law on Movement and Stay of Aliens and Asylum*.²⁷

The Vlasic Procedures provide clear instructions for the various institutions involved regarding their involvement in the process of identification and assistance. However, these instructions are not always in compliance with the *Rulebook* and may negatively impact on the rights of the victims of trafficking.

The Vlasic Procedures open up the possibility that potential victims can be placed in shelters without giving their consent (in accordance with Article 68 of the *Law on the Movement and Stay of Foreigners and Asylum*). In such cases, NGO shelters are being expected to accommodate people who do not wish to stay there and thus to function as centres for illegal migrants in need of supervision. In other words, NGOs have been given the task of supervising, or even detaining, aliens.

The 15-day reflection period, mentioned in the *Rulebook* as the time for a victim to recover and make an informed decision about the future, is seen in the *Vlasic Procedures* as the period for the prosecutor to decide whether to grant the victim the right to stay in a shelter. Consequently, the decision to request further assistance depends not on the victim, who, according to the *Rulebook*, has the right to ask for a temporary residence for three months, but rather on the prosecutor, who decides if the victim should have the right to apply for temporary residence.

From the perspective of victims' rights protection, there are a range of other concerns about the whole process of identification which have a negative impact on their rights. These include:

1. The lack of clear indicators for identification: it seems that the set of standard issues listed in the *Rulebook* is either not used or is not sufficient to determine the status of potential victims;
2. Marginalisation of the role of self-identification and the role of the shelter staff in the process of identification and consequently giving authority for identification almost exclusively to law enforcement officials, to the evident detriment of some victims;
3. Establishing the procedure for accommodation of victims in shelters without their consent, which can be perceived as unlawful detention;
4. Making the status of the victim and provisions of services conditional on cooperation with the police and prosecutors and willingness to testify against traffickers;

5. A lack of any monitoring and evaluation of the process of identification of victims of trafficking.

It has to be added that the *Vlasic Procedures* are not binding, as they were never published in the Official Gazette as a legal document and were not approved by the Council of Ministers. The document only has the status of an informal agreement, approved and signed by governmental, non-governmental and international agencies working on the issue of trafficking in BiH. However informal it is, it nevertheless is being implemented and consequently has a significant effect on people who have been trafficked.

Identification and Assistance to Local Victims of Trafficking

According to the State Group – a governmental body assisting the State Coordinator for Combating Trafficking in Human Beings and Illegal Immigration – there is a satisfactory legal framework for assistance to foreign victims of trafficking, but there is still no adequate legislation for protection of local victims (both Bosnians who are trafficked within BiH and BiH citizens who have been trafficked abroad and then returned to BiH).²⁸ It was not only the ambiguities in existing legislation which created the impetus to draw up the *Vlasic Procedures for Treatment of Victims of Trafficking in Bosnia and Herzegovina*, but also concern that referral procedures were needed for local victims.

Regardless of the fact that the number of assisted local victims of trafficking in BiH has grown since 2001, the legally-binding rules for the identification and assistance to local victims of trafficking are still lacking. The only text which mentions the treatment of local victims is the *Vlasic Procedures* in its Part III – Treatment of Domestic Victims of Trafficking. However, the provisions are only very general, stating that, “The procedure for the treatment of local victims of trafficking is carried out in accordance with Section II, Chapter A, except for those provisions which apply to treatment of foreign victims of trafficking.”²⁹ The *Vlasic Procedures* do not include any information related to the procedures for identifying local victims.

Information on trafficking within BiH is rather limited among the agencies that are involved.³⁰ While the majority of anti-trafficking institutions are convinced that local trafficking is a growing problem, this conviction is based, on the one hand, on an increase in the number of assisted local women and, on the other, on information about the expanding or changing market for commercial sex in BiH.

The growing number of identifications of local victims does not necessarily mean that larger numbers of Bosnian women are becoming victims of trafficking. It may also be due to the increased interest of organisations and international agencies that provide assistance in identifying local trafficking and including its victims in their statistics. While there is more acceptance now than a few years ago that the definition of trafficking does not apply exclusively to cross-border crimes, but that local women too can be trafficked (within Bosnia), the mechanisms for their identification and assistance are still not in place.

The Vlasic Procedures give the main role in the process of identification of local cases of trafficking to the prosecutor: “Non-governmental organizations and competent social welfare institution shall, at the request of the prosecutor, try to ensure all necessary assistance and protection for the victims.”³¹ And: “In case where a non-governmental organization is the first to come into contact with local victim of trafficking, the NGO shall inform the prosecutor, or the police, and, with the consent of the trafficking victim, also competent social welfare

institution.”³² “Further procedure for the treatment of the domestic trafficking victim is applied in accordance with Section III, Chapter A.”³³

These have serious consequences for the process of identifying victims of trafficking. They imply that any information about any possible victims of trafficking which NGOs acquire, must be forwarded to the police/prosecutor, regardless of the consent of the victim, whereas mentioning the victim’s case to the social welfare institution does depend on the wishes of the trafficked person. This shows that the needs of the prosecution are being given much higher priority than the need to protect the individuals involved. NGOs that have signed MoUs with the Ministry of Security are not entitled to keep any information confidential about any case of trafficking, even when requested to do so by the victim. And, as in the case of the procedures concerning foreign victims, the decision whether the person is recognised as a victim of trafficking is made by the prosecutor, who might then request NGOs to provide assistance to the victim (or not). While, in theory, NGOs are not prohibited from assisting persons in need who are not recognised by the state authorities as victims of trafficking, the decision of the prosecutor has direct financial consequences for NGOs which have signed the MoU with the Ministry of Security, as they receive funding from the Ministry and the IOM only for formally ‘identified cases’.

It is also worth pointing out that the information available about trafficking cases in BiH is not usually fully reliable and the response to trafficking is focused entirely on combating trafficking in women for commercial sexual exploitation. NGOs and experts have pointed out the existence of other forms of trafficking in BiH and the need to establish a broader system of referrals, which should include other groups, especially children trafficked to beg and women from the Roma minority who are forced into early marriages.³⁴ While the need to create a broader referral mechanism for local trafficked persons is recognised by all the agencies involved, such a system still does not exist. The only policy document which refers to the identification of local victims and assistance to them is the *Vlasic Procedures*.

In 2005, UNICEF, on the request of the State Coordinator, carried out an *Assessment on the situation of internal trafficking in Bosnia and Herzegovina*.³⁵ This makes recommendations for the identification of local victims of trafficking. First of all, it states that the identification procedure, in its current form, is strongly focused on the identification of victims of trafficking for sexual exploitation and excludes other categories of victims. It recalls the role of human rights standards in the process of identification and calls for the establishment of non-discriminatory structures for identification, which should be coordinated by a single body. It also suggests that a longer reflection period is needed for victims to come to terms with their situation.³⁶

4. Migration and Trafficking

The dynamics of trafficking in human beings in BiH does not directly reflect the general trends of migration between the countries of Eastern and Western Europe. Despite the fact that BiH is a poor country, with a very high unemployment rate (45.5 per cent among women, with 25 per cent of population below the poverty line³⁷), it is not a country of origin for migrant labour but rather a country of transit and prolonged transit for the majority of one specific group of trafficked persons – women trafficked for sexual exploitation.³⁸ Labour emigration from BiH is not very high and labour immigration to BiH for purposes other than prostitution has never constituted a significant problem.³⁹

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There is no reliable information about cases of Bosnian citizens trafficked abroad, nor about Bosnian men or boys trafficked abroad. There have been a few cases of trafficked Bosnian women, some of them Roma, being repatriated from other countries, notably EU countries (Italy, Austria and Sweden). Information collected by the OHCHR in 2005 showed that while professionals working on the issue of trafficking in BiH are convinced that the numbers being trafficked abroad from Bosnia are growing, there is no evidence to support this.⁴⁰

The trafficking situation in BiH is not so much determined by the very poor situation of the labour market and the general demand for migrant labour in Western Europe, as by three other factors related to the situation in BiH in the wake of the war in the Balkans in 1995:

1. the creation of a new market for prostitution in response to the arrival of the UN peacekeeping forces stationed in BiH and other countries of the region;
2. the activities of organised crime groups involved in smuggling goods and people through the porous borders of the Balkan states to the countries of the EU;
3. the location of BiH on the migration route from Eastern European countries, such as Romania, Bulgaria, Ukraine and Moldova, via Albania and BiH to EU countries.

These factors contributed to BiH becoming one of the transit countries for trafficking in women for sexual exploitation in the late 1990s.

However, in the last three years there has been a significant change in trafficking patterns, as trafficking of foreign women from Eastern European countries to BiH has systematically decreased. According to the State Coordinator's Report for 2005, there were approximately 200 cases per year identified in 2000 and 2001, 250 cases in 2002, and only around 45 cases per year in 2003 and 2005. In the first half of 2006 only a few foreign women were placed in shelters. The majority of suspected victims from Serbia and Montenegro refused any assistance and claimed not to be victims of trafficking.

The drop in the numbers of assisted foreign women as well as information collected from the institutions working on this issue suggests that the pattern of transnational trafficking known in previous years has almost ceased to exist. There are much fewer women identified and far less foreign clients from peacekeeping forces paying for commercial sex, as there are far fewer peacekeepers to be potential clients for sex workers or trafficked women. The peacekeepers who are still based in BiH enjoy much less freedom of movement and are not able to visit bars and other places known for prostitution. Very few cases have been identified of women being trafficked from the Eastern European countries (Moldova, Romania, Bulgaria and Ukraine) which accounted for most of the victims in the past. There are also almost no cases of new arrivals from those countries: the women who were identified recently arrived in BiH many years ago (at least five years ago) and stayed in different bars in BiH or in other countries of the region, all this time working in prostitution.

Migration Statistics

According to the *Report on Trafficking in Human Beings and Illegal Migration* prepared by the State Coordinator's Office,⁴¹ general statistics gathered by the Ministry of Security referring to illegal migration into BiH showed a declining trend in 2005. The difference between the number of registered entries to BiH by citizens from the countries of high risk migration (including countries where women are at disproportionately high risk of being trafficked) and the number of departures has declined. The number of illegal migrants returned from Croatia

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to BiH as a result of the readmission agreement between those two countries also declined, from 2,317 in 2001, to 766 in 2002, 756 in 2003, 255 in 2004 and 170 in 2005. The number of detected illegal border crossings in 2005 was 655 persons, representing a drop of 220 or about 25 per cent in comparison to 2004.⁴²

In 2005, the Ministry of Security granted 4,928 temporary (4,751) or permanent (177) permits to stay in BiH to foreign citizens.⁴³ Of these, 28.75 per cent were granted on the basis of work (i.e. work permits) and 27.28 per cent for marriage. Other reasons cited include: business, family reunion and schooling. No work permits were granted to foreign women to work in the sex industry as prostitution has not been legalised in BiH and prostitution is not acknowledged as a legitimate profession.

While all the migration statistics in BiH show decreases, it has to be mentioned that the statistics referring to migration are not differentiated by gender or age, so it is not possible to differentiate the number of female migrants or foreign women granted permits to stay and work in BiH from other migrants.

Asylum on Humanitarian Grounds

In theory, according to the *Rulebook*, the option to stay in BiH on humanitarian grounds is open to victims of trafficking.⁴⁴ In practice, this option was only used successfully on two occasions by the end of 2006. In both cases, asylum was granted to women who were then resettled as refugees in a third country. Both women were assisted by a local NGO, La Strada in Mostar. The women testified against the traffickers in BiH and, on the grounds of a well-founded fear of persecution (i.e. reprisals from the traffickers or their associates), both in the event of return to their home countries and if they remained in BiH, were relocated to another, safe country. Another person assisted by La Strada, who also testified against traffickers in Bosnia and claimed to have grounds for a well-founded fear to return to her home country, lodged a request for asylum with the Ministry of Security in 2005 and was still awaiting a decision at the end of 2006. It seems that only La Strada among the various NGOs was involved in helping women start asylum procedures, but judging from the lack of a decision in the second case, the BiH authorities appear reluctant to accept asylum claims and to grant asylum to a trafficked person who wants to stay in the country.

Law enforcement agencies tend to view the use of asylum procedures as a misuse of the migration law, rather than as a tool to protect victims of trafficking, especially those who have testified against traffickers and who may have a reasonable fear of persecution. In a survey conducted by the OHCHR in 2005 on the trends in human trafficking and the effectiveness of anti-trafficking responses,⁴⁵ respondents in law enforcement agencies (including prosecutors) expressed the view that asylum procedures were being abused in BiH by foreign prostitutes. According to them, the lawyers working for bar owners were helping women from Eastern European countries to request asylum in BiH, based on false grounds that the women concerned at least had a legal right to stay in BiH while their applications were under consideration. Some respondents argued that this was evidence of how easily the migration laws could be misused and that migration regulations needed to be changed further, including the establishment of special speedy procedures to refuse asylum claims in cases where the asylum system was being abused.⁴⁶

The information from victims of trafficking who were convinced by the bar owners to request asylum in BiH on unsubstantiated grounds shows that the asylum requests were seen by traffickers as a way to ensure ‘legal’ grounds for the temporary stay of women in BiH during the time they were subjected to exploitation. The procedure was initiated by traffickers and their lawyers, and instead of perceiving this as the misuse of asylum procedures by the women themselves, should be seen as one more way of deceiving trafficked persons and building their dependency. Additionally, it has to be added that the situations of the abuse of the asylum system were very few and not successful. The legal status of the trafficked persons who were persuaded to lodge asylum claims on false grounds is not clear. As victims of trafficking they should not be held responsible for crimes committed during the process of being trafficked. The position of the UN Office of the High Commissioner for Refugees (UNHCR) on trafficking suggests that they could still be defined as refugees under the 1951 *Convention relating to the Status of Refugees*,⁴⁷ if a well-founded fear of persecution based on one of the Convention grounds is established.⁴⁸ This position was not confirmed by the UNHCR in Bosnia in relation to the cases revealed in BiH and, by the end of 2006, there was no precedence of such procedures in BiH.⁴⁹

Resettlement

The *Law on Witness Protection Program*⁵⁰ offers protection to witnesses and their families not only during, but also **after** criminal proceedings, if they face a danger to their life, health or freedom. However, the law does not provide for specific measures other than hiding the identity of the witness and providing a new but temporary identity (usually an expensive process). While other measures, such as resettlement to a third country, can also be seen as protection measures, they are not mentioned by the law. Additionally, due to the potentially high costs, the *Law on Witness Protection Program* was adopted but never properly implemented. Lack of implementation makes the assessment of its usefulness in general and in relation to cases of witnesses in trafficking in particular, impossible.⁵¹

In theory, according to the UNHCR, third-country resettlement is an option that should be used in a situation when victims of trafficking, due to a fear of persecution based on one of the grounds specified in the 1951 Refugees Convention,⁵² are not able to return to their home country or stay in the country of destination. In practice, this option has been used in BiH only a few times and only on an *ad hoc* basis for protected witnesses testifying in court cases against traffickers.

In August 2003, following arrangements made by the prosecutor and with the help of the OHCHR, five women who were protected witnesses in a trafficking case against Milorad Milakovic, owner of the Sherwood Castle bar near Prjedor, were resettled in a third country. In 2005, the OHCHR made an assessment of this resettlement case and developed a case study of a successful resettlement of victims of trafficking to a third country, that could create a standard for these types of procedures.⁵³ The assisting agencies and the victims in this case believe that the goal was achieved: the women were protected from any of the negative consequences of testifying against their traffickers, their security was ensured and a long-term solution was found to their problems. It answered the needs of the prosecution, as the women became reliable witnesses and their testimonies contributed to the traffickers’ conviction.

5. The Human Rights Impact of Laws and Policies

Prosecution

Until 2003, BiH law at the state level did not include any explicit anti-trafficking provisions. There were some provisions in the Criminal Codes of the two entities, the Federation of BiH (FBiH) and the Republika Srpska (RS), which could be applied, including slavery and transportation of enslaved persons, unlawful detention, rape, forced intercourse, sexual intercourse with a minor and recruitment into prostitution. These offences, however, were often not recognised either by the police or by the judges as being related to trafficking. The sentences under these provisions therefore were low and were often not a sufficient deterrent.

In 2001, there were 11 successful prosecutions of traffickers in BiH. One person was sentenced to three years' imprisonment for the offence of trafficking in women for prostitution, and another two were given 28 months and 15 months for the same offence. The term for the others varied from 4–5 months to 1–2 years. These cases involved a total of 174 trafficked women giving testimonies to the investigating judges.⁵⁴

During 2005, law enforcement in BiH submitted 36 reports to the relevant prosecutor's offices, implicating 59 persons in committing the offence of human trafficking and related crimes. Over the same period, prosecutors conducted 68 investigations of trafficking and related cases, including 37 initiated the same year (some based on the reports from the previous year). A total of 24 indictments were made and 26 confirmed by the court.

During 2005, courts in BiH reached verdicts against 17 persons. Nine verdicts were the result of plea bargain agreements: two defendants were given suspended sentences, one person was fined and six were sentenced to periods of imprisonment. According to the Office of the State Coordinator, the sentences imposed were very lenient, often below the minimum prescribed by the law. The highest sentence of 4 years and 6 months was imposed under Article 210 of the Criminal Codes of Federation of Bosnia and Herzegovina (for enticement to prostitution).⁵⁵

As a result of monitoring of these regulations, the State Group, assisting the State Coordinator, agreed that Article 186 needed to be amended so that sentences based on plea bargaining could not be below the minimum prescribed by the law for this type of crime. The State Group has also suggested that an additional penalty should be prescribed by adding a paragraph concerning those who pay for the services of persons who are in a situation of sexual exploitation, in forced labour, slavery or slavery-like conditions, and who should, it was recommended, be punished by six months to five years' imprisonment.⁵⁶

Prostitution Law

Prostitution in BiH has not been made legal and is treated as a minor offence under the *Law on Peace and Public Order*. As this law had still not been adopted at the state level by the end of 2006, it is being implemented at the level of cantons in the Federation and in the RS. The penalty on conviction (for prostitution) varies from a fine to the possibility of several months' imprisonment.

According to the OHCHR in BiH: "The existing legal framework provides for the possibility of processing the users of sexual services, as well as those engaged in selling sex. 'Prostitution' is an offence against public peace

and order. In this way, both the person receiving the money and providing service, and the person giving the money and receiving the service, are committing the same offence against public peace and order. In minor offence legislation, it is important to emphasize the potential for prosecuting the owners of nightclubs and bars for breach of maintaining public peace and order as well as for other trafficking related acts. Evidence from registered cases indicates that it is the bar and nightclub owners who are the main perpetrators of the acts of trafficking and mediation in prostitution.”⁵⁷

Women who work in prostitution or are trafficked into prostitution can be accused of committing an offence against public order if the police are able to prove they have accepted money in exchange for a sexual act. Even in a situation when proving prostitution might be difficult, victims of trafficking report that police, after raiding a bar, offered them a ‘choice’ of either going to a shelter for victims of trafficking or being transferred to prison and charged with the offence of prostitution. In such situations, not only women who fear deportation due to their being in BiH illegally, but also those with legal immigration status, as well as local women, are open to ‘persuasion’ and agree to stay in a shelter on a nominally ‘volunteer basis’. As was mentioned above, the final decision whether the women should receive assistance and temporary resident permit depends on the prosecutor.

Consequences of the Vlasic Procedures

The Vlasic Procedures for the Treatment of Foreign Victims of Trafficking were adopted as a reaction to difficulties experienced in implementing the *Rulebook* that became apparent in the so-called Mlin case from June 2005. Six foreign women, who were found in the Mlin bar during a police raid, were placed in a shelter on the request of the police. A written request for the accommodation of six potential victims of trafficking was received by the shelter management upon their arrival. However, the shelter did not receive any further instructions from the Ministry of Security regarding the status of the women within the prescribed 15 days. The request to the Ministry of Security for temporary residence permits on the grounds that they were victims of trafficking was sent six weeks after their arrival in the shelter. At the same time, shelter staff were informed repeatedly by the women that they were not victims of trafficking and did not wish to be kept in the shelter. The NGO Vasa Prava, which had signed an MoU to provide the victims with legal advice, was not made aware of the situation until September 2006.

The *Vlasic Procedures* were supposed to address the issues outlined above. The main problems with the implementation of the *Rulebook* identified during the Mlin case included:

- The lack of clear division of responsibilities between different institutions;
- The need to establish procedures to inform Vasa Prava about all potential cases of trafficking directly after the identification of potential victims;
- The role of the prosecutor and ensuring that his/her opinion about the status of the potential victims was included in the procedures being followed;
- The provision that possible victims of trafficking could be sent to a shelter (and detained there) without giving their consent.

While the *Vlasic Procedures* have clarified the procedures for identification of trafficked persons, they have also created a situation in which the principal decisions about the identification of victims are made by the prosecutor and depend on the prosecutor’s assessment of the potential usefulness of the victims as witnesses in cases against

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traffickers. The concern for protection of human rights of all victims of trafficking, which originated in international human rights standards⁵⁸ and then was reflected in the *Temporary Instructions* and subsequently in the *Rulebook*, was replaced in the *Vlasic Procedures* by a provision which apparently gives priority to the effective prosecution of traffickers.

Since July 2005, the *Vlasic Procedures* have started to be used in cases in which foreign women have been identified. In February 2006, during police raids on three bars in middle Bosnia, 10 women from Serbia were found. When asked by the police, all of them reportedly stated that they were not victims of trafficking. As in the previous cases, regardless of that fact, on request of the prosecutor, they were placed in closed shelters run by NGOs. Nine women were kept in one shelter for a period of two months during which they were interviewed several times by the police and by the prosecutor. Vasa Prava was not informed about the cases. Because these women were refusing any assistance and did not perceive themselves to be victims of trafficking, they also did not sign, during the requisite period of 15 days after the raid, the request to the Ministry of Security for temporary residence in BiH. As citizens of Serbia and Montenegro, who are entitled to travel to BiH with their identity cards (rather than passports) and to stay there up to three months each time, the women had not committed any migration-related crimes and did not need any special arrangements to be able to return to their home country.

The women were released after two months in response to their written requests sent to the Ministry of Security by the shelter manager demanding their right to return to their home country. Before the release, they were required by the prosecutor to sign statements acknowledging their obligations as potential witnesses and agreeing to return to BiH to testify in court cases against the owners of the bars or otherwise to pay a fine of 30,000 Bosnian Mark (USD 15,000). One woman, on request of the prosecutor, was placed alone in another shelter and was offered Vasa Prava's assistance. This woman too claimed that she was not victim of trafficking. Her stay in the shelter was not regularised as she did not wish to get temporary residence and therefore Vasa Prava did not send a request to the Ministry of Security, regardless of the fact that she spent more than eight months in the shelter where she awaited permission to return to Serbia. It is not clear why the woman was kept in the NGO custody (under police supervision) and why she was allowed to leave Bosnia only after eight months.

Also in the case of the procedures for identification and assistance to local women about whose legal status there are no doubts, the needs of the prosecution are given priority. While making the decision about the status of the victim, the prosecutor can insist that the victim must testify in exchange for assistance and protection and might refuse such assistance and protection if the victim does not agree to testify. Also, there is a danger that the Ministry of Security and the prosecutor end up controlling the work of NGOs and their contacts with potential victims. NGOs are not entitled to respect the rights and needs of their clients in relation to confidentiality, anonymity and cooperation with law enforcement. Also clearly NGOs that have high ethical standards may decide that the best interests of their clients take precedence over the claims of law enforcement agencies. Making assistance and protection conditional on cooperation with law enforcement officials and prosecutors seems likely to seriously undermine the independence and credibility of the NGOs in the eyes of potential victims. It might also reduce the number of persons willing to seek assistance.

Assistance Problems

According to the NGOs, the treatment of women by law enforcement officials during and after identification is routinely harsh. Their passports are confiscated and only given back at the time of leaving BiH. Mobile phones (not only the phone cards but phones) and all the money that the women possess are confiscated from them, kept

as evidence in trafficking cases, and either returned several months (or even years) later or never returned. The women transferred to shelters do not have a chance to collect their personal belongings beforehand, meaning that they are arbitrarily deprived of their property as a result of actions by law enforcement officials, a clear violation of their human rights.⁵⁹ While the police explain that the confiscation of passports and money are a necessary part of the process of collecting evidence, the women see it as one more method to prevent them from leaving the shelter which they are dispatched to. The reflection period of 15 days is not observed by the police or prosecutors, who reportedly interview women whenever they want to on the shelter premises, including during the first 15 days when the women are supposed to be left untroubled.

It has to be added that the determination of the prosecution to arrest traffickers, collect evidence against them and use foreign victims of trafficking as witnesses has brought concrete results. This method was used for the first time in the Milakovic case and resulted in the perpetrator's conviction. However, it is evidently not legitimate for prosecutors to use a system which was designed to provide assistance to *all* victims of trafficking to extend such assistance only to those who they want as witnesses, nor to use the 'carrot' of assistance as an incentive to trafficked persons to testify, when they have an internationally-recognised right to protection and assistance. In particular, the legitimacy and legality of the cases in which trafficked persons with regular legal status (such as BiH citizens, asylum-seekers or Serbian citizens) have been kept in closed facilities, often under police guard, has to be questioned. The authorities' refusal to treat foreign women as victims when they do not wish to share information about traffickers and to make assistance and protection dependent upon their willingness to testify is not in compliance either with the *Rulebook* or with international standards. It is also doubtful whether keeping witnesses in closed shelters until a trial (in some cases for as long as 19 months), is a legitimate practice, as victims have the right but not the obligation to accept assistance. The procedure of the confiscation of passports, telephones and money for the whole period of pre-trial investigations and the trial also seems abusive.

Return to their Country of Origin

The most commonly used and the best-known outcome of assistance is the return of trafficked persons to their countries of origin. In a situation where the possibilities of staying on in BiH or being resettled to a third country are, in practice, limited to very few cases (of witnesses who agreed to testify against their traffickers), the only option available to others is to return to their home country.

Trafficked persons often express the opinion that they do not receive adequate assistance, and associate the existing provision of support with:

Stigmatisation – participating in an IOM programme means that they are in danger of being recognised as prostitutes. Returning with the support of such a programme means that people in their country, family and friends may also find out about their past. They come back, not as successful migrants, but as women with a bad reputation and very limited chances to start a new life.

Criminalisation – women are included in police databases and are registered with the police in the country where they were exploited as well as their own country. In some cases, they had stamps put in their passport preventing them from re-entering the country from which they were repatriated. Upon repatriation, especially in the case of return to Romania, some have been accused of crimes related to trafficking.

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Re-victimisation – alleged victims have to answer many questions, including some very personal and embarrassing ones, posed by the police, border police and the IOM, both abroad and in their own country. Their freedom of movement is restricted; they are locked in the shelters with their activities controlled and passports taken away. Even women from Serbia with valid documents had problems returning to their home country on their own.

Lack of protection – an assessment of their likely security situation in the home country is not seen as a vital precondition to repatriating them. While in the custody of NGOs in BiH, as well as during the journey to the country of origin, the women, when necessary, are protected by the police. This protection stops when they arrive in their home country and leave the shelter there. The return and possible encounters with their traffickers can prove to be traumatic and dangerous, especially for women who have divulged information to the police. Quite commonly, victims of trafficking try to protect themselves by changing their testimonies after their return, so as not to accuse their traffickers.

Lack of long-term support – upon repatriation, victims of trafficking are routinely sent back to the places from where they were trafficked. There they have to face the same problems of unemployment, lack of means to survive, lack of perspectives, abuse and discrimination, all of which are often exacerbated by a new stigma. While in many countries of the region, local NGOs have started very good reintegration programmes that offer long-term options for returning victims, the general economic situation in those countries and difficult situation of the traumatised victims make successful reintegration very difficult.⁶⁰

Lack of real options – as it has already been pointed out, many women decide to stay in an abusive situation and not accept assistance because they perceive sex work as the only available way to support themselves and their families. Assistance programmes, from their perspective, do not offer any viable, long-term options.⁶¹

Addressing the root causes of trafficking in countries of origin and further development of prevention/reintegration programmes focused on economic empowerment of potential and returning victims are the necessary conditions also for the successful functioning of assistance programmes. Foreign women staying in shelters should be informed about the possibilities of assistance and reintegration following their repatriation and should be given advice on how to contact NGOs in their home country that provide suitable assistance before they embark on their return journey. In some cases such programmes have already been started by NGOs in BiH. NGO Lara from Bijelina has contacts with anti-trafficking NGOs in Serbia and can arrange support for victims returning to Serbia, while La Strada is able to use its extensive contacts within the regional La Strada network.⁶² Also the therapy, schooling or vocational training offered in the shelters in BiH should be discussed with the NGOs in the home country and continued if necessary after return.

Resettlement Options

To ensure that the option of being resettled in a third country remains a viable one, there is a need for political will (by governments in general, and not just of those countries that people are trafficked from or to), commitment and cooperation of the countries of destination in which the victims were identified and third countries that can offer a refugee status on humanitarian grounds to some victims/witnesses.

There is also a need for a system of witness protection in trafficking cases, based on the individual needs of each witness, that, when necessary, includes the option of resettlement in a third country. For victims who are willing to cooperate with the prosecution, the most problematic part routinely is that they are not given clear information

about what possible protection they will receive after the trial. While in the past some witnesses were resettled to a third country, this option was never legally defined. It was dependant on the goodwill of intermediaries working in intergovernmental organisations and on the willingness of a Western country to accept witnesses as refugees on humanitarian grounds and provide them with humanitarian visas, as well as to offer them all necessary security measures.

6. Conclusion

Trafficking and the Sex Industry

For several years now, there have been claims that ‘new forms of trafficking’ closely related to local prostitution were occurring in BiH. The information mostly came from contacts between victims and shelter staff and this hypothesis seems to be supported by almost everyone involved in anti-trafficking work in BiH. However, by the end of 2006, no evidence was available to illustrate what these new trafficking trends were, and no reliable information was available about the scope and forms of internal trafficking within BiH, including for sexual exploitation. Somewhat surprisingly, the relevant local institutions had not carried out in-depth investigations to understand the connections between prostitution and trafficking. The way the anti-trafficking work in BiH is currently organised (stressing forms of trafficking and modalities that hardly exist any longer, in particular emphasising that most victims are women from Eastern European countries) further precludes a fresh assessment of the situation.

This has resulted in blurring the distinction between different types of violence against women, sexual exploitation, prostitution and trafficking. In many cases it is not possible to find out whether women being assisted by NGOs are cases of trafficking, violence against women, forced prostitution or exploitation of prostitution more generally. The two main reasons for this situation are:

- Lack of clear definitions on the ground and of factual information collected and analysed according to commonly accepted definitions and methodologies;
- The differing and inconsistent approaches to different forms of violence against women taken by donors and intergovernmental agencies – while there is not sufficient support for initiatives against domestic violence and sexual abuse, there are plenty of resources made available for anti-trafficking initiatives. Consequently, many cases are labelled as ‘trafficking’ when they are not. NGOs when seeking funding for their activities tend to describe the persons that they support as *victims of trafficking*.

It seems that the institutions working on trafficking are interested in keeping the *status quo* as this attracts funding – conducting the same type of programmes, without proper monitoring and evaluation or being held accountable for their actions and creating a picture which suggests that women are at grave risk of being trafficked. According to NGOs, keeping the *status quo* and the lack of interest in new forms of trafficking might also be the result of corruption among government officials and involvement of politicians in the local sex industry and local trafficking.

The continuous focus on foreign women and bar raids as a tool to address trafficking shows the inability of existing structures to shift their focus and the lack of political will to address the new problems at hand and to react effectively to changing trafficking trends. The absence of any guidelines and procedures governing assistance

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to victims of internal trafficking and the lack of clarity about the definition of a 'victim of trafficking' in the changed context needs to be addressed, while the role of government institutions and NGOs needs to be clarified.

The fact that women identified by the police usually refuse any assistance shows their mistrust in law enforcement and their lack of interest in existing assistance options. It also shows that there is not enough use of self-identification methods and no alternatives created for women who do want to contact NGOs and request their help (but without agreeing to testify to the police). What is required is a more flexible approach. Equally important is the outreach work and awareness raising among high-risk groups done by NGOs, as well as creating new ways in which victims can approach NGOs directly.

Answering the Needs of Victims

The theoretical framework to allow a proper system of assistance to all trafficked persons in BiH, including local people and those trafficked for purposes other than sexual exploitation is already in place.

- There is a legal system founded on international law that creates a legal base for the protection of victims of trafficking and assistance programmes.
- The governmental structures to coordinate this system and to establish rules for its functioning and to govern the cooperation and participation of relevant institutions are in place.
- There are local NGOs with the necessary capacity and knowledge to provide assistance.
- There are also substantial financial resources available to finance the process of assistance and reintegration.⁶³

There is also a good understanding of the needs of the victims among anti-trafficking institutions in BiH. These needs include: sorting out their legal status, provision of economic support, integration, more time and options in the process of assistance, and, in cases of foreigners, availability of options other than repatriation, such as asylum and third-country resettlement.⁶⁴

It is a paradox that while BiH has the technical and financial capacity to design and properly organise assistance to victims of trafficking, the existing services, according to the assessment of almost all the institutions involved, do not respond to the needs of their clients and are not able to reach all the people who need protection and assistance.⁶⁵

Besides the lack of proper response to the problem of local trafficking, there are serious shortcomings in the assistance programmes, often mentioned by the shelter staff, victims and experts.⁶⁶ In general, the main problems are connected with the closed-type shelters that are predominant in BiH:

- 1) restricted freedom of movement for the victims;
- 2) long periods of residence in shelters for witnesses in trafficking cases, without any perspectives for the future;
- 3) dearth of reintegration options for returning victims; and
- 4) no monitoring of shelters and no assessment of the results of assistance programmes.

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Foreign victims of trafficking are kept in shelters, in some cases for years, but during this time they receive only basic support and assistance. They do not participate in any training or re-schooling programmes and are not entitled to get employment. There are no activities to support the social inclusion of the victims and their future reintegration back home. In almost all cases, women are simply returned to their countries of origin by the IOM through the programme called “return and reintegration”, but without any knowledge about the reintegration options and no plans for the future. Only in very few cases, when trafficked women were used as witnesses against traffickers in BiH, were they resettled to a third country where they received long-term financial support and assistance similar to other refugees, to help them integrate into a new society.

Local victims of trafficking can count only on receiving basic assistance, and only for a short time. Due to the lack of clear procedures governing assistance to and support for the reintegration of locally trafficked persons, NGOs are able to offer them only limited help that can be delivered without the involvement of governmental institutions. Long-term support, such as medical treatment for persons staying outside their place of registration (in another canton or another entity), alternative housing, vocational training or job placement are provided only on an *ad hoc* basis and depends on NGO resources. In some cases, NGOs have even experienced problems in placing children in schools and getting any support from the government-run Centres for Social Welfare.

Assistance to all Victims

The UNICEF report, *Assessment on the situation of internal trafficking in Bosnia and Herzegovina*, that has been mentioned already,⁶⁷ offers some suggestions for the establishment and functioning of the referral system for victims of internal trafficking. Such a system should be led by government agencies which should take responsibility for the implementation of the referral mechanism. “The identification of a presumed victim should ideally be carried out by a multidisciplinary team of professionals (social services, law enforcement and specialized NGOs), who would assess the victim’s needs and refer the victim to specialized services such as shelter, legal counselling, health care, psycho-social assistance and training opportunities. Especially for Bosnian citizens, who become victims of trafficking, this procedure should be anchored in the scheme of overall social welfare and protection. Victims of trafficking should have equal access to support like all other victims of violence and crime.”⁶⁸

The referral mechanism should be well coordinated and all the actors involved should be aware of each other’s mandates and responsibilities. The mechanism should also be based on the experiences and views of the victims themselves. The human rights of the victims should be respected at all times. That includes ensuring their freedom of movement (if the security situation permits). “Assistance has to be provided until the trafficked person can assert an independent life in society. Education, vocational training, job placement and housing are basic requirements for successful social inclusion.”⁶⁹

It has to be added that, in the case of local victims, the unequivocal identification of the person as a victim of trafficking should not be the most important condition for the provision of assistance. If a person belongs to one of the vulnerable or high-risk groups (such as Roma, rural and poorly educated women, prostitutes, women and girls who have been victims of domestic violence and potential migrants, as well as children, especially children from institutions or dysfunctional families), this should be sufficient to justify their receiving assistance and protection. Assistance should be tailored according to the needs of the person and focused on the development and provision of a long-term solution.

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Also, in the case of local victims, assistance programmes should not be developed and implemented in a vacuum. There is a need for an integrated approach to internal trafficking, which will offer a combination of assistance, reintegration and prevention programmes focused on addressing the needs of high-risk groups, including preventing discrimination, poverty and unemployment, as well as protection from violence and exploitation.

Among the conditions identified by international NGOs as necessary for the process of assistance and recovery of the victims is the placement of those trafficked persons who need accommodation and assistance in a safe, friendly shelter,⁷⁰ which is understood as providing conditions free of the fear of traffickers, the police and of any forms of re-victimisation. This condition is not met in BiH as all shelters have signed the MoU with the Ministry of Security and are obliged to cooperate with the police. The restrictions on the freedom of movement of the trafficked persons and free access to the shelter by the police and prosecution, even during the first 15 days of the reflection period, are the norm rather than an exception.

Some Concluding Observations

Currently in BiH there is a well-developed and functioning (although not always based on clear legal principles) system of protecting witnesses in trafficking cases, while an open system of victim protection, not based on placing trafficked persons in closed shelters, and responding to the needs of the victims, is to a large extent still missing. The participation of the NGOs in the current witness protection system, approved by signing the *Vlasic Procedures* and the MoUs with the Ministry of Security, makes it difficult for them to lobby for the more open structures designed to offer help indiscriminately to all victims based on human rights principles and implemented with participation of NGOs.

It seems necessary to re-design the referral system for foreign women in such a way that all victims – regardless of whether they are willing to cooperate with a prosecution or not – have access to the help they need. This also requires different types of identification methods (not those relying exclusively on the work of law enforcement, but rather on self-identification and involvement of NGOs) through the establishment of contacts, outreach to high-risk groups, hotlines and international contacts.

To ensure protection of the rights of all foreign victims of trafficking, there is a need to introduce some changes into the anti-trafficking regulations:

- Bilateral agreements with several countries that accept refugees on humanitarian grounds offering quotas for victims of trafficking (this need goes far beyond just BiH and applies to many other countries);
- Establishing standard procedures for the implementation of witness protection programmes, including the procedure for relocation to a third country, as set up in the *Law on Witness Protection Program*;⁷¹
- Full information to all victims about all possibilities and the forms of protection and social integration available;
- A security assessment to be carried out in the victim's country of origin prior to her or his repatriation;
- Regulation and formalisation of the resettlement options;
- Standardised procedures for resettlement of victims of trafficking to a third country.⁷²

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In the case of local victims:

- Integrated approach to local trafficking;
- Clear standards for assistance and cooperation of all agencies;
- Addressing root causes of trafficking;
- More options for the beneficiaries of assistance and reintegration programmes – including housing, social support, re-schooling and job placing.

As mentioned in the OHCHR's *Legal Manual on Protection of Victims of Trafficking in Persons in Bosnia and Herzegovina*, protection should be available to all victims of trafficking and not only to the witnesses. Also in cases of victims refusing to testify, they must not be deprived of any rights they are entitled to.

ENDNOTES

- ¹ BiH comprises two entities, Republika Srpska (RS) and the Federation of BiH (FBiH). The Federation is further divided into 10 districts called cantons. Both entities have their own governments and civil structures. Criminal legislation in the entities is still in the process of being harmonised with the new state-level legislation.
- ² Article 186 of the Criminal Code of BiH, Official Gazette BiH, No. 3/30, re Article 3 of the *Law on the Amendments to the BiH Criminal Code*, Official Gazette of BiH, no. 61/04, 29 December 2004.
- ³ The new Article 186 now reads:
- (1) Whoever, by means of use of force or threat of use of force or other forms of coercion, of abduction, of fraud or deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, recruits, transports, transfers, harbours or receipts a person, for the purpose of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or similar status, servitude or the removal of organs or of the other type of exploitation, shall be punished by imprisonment for a term between one and ten years.
- (2) Whoever recruits, transports, transfers, harbours or receipts a child or a juvenile for the purpose of the exploitation referred to in paragraph 1 of this Article, shall be punished by imprisonment for a term not less than five years.
- (3) Whoever organises or directs at any level a group of people for the purpose of perpetration of the criminal offences referred to in paragraphs 1 and 2 of this Article, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.
- (4) The circumstance whether a person consented to the exploitation referred to in paragraph 1 of this Article is of no relevance for the existence of a criminal offence of trafficking in persons.
- ⁴ The new Article 189 now reads:
- (1) Whoever, out of gain, transports across the state border one or more persons that do not comply with the requirements for legal entry across the state border, or whoever enables another person to cross the border illegally, shall be punished by imprisonment for a term between six months and five years.
- (2) Whoever, out of gain, enables a person who is not a citizen or permanent resident of a receiving state to remain in the territory of that state without complying with the requirements for legal stay, shall be punished by a fine or imprisonment for a term not exceeding three years.
- (3) If, during the perpetration of the criminal offence referred to in paragraph 1 of this Article, life or safety of persons transported across the state border was endangered or was likely to be endangered, or they were treated for the purpose of exploitation or in another inhuman or degrading manner, the perpetrator shall be punished by imprisonment for a term between one and eight years.
- (4) If, during the perpetration of the criminal offence referred to in paragraph 2 of this Article, life or safety of persons to whom illegal stay in the territory of a receiving state was enabled was endangered or was likely to be endangered, or they were treated for the purpose of exploitation or in another inhuman or degrading manner, the perpetrator shall be punished by imprisonment for a term between six months and five years.
- (5) Whoever organizes or directs at any level a group of people for the purpose of perpetrating the criminal offence referred to in paragraphs 1 and 2 of this Article, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.
- ⁵ *Temporary Instructions on the Treatment of the Victims of Trafficking*, Ministry of Human Rights and Refugees, September 2002.
- ⁶ *Rulebook on Protection of Aliens Victims of Trafficking in Persons*. On basis of Article 37 paragraph 2 of the *Law on the Movement and Stay of Foreigners and Asylum* – Official Gazette BaH No. 29/03 and 4.04.
- ⁷ *Law on Movement and Stay of Aliens and Asylum*, Official Gazette BaH No. 29/03 and 4.04
- ⁸ *Instruction on procedures for expulsion, detention and tributaries for expenses of detention and expulsion of foreigners from Bosnia and Herzegovina*, Ministry of Security, May 2005.

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Law on Protection of Witnesses under threat and vulnerable witnesses, published in Official Gazette of BiH 21/03, amended 61/04 and 55/05.

BiH Witness Protection Program Law, Official Gazette of Bosnia and Herzegovina, 29/04.

Information in the section “Other Laws” is based on the text from the *Report on Trafficking in Human Beings and Illegal Immigration in BiH and the Report on the work of the State Coordinator for Combating Trafficking in Human Beings and Illegal Immigration in 2005*. State Coordinator for Combating Trafficking in Human Beings and Illegal Immigration in BiH, 2006.

Decision on Procedures and Ways to Coordinate Activities Suppressing Trafficking in Persons and Illegal Migration in BiH, Official Gazette of BiH: 24/03, 15 August 2003.

Ibid.

Temporary Instructions on the Treatment of the Victims of Trafficking, Ministry of Human Rights and Refugees, September 2002.

Trafficking in Human Beings in Bosnia and Herzegovina, Human Rights Filed Operation in Bosnia Herzegovina, United Nations High Commissioner for Human Rights, 3 June 2003, 6.

Rulebook on Protection of Aliens Victims of Trafficking in Persons. On basis of Article 37 paragraph 2 of the *Law on the Movement and Stay of Foreigners and Asylum*, Official Gazette BaH No. 29/03 and 4.04.

Vlasic Procedures – Procedures for treatment of human trafficking victims in Bosnia and Herzegovina, Vlasic, 29 July 2005.

Rulebook on Protection of Aliens Victims of Trafficking in Persons. On basis of Article 37 paragraph 2 of the *Law on the Movement and Stay of Foreigners and Asylum*, Official Gazette BaH No. 29/03 and 4.04, Art. 10(5).

The authorised officials are obliged to take into consideration whether an individual describes herself or himself as a victim of trafficking.

Ibid. Art. 8(2)

Ibid. Art. 11(2)

Ibid. Art. 6(1)

Ibid. Art. 6(3)

Vlasic Procedures – Procedures for treatment of human trafficking victims in Bosnia and Herzegovina, Vlasic, July 29, 2005. Part II, Chapter C(1)

Ibid. Part II, Chapter A(1)

Art. 68 from Part B – Placing Aliens under Supervision – of the *Law on the Movement and Stay of Foreigners and Asylum* states in Article 68 (imposing supervision) that:

1. Supervision may be imposed against an alien for the purpose of ensuring the enforcement of the decision on expulsion, cancellation of residence or for other reasons prescribed by the Law.
2. Supervision shall be imposed against an alien when there are reasonable grounds to believe that:
 - a) the alien shall escape or otherwise prevent the execution of the decisions referred to in paragraph 1 of this Article,
 - b) free and unrestricted movement of the alien might jeopardise the national security or public order and rule of law in BiH,
 - c) for the purpose of executing actions referred to in Article 28 paragraph 3, Article 30, Article 47 paragraph 4 and Article 65 paragraph 4 of this Law.

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3. For the same reasons, supervision may also be imposed against an alien admitted under international agreement on cooperation in delivering and admitting persons whose stay is illegal.

Vlasic Procedures – Procedures for treatment of human trafficking victims in Bosnia and Herzegovina, Vlasic July 29, 2005, Part II, Chapter A (2–6).

Report on Trafficking in Human Beings and Illegal Immigration in Bosnia and Herzegovina and report on the work of the State Coordinator for Combating Trafficking in Human Beings and Illegal Immigration in 2005. State Coordinator for Combating Trafficking in Human Beings and Illegal Immigration in BiH, 2006.

Vlasic Procedures for Treatment of Victims of Trafficking, Part III, Chapter A (1).

Draft Report OHCHR.

Vlasic Procedures for Treatment of Victims of Trafficking, Part III, Chapter A (1).

Ibid. Part III, Chapter B (1).

Ibid. Part III, Chapter B (2).

Gabriela Reiter. *Assessment on the situation of internal trafficking in Bosnia and Herzegovina*, UNICEF, Sarajevo, September 2005, 5.

Ibid.

Ibid. 25

Ibid.

Migration rate in BiH in 2006 was 13.01 migrant(s) per 1,000 population (est.). *The World Factbook*. Accessed on 24 November 2006 at <http://www.cia.gov/cia/publications/factbook/print/bk.html>.

supra note 28 (pages 31–34)

Facts presented as the evidence of growing trafficking from Bosnia appeared to be old, not fully substantiated stories from the years 1996–1998. See: OHCHR Report.

supra note 28 (pages 31–34)

Ibid.

Ibid. 37.

Rulebook, Art. 15(4). “If a person who is accommodated in the shelter and who has been identified as victim of trafficking has filed a request for asylum in Bosnia and Herzegovina, pursuant to the decision of the organizational unit of the Ministry of Security conducting the asylum procedure he/she can stay in the shelter until a legal decision on his/her request is passed.”

Draft Report OHCHR (unpublished).

Ibid.

According to the UNHCR: “Some trafficking victims, in particular but not exclusively women and children, can be defined as refugees under the 1951 *Convention relating to the Status of Refugees* if they establish a well-founded fear of persecution based on one of the Convention grounds. Victims of trafficking may qualify for international refugee protection if their country of origin is unable or unwilling to provide protection against further re-trafficking or serious harm as a result of traffickers’ potential retaliation when circumstances can be linked to Convention

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grounds. A claim for international protection from a victim of trafficking can thus arise in two distinct circumstances: where the victim has been trafficked from abroad and seeks the protection of the host state, or where the victim, having been trafficked within national territory, manages to extricate her/himself and flees abroad in search of international protection. In both instances, it is necessary to establish a well-founded fear of persecution in addition to a causal link to one or more of the 1951 Convention grounds, i.e., for reasons of race, religion, nationality, membership of a particular social group or political opinion.” See *Combating Human Trafficking: Overview of UNHCR Anti-Trafficking Activities in Europe*. UNHCR, 2005, 1.

48 Author’s personal communication with Marta Balloroso, UNHCR BiH, 25 July 2006.

49 Vasa Prava sent a letter to the UNHCR in April 2006, requesting guidance and information on whether those women could apply again for asylum as victims of trafficking and protected witnesses, on the grounds that they feared persecution in their home countries. Vasa Prava reportedly did not receive a response until the end of November 2006. It is also not clear who should process their case, as the responsibility for processing asylum claims has, in the meantime, moved from the UNHCR to the BiH Ministry of Security.

50 *BiH Witness Protection Program Law*, Official Gazette of Bosnia and Herzegovina, 29/04.

51 According to the *Law on Protection of Witnesses under Threat and Vulnerable Witnesses* (Official Gazette of BiH, 3/03, 21/03, 61/04, 55.05), in-court protection measures may include: control over the manner of examination, testimony using technical means for transferring image and sound, removal of the accused, exception from the imminent presentation of evidence, limitation of the right of an accused and his defense attorney to inspect files and documentation, confidentiality of personal details of the witness and witness protection hearing (art. 9–14).

52 Some victims of trafficking may fall within the definition of a refugee contained in Article 1 A(2) of the 1951 *Convention relating to the Status of Refugees* and therefore have an entitlement to international protection: “UNHCR has consistently expressed the view that persons who experience sexual violence or other gender-related persecution should have their claims for refugee status considered under the 1951 *Convention Relating to the Status of Refugees* (...). Some trafficking victims, in particular but not exclusively women and children, can be defined as refugees under the 1951 Convention if a well-founded fear of persecution based on at least one of the Convention grounds is established. Victims of trafficking may qualify for international refugee protection if their country of origin is unable or unwilling to provide protection against further re-trafficking or serious harm as a result of traffickers’ potential retaliation. A claim for international protection from a victim of trafficking can thus arise in two distinct circumstances: where the victim has been trafficked from abroad and seeks the protection of the host state or where the victim, having been trafficked within national territory, manages to extricate her/himself and flees abroad in search of international protection. When assessing asylum claims by victims of trafficking it is always necessary to establish a well-founded fear of persecution and a causal link to one or more of the 1951 Convention grounds – for reasons of race, religion, nationality, membership of a particular social group or political opinion.” See UNHCR’s role in combating human trafficking in Europe by Malika Floor. The full report is available at www.unhcr.org.

53 Draft Report OHCHR, Sarajevo.

54 Sonja Cronin, *Prosecution of Trafficking Cases*. UNMIBH, Sarajevo, updated 14 December 2001.

55 *supra* note 28 (page 25)

56 *Ibid.* 7.

57 *Report on Trafficking in Persons in Bosnia Herzegovina*. OHCHR, July 2004, 13.

58 The UN High Commissioner for Human Rights’ Recommended Principles and Guidelines, E.2002.68.Add.1, can be found at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument).

59 Under the terms of Article 17.2 of the Universal Declaration of Human Rights.

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60 Five women resettled to a third country from BiH, stated that assisting agencies should be aware of the limited impact of their anti-trafficking programmes. They have to understand that as long as victim assistance programmes are limited to offering return to the home countries, the returned persons immediately will try to migrate again hoping for a better outcome of their migration project in the future.

61 Barbara Limanowska, *Trafficking in Human Beings in South Eastern Europe. Update on Situation and Responses to trafficking in Human Beings*. OSCE/ODIHR, UNICEF, OHCHR, Sarajevo, 2005, 197–198.

62 The La Strada network is a network of nine independent women's rights NGOs in the Netherlands (STV), Poland, the Czech Republic, Ukraine, Bulgaria, Belarus, Bosnia and Herzegovina, Macedonia and Moldova. It aims to prevent trafficking in human beings, especially women and children in Central and Eastern Europe. See http://www.lastradainternational.org/documents/Mission_Statement.pdf.

63 In 2006, in BiH, there were several anti-trafficking programmes implemented: USAID programme implemented by IOM (US\$3 million), CARE (approximately US\$1 million), Catholic Relief Services (approximately US\$ 1 million), the Swedish International Development Agency (SIDA) (US\$3 million) and others. The total number of identified cases of trafficking in BiH in 2006 was approximately 40.

64 OHCHR Draft Report.

65 *Ibid.*

66 Ruth Rosenberg, *Shelter Assessment in Bosnia and Herzegovina*. USAID, Sarajevo, 2006.

67 Gabriela Reiter, *Assessment on the situation of internal trafficking in Bosnia and Herzegovina*, UNICEF, Sarajevo, September 2005.

68 *Ibid.* 21.

69 *Ibid.* 21.

70 C. Zimmerman, C. Watts, *World Health Organization Ethical and Safety Guidelines for Interviewing Trafficked Women*. London/Geneva, 2003.

71 *BiH Witness Protection Program Law*, Official Gazette of Bosnia and Herzegovina, 29/04. While the Law gives the responsibility to the Witness Protection Department of the State Investigation and Protection Agency (SIPA) for the implementation of the programme, it does not define what measures should be used and what the process of implementation should look like.

72 OHCHR Draft Report, *Protection of Human Rights of Victims of Trafficking in BiH*, 2006.

Brazil

Frans Nederstigt and Luciana Campello R. Almeida

1. Introduction: *For the English to see?*

Trafficking in persons is often referred to as one of the most explicit forms of modern slavery. Although officially abolished, slavery was never really eradicated. International treaties, national laws and binding resolutions might be able to prohibit trafficking, but putting an actual end to the practice depends on much more than legal tools, policies and law-making processes. The truth of this statement is best exemplified in an old Brazilian saying, which remains popular even today and is only too relevant to the issue we are reviewing: ‘for the English to see’, meaning that it is enough to give the appearance of having good intentions (see Box 1).

Box 1 – The Slave Trade in Brazil

When Brazil declared its independence from Portugal in 1822, its main trading partner was Great Britain. While the British offered various forms of support and friendship in return for access to Brazilian ports and the right to trade in Brazil, Great Britain had already declared the importation of African slaves into its colonies to be illegal and was encouraging other countries to do the same. Moral arguments played a role, but Brazil – economically highly dependent on cheap slave labour on the sugar, coffee and cotton plantations – was also considered an unfair competitor by Britain and its colonies, which were producing many of the same goods and where slavery was abolished in the 1830s. As a result, under British pressure a number of Brazilian laws were passed, aimed formally at the abolition of slave trade, while actually having little or no impact. These initiatives were *para inglês ver* (for the English to see). One of these laws, the *Lei Euzébio de Queiroz*, which prohibited slave trafficking in 1831, did not have even the slightest effect – after this prohibition, the nominally illegal slave trade even increased significantly (Bethell, 1989, 40, 62, 95; Militão, 2005).

The next few sections will show how recent anti-trafficking initiatives in Brazil were also triggered by subtle or less subtle foreign pressure. At the same time, attention will be drawn to the most important dimensions of human trafficking in Brazil, being a country of origin and destination of people who are trafficked. Finally, throughout the different sections, existing governmental and non-governmental initiatives will be analysed in order to assess if they address the needs of trafficked persons adequately, or serve other interests and objectives.

2. The Current Legal Framework

The year 2006 will probably be a watershed year in the history of Brazil's anti-trafficking efforts. Until recently, international trafficking in women for the purpose of prostitution was routinely considered to be the only contemporary form of human trafficking occurring in Brazil, while slave labour and practices similar to slavery regularly found on huge and isolated soy and sugarcane plantations were treated as something completely different. This separation seems to be closely linked to debates on voluntary and forced prostitution and the feminisation of the increasing flows of people leaving Brazil on the one hand, and internal migration and a traditional patron-client system on the other.

On 26 October 2006, Brazil's President Luiz Inácio Lula da Silva signed Decree No. 5,948 promulgating the *National Policy to Combat Human Trafficking*,¹ and organised federal government initiatives around this issue. Although without the status of law,² for the first time in Brazil's history, all the different forms of human trafficking mentioned in the UN Trafficking Protocol, including slave labour and practices similar to slavery, as well as the illicit removal of organs, are officially considered to constitute human trafficking (even though the country's legislation does not yet reflect this interpretation).

Is Decree No. 5,948 just another legal instrument 'for the English (and Americans) to see'? The answer to that question will mainly depend on how anti-trafficking efforts are put into practice and if courageous political support from local, state and federal authorities will be forthcoming to back this common framework that relies on substantial investment at national level, involvement of NGOs and international cooperation. Although Brazil's legislation on human trafficking needs to be improved, a major concern is that laws, in general, often go unenforced.

Recent Changes in the Law: Human Trafficking for the Purpose of Prostitution

Brazil's Penal Code, which used to refer only to women being trafficked abroad into prostitution, has, since March 2005, explicitly made internal human trafficking a crime and now also applies to men and children. These changes should be welcomed but the new articles (Articles 231 and 231-A of the Penal Code)³ still restrict their definition to cases involving prostitution and do not apply to other forms of human trafficking. Although not labelled as human trafficking, most of these other forms are, in part at least, offences under other articles of the Penal Code or under other special laws. For instance, the *Children's Rights Statute*, adopted in 1990, already has some articles indirectly referring to trafficking in children.

The changes introduced by Law No. 11,106 (adopted on 29 March 2005) came more than a year after the UN Trafficking Protocol had already been ratified by Brazil (on 29 January 2004). The ratification gave the UN Trafficking Protocol (which entered into force in Brazil on 28 February 2004) the same legal status⁴ as ordinary non-constitutional laws, such as the more recent, though more restricted, Law No. 11,106. Consequently, there are two legal instruments on (partially) the same issue, not synchronised with each other.⁵

This is also clear evidence that the various Brazilian policy makers do not coordinate properly or exchange enough information, or, by implication, give sufficiently close attention to issues pertaining to human trafficking. Clearly, the changes⁶ foreseen by Law No. 11,106 did not take into account the broader international context of the UN Trafficking Protocol, although it abolished, among other changes, the questionable and discriminatory use of the term *honest woman* (as used previously in Articles 215 and 216 of the Penal Code), which had been

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used to imply that only a woman who was *not* a prostitute and therefore sexually ‘honest’ could be a victim of certain sexual assaults.

So, despite the recent changes in the Penal Code, the scope of the concept of human trafficking in Brazil continues to be very limited and highly controversial. It still emphasises human trafficking for the purpose of *prostitution*, without narrowing prostitution down to the UN Trafficking Protocol’s focus on the “exploitation of the prostitution of others”. “The Brazilian Penal Code, dated 1940, considers prostitution as a crime, not for the prostitute, who does not incur in any crime, but for the so-called agents (hotel, cabaret, and brothel-owners), as well as for any other person working in or around the sex sector” (Leite, 2000, 11).

Indeed, Brazilian legislation already penalises the exploitation of prostitution through Articles 228 to 230 of the Penal Code.⁷ So Article 231-A, defining internal human trafficking, is redundant and there is consequently a serious question about whether it is simply ‘for the English to see’. Furthermore, this article does not criminalise the more narrow offence of “exploitation of prostitution”, but refers instead to the “promotion and facilitation of prostitution”.⁸

Articles 231 and 231-A do not take into account the fundamental difference between forced and voluntary prostitution, and so, in the name of a policy intended to stop human trafficking, they may eventually result in the closing down of brothels, making it impossible for sex workers to earn a living. Tightening legislation on human trafficking for the purpose of *prostitution* (which is not, as such, prohibited in Brazil) does affect all sex work directly, but also indirectly. Since corruption among law enforcement officials is known to exist, they can demand higher bribes to ‘protect’ sex workers’ jobs, especially when policemen own brothels.⁹

The New National Policy to Combat Human Trafficking (for all purposes)

Fortunately, the recently adopted *National Policy to Combat Human Trafficking*, defining ‘trafficking in persons’ in Article 2, makes a direct reference to the UN Trafficking Protocol’s definition. But paragraph 7 of that same article also introduces a significant difference. Since the National Policy does not consider ‘consent’ of the victim to be relevant at all, it avoids the discussion on consent in a rather unorthodox way, by not referring to Article 3(b) of the UN Trafficking Protocol (which states: “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used”). This Brazilian solution of avoiding any discussion on consent *de facto* also ignores the issue of recruitment through abusive means, which is an essential part of the UN Trafficking Protocol’s definition of trafficking in persons. However, these means are still mentioned in the National Policy’s definition of what trafficking consists of (“...the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”).

In other words, by disregarding whether the victim (initially) consented to being recruited, and as such ignoring any analysis on the use (or not) of any of the means to achieve instigated or ‘poisoned’ consent, Brazil appears to have adopted a simplified definition, with the intention of avoiding misuse and interpretative discussions at the level of the courts. Before and during the National Consultation on the National Policy, that occurred on 28 June 2006 in Brazil’s capital Brasília, some of the participating governmental and non-governmental policy makers had expressed their fear that cases of trafficked sex workers might precipitate lengthy court discussions, triggered

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by conservative judges or smart lawyers, on trafficked ‘non-honest women’ who will automatically be assumed to have consented to their exploitation since they earn a living from sex work. Those in favour of avoiding any discussion about consent wanted instead to focus on the issue of ‘exploitation’ as the key constitutive element defining human trafficking.

Shrinking the UN Trafficking Protocol’s definition of human trafficking by eliminating the issue of consent, means that the Brazilian National Policy in fact considers trafficking in persons to be *the recruitment, transportation, transfer, harbouring or receipt of persons, for the purpose of exploitation*. Exploitation is then still interpreted to mean what is set out in the UN Trafficking Protocol: “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

In the view of Projeto Trama¹⁰ (the Brazilian NGO based in Rio de Janeiro to which the authors belong), expressed during the public consultations on the *National Policy to Combat Human Trafficking*, Brazil has not only adopted a different definition of trafficking from that recognised by the international community, but also introduced aspects of paternalism and a somewhat moralistic approach to the issue. Without a clearer and more specific definition of ‘exploitation’ than the one mentioned in the UN Trafficking Protocol, the paid activities of a non-autonomous adult sex worker, who has made a genuine voluntary choice to work in a brothel where her or his rights are fully respected, might be considered criminal acts of ‘exploitation of the prostitution of others’ and, consequently, human trafficking.¹¹ In fact, the practical solution to ignore the discussion on ‘consent’ makes a case-by-case analysis impossible and eliminates all subjective elements and possible personal circumstances that should be taken into consideration to determine precisely where, in a particular case, autonomy ends and exploitation begins, especially in those cases within the dim area where the universally accepted minimum definition of exploitation as set out in the UN Trafficking Protocol is not applicable.

Other Forms of Exploitation associated with Human Trafficking

As already mentioned, the anti-trafficking Articles 231 and 231-A of the Penal Code do not define as human trafficking any of the other forms of exploitation mentioned in the UN Trafficking Protocol, such as forced labour or services, slavery or practices similar to slavery, servitude, unlawful organ removal or even other forms of sexual exploitation. Some of these practices are, however, considered crimes, partially or wholly, by other articles of the Penal Code, or specific laws.

Article 149 of the Penal Code (reducing someone to slavery-like working conditions) deserves extra attention since it was changed by Law No. 10,803 (dated 11 December 2003). Formerly, Article 149 was able to cover different types of exploitation, but its scope was narrowed from “reducing someone to a slavery-like condition” (which could include forced marriage) to slavery-like *working* conditions. Article 206 of the Penal Code pertains to the fraudulent recruitment of workers for emigration purposes. Likewise, Article 207 deals with the fraudulent recruitment of workers to transport them elsewhere within national territory.

Article 14 of Law No. 9,434, dated 4 February 1997, amended by Law No. 10,211 dated 23 March 2001, prohibits the removal of organs from living persons or corpses when proper legal procedures are not followed. Article 9, however, states that, in the eyes of the law, anyone who is apt to make decisions for themselves is entitled, under strict conditions, to dispose of tissues, organs or other parts of their own living body for the

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purpose of proven indispensable transplantation or therapy, if such does not imply any risks for the health or the physical integrity of the donor involved.

In contrast with the UN Trafficking Protocol, none of these various other offences mentioned above make exploitation a key constitutive element of the offence. Consequently, their practical scope in human trafficking cases will be limited. Besides, none of these offences are considered to constitute human trafficking, meaning that people defined as victims of human trafficking, under an international law which Brazil is committed to enforce, may not receive the protection and assistance to which they are entitled.

3. Policies to Combat Human Trafficking

The practice of human trafficking is not new: from the sixteenth to the nineteenth centuries, the slave trade resulted in millions of Africans being exported to various countries to be exploited, including to Brazil, the last country in the Americas to abolish slavery (in 1888). This phenomenon that today involves organised and informal networks supplying a cheap workforce for labour and other forms of exploitation, such as the unlawful organ removal for transplantation,¹² began to be studied and combated in Brazil only in the 1990s.

This section delineates some of the major governmental and non-governmental initiatives to combat human trafficking, focusing on special laws and policies, as well as the international support that Brazil has received on this issue.

The First Steps to Combat Human Trafficking

In 1992, Gilberto Dimenstein, a well-known Brazilian journalist, denounced the problem of commercial sexual exploitation of girls, especially in the Amazon. His book, entitled *Meninas da Noite* (Girls of the Night), however, did not explicitly label forced prostitution of girl-slaves as human trafficking. In the same year, Americas Watch published its report *The Struggle for Land in Brazil, Rural Violence Continues*, denouncing several *fazendas* (large ranches) for using forced labour, supplied by so-called *gatos* (literally: cats) or labour contractors who recruit workers, mostly with false promises, to cut down the forest, especially in the southern part of the Amazon state of Pará. This report in English was mainly based on information provided by the grassroots *Comissão Pastoral da Terra* (Pastoral Land Commission – CPT), an organisation linked to the National Conference of Brazilian Bishops, formed in 1975 to monitor human rights abuses in Brazil's countryside.

Three years later, in 1995, the *Centro de Articulação de Populações Marginalizadas* (Centre for the Articulation of Marginalized Groups – CEAP), launched the first campaign and research on trafficking in persons in Rio de Janeiro with the slogan, *Trafficking in Women is a Crime: a Dream, a Passport, a Nightmare*. At that time however, the political agendas of federal, state and local governments, as well as various NGOs, did not seem ready to respond to the problem of human trafficking, although there was already quite some focus on the commercial sexual exploitation of children.

The question of how to combat human trafficking found a place on the political agenda only at the beginning of the new millennium, when the first National Research on Trafficking in Children, Women and Adolescents for

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Commercial Sexual Exploitation, also known by the acronym PESTRAF (2002), was conducted jointly by a large group of Brazilian NGOs and universities receiving substantial international support.

Offices to Assist Victims of Human Trafficking

In December 2001, the conservative government of President Fernando Henrique Cardoso – through the National Justice Secretariat of the Ministry of Justice – signed an agreement with the UNODC to implement the Global Programme Against Trafficking in Human Beings (GPAT), financed by the governments of Brazil and Portugal¹³ in order to combat international trafficking in women for sexual exploitation.¹⁴ In 2002, the Federal Government, not yet fully influenced by PESTRAF, set up State Committees to Prevent and Combat Human Trafficking in five Brazilian states (Bahia, Ceará, Pará, Pernambuco and Rio de Janeiro), basically within the structure of the Federal Witness Protection Programme, PROVITA.¹⁵ It also tried enlisting the support of NGOs for back-up and networking facilities.

After this largely unsuccessful governmental initiative, the new and more left-leaning government of President Lula revived the GPAT, choosing initially four priority states – Ceará, Goiás, São Paulo and Rio de Janeiro. Ceará and Goiás were chosen as they were considered to be locations of intense trafficking activity, while Rio de Janeiro and São Paulo have the country's main international airports that serve as departure points for many trafficked persons going overseas. It is important to emphasise that a notorious human trafficking route, from Belém (capital of the northern state of Pará in the Amazon region) to Surinam and further on to Europe, and some other infamous routes in Brazil, such as the point where the three borders of Argentina, Brazil and Paraguay meet (Sanchis, 2005, quoting the IOM), were unfortunately not covered by this first five-year GPAT.

The GPAT proposed specific actions concerning research and the prevention of human trafficking for sexual exploitation in the four states involved. Other forms of trafficking were not covered in this first programme. In particular, the patterns of slave labour occurring within Brazil were dealt with quite separately, receiving international attention instead from the ILO. The focus within the GPAT was on capacity building among law enforcement professionals (especially the federal police), campaigns, research and diagnosis, and the construction of a database on trafficking statistics that was not fully concluded.

Furthermore, together with the governments of the four states involved, the Ministry of Justice and the UNODC promoted the creation of Victims of Human Trafficking Assistance Offices. The offices were supposed to provide legal, social and psychological assistance to enable trafficked persons to reintegrate. Health services, education and social facilities were to be offered through a network of local service organisations. Even though innovative and, to a certain extent, showing the government's commitment to initiate action, the four offices hardly represent good practice in terms of providing assistance to trafficked persons or preventive action.

Victims of Human Trafficking Assistance Office in São Paulo

The office in São Paulo was opened in May 2003, within the headquarters of São Paulo's Secretary of Justice and Defence of Citizenship. São Paulo's state government provided staff and an office, while the Federal Ministry of Justice promoted training and workshops on human trafficking. But the fact that the São Paulo office, located in the city centre, could extend assistance to very few trafficked persons might be explained by the lack of means and the difficulties experienced in identifying trafficked persons, who do not easily step forward. As a result, the

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office gives support to an NGO,¹⁶ that by the end of 2006 started a pilot project at São Paulo's International Airport at Guarulhos to provide information to Brazilians who might have been trafficked and forcibly repatriated and their rights violated in the process.

Victims of Human Trafficking Assistance Office in Goiás

The office in the capital Goiânia of the centre-west state of Goiás was also installed in cooperation with the state government, within the state public prosecutor's office in Goiás. As in São Paulo, there was not a great demand for the office's services, although it provided assistance to some trafficked women returning from abroad. As a result, the office in Goiás started focussing on prevention and awareness raising activities in schools, in order to mobilise in a non-discriminatory and empowering manner. It also managed to establish close contacts with the general social assistance network, since the coordinator is also the leader of the Municipal Network to Combat Sexual Violence, which helps to bring together practical assistance to trafficked people. In fact, Goiás has a reference centre for legal abortion as well as a special police station for women. As a result of these initiatives, the Federal Special Ministry of Women Rights (SEPM) chose Goiás to set up the Centre to Assist (female) Victims of Violence, also intended to identify trafficked persons.¹⁷

Victims of Human Trafficking Assistance Office in Ceará

In contrast to the other offices, the office in the capital Fortaleza of the north-east state of Ceará on the Atlantic coast collaborates with the state public prosecutor's office on the issue of internal trafficking, mainly involving children and adolescents. A civil police detective (without a mandate to investigate international human trafficking) was appointed to conduct investigations and to act together with the office.¹⁸

Victims of Human Trafficking Assistance Office in Rio de Janeiro

Rio de Janeiro was the only state where the project was postponed, since the Ministry of Justice took some time to identify which state organisation would be able to take responsibility in the regional project. In 2005, the Rio de Janeiro *Conselho Estadual dos Direitos da Mulher* (State Women's Rights Council – CEDIM), turned out to be a relevant, gender-sensitive partner for the Federal Ministry of Justice. CEDIM has been developing several strategies for the implementation of the mandate of the office, inviting several relevant NGOs to participate. However, as far as trafficking for sexual exploitation is concerned, Rio de Janeiro – being depicted as one of its biggest suppliers for the foreign market and an important trafficking route (Leal and Leal, 2002) – still lacks policies to assist trafficked persons, since the office has not yet been set up and the state government has not yet taken any substantial initiative on this issue. UNIFEM, however, directed a specialist on the issue to work at CEDIM's headquarters in the city centre of Rio de Janeiro.

Limits of effectiveness

Opening an Office to Assist Victims of Human Trafficking, even when offering a range of services, is unlikely to be effective unless there is also a clear strategy and campaign on how to address and identify trafficked persons in a non-discriminatory and empowering way. However well intentioned, unless assistance services take the direct needs of trafficked persons into account, they are hardly going to be effective. According to Sodireitos, one of the main NGOs involved in responses to human trafficking in the north of Brazil, the offices lack a clear mission and the (four) bureaux do not work together or liaise in any way.¹⁹

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Another concern regarding mid- and long-term assistance is that the existing support network is not prepared to assist trafficked persons. In the city of Rio de Janeiro, for example, there are only two public shelters to protect women. However, these shelters are designed for victims of domestic violence and in principle do not accept sexually exploited or trafficked women.

Furthermore, the title of the Office was not carefully chosen, since people who suffer human rights violations, especially trafficked persons, do not automatically identify themselves as ‘victims of human trafficking’. Trafficked persons may well just want to forget what has happened to them, as if it were a bad dream, an unlucky choice for which they carry the sole responsibility or just another chapter in an unfair life full of exploitation. They may not perceive this as a violation of their human rights that needs to be confronted.

Maybe even more important, trafficked persons might be reluctant to step forward for fear of reprisals by traffickers and their lack of confidence in the police and law enforcement officials, owing to intimidation and abuse. The fact that the offices in São Paulo, Goiás and Ceará were situated in the premises of other state government organisations – directly linked to law enforcement – is likely to have been another factor that discouraged trafficked persons from stepping forward.

The first phase of the GPAT ended in 2005. Throughout 2006, the Brazilian government negotiated with the UNODC to secure its financial support for a second phase. A new phase will start in 2007 and it seems that all Brazilian states willing to develop tailor-made anti-trafficking initiatives will be able to take part.

The National Policy to Combat Human Trafficking and its future Plan of Action

The *National Policy to Combat Human Trafficking* recognises that human trafficking is a multi-dimensional problem that needs joint action, and brings together, for the first time, all the different actors and agencies that should be involved. In a broader analysis, it can be stated that the Brazilian anti-trafficking policy is primarily based on human rights principles (Articles 1 and 3). The policy, for example, states explicitly that it does not make any of the victims’ rights conditional on their cooperating with law enforcement (Article 3, III).

Nevertheless, there is still a lot of practical work to be done in terms of implementation. Therefore, the development and implementation of the *National Plan of Action to Combat Human Trafficking*, as foreseen in the National Policy, will have to establish specific long-term, mid-term and short-term goals, set deadlines, allocate responsibilities to governmental organisations and necessarily include a detailed budget. Civil society, without a doubt, will have an important role to play in monitoring the implementation of the National Policy and Plan of Action, the latter expected to be ready in September 2007.

4. Migration Policies and Human Trafficking

Migration is an important aspect of society in Brazil. This largest country in South America started off as a typical receiving country for international migrants, while undergoing colonisation (and economic exploitation) from 1500 onwards by the French, Dutch and (especially) Portuguese immigrants. Later on, the slave trade from Africa to Brazil meant a huge rise in Brazil’s population. After the slave trade and slavery were officially abolished in 1888, “the immigration of Italians between late nineteenth and early twentieth centuries comprised more than

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800,000 immigrants. The Japanese flow brought to Brazil around 200,000 immigrants in the first half of the twentieth century” (CNPd, 2005, 2).

From the 1970s onwards, internal migration within Brazil became a significant issue, with a large number of people from the less developed north and dry north-east regions moving to the south-east of Brazil, especially to metropolises such as Rio de Janeiro and São Paulo. As a result, slums multiplied, as well as economic and social inequality, since the cities were not prepared to receive millions of migrants (MacDonald, 1991). The same is true for people migrating into the Amazon, opened up by the military dictatorship (1964–1985) and by the construction of the Transamazonica highway.

Emigration from Brazil

During the 1980s, Brazil, for the first time in history, had more people leaving the country than coming in (CNPd, 2005, 2). Conversely, in 1980 the (military) government created the National Council on *Immigration*,²⁰ consequently only dealing with *immigrants*, as the former government had also done, in fact affirming a policy of *laissez-faire* towards emigration (and internal migration). Official estimates from the Ministry of Foreign Affairs point out that the number of Brazilians emigrating in 2001 was around 1,887,895, approximately 1.5 per cent of the total population at that time (CNPd, 2005, 7). The number of Brazilians living abroad went on increasing, to about two million living overseas by 2005 (CNPd, 2005, 2), prompted, at least in part, by successive economic crises. According to estimates from the Brazilian Ministry of Foreign Affairs, currently some three to four million Brazilians live abroad, some with regular status and some as irregular migrants (Chagas, 2006).

In May 2005, the Brazilian Congress set up a Mixed Parliamentary Commission of Inquiry (CPMI) to investigate criminal and civil offences related to the illegal emigration of Brazilians to the US, in particular, as well as to investigate the citizenship of Brazilians living abroad. One of the many recommendations the CPMI made was to call for the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CPMI Illegal Emigration, 2006, 532). A lengthy report²¹ (577 pages), dated 12 July 2006, managed to examine several important issues, such as emigration, human smuggling, especially via Mexico to the US, as well as the precariousness of the rights of Brazilians living (undocumented) abroad.

It is important to note that the “LAC [Latin America and the Caribbean] migrants show relatively high levels of education and significant feminization; indeed, more than half of all LAC migrants are women” (Pellegrino, 2004, 6). According to the population census of 2001, published by the Spanish National Institute of Statistics, 54.6 per cent of all South American migrants in Spain are female, while the percentage representing women rises to 69.5 when considering Brazilian migrants alone (Pellegrino, 2004, 30).

It is also interesting to see that most Brazilians who officially emigrate come from the richer south-east region of the country (CNPd, 2005, 2), which seems to confirm the idea that at least emigration is not caused by *absolute* poverty, but by *relative* poverty. This means that the differences people feel in social, economic and educational opportunities are more likely to cause them to migrate abroad than poverty alone.

Finally, it must be highlighted that most Brazilian migrant workers travelling to Europe enter as tourists without work permits, especially those who were already part of the informal work sector in Brazil. Seeking opportunities to earn more money away from home, sometimes even without job offers in advance, they normally end up in informal forms of employment that do not require specific qualifications, such as baby-sitting, domestic work and

sex work. These migrants are most likely to experience some kind of exploitation at least, being also vulnerable to immediate deportation from destination countries if and when their irregular status is discovered. Or, in other words: "...with the migratory flows, the number of irregular migrants has also increased and human trafficking between LAC and the EU has become a serious problem. The trafficking in women and children for sexual exploitation is particularly serious and a growing concern" (Pellegrino, 2004, 6).

Internal Migration: Sexual Exploitation *versus* Slavery-like Practices

Since internal migration is an important issue in Brazil, a distinction can be made between the flows from poor rural regions (especially in the north and the north-east) to large urban metropolises on the one hand, and, on the other, to large agricultural development zones where cutting down the forest, ranching and growing various crops on an industrial scale have all been very profitable. Internal trafficking to large urban areas as well as to the agricultural and other distant development zones both have two different faces:

1. internal human trafficking for prostitution purposes (Article 231-A of the Penal Code);
2. internal 'human trafficking' of labourers (Articles 207 and 149 of the Penal Code, considering slave labour or slavery-like practices).

Brazil's current legislation on human trafficking treats them as two separate crimes, formally only labelling the first one as trafficking. Moreover, the government, until the promulgation of the *National Policy to Combat Human Trafficking* in 2006, also did not consider the confinement of labourers to huge farms in the north, north-east and centre-west regions of Brazil to be one of the patterns of internal human trafficking, but as slave labour or practices similar to slavery. Not only did legislation and government policies make (and still make) this distinction, but also international organisations, governmental structures, researchers and civil society organised themselves separately on the issues of forced labour and sexual exploitation (and still do today). This does not always turn out to be a useful distinction, since, through the exchange of information about good practices obtained in these different locations where people are exploited, more effective anti-trafficking measures could be deployed in various other contexts.

The ILO has described the initiatives taken by the Brazilian authorities to stop slavery-like practices as a model for other countries to follow.²² A good example is the so-called *lista suja* (literally: *dirty list*, in order to avoid the discriminatory term, 'black list') published by the Federal Ministry of Labour,²³ which in October 2006 contained the names of 178 employers caught red-handed exploiting slave labour at rural properties. As a result of this 'name and shame' tactic, the entrepreneurs and companies mentioned in the *dirty list* have been prevented from obtaining loans from public (and some private) banks.

Nevertheless, the US Department of State's Trafficking in Persons Report (TIP Report 2006) that placed Brazil on its Tier 2 Watch List, emphasised Brazil's "failure to apply effective criminal penalties against traffickers who exploit forced labour" (US Department of State, 2006, 76), since "there was only one reported prosecution in Brazil that resulted in a conviction at the national level for a trafficking-related crime during the reporting period [i.e. 2005 and early 2006] – a decrease from three convictions obtained in 2004" (US Department of State, 2006, 77). The US Department of State correctly typifies slave labour and slavery-like practices as internal trafficking, but when it comes to criminal convictions in Brazil it only seems to consider international slave labour and slavery-like practices, ignoring possible criminal convictions for other forms of human trafficking, such as for

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sexual exploitation. It also does not highlight non-criminal repression and convictions, such as payment of damages and fines for labour law offences.

The ILO confirms that in Brazil no one has served time for exploiting slave labour, and the CPT estimates that at least 25,000 Brazilians fall victim each year. In 2004 the Brazilian authorities appeared to agree with this estimate in their contacts with the UN (ILO, 2005, 23). However, according to the Labour Inspection Secretary from the Federal Labour Ministry (SIT/MTE), their mobile anti-slavery teams (the GEFM, installed in 2002)²⁴ managed to free a total of 17,983 forced labourers between 1995 and 2005 (ILO, 2005, 24).

More structural and daring changes, such as a proposed amendment to the Constitution (PEC 438-2001, former PEC 232-1995) that foresees, among other measures, the expropriation (without compensation) of land where slave labour is detected, have already been under discussion for 11 years now, indicating a complete lack of political will to adopt them. On the other hand, the *National Plan to Eradicate Forced Labour*, launched in 2003, sets out a series of concrete actions to address the structural causes of slave labour in Brazil. It also led to the creation of a National Council for the Eradication of Forced Labour (CONATRAE), counting on governmental and non-governmental participation. Though based on agreements with the ILO, the Plan, unfortunately, does not encompass anti-trafficking actions as such and does not make any reference to the definitions contained in the UN Trafficking Protocol.

According to Camargo,²⁵ a federal labour law prosecutor and member of the CONATRAE, rescued slave labourers have applied successfully both for unemployment assistance (to be paid by the state) and labour law damages (a fine paid by their former abusive employers). Victims of other forms of human trafficking – where no regular relationship of employment can be detected, as in the case of forcibly employed sex workers – are traditionally considered unprotected by Brazil's quite progressive labour law provisions. But they can apply for damages, like anyone else, through a lengthy and rather costly civil lawsuit, based on a penal conviction. Although the employment of prostitutes is illegal, sex-workers, however, should somehow also be able to successfully invoke the labour law provisions in case of a violation, since apparently applicable jurisprudence also honours labour law claims of those employed in the illegal and mafia-like gambling business (*jogo do bicho*).

Immigration to Brazil and MERCOSUR

The region that constitutes the MERCOSUR (*Mercado Común del Sur*, the Southern Common Market) initially included Brazil, Argentina, Paraguay and Uruguay. Other states have joined subsequently: Chile (1996), Bolivia (1997), Peru (2003), Colombia (2004), Ecuador (2004) and Venezuela (2004). There has been significant migration within the region, although the Treaty of Asunción, that created the MERCOSUR in 1991, was concerned principally with the free movement of capital, goods and production.

In December 2002, the four initial member states of MERCOSUR, together with Bolivia and Chile, signed two agreements – *Residence for Nationals* and *Regulating the Migration of MERCOSUR Citizens*. “According to the Agreement on Residence for Nationals of the MERCOSUR Member Countries, immigrants from one country of the region who acquire a temporary or permanent residence visa in another MERCOSUR country will receive the same treatment as the country's nationals, including in the labour field” (Intall, 2004, 69). The two agreements will only enter into force after ratification by all six signatories. “The fact that the situation of the labour

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markets in the MERCOSUR countries remains difficult is, to a greater or lesser extent, a significant obstacle to such ratification in the short term” (Intall, 2004, 69).

In 2005 the MERCOSUR countries, together with Chile, Bolivia, Peru, Venezuela and Ecuador, signed the *Montevideo Declaration Against Human Trafficking*, foreseeing police cooperation and exchange of information on trafficking in persons, especially trafficking linked to prostitution (CPMI Illegal Emigration, 2006, 333). In 2006 the Montevideo Declaration gained practical significance through the adoption of the *MERCOSUR Plan of Action to Combat Human Trafficking*. Conceived in Buenos Aires, the MERCOSUR Plan of Action has identified focal points within each government responsible for its implementation and also foresees informative campaigns, exchange of information, training of governmental and non-governmental actors and assistance for victims of human trafficking.

Brazil is mainly a destination country for human trafficking in relation to neighbouring countries. Latin American immigrants, especially Bolivians, Paraguayans, Peruvians and Chileans, but also Koreans, face exploitative work conditions or even forced labour and slavery-like practices in Brazil’s largest urban centres, especially in small industries (sweatshops) in São Paulo (US TIP Report, 2005). Immigrants, most of them undocumented, are attracted to the most productive areas of the MERCOSUR region, trying to get a share in the material benefits. There are around 150,000 Bolivians in São Paulo alone, mainly without a residence permit, sometimes exploited in unfair labour conditions.²⁶ According to the Catholic Church’s *Serviço Pastoral de Migrantes*²⁷ (Migrant Pastoral Service or SPM) – one of the few Brazilian organisations working directly with migrants – around 10 per cent of Bolivians in São Paulo are subjected to slave-like practices and servitude (Castro, 2005). Moreover, some undocumented migrants in vulnerable situations get involved in drug trafficking as a means to pay off their debts, but end up in prison instead. The coordinator of the NGO ASBRAD has come across a considerable number of Latin American women from different countries imprisoned in São Paulo for (international) drug trafficking. They in fact assert that they were forced to act as ‘drug-mules’.²⁸

In September 2005, the Federal Ministry of Justice launched a public consultation on its proposal for a new Foreigners Statute (Alien Law). The actual *Foreigners Statute* (Law No. 6,815, dated 19 August 1980) is the product of a period when the (military) government was preoccupied with national security issues and is restrictive as far as immigrants’ rights are concerned. The new proposed Foreigners Statute aims to be more progressive. It also makes it easier to obtain a temporary resident status in order to attract immigrants, and proposes to change the National Council on Immigration into the National Council on *Migration*, thereby extending its scope.²⁹

Nevertheless, migrants’ organisations and agencies such as the SPM believe that the proposed statute does not go far enough on the issue of free mobility within the MERCOSUR region and the protection of the human rights of migrants (Bassegio, 2005, 2). Moreover, the SPM believes that the proposal is extremely selective, scarcely paying any attention to the interests of migrants who do not have qualifications or who are not highly educated, but who may nevertheless be productive in the Brazilian economy.³⁰

On the other hand, in 2006 the Brazilian government made it possible for Bolivians whose residence situation was irregular to apply for a permit without having to return to Bolivia, implying some kind of an amnesty. Since the MERCOSUR agreements have not been ratified, Brazil and Bolivia have adopted a temporary measure to solve the problem of a great number of undocumented Bolivians in Brazil. On 15 August 2005, Brazil and Bolivia concluded the *Migration Regulation Agreement*,³¹ with the objective of promoting the socio-economic integration

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of undocumented immigrants of both countries in their territories. For that, the immigrant has to present some documents in order to request a permanent residence permit. The only concern here is with regard to the payment of a fine resulting from irregular residence, since those migrants may not be able to pay the tax to register and be granted residency.

5. The Human Rights Impact of Anti-Trafficking Efforts

This section will analyse some of the impacts of anti-trafficking laws, policies and initiatives on the human rights of trafficked persons, migrants, sex workers and other groups in vulnerable situations.

The Impact on Trafficked Persons

The general assistance services in Brazil are unprepared to extend security, legal and health services. More importantly, authorities and officials show a lack of understanding about what respecting the human rights of trafficked persons entails. Ana's case³² helps to understand the complexity of international trafficking in women, efforts to combat it and the impact on trafficked persons and their families.

In 1999 Ana left her home in the coastal state of Bahia to travel to Switzerland at her aunt's invitation. Her aunt promised that she would be able to study, have a good job and also be able to send money to sustain her family living in the countryside. As soon as Ana arrived in Switzerland, she married a Swiss man, probably to arrange a permit to stay. However, her newlywed husband started almost immediately exploiting her with the help of her aunt. They kept all of Ana's earnings acquired through forced prostitution. In the first year, Ana also became pregnant and was forced to have an abortion. She suffered serious bleeding and was taken to hospital. This allowed her to escape from her abusive husband and aunt.

It is important to note that in many Brazilian cases, the trafficker is a family member or a friend, usually a woman and sometimes someone who was herself once trafficked, as suggested by the Director of the Human Rights Division of the Department of the Federal Police.³³ "The relevance of neighbourhood-schemes, friendships and family relations, that we have learnt about from other research in connection with people on the move, is important to take into account as we develop awareness raising materials to try and prevent human trafficking" (*unofficial translation*, Piscitelli, 2006, 67).

Supported by the Swiss NGO FIZ³⁴ (Women's Information Center for women from Africa, Asia, Latin America and Eastern Europe), in 2000 Ana started legal proceedings as a victim of human trafficking. Ana's mother was asked to testify in favour of her daughter. She travelled to Switzerland despite being threatened by Ana's aunt before leaving Brazil. Soon after her return to Brazil, Ana's mother was murdered, while her father was badly injured.

The *Centro Humanitario de Apoio a Mulher* (Humanitarian Centre to Assist Women – CHAME³⁵), the main NGO in Bahia involved in efforts to combat human trafficking, contacted the local police in order to explain that the murder of Ana's mother was almost certainly a consequence of transnational trafficking in women. Together with FIZ, CHAME arranged for Ana to travel to Brazil in order to meet with her sisters and father. CHAME also contacted and gave information to the federal police, Ministry of Justice and the public prosecutor in order to secure protection for Ana and her family.

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The Federal Witness Protection Programme PROVITA offered to protect Ana while she was in Brazil. This nationwide programme protects and assists threatened witnesses in general, without being specific to victims of human trafficking. It is important to observe that PROVITA guarantees protection and assistance only to victims who agree to testify in the course of a prosecution. Once supported by PROVITA, the federal police were in charge of picking Ana up at the airport and driving her to a safe place indicated by the protection programme. The day before her arrival, however, CHAME was informed that the federal police would not pick up Ana at the airport, since the genuineness of her case had been called into question. Only after a superior order had been issued did the federal police go to the airport. At the same time, the state civil police from Bahia was not convinced that the murder of Ana's mother was a trafficking-related crime – an indication that both these agencies had not coordinated well with each other over an international trafficking case.

As of April 2007, court proceedings in Brazil are still pending and the murderers of Ana's mother are still at large, putting her and her family at serious risk. During this entire process, Ana's behaviour and reliability have been challenged and questions were raised about why she had consented to travel to Switzerland. The proceedings in Switzerland are closed now and the traffickers have managed to get away with a minor punishment for the promotion of prostitution. Ana, still very traumatised, continues to live in Switzerland and receives support from FIZ. For years, her application for a residence permit as a victim of human trafficking was ignored, but quite recently it has been sorted out and she can stay in Switzerland as a registered migrant. Since Ana's human rights as a trafficked person and the rights of her family were denied and seriously violated, her case exemplifies 'bad practice'. It can also be cited as an example of 'good practice', in the sense that Ana herself recognised that her rights were being violated and courageously stepped forward to demand that justice be done.

The number of investigations concerning international human trafficking is growing in Brazil, but figures are still relatively low, according to the table³⁶ below.

Table 1: Brazilian federal police investigations into transnational trafficking for the purpose of prostitution over the past 17 years

Year	Total number of investigations
1990	1
1991	5
1992	4
1993	4
1994	6
1995	8
1996	10
1997	7
1998	11
1999	20
2000	35
2001	48
2002	39
2003	56
2004	72
2005	119
2006	35
<i>(Until 30 June 2006)</i>	
TOTAL	480

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This chart – from the Human Rights Department of the Federal Police – mentions 480 federal police investigations into cases of transnational trafficking for prostitution purposes recorded over the past 17 years. These numbers do not accurately reflect the scale of human trafficking in Brazil, for the simple reason that not all cases of human trafficking are the subject of a police investigation. Also, the chart does not mention cases of other forms of exploitation. Furthermore, investigation and prosecution of internal trafficking cases is not a responsibility of the federal authorities, but rather of the state civil police and the state public prosecutor's office, making it more difficult to link information obtained in transnational trafficking cases to internal trafficking investigations, or *vice versa*.

It is also important to reiterate that numbers, tables and charts on human trafficking reflect only part of what is happening in reality, as human trafficking is a crime couched in secrecy and hence difficult to measure. It must also be pointed out that in Brazil all the various numbers, tables and charts still reflect a confused understanding of what constitutes human trafficking.

The Impact of Anti-Trafficking Initiatives on Sex Workers

Although this is not intended to label sex workers or to contribute to any kind of stereotype, in practice it seems there are two groups of Brazilians who migrate to earn money from commercial sex – sex workers who migrate internally or to other countries, aiming to increase their profits,³⁷ and Brazilians without a previous history in the sex business who consider prostitution to be a temporary opportunity to earn (more) money.

In both cases people mainly resort to irregular emigration (i.e. leaving Brazil without proper documentation such as working-permits or without following legal procedures), or being smuggled in order to go abroad. Human trafficking might (eventually) be one of the consequences. Both groups of migrant sex workers might face human rights abuses that they would have already experienced in Brazil, and hard social and economic living conditions. Experienced sex workers, however, seem to be relatively more aware³⁸ than many other migrants of the risks when migrating, calculating the risks, just as they are used to doing in their daily work in Brazil.

With a federal minimum wage just raised to 380 Brazilian *Reais* per month (equivalent to US\$187 in April 2007), poverty is omnipresent and few incentives are needed for someone to take extra risks for a better life. Many a time, a well-packaged promise is enough, especially in a country that is still steeped in the traditional economic 'patron-client' system,³⁹ which makes you believe that you are morally and financially obligated to anyone who helped you survive or arranged a job for you. This means that a financial or moral debt need not be backed up by the use or threat of force, even when circumstances are extremely hard or exploitative, since paying back a debt is already part of the patron-client system and ingrained in the debtor's culture and beliefs.⁴⁰

The anti-trafficking Articles 231 and 231-A of the Penal Code only focus on trafficking for prostitution purposes. These articles do not consider consent of the person as a relevant factor in assessing whether an offence has been committed. At certain times, the police have conducted raids in saunas, massage parlours, baths (*termas*) and brothels to curb prostitution.⁴¹ Legislation makes no distinction between forced and voluntary prostitution and consequently, criminalises all who make money out of prostitutes, although prostitution as such is not prohibited. So helping someone to migrate (within or from Brazil), while knowing that the person has the intention to practise prostitution, can, under the terms of the law, be considered an act of human trafficking (Piscitelli, 2006, 65). In contrast, the UN Trafficking Protocol does not consider people who decide for themselves to migrate and earn

money from commercial sex to be victims of trafficking, nor those who aid them to be guilty of any sort of trafficking offence, unless some element of deception or force is used or the migrant is under 18.

The Impact of Anti-Trafficking Initiatives on Migrants

Undoubtedly, in the name of combating human trafficking, governments – especially in destination countries – implement policies that are contrary to the interests of trafficked persons and migrants in general. It was not by chance that many destination countries from the north have expanded their legal arsenal for containing and controlling migration, even adopting repressive methods to deal with the problem. The US, for example, is supposed to have pressured Mexico to require Brazilians to obtain a visa to enter Mexico, in order to stop the massive irregular flows of Brazilians using Mexico as a ramp to enter the US (CPMI Illegal Emigration, 2006, 100–109).

Research conducted at the International Airport at São Paulo among Brazilians who had been deported or refused entry to another country and repatriated, seems to confirm that a rather large number of Brazilian women who were refused entry into the European Union countries were not prostitutes, nor were they planning to join the sex business (Piscitelli, 2006). “An image of Brazilian women from a certain social background, a particular colour and with their own body language has been constructed that portrays them as prostitutes” (*unofficial translation*, Piscitelli, 2006, 65). This stereotype seems to be nurtured by the immigration departments of numerous other countries. Many Brazilian women who were deported or refused entry mentioned the bad treatment and humiliations they suffered while in Europe. “It is important to consider that prostitutes are more visible and vulnerable than other workers in an irregular situation and it is possible that this aspect is reflected through a relatively larger representation of sex workers within the deported group” (*unofficial translation*, Piscitelli, 2006, 65). The research concludes that European countries have treated Brazilian women in a disrespectful and humiliating way. “The study suggests that in these (European) countries there is a great concern about irregular migration, which, to Brazilian women, is highly connected with the stigma of prostitution” (*unofficial translation*, Piscitelli, 2006, 67).

In Brazil, as in other countries, law enforcement and immigration officials do not always realise that trafficked persons and their traffickers might travel together. This puts trafficked persons in an extremely vulnerable situation, when they and their traffickers are attended, interrogated or detained together. On 14 September 2006, during a joint action at the International Airport of Rio de Janeiro, the coordinator of ASBRAD and the psychologist of Projeto Trama, responding to a special request by the federal police in Goiânia, tried to assist three young Brazilian women being deported from Spain, apparently victims of human trafficking. The federal police at the Rio de Janeiro airport did not facilitate the entrance of the two professionals into the restricted area and also obstructed a private conversation, as one of the police officers was present throughout and the women seemed to be afraid of talking in front of the police. When two of the women went to the bathroom, the youngest one stated that, although she earned some money in Spain, she did not want to go back, preferring to stay with her little daughter in Brazil. But when the other women returned from the toilet, the coordinator of ASBRAD was aggressively told by one of them to mind her own business. It became clear that she probably was the trafficker; she spoke for the other two, saying that they were aware of their rights, wanted to return to Spain and did not need any help. The others did not contradict this.

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Finally, it is important to draw attention to the vulnerability of migrant transgendered persons (transsexuals, transvestites and cross-dressers). According to the street educator of Projeto Trama, some transgender persons (migrating especially to Italy) mention their experience of exploitation, violence and threats, but reckon they can protect themselves abroad better than women.⁴² “This is a category (transgender) that, until now, has been receiving little attention in the discussions on international and internal human trafficking” (*unofficial translation*, Piscitelli, 2006, 67), although the media have started taking note of the trafficking of transgendered persons.⁴³

The Impact of Anti-Trafficking Initiatives on Children

PESTRAF identified specific flows of children being trafficked into commercial sexual exploitation. On the 110 internal trafficking routes between different towns in the same state and between different states in Brazil, the number of adolescents (children between 12 and 18 years of age) was found to be greater than the total number of younger children and adult women (Leal and Leal, 2002).

In 2006, a two-year training programme, financed by USAID, was launched to develop a reference methodology of local service networks in 11 cities that focuses on sheltering victims up to the age of 18 who have been trafficked for sexual exploitation within Brazil. The option to focus assistance on children avoids any dilemma regarding USAID funds – since funds for anti-HIV/AIDS efforts⁴⁴ and anti-trafficking efforts are conditional on their local partners pledging to oppose commercial sex work.

The coordinator of the Programme to Assist Children and Adolescents Victims of Trafficking for Sexual Exploitation from Partners of the Americas acknowledges this fact: “Our programme focuses on children up to 18 years who are victims of trafficking for sexual exploitation purposes. With a child you do not have to discuss prostitution because there is a legal standard for offering protection against what has to be considered a crime, no matter what... In the case of adults, it is far more complex and a lot of other questions might be asked.”⁴⁵ Furthermore, although the coordinator of the programme told the authors that she recognised that trafficked children are also subjected to other forms of exploitation, the USAID programme is intended to assist children who have been trafficked within Brazil for sexual exploitation.

A rather recent phenomenon of child trafficking, especially relevant in football-loving Brazil, was the subject of a proposed European Parliament resolution, as part of the 2007 European Parliament report on the future of professional football in Europe. It suggested that “additional arrangements are necessary to ensure that the home-grown players initiative does not lead to child trafficking, with some clubs giving contracts to very young children (below 16 years of age)” (Belet, 2007, 10). The Brazilian media, along with their counterparts in several European countries, have published information on this phenomenon.⁴⁶

Finally, regarding legal criminal procedures in general, Brazilian justice automatically guarantees some confidentiality in cases involving children and adolescents,⁴⁷ although confidentiality might also be requested in certain circumstances in (criminal and civil) cases involving adults.⁴⁸ For adults however, this is not a standard procedure and victims and witnesses, children and adults, normally have their identity exposed during the legal procedure, not receiving any special support, and therefore feeling unsafe and afraid.

The Impact of Anti-Trafficking Initiatives on Indigenous Communities

The length of Brazil's inland frontiers, touching almost all the other countries in South America, should cause worries regarding human trafficking, especially when it concerns remote indigenous communities. Although specific information on the trafficking of people belonging to Brazil's indigenous communities is lacking, some issues have received attention. For instance, the sexual exploitation and prostitution of young women and adolescent Indians have provoked a few superficial reactions from official institutions such as FUNAI (National Foundation on Indigenous Issues) and FUNASA (National Health Foundation).⁴⁹ The *Conselho Indigenista Missionário* (Indigenous Missionary Council – CIMI) highlights cases of sexual exploitation in different states, such as Paraíba, Mato Grosso do Sul and Paraná. "In Paraíba, the disordered growth of tourism to indigenous territories makes the infiltration of organised crime and the recruitment of adolescents for sexual exploitation purposes easier" (CIMI, 2006, 125). According to Sodreitos, the problem is particularly serious in the centre-east region of Mato Grosso do Sul, where indigenous women and girls are being prostituted and used for international drug trafficking.⁵⁰

Likewise, another matter of concern is the recruitment of indigenous children by drug traffickers and other criminal organisations. "In Dourados [the centre-west state of Mato Grosso do Sul near the Bolivian border], a fifteen-year-old girl was recruited by drug dealers and forced into prostitution in order to pay off the drugs she used" (CIMI, 2006, 125). Moreover, a recently published article in one of Brazil's main newspapers denounced the recruitment of Brazilian children in the Amazon at the border with Colombia. In at least three municipalities (Santo Antônio de Içá, Atalaia do Norte and São Gabriel da Cachoeira), there were reports of Brazilian adolescents being recruited by the Colombian guerrillas. The Federal Police Coordinator for Special Border Operations (COESF) rather unfortunately stated that the "adolescents were not forced to join the FARC (Colombian Revolutionary Armed Force) but seduced with money. And as far as we know, the FARC do not pay what they promise" (*unofficial translation*, Gripp, 19 December, 2006).

The fact remains that trafficking of people belonging to indigenous communities and their exploitation has not been the subject of specific research. This may lead to the conclusion that the issue is just as marginalised as the indigenous communities themselves are within Brazil.

6. Conclusion: Concerns and Possibilities

Concerns

"Brazil's dramatic level of social inequality and lack of work opportunities are the push factors leading Brazilians to leave their homes and their country" (Almeida, Leite and Nederstigt, 2006, 34). This root cause should be the first and central observation of any conclusion on internal and international human trafficking. Not because it is so obvious, but to remind us that anti-trafficking efforts may in fact not have any real effect, but merely be palliative and provide a little assistance while doing nothing about the continuing patterns of trafficking and exploitation, which are due, in large part, to current macroeconomic and social policies associated with unlimited capitalist growth and globalisation based on free-market principles and a policy of non-state intervention. This suggests that the focus in discussions about the effectiveness of anti-trafficking efforts should be on the contradictions

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between anti-trafficking efforts on the one hand and the macro politics that fertilises the root causes for human trafficking on the other – causes which are able to dilute anti-trafficking efforts into mere symbolism. People without access to education, health care and especially employment or social security naturally seek practical solutions. They might courageously opt to migrate in the legitimate search for better living conditions, necessarily accepting risks, including those of irregular migration, contracting smugglers and possibly ending up as trafficked. What can be worse than the exploitative status quo? Moreover, preventing people from migrating, besides being quite naïve in a globalised world, violates their right to freedom of movement (Article 13 of the Universal Declaration of Human Rights).⁵¹

Another concern is the widespread foreign influence. As mentioned before, anti-trafficking initiatives in Brazil, ever since the English pressured Brazil to abolish slave trade, were triggered by subtle or less subtle foreign influence. Governmental and non-governmental anti-trafficking efforts are directly or indirectly financed and programmed by IGOs, foreign governments (such as the US and Portugal) or foreign NGOs. Foreign interest in Brazil's anti-trafficking efforts became evident only a few years ago, and might be welcomed when it involves the exchange of information, good practices, bilateral agreements, capacity building and finance to be spent according to Brazil's priorities.

But it is important to ask if existing governmental and non-governmental initiatives really address the needs of trafficked persons, or if they serve other interests and objectives? This is partly answered when analysing national and international relations. *Being indifferent* to the issue of human trafficking and *not* being able to show any kind of anti-trafficking effort means risking becoming a political pariah. Rushing the implementation of anti-trafficking efforts without clear strategies, such as the setting up of the Victims of Human Trafficking Assistance Office, might appear as an achievement in the yearly ranking of the US TIP reports (2005), but such actions can also be considered highly speculative and ineffective. Undertaking efforts which are visible and get noticed seems to become the priority, instead of the *impact* of those efforts. Furthermore, there is a possibility that governments, as well as NGOs, may use the issue of combating human trafficking to pursue their own agendas: the US, for example, as mentioned before, is supposed to have pressured Mexico to require Brazilians to obtain a visa to enter Mexico (CPMI Illegal Emigration, 2006, 100–109).

A third major concern is the fact that Brazil's prosecutors and the media have ignored the difference between forced prostitution and sexual exploitation on the one hand and voluntary prostitution on the other. This gets further complicated by issues of sex tourism and commercial sexual exploitation of children. In addition, human smuggling and irregular migration enter the discussion, not always contributing to a fruitful debate, piling up concepts that are somehow linked, but different. These various confluences and mix-ups have a negative impact on the design and implementation of adequate and pertinent strategies to combat human trafficking. For instance, one has to bear in mind that protective measures for sexually exploited and trafficked children, such as the USAID initiative, cannot automatically apply to trafficked adults, since adults have to be addressed quite differently. Of course, it should be acknowledged and appreciated that the issues of international human trafficking and smuggling have been aired on Brazilian television recently, for the first time, via enormously popular and influential soap operas, but the exact meaning of these terms or the difference between them is not yet clear to the public.

Lastly, a significant conclusion is that whenever there are few opportunities to migrate legally and an excess of push factors, people in vulnerable situations will be more likely to fall prey to human traffickers and smugglers. Therefore, Brazil, as a country of origin and destination, should urge for the promulgation of a human rights based

Foreigners Statute, free movement within the MERCOSUR region and a quick ratification of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

Possibilities

Notwithstanding the concerns mentioned above, the Brazilian context also offers interesting future possibilities, indeed more than ever before. Human trafficking is now on the political agenda with the promulgation of a *National Policy to Combat Human Trafficking*. For the first time in Brazil's history, the multidimensionality of human trafficking is recognised, as 13 ministries are invited to participate in the development of a National Action Plan. And, also for the first time, all the forms of exploitation associated with human trafficking that are mentioned in the UN Trafficking Protocol, including slave labour and practices similar to slavery, and the removal of organs, are officially considered to constitute human trafficking.

It is evident that Brazil, with a clear and outspoken aspiration to become Latin America's permanent representative in a remoulded UN Security Council, is evolving from an isolationist ex-military dictatorship into a kind of international role model for world democracy and human rights. Brazil's role in international politics is characterised by a heightened sense of engagement on several issues, including human trafficking and migration. Some recent examples of its participation in the human trafficking issue are: fielding Mary Castro as Brazil's candidate for the Global Commission on International Migration; active participation in the UN High Level Dialogue on Migration and Development (New York, 11–15 September 2006); and sending a highly qualified delegation to the Conference of State Parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Vienna, 8–12 October 2006) (GAATW, 2006). Besides that, Brazil's eagerness to pay attention to UN standards, while at the same time playing a quite independent role in relation to the US, might turn out to be a political opportunity.⁵² It is a fact that the largest country of South America owes the existence of its multicultural society to internal and international migration (including forced migration). If Brazil really opts to open up its borders, respecting the human rights of migrants, it might serve as an example to counter the current of anti-migration policies worldwide.

And last but not least, the fact that, according to the ILO, the way slavery-like practices have been eliminated in Brazil has become a model for other countries to follow and this should facilitate the implementation of good practices (as well as prevent bad practices). The Brazilian know-how on the eradication of slave labour, although understandably not entirely free of its critics, is a great asset when drawing up joint actions in the *National Action Plan to Combat Human Trafficking*. Slave labour and forced prostitution are different problems with a lot in common; so the strategies to combat them should probably also have a lot in common, even though it is clear that it would be a mistake to adopt a 'one size fits all' approach. The UN Trafficking Protocol clearly considers both patterns of exploitation to be part of human trafficking. Or should we say (modern) slavery?

ENDNOTES

- ¹ *Política Nacional de Enfrentamento ao Tráfico de Pessoas* in Portuguese. The word *enfrentamento* means facing up to a challenge and it is used in Brazil instead of the word ‘combat’ (as in ‘to combat trafficking’) used in English language texts elsewhere. In Brazil, the word *enfrentamento* is less repressive, referring also to prevention and assistance actions. However, the word ‘combat’ is used throughout this chapter whenever the Portuguese text refers to *enfrentamento*.
- ² Based on Article 84, VIa of the Brazilian Constitution (1988), meaning that Decree No. 5,948-2006, although a legal instrument, does not have the status of law but is an administrative regulation.
- ³ Unofficial translation from Brazil’s Penal Code:
International Trafficking of Persons (amended by Law No. 11,106-2005)
Art. 231 – Promoting, serving as an intermediary, or facilitating the entry, into national territory, of a person with the intention to practice prostitution, or the exit of a person with the intention to practice prostitution on foreign soil.
Penalty – imprisonment from 3 to 8 years and fine.
§ 1º – If this occurs in conjunction with any of the circumstances listed in § 1º of Art. 227:
Penalty – imprisonment from 4 to 10 years and fine.
§ 2º – If there is use of violence, serious threat, or fraud, the penalty is imprisonment from 5 to 12 years as well as a fine and apart from the penalty corresponding to violence.
Internal Trafficking of Persons
Art. 231-A. Promoting, serving as an intermediary, or facilitating, within national territory, the recruitment, transport, transfer, harbouring or receipt of a person with the intention to practice prostitution (Included by Law No. 11,106-2005):
Penalty – imprisonment from 3 to 8 years and fine.
- ⁴ Until a recent change in Brazil’s Federal Constitution (Constitutional Amendment No. 45, dated 30 December 2004), an intense legal debate in Brazil focused on the legal status of international treaties ratified by Brazil, particularly whether they had the status of Constitutional Law or were less significant. Since the UN Trafficking Protocol is not a human rights treaty and was not approved by the Brazilian Congress through the (newly introduced) special constitutional procedure of Article 5, paragraph 2 (stipulating that only international human rights treaties ratified by Brazil will have a Constitutional status when approved two times in both chambers by 3/5 of the quorum), the UN Trafficking Protocol should be considered to have the same legal status as ordinary non-constitutional law (Capez, 2006, 245–246).
- ⁵ Although one could argue that *lex posterior derogat legi priori*, which means that a newer law on the same issue replaces a previous one whenever the two are in conflict. In this case, it means that Law No. 11,106 implicitly sets aside the UN Trafficking Protocol, which, of course, was never intended and should not be accepted, especially since the *National Policy to Combat Human Trafficking*, published by Presidential Decree No. 5,948 on 26 October 2006, defines “trafficking in persons” in its Article 2, by making a direct reference to the UN Trafficking Protocol definition.
- ⁶ Proposed Law No. 117-2003.
- ⁷ Unofficial translation from Brazil’s Penal Code:
Favouring Prostitution
Art. 228 – To induce or attract someone to prostitution, facilitate it or prevent someone to abandon it:
Penalty – imprisonment from 2 to 5 years.
§ 1º – If in conjunction with one of the circumstances listed in § 1º of the previous article:
Penalty – imprisonment from 3 to 8 years.
§ 2º – If the crime is committed with the use of violence, serious threat, or fraud:
Penalty – imprisonment from 4 to 10 years, apart from the penalty corresponding to violence.
§ 3º – If the crime is committed with the intention to make profit, a fine may also be applied.
Sheltering Prostitution
Art. 229 – Maintaining, on one’s own or through a third party, a house of prostitution or place designated for libidinous encounters, regardless of the intention to make profit or direct involvement of the owner or the manager:
Penalty – imprisonment from 2 to 5 years and fine.
Ruffianism

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Art. 230 – To take advantage of the prostitution of another person, participate directly in profit making or being sustained by it wholly or partially:

Penalty – imprisonment from 1 to 4 years and fine.

§ 1º – If this occurs in conjunction with any of the circumstances listed in § 1º of Art. 227:

Penalty – imprisonment from 3 to 6 years and fine.

§ 2º – If the crime is committed with the use of violence or serious threat:

Penalty – imprisonment from 2 to 8 years and fine apart from the penalty corresponding to violence.

⁸ *supra* note 3.

⁹ *O Globo*, Marcelo Dutra, 4 February 2007, *Nas casas de ‘fast-sex’, um real por minuto; Centro já tem pelo menos 30 pontos de prostituição desse tipo, onde o movimento maior é na hora do almoço*. In the ‘fast-sex’ houses, one Brazilian Real [equivalent to US\$0.49 in April 2007] per minute; the centre – of Rio de Janeiro – has at least 30 of these points of prostitution, where it is the busiest around lunch-time. (“...*Não há crime nessa região, já que a maioria desses lugares pertence a policiais...*” There are no crimes in this area, because most of these places are owned by policemen...)

¹⁰ www.projetotrama.org.br

¹¹ *supra* note 7.

¹² The final report of the Parliamentary Inquiry Commission (CPI) that investigated trafficking in organs mentions several cases (November 2004). www2.camara.gov.br/comissoes/temporarias/cpi/encerradas.html/cpiorgao/relatoriofinal.pdf

¹³ www.unodc.org/unodc/en/trafficking_projects.html

¹⁴ www.unodc.org/pdf/brazil/folder_tsh_ing_port.pdf

¹⁵ Law No. 9,807 dated 13 July 1999 (www.planalto.gov.br/ccivil/leis/L9807.htm and also www.presidencia.gov.br/estrutura-presidencia/sedh/protecao/)

¹⁶ *Associação Brasileira de Defesa da Mulher, da Infância e da Juventude* (Brazilian Association for the Defense of Women, Children and Adolescents – ASBRAD).

¹⁷ Interview, Marina Pereira Pires de Oliveira, Project Manager of the National Justice Secretariat, Brasília, 19 September 2006.

¹⁸ *O Globo*, 25 February 2007, *Só este ano, 16 mulheres enviada para o exterior*. Only this year already 16 women were sent abroad.

¹⁹ Written interview, Sodireitos, Belém, 6 November 2006.

²⁰ *Conselho Nacional de Imigração*, created by Law No. 6,815-1980 (Foreigners Statute), amended by Law No. 9,694-1991 and Law No. 8,422-1992.

²¹ The report of the CPMI on illegal migration was accessed at www.senado.gov.br/web/comissoes/CPI/Emigracao/RelFinalCPMIEmigracao.pdf.

²² *Diário do Pará*, 23 April 2006, *OIT avalia trabalho escravo no Pará e no Brasil*. In this interview with the newspaper *Diário do Pará*, Patrícia Audi, National Coordinator of the *Projeto de Combate ao Trabalho Escravo* (Project Combating Slave Labour) and representative of the International Labour Organization (ILO) in Brazil explains how Brazil managed to become an international model for combating the enslavement of workers.

²³ www.mte.gov.br/Noticias/conteudo/5773.asp (see also *Portaria* No. 540, dated 15 October 2004.)

²⁴ The GEFM (*Grupos Especiais de Fiscalização Móvel*) were installed through *Portaria* No. 265, dated 6 June 2002. www.mtb.gov.br/legislacao/portarias/2002/p_20020606_265.asp

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Interview, Luis Antônio Camargo de Melo, Federal Labour Law Prosecutor and member of the National Council for the Eradication of Forced Labour (CONATRAE), Brasília, 19 September 2006.

Barros, Marcelo, *Travessias na Desordem Global*, in www.migracoes.com.br/artigos.html.

SPM (*Serviço Pastoral de Migrantes*) is an organisation linked to the Social Pastoral Sector of Brazil's National Conference of Bishops (CNBB). See also: www.migracoes.com.br.

supra notes 16 and 17.

www.mj.gov.br/noticias/2005/setembro/rls010905estrangeiros.htm

Interview, Luiz Bassegio, SPM coordinator, São Paulo, 25 September 2006.

www.mte.gov.br/Empregador/TrabEstrang/Ingles/Acordo/Default.asp

This is not her real name.

Presentation by Eriosvaldo Renovato Dias, former Director of the Human Rights Division from the Department of the Federal Police, *Human Trafficking, the Brazilian Reality* at a seminar on human trafficking (Pernambuco, 17–19 May 2006) promoted by the Federal Police and the French Embassy.

www.fiz-info.ch

www.chame.org.br

supra note 33 [Eriosvaldo Renovato Dias]

Jornal de Brasília, 28 October 2006, Prostituição: brasileiros detidos; *Folha de São Paulo*, 26 October 2006, Espanha desmantela rede de prostituição que envolvia brasileiras; *O Globo*, 19 October 2006, PF prende 10 durante operação contra tráfico de travestis; *Portugal Diário*, 11 October 2006, Brasil, China e Nigéria alimentam prostituição em Portugal; *Notícias Terra*, 14 June 2006, Presas 17 brasileiras por prostituição na Espanha; Últimas Notícias Terra, in www.projetotrama.org.br/trafico_pessoas/noticias.asp.

Interviews and 'diary-reports' of street educator Wanderley da Silva Oliveira of Projeto Trama, Rio de Janeiro, 2006.

Although Skidmore makes a reference to ...old-style "clientelistic" *politics*..., the system of powerful local leaders with military power (known as 'coronel' or 'coronéis' in Portuguese, colonels) deciding on behalf of their people, whom they employ and 'own' is also highly economical (Skidmore, Thomas. E. *Politics in Brazil 1930–1964, an experiment in democracy*. Oxford University Press, New York, 1986, pages 33 and 77–78. Boris Fausto, "Society and Politics," chapter 6 in Bethell, 1989, writes: "Social and political life were dominated throughout the First Republic by clientelistic relationships, even in major urban centres such as Rio de Janeiro and São Paulo. (...) ... and the generally precarious conditions for survival did not allow the dominated classes to pursue any course other than individually to seek the protection of the most powerful elements. Protection, in the form of land, financial assistance or employment, was exchanged for a guarantee of loyalty, which, depending on individual cases, meant being prepared to defend the coronel physically, or obey his wishes at the ballot box" (267–268).

Lecture by the CPT lawyer in Marabá, during Jupiara's Conference on Migration, Slave Labour and Human Trafficking, Belém, 1 April 2005.

Globo News, 6 September 2006, PM prende oito em Goiás por tráfico de mulheres; *Jornal Extra*, 12 Agosto 2006, Agenciadora de prostitutas é presa.

supra note 38 [Wanderley Interviews].

Folha Online, 20 December 2006, Itália desarticula rede brasileira de exploração de transexuais (www.projetotrama.org.br/trafico_pessoas/noticia1.asp?id=293); *Globo Notícias*, 19 October 2006, PF prende 10 durante operação contra tráfico de travestis (www.projetotrama.org.br/trafico_pessoas/noticia1.asp?id=278).

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- ⁴⁴ *Brazil Refuses \$40M in US AIDS Grants to Protest Policy Requiring Groups To Condemn Commercial Sex*. Brazilian officials last week said that the country has refused US\$40 million in US AIDS grants because of a Bush administration requirement that HIV/AIDS organizations seeking funding to provide services in other countries must pledge to oppose commercial sex work (Phillips/Moffett, Wall Street Journal, 5/2). (http://gaatw.net/index.php?option=com_content&task=view&id=124)
- ⁴⁵ Interview, Leila Paiva, Programme Coordinator Partners of the Americas, Brasília, 19 September 2006.
- ⁴⁶ *Globo Esporte*, 16 March 2007, Denúncia! Tráfico humano atinge futebol europeu. Falsos agentes levam, de maneira ilícita, jovens jogadores brasileiros e africanos. (<http://globoesporte.globo.com/ESP/Noticia/0,,AA1490725-4840,00.html>, see also: www.footsolidaire.org)
- ⁴⁷ Article 17 and 18 of Brazil's *Children's Rights Statute* (inviolability of a child's physical, moral and psychological integrity and dignity), as well as Article 143 (in case a child is a suspect in a criminal case).
- ⁴⁸ Article 155 of the Brazilian Civil Procedure Law Code and Article 792, §1 of the Brazilian Penal Procedure Code.
- ⁴⁹ *supra* note 19 [Interview Sodireitos].
- ⁵⁰ *supra* note 19 [Interview Sodireitos].
- ⁵¹ Article 13 of the Universal Declaration of Human Rights (10 December 1948): 1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country.
- ⁵² *supra* note 44 [Brazil Refuses \$40M].

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India

Ratna Kapur

1. Introduction

Over the past several years, sex workers (male, female, and transgendered), their families, and their support communities have crossed international borders and converged on different cities in India to celebrate the International Sex Workers' Rights Day on 3 March. At the epicentre of their debates and protests has been a demand to be recognised as entertainment workers as well as a challenge to the anti-trafficking initiatives being promoted by Western and South Asian countries, feminists, and human rights groups (Binodini Sramik, 2007; durbar.org, 2007a; Batliwala, 2004). These communities argue that such measures have resulted in targeting migrants, promoting highly conservative moral agendas, and denying sex workers and other migrants their rights to work, family, and mobility (durban.org, 2007b).

As discussed below, anti-trafficking initiatives in India have emerged almost exclusively from within the debates around the legality or illegality of prostitution. Existing legal and policy initiatives and proposed reforms on trafficking have invariably been displaced onto debates about whether or not prostitution constitutes violence against women, is against Indian cultural values and compromises the nation's integrity, and whether the women involved are exclusively victims of sexual predators and sexual exploitation, incapable of choosing to engage in such work. The push and pull factors that compel unsafe movement, the various sites into which trafficking takes place and the larger issue of migration all remain largely unaddressed within the debates on trafficking in India (Kapur, 2005, 143). As a result of the narrow focus of the debate, the legal and policy responses focus almost exclusively on regulating sex work, strengthening border controls and prosecuting brothel-keepers and those who profit from the sex work industry.

Background

Human trafficking in India is thought to be largely an internal phenomenon according to the Indian government, the Asian Development Bank (ADB) and several NGOs (Shakti Vahini, 2004; ADB, 2003, 103). There is, however, evidence that people from Bangladesh and Nepal have been trafficked via India to the Middle East (UNODC, 2006, 88-90; US TIP Report, 2005). While most of the laws and policies in India have focused on the trafficking of people for sexual exploitation, a comprehensive study carried out by the National Human Rights Commission (NHRC) of India (an institution established by the state) provides strong anecdotal evidence of trafficking for the purposes of factory work, performing in circuses, camel jockeying, begging, domestic labour, adoption, organ removal, marriage, and bonded labour (Sen and Nair, 2004, 164–169).

The Indian Ministry of Home Affairs estimates that 90 percent of India's sex trafficking is internal and that India is also a destination country for women and girls from Nepal and Bangladesh trafficked for the purpose of

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commercial sexual exploitation (US TIP Report, 2006). In addition, boys from Afghanistan, Pakistan, and Bangladesh have been trafficked through India to the Gulf countries for servitude as child camel jockeys (Tumlin, 2000, 5), although there are indications that the number has diminished as a result of efforts to stop young children racing camels in the United Arab Emirates (UAE) in the past few years. Indian men and women migrate willingly to the Gulf for work as domestic servants and low-skilled labourers, but some later find themselves in situations of servitude, including extended work hours, non-payment of wages, restrictions on their movement by withholding of their passports or confinement to the home, and physical or sexual abuse (US TIP Report, 2006).

There are no accurate or reliable statistics available regarding the number of persons who are either trafficked into or out of India, or internally within India. Some reports state that “millions” of men, women and children are internally trafficked and subjected to debt bondage, experiencing servitude in brick kilns, rice mills, and *zari*¹ embroidery factories (South Asia March Against Child Trafficking, 2007). Hundreds and thousands of women and girls are alleged to be trafficked for the purpose of commercial sexual exploitation (Human Rights Watch, 1995, 1; Sen and Nair, 2004).

There are two prominent reasons why data on human trafficking is notoriously inaccurate. The first is that the clandestine nature of trafficking makes it difficult to track from the outset. The acts are hidden and the actors presumably have few incentives to be truthful even when found. In 2001, for example, the United Nations Children’s Fund (UNICEF) estimated that 1.75 million women and children were trafficked that year, while the International Organization for Migration (IOM) estimated that 400,000 women and children were trafficked that year (IOM, 2005; IOM, 1998; pbs.org, 2006). The US Department of State’s estimate for all persons trafficked each year is from 600,000 to 800,000. The second reason is that there are a number of contentious definitions of trafficking, any one of which may be used by different bodies to collect data. Depending on which definition one adopts, human trafficking may be conflated with prostitution, smuggling and/or illegal migration, and it may exclude internal trafficking, trafficking for purposes other than sexual exploitation and/or the trafficking of men and/or boys. For example, in contrast to the definition of trafficking set out in the UN Trafficking Protocol, India has accepted a much more narrow definition of trafficking in the South Asian Association for Regional Cooperation (SAARC) Convention, which conflates trafficking with prostitution, ignores trafficking in other sites of exploitation, addresses the trafficking of women and girls together, and fails to address the trafficking of men and boys.

2. Legal Framework

Trafficking is currently addressed primarily in the Constitution of India, the *Immoral Traffic Prevention Act, 1956* (ITPA) and the *Indian Penal Code (1860)*. Other relevant provisions can be found in the *Bonded Labour System (Abolition) Act (1976)*, the *Transplantation of Human Organ Act (1994)*, the *Child Labour (Prohibition and Regulation) Act (1986)* and the *Child Marriage Restraint Act (1929)*.

Background

The anti-trafficking law in India was almost exclusively enacted in pursuance of the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* (UN Suppression of Traffic Convention), adopted by the UN General Assembly in 1949, which India ratified in 1953. It was initially enacted

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as the *Suppression of Immoral Traffic in Women and Girls Act, 1956*. The UN Suppression of Traffic Convention is overwhelmingly focused on abolishing prostitution and has been of little assistance to trafficked persons. The preamble of the UN Suppression of Traffic Convention notes that “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community”. The Convention then goes on to call for the punishment of those who, “to gratify the passions of another”, entice a person into prostitution or exploit the prostitution of another person, irrespective of the person’s consent (Article 1), as well as those who manage or knowingly finance brothels and those who knowingly rent a property for the purpose of prostitution (Article 2). In addition to a number of criminal measures designed to prosecute those implicated in the aforementioned acts, the UN Suppression of Traffic Convention further stipulates that states should adopt a broad range of supervisory functions relating to immigration checkpoints and employment agencies (Articles 17 and 20). While the Convention mentions education and rehabilitation, it merely calls for states to take or to encourage measures aimed at the prevention of trafficking, and at the rehabilitation and “social adjustment” of victims of prostitution.

The anti-trafficking law in India has largely been informed by the UN Suppression of Traffic Convention, though in many situations government policy has appeared at odds with the Convention, by seeking to regulate prostitution rather than to prohibit it. More recently, there have been two primary concerns that have drawn the government’s attention to the issue of anti-trafficking. These include a concern over the spread of HIV in India and the concern over the exploitation and trafficking of minors, in particular, young girls into sexually exploitative situations, quite specifically, prostitution.

In the early 1980s, state officials denied that AIDS could be a problem in India because of the ‘moral values’ of Indian men and women (AIDS Bhedbhav Virodhi Andolan, 1993, 25). According to the 2006 UN AIDS report, India, with 5.7 million infected people, now has more individuals living with the disease than any other country. AIDS could easily emerge as the largest cause of adult mortality in this decade. As regards the concern over the trafficking of young girls into prostitution, while there are almost no reliable statistics or data available on the number of children or women who are trafficked into this form of exploitation, there nevertheless seems to be a sense of urgency over producing a response to this ‘problem’, usually in the form of strengthening the criminal law (Gallagher, 2002, 70; Asia Foundation and Horizons Project Population Council, 2001, 17).

The AIDS crisis and concerns over trafficking of minors have produced different responses by government departments. A dominant response includes increased surveillance of so-called at-risk populations, including sex workers. The crisis over HIV in particular has sparked a plethora of research with an emphasis on “knowing and measuring sexual practices of ‘at-risk populations’, such as the youth, college students, and sex trade workers” (Puri 1999, 283). The concern over trafficking in young girls, in particular sex trafficking, has also led to an overwhelming focus on sex workers. Law reform proposals seeking to amend the existing law dealing with trafficking have been focused primarily on treating trafficking as a law and order problem, a problem of moral turpitude, and sex workers as either victims, ‘evil doers’ or vectors of immorality and criminality. The proposals do not consider sex workers to have rights to health care, a family life or access to education without discrimination, nor to be entitled to safe and non-exploitative working conditions.

Existing Laws

Constitution of India

Article 23 of the Indian Constitution prohibits “traffic in human beings, beggary and other similar forms of forced labour”. Other constitutional provisions that concern human trafficking include those that guarantee the right to equality, the right to be free from discrimination, the right to life and liberty, and the right for children under 14 years of age to be free from engaging in hazardous forms of labour.

Immoral Traffic Prevention Act, 1956

The ITPA was initially enacted in compliance with India’s obligations under the UN Suppression of Traffic Convention, ratified by India on 9 January 1953. As such, the aim of the Act is to eliminate the recruitment of women and girls for the purpose of prostitution. Among the activities prohibited by the Act are:

- keeping a brothel or allowing a premises to be used as a brothel;
- living off the earnings of prostitution;
- procuring a person for prostitution with or without consent;
- detaining a person in a premises where prostitution is carried out, with or without consent;
- prostitution in or near a public place;
- soliciting for prostitution; and
- seducing a person in custody (sections 3 to 9).

Although the prescribed penalty for women who are convicted of soliciting for prostitution is imprisonment for up to six months for their first offence and up to one year for every offence committed after that, the prescribed penalty for men who are convicted of the same crime is between seven days and three months (section 8).

The ITPA also grants police officers and magistrates broad powers in relation to the rescue and rehabilitation of victims. While section 15 allows police officers to search premises without a warrant if accompanied by two or more female police officers or by two or more “respectable inhabitants” of the community, section 16 allows the police to “rescue” any person found in a place where it is believed that prostitution is occurring. Rescued persons are then supposed to be subjected to mandatory health checks and brought before magistrates who are empowered to place rescued children (under 16) and minors (aged 16 or 17) in an authorised custodial institution and to place any rescued person in a protective home for up to three years if that person is deemed to be “in need of care and protection” (section 17). It is noteworthy that while the Act defines children as persons under 16, minors are defined as persons between 16 and 18. This definition is inconsistent with India’s obligation under the UN Convention on the Rights of the Child to define all those under 18 as ‘children’. In deciding where to place a rescued person, the magistrate will consider the age, character, history, home situation, and personality of the person, as well as the suitability of his or her parents and the likelihood of rehabilitation (section 17).

In 2005, the cabinet approved proposed changes to the ITPA that are scheduled to go before the Indian Parliament in 2007 (CFLR, 2006, 2). Among the proposed changes are: changing the age of majority from 16 to 18; adding a new offence prohibiting the purchase of the services of prostitutes; deleting the section that criminalises soliciting for prostitution; and allowing police officers of a lower rank than before to conduct raids and arrests (CFLR, 2006, 22 and 26).

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Indian Penal Code (1860)

The Indian Penal Code outlaws a number of trafficking-related activities. Among the prohibited activities are; kidnapping or abducting women and girls in order to force them to have illicit intercourse or to marry against their will (section 366); kidnapping or abducting persons in order to subject them to slavery (section 367); buying or selling, or otherwise giving or receiving, people for the purpose of slavery (section 370); and buying or selling, or otherwise obtaining, a child for the purpose of prostitution or any unlawful or immoral purpose (sections 372 and 373).

The Penal Code also has separate provisions dealing with the procurement of children (section 366A) and the importation of a girl below the age of 21 years of age (section 366B). Section 374 provides punishment for compelling any person to labour against the will of that person.

The term ‘slavery’ and related terms such as ‘bondage’, ‘forced labour’ and ‘beggar’ are not defined in the Indian Penal Code. Their meanings have been clarified over the years by the Supreme Court. In the case of the *People’s Union for Democratic Rights v. Union of India* (All India Reports 1982 Supreme Court 1273), the Supreme Court observed, “[w]here a person provides labour or service to another for remuneration which is less than the minimum wage fixed by the *Minimum Wages Act, 1948*, he renders forced labour within the meaning of Article 23 [of the Constitution]”. The *Bonded Labour System (Abolition) Act, 1976*, also gives a detailed definition of ‘bonded labour system’ (section 2(g)).

Juvenile Justice (Care and Protection of Children) Act, 2000

The *Juvenile Justice (Care and Protection of Children) Act, 2000* (*Juvenile Justice Act*) was passed in consonance with the *Convention on the Rights of the Child*, which has been ratified by India, to consolidate and amend the law relating to juveniles who have violated the law and provide for children in need of care and protection (Committee on the Rights of the Child, 2004). The *Juvenile Justice Act* recognises that a child who is vulnerable and likely to be inducted into trafficking is a child in need of care and protection, and includes elaborate provisions for the rescue and rehabilitation of such a child. It gives NGOs a position on the child welfare committees established at the local level and the Juvenile Justice Board. The focus of the Act is to provide for proper care, protection and treatment by catering to the child’s development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interests of children and for their ultimate rehabilitation through various institutions established under the Act. ‘Child’ means a person, either male or female, who has not reached the age of 18. The Act empowers state governments to constitute child welfare committees in relation to such areas as they deem fit (section 19). It also outlines the powers of the committees and the procedures to be followed and gives the committees the ultimate authority to dispose of cases for the care, protection, treatment, development, and rehabilitation of children, as well as to provide for their basic needs and the protection of their human rights (section 31). A state government may establish and maintain children’s homes for the care and protection of children (section 34). The primary objective of the children’s home or shelter is the restoration and protection of childhood (section 39).

Goa Children’s Act, 2003

Trafficking has not been defined under Indian law. However, in 2003 Goa became the first state to provide a

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definition of ‘child trafficking’ under the *Goa Children’s Act*. The definition states, “child trafficking means the procurement, recruitment, transportation, harbouring or receipt of persons legally or illegally within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person for monetary gain or otherwise” (section 2(z)). The law authorises airport authorities, border police, railway police, and traffic police to report any cases of adults travelling with a child or children in suspicious circumstances or any suspected cases of trafficking. Such adults may be detained for questioning at the nearest police station (section 8(15)). Anyone who exploits a child for commercial sexual exploitation will be liable to pay a monetary fine and serve a prison sentence of one year, in addition to any other penalty that is attracted by any other Act in force (section 9(4)).

The Act also provides a definition of sexual assault that is designed to incorporate every type of sexual abuse, and not just vaginal or anal penetration (section 2(y) i, ii, and iii). Under the new legislation, the owner and manager of a hotel or other establishments will be held solely responsible for the safety of a child on the premises, as well as all the adjoining beaches and parks. It provides for strong action against making children available for commercial exploitation, including posing obscenely, selling or abetting the sale of children, even under the guise of adoption or of the dedication of a girl child as a *devadasi*.² Photo studios are also required to periodically report to the police that they have not shot any obscene photographs of children, and stringent control measures have been introduced to regulate the access of children to pornographic materials. The *Goa Children’s Act* also proposes the setting up of Children’s Courts, to deal with cases under the Act. However, the rules for setting up these courts had not been promulgated by early 2007.

Other Initiatives

The Committee on Prostitution, Child Prostitutes and the Children of Prostitutes, which exists within the Department of Women and Child Development under the authority of the Ministry of Human Resource Development, released the *Report and Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children* in 1998. The National Plan of Action (NPA) highlights a number of initiatives in the areas of, among others: prevention, awareness raising, health services, education, housing, economic empowerment, legal reform, and rescue and rehabilitation. In the area of legal reform, the NPA recommends that trafficking laws be reviewed to ensure that victims are not re-victimised and that exploiters are punished.

To prevent the trafficking of girls in India, the government has embarked on a comprehensive public awareness campaign designed to educate influential members within the community, such as parents and teachers, on the issues surrounding trafficking in girls. Following three years of consultation, a communication strategy was developed so that information about trafficking could be passed on to the influential persons through the mass media. India is providing other countries in the region with information on how to conduct and orchestrate such a campaign (UNICEF, 2005, 16–17).

A number of development projects have also been launched by the government with the aim of addressing many of the underlying factors that lead to human trafficking. These projects are designed to alleviate, among other problems, poverty, unemployment, and poor health and sanitation. Importantly, the poverty reduction programmes have specifically targeted red-light and rural areas, both of which are considered by the government to be high source areas for human trafficking. In addition, the Indian government increased its annual budget allocation for women-specific and pro-women schemes in the 2002/2003 budget by three per cent and 23 per cent respectively

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(Asian Development Bank, 2003, 138). The ADB's report on trafficking in India noted, however, that in relation to prevention programmes, there was unfortunately a pattern of "monitoring [financial] input rather than outcome and [a] proliferation of too many programmes with too little money" (ADB, 2003, 139).

In 2001, the government sought to develop a holistic rehabilitation and reintegration programme for women in difficult circumstances, including trafficked women (Sen and Nair, 2004, 298). Under this programme, the Department of Women and Child Development provides grants to NGOs that develop innovative projects pertaining to rehabilitation, particularly, counselling, non-formal education and vocational training (Sen and Nair, 2004, 297).

The existing anti-trafficking laws and policies have been developed almost entirely without the participation of the affected communities – migrants, sex workers and children. Such exclusions partly explain why these laws have failed to successfully reduce the number of trafficked persons despite being in operation for more than 50 years.

The Durbar Mahila Samanwaya Committee (DMSC), more widely known as the Sonagachi Project, is an organised sex workers' rights movement based in Calcutta and consisting of over 60,000 sex workers. By gathering and organising information, it has been able to reduce the transmission of HIV as well as the trafficking of minors into sex work. Their anti-trafficking initiatives rely on the participation of residents in red-light areas in monitoring the entry of minors into the area and assisting in the return of any who try to enter (Sex-workers Manifesto, 1997). Over the past several years, sex workers' groups have been organising annual conferences to highlight the situation of sex workers around the country, drawing attention to the issue of trafficking as well as the impact of anti-trafficking measures on their rights and lobbying for more rights protection from the state for sex workers (Festival of Pleasure, 2003). Some of these concerns are expressed in *Tales of the Night Fairies* (Centre for Feminist Legal Research and Mama Cash 2002), a film directed by Shohini Ghosh documenting the Sonagachi Project. These sex workers and their activist allies have set up, however rudimentary, financial institutions, health clinics, sex education schools, and blood banks for the surrounding community. The work of DMSC and the representation of the sex workers in the film stand in stark contrast to assumptions about their victimisation or their portrayal by others almost exclusively as trafficked and exploited victims (Briski, 2005; Levine, 2003).

Analysis of the Impact of Laws and Policies

Enforcement

While there are innumerable legal provisions that address different aspects of trafficking in India, part of the problem lies in ineffective implementation or only partial implementation of the law. This does not detract from the fact that the provisions that do exist are deeply flawed in terms of definition of the offence as well as the gender bias and assumptions about women's roles on which they are based.

The NHRC report mentioned above paints a bleak picture of the enforcement of the ITPA. A number of findings demonstrate that women engaged in commercial sex work, whether willingly or otherwise, are being disproportionately punished and that traffickers are able to act with relative impunity (Coomaraswamy, 2000, 30). The report highlights two problems: first, the ITPA is being misused by police officers who are more concerned with arresting and charging prostitutes than traffickers, and second, the conviction of a significant number of women who were likely to have been forced into engaging in prostitution represents a misapplication of the law

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by the charging officers and the judges involved, as those women cannot have had the requisite intention to commit trafficking (Sen and Nair, 2004, 386). The report also notes, however, that there has been an important shift whereby there are more, though still relatively few, traffickers arrested now than before (Sen and Nair, 2004, 274).

A particularly troubling consequence of the conviction of the large number of women who have been trafficked for the purpose of prostitution is that the criminal justice system becomes a means through which trafficked women become even more deeply enslaved. A “spiral of exploitation” was identified in the NHRC report, whereby trafficked women are arrested and charged for soliciting for prostitution. They are then bailed out by brothel-owners who add the amount paid to secure their release to the debt the women were previously working to pay off, and the women are then forced to work more than before to pay off their higher financial burden (Sen and Nair, 2004, 85 and 86). This pattern of debt bondage is exacerbated by the ineffective application of India’s Bonded Labour Act. The report also highlighted a high level of corruption amongst police officers, with 15 per cent of the survivors of commercial sexual exploitation interviewed saying they had secured their release after being arrested by bribing police officers (Sen and Nair, 2004, 85).

The Department of Women and Child Development has established a number of shelters for trafficked women and children including protection homes created under section 21 of the ITPA, juvenile homes created under the Juvenile Justice Act, 2000 and a network of short-stay homes (ADB, 2003, 151; Sen and Nair, 2004, 296). While custodial care, education, vocational training and rehabilitation are available at the protection homes, medical and counselling services are available at the juvenile homes. NGOs that run care centres for child victims of commercial sexual exploitation also receive financial assistance from the Central Social Welfare Board.

In 1998, the *Report and Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children*, released by the Committee on Prostitution, Child Prostitutes and the Children of Prostitutes, noted that the initiatives that had been previously undertaken had not had an impact on the prevalence of commercial sexual exploitation and that the legal framework re-victimised the victims of exploitation while having little impact on exploiters (ADB, 2003, 100,101). Among the reasons provided for the problems in relation to the enforcement of anti-trafficking initiatives were: the lack of seriousness among law enforcement machinery; insufficient awareness about the extent of the problem; and the lack of coordination between the border police of neighbouring countries.

Immoral Traffic Prevention Act

The ITPA primarily targets trafficking and exploitation linked to commercial sex, and does not address any other form of trafficking. Although there is no specific definition of trafficking in the Act, the focus on prostitution has narrowed the focus of the Act to women and children trafficked into prostitution. The ITPA is based on the assumption that the main victims of trafficking are those who are forced into prostitution by procurers, pimps, brothel-keepers and madams. The primary aim of the ITPA is to punish ‘immoral trafficking’ and traffickers. The ITPA is divided into two parts: the first part criminalises activities such as trafficking and the keeping of brothels, and the second part contains certain welfare measures that are directed towards the rehabilitation of sex workers. The Act was ostensibly not intended to be used against sex workers.

The provisions of the ITPA are aimed specifically at criminalising the activities of persons engaged in the sale and procurement of women *for the purpose of prostitution*. The focus is on the purpose for which the woman is

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being sold or procured rather than on the use of force, fraud, violence or deception. Where the purpose does not qualify as illegal, such as in the case of domestic labour, then the manner in which the procurement occurs, no matter how violent, would not fall under these provisions.

The ITPA deems the consent of the trafficked person relevant only for the purpose of sentencing and not at the stage of defining the offence. Excluding consent from the definition of the offence of trafficking assumes that women are victims who are invariably forced into the sex trade against their will.

Where the use of force, fraud, coercion or even sexual violence is manifest, but the woman is or has been a sex worker, is unmarried or is not a minor, then she may be less able to take advantage of these provisions. In fact, there is a risk that she can become vulnerable to prosecution as a co-conspirator. The law provides no remedy to a woman who willingly agrees to enter into sex work, but is subjected to sexual abuse by her procurers. Although the issues of force, fraud, deception, and violence are specific concerns behind the anti-trafficking provisions, these are not addressed in the ITPA, nor are remedies provided for these criminal acts in other legal provisions. The primary focus of the ITPA provisions is on whether or not the trafficking is 'immoral', which deflects attention from the main concerns, namely the use of *force, fraud, deception, coercion and sexual exploitation*, which may have been used on a woman in the process of being trafficked or at the point of arrival. As discussed above, recent evidence suggests that the provisions of the ITPA have been used overwhelmingly against women and children in prostitution (Sen and Nair, 2004, 397).

The ITPA also deals with the trafficking of women and children together. There are no separate laws dealing with child trafficking at the national level. However, there are provisions that assume that children found on premises where sex work is carried, are being used for sex work. Such provisions place a burden on the sex worker to establish that her child or children have not been used for sex work, and make her vulnerable to police harassment. In some cases, this leads to removal of the children from the premises and their placement in a government home or shelter.

In addition, if a sex worker uses her residence for the purpose of sex work, she can be charged under the ITPA. The Act also makes it an offence for a sex worker to support her family from her earnings where her children and other family members are not minors. These provisions appear to betray the ITPA's objective of not targeting the sex worker. They also effectively undermine the rights of children to be with their families, if they so choose and it is in their best interests.

The anti-trafficking law focuses on the method of rescue and rehabilitation of the women and girls assumed to have been trafficked for the purpose of prostitution. Administrative detention of the woman who has been trafficked, whether in a protective home or a corrective institution, is seen as the primary response to victims of trafficking into the sex trade. Once incarcerated, a woman has no right to privacy or bodily integrity and is subjected to invasive medical examinations and inquiries into her personal background. The conditions in corrective and protective homes have been documented and have been considered barely habitable (Coomaraswamy, 2000, 8). Indefinite incarceration, loss of liberty, forced medical examinations and appalling living conditions drive the young girls and women placed in these institutions back into sex work. Frequently, they incur huge debts to cover the cost of legal fees, bail and sureties, which reinforces their debt bondage status. Rehabilitation has the limited objective of providing the victim with temporary shelter and safeguarding her from the abusive and exploitative aspects of her work. However, these homes do not serve the function of reintegration (Coomaraswamy, 2000,

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18). Nor are women entitled to leave the homes of their own free will. They are regarded as being in protective custody and can only be removed through an application to the court. This procedure denies victims the rights to which ordinary criminals are entitled, namely, due process and the right to liberty. This omission is particularly problematic given that the women are ostensibly the victims of criminal conduct and not actual criminals themselves. These institutions also provide few options for self-employment and alternative income generation. Marriage is promoted as the primary mechanism for the reintegration of such women into society.

Brothel raids

The phenomenon of brothel raids carried out by the police with the assistance of information provided by NGOs has been one of the most problematic strategies pursued under the provisions of the ITPA. The raids are justified in order to 'rescue' women and children forced into prostitution, yet there is evidence that these raids have occasioned abuse by the police and are also counter-productive (McGill, 2002, 32). There have also been suggestions that these raids are at times politically motivated by communal or anti-migrant groups, since most sex workers in India are from lower castes, tribal groups or neighbouring countries (Joint Letter to the Chairperson, National Commission for Women, dated 21 February 2002).

While the raids are justified on the grounds that they are a means through which exploited women and children can be 'rescued', several problems have been identified with the raid process. These include a lack of sensitivity and legal knowledge by the police with respect to trafficking; the bribing of the police by brothel-owners before, during or after raids; the serious human rights violations occurring during raids; the arrest of 'rescued' women for soliciting while brothel-owners remain at liberty; and the failure to inform women of the reasons for which they have been arrested (Sen and Nair, 2004, 85, 86, 110, 133, 250, 269, 274).

Several organisations have noted that the police have expanded raids on the brothels of Kamathipura, Khetwadi and outlying brothel areas of greater Mumbai, in the name of 'rescuing children' from forced prostitution, which is specifically a government objective. These raids have been supported and encouraged by a number of NGOs including the International Justice Mission and Maiti Nepal, as well as a number of Indian NGOs. Yet the sex workers and other support groups have documented how these raids have actually encouraged and legitimated large-scale harassment, abuse and extortion of the brothel communities by the police, without clear evidence of many children being 'rescued'. NGOs have documented instances of police brutality during raids, the fact that women and children have been rounded up during the raids, and the fact that many women end up in remand homes for long periods because of delays in medical examinations and court delays, without access to counselling or other services (Terre des hommes and Partnership Nepal, 2004). One consequence has been the intensification of the mistrust that exists between the sex workers and brothel community on the one side, and the police and NGOs on the other. As a result of the raids, sex workers have been leaving established red-light areas and moving outside the range of health and other established support services (Joint Letter to the Chairperson, National Commission for Women, dated 21 February 2002). This consequence has, in turn, impacted on HIV/AIDS intervention work being conducted in these communities and hence undermined one of the primary concerns of the government in its battle against trafficking (Terre des hommes and Partnership Nepal, 2004, 4).

Sex workers have argued that in order to prevent raids on brothels, the police extract bribes from the women. During the recent festival marking International Sex Workers' Day on 3 March 2007, the sex workers of West Bengal submitted a proposal to the state government to pay taxes in return for stopping police raids and harassment

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of their clients, which were both ineffective strategies in stopping either trafficking or prostitution (reuters.com, March 2, 2007).

Children's rights and trafficking

There are no separate laws dealing with child trafficking at the national level. The laws are based on the primary assumption that the main victims of trafficking are those who are forced into sex work by procurers, pimps, brothel-keepers and madams. The *Juvenile Justice Act* recognises that a child who is vulnerable and likely to be inducted into trafficking is a child in need of care and protection and includes elaborate provisions for their rescue and rehabilitation. In such a situation, the police or an NGO can place the child in a protective home until the case is considered. In view of the provisions of the ITPA, such a child would automatically seem to include those whose parents are sex workers or who reside in a brothel.

The children of sex workers are considered “neglected children” under the interpretation of the provisions of the *Juvenile Justice Act*. The law empowers the state to intrude into the privacy of the home of the sex worker and remove her children from her custody and even guardianship (section 2(d) vii). Such provisions end up destroying the family of a woman in sex work, and penalise her for the work in which she engages. It also violates the rights of children who should be allowed to remain with their families if there is no evidence of abuse or exploitation. The “best interests of the child” should not be contingent on the nature of the work his or her mother does. Such a position could otherwise be extended to many other types of work, including garbage picking, latrine cleaning or street sweeping – these last jobs might not have much prestige but they do not involve the crucial element of sex. An odd statement perhaps, but part of the point of all this analysis is that the law is fixated upon women as sexual beings and the inherent immorality of that.

The primary focus of the *Juvenile Justice Act* and the *Goa Children's Act* is on the rescue and rehabilitation of children in trafficked situations. The *Juvenile Justice Act* does not provide any definition of trafficking. However, the definition of child trafficking provided by the *Goa Children's Act* is focussed primarily on the transportation of the child through force, fraud and deception. This Act is important insofar as it separates the treatment of children from women. It has also extended the definition of sexual abuse without being moralistic and conservative in its language. It is, however, extremely broad, and imposes very restrictive policies on other actors, such as the owners of photo studios. The definition of trafficking is also exceptionally broad and could lead to the removal of children from the care of an adult who does not conform to normative assumptions about the ‘good parent’.

There is little disaggregated data available on the number of children under 18 years of age who have been arrested or detained under the existing legal provisions. The statistics available regarding prosecutions and convictions under this Act, published by the National Crimes Records Bureau (NCRB) indicate that the total number of cases registered between 1997 and 2001 under the procurement provision of the *Indian Penal Code* (section 366A) was 715; under the importation provision of the Penal Code (section 366B) was 179; for selling minors, it was 56 and for buying minors, it was 90 (Sen and Nair, 2004, 257). These statistics indicate that despite the fact that there are laws in the statute books dealing with trafficking, especially in minors, the number of cases registered, at least under the provisions of the Penal Code, is nominal.

An adult woman who is arrested by the police after being rescued from a brothel can be bailed out, though she can also be sent to a protective or corrective home. In the case of a child under 18, the provisions of the *Juvenile*

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Justice Act apply, and he or she will be sent to a rescue home for protection and dealt with by the Child Welfare Committee. Yet, under the provisions of the *Juvenile Justice Act*, the minor is to be given no legal representation and is to be dealt with solely at the discretion of the Committee. While there is some concern that the victim may be bailed out on the basis of false evidence by brothel-owners or by traffickers regarding age, the *Juvenile Justice Act* inappropriately seeks to address this concern by denying the minor legal representation and placing the minor in a rescue home.

As regards the Plan of Action, while the UN Special Rapporteur on Violence against Women praised the plan for its innovation and comprehensiveness, particularly in relation to awareness raising and health services, she also expressed concern about the provisions that suggested that the children of prostitutes should be removed from their parents and that greater social surveillance should be used to combat trafficking. The Special Rapporteur also noted that the Plan of Action failed to provide strategies for the capture and punishment of traffickers (Coomaraswamy, 2000, 32; Sen and Nair, 2004, 26).

Judicial activism

The courts have engaged in high-level judicial activism that has had an important effect on the development, interpretation and implementation of anti-trafficking legislation. In *Vishal Jeet v. Union of India and Others* (1990 3 SCC 318) (Vishal Jeet's Case), the Supreme Court held that the results of provisions to rehabilitate girls who had been forced into prostitution were inadequate and ordered, among other measures, a review of the central and state governments' performance with respect to their implementation (Sen and Nair, 2004, 283). Similarly, the Supreme Court held in *Gaurav Jain v. Union of India* (AIR 1990 SC 292) (Gaurav Jain's Case) that a committee ought to be established to analyse prostitution and the situation of child prostitutes and the children of prostitutes (Sen and Nair, 2004, 283). The Court also stipulated that the "children of prostitutes should not be permitted to live in the inferno and the undesirable surroundings of prostitute homes" and that the human rights of such children had to be protected (Gaurav Jain, 1990, para. 1).

In a subsequent order, the Court, while drawing attention to the human rights impact of some anti-trafficking provisions, reiterated that the "eradication of prostitution is integral to social welfare and the glory of womanhood" (*Gaurav Jain v. Union of India*, AIR 1997 SC 3021, 3023, para. 15). The Court stated that it was in the interests of the children of sex workers and of society that they "be segregated from their mothers and be allowed to mingle with others and become part of society" (Gaurav Jain, 1997, para. 1). The Court was opposed to the establishment of separate hostels and schools for the children of sex workers (which had been requested by the petitioner, Gaurav Jain). However, it was of the view that "accommodation in hostels and other reformatory homes should be adequately available to help segregate these children from their mothers living in prostitute homes as soon as they are identified" (Gaurav Jain, 1997, para. 1).

The Supreme Court also observed that the capacity of a prostitute to pay for her child's education would not relieve the child from social trauma and that it would always be against the interests of the child to permit the child to remain in her custody or in a brothel. "So, they should be rescued, cared for and rehabilitated ... the three Cs, namely, counselling, cajoling and coercion of the fallen woman to part with the child or child prostitute herself from the manager of the brothel is a more effective, efficacious and meaningful method to rescue the child prostitute or neglected juvenile" (Gaurav Jain, 1997, para. 20).

Conflating Trafficking, Migration and Prostitution

The judicial decisions have also been overwhelmingly influenced by the alarm sounded on the issue of trafficking and have at times recast issues concerning the rights of migrants into issues about trafficking and the sexual exploitation of women. In *Savera and Ors. v. the State of Goa* (MANU/MH088/2003), the High Court addressed a challenge by an NGO, Savera, to the Goa municipality's efforts to evict the residents on Baina Beach to make way for the construction of luxury resorts as well as the expansion of the port. While the community, numbering about 5000 persons, consisted largely of migrants from other states who worked as daily wage labourers at the port, in garbage collection or in other types of manual labour, a local member of the legislative assembly lobbied for the beach to be 'cleaned up', alleging that it was overrun with sex workers who posed an HIV threat to the local population, and that the beach was a den of corrupt and illegal activity (Bailancho Saad, 1997). Some women amongst these workers were engaged in commercial sex work and carried on their work from 250 cubicles located among the many other small residential units, businesses and NGO offices in the area. Their clients included sailors, shipyard workers and tourists (Desouza, 2004, 3342).

The Kamat Committee that was set up by the court to examine the 'rehabilitation' of the community recommended that the cubicles used in the area for conducting the sex trade be identified, eviction notices issued and the cubicles closed. The programme for rehabilitating the sex workers was not based on any empirical evidence that either the women were being forced, exploited or abused when engaging in their trade or that girls below the age of 18 were being forced into prostitution in the area. Information gathered about the residents of Baina indicated that there were hardly any children in sex work and that sex workers were actually sending money to their native homes to fund the education of their children. However, the committee recommended that the residents, including the women, be rehabilitated, which included providing them with shelters, livelihood options, health and vocational assistance, and also indicated that those migrants who wanted to continue in the trade be shifted to another area to be notified as a 'red-light' zone.

The High Court followed the recommendations of the Kamat Committee with respect to the 250 cubicles used for commercial sex work and directed the National Commission of Women, a government appointed commission, to formulate a rehabilitation programme for the women. The court held that "*The need to protect the rights of the law abiding citizens at the same time has to be asserted. The sex workers cannot cause inconvenience to other citizens and their right to live life in a surrounding free from amoral activities*" (Savera, para. 9) (emphasis added). The right of 'decent' people to take walks on the beach on weekends undisturbed by the presence of sex workers trumped the rights of sex workers to earn a livelihood and to have a place to reside in the state of Goa. In June 2004, the municipality ordered the demolition of the entire community on Baina Beach. The demolition took place in the presence of hundreds of armed police and within hours the entire population of 5000 people was rendered homeless. The state government initially claimed the demolition only affected the cubicles of the sex workers. When the press and local NGOs exposed the falsity of this claim, the state argued that the demolished structures were, in any case, illegal and that the evicted persons were "non-Goans", that is aliens from the southern Indian states of Karnataka and Andhra Pradesh.

3. Regional and International Laws and Policies Impacting on Trafficking Initiatives in India

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

The laws and policies pertaining to female migration in India are riddled with conflation and confusions. So too are the views of various stakeholders who seek to influence how women move and why. The discourse on female migration thus often leaps from migration to trafficking to prostitution, with the exponents of the discourse thereby deeming the distinct characteristics of each phenomenon irrelevant.

All of these conflation and confusions – in addition to an overt reference to the irrelevance of the consent of women – are encompassed within the South Asian Association for Regional Cooperation (SAARC) *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*. The SAARC Convention, to which India is a signatory, defines trafficking as “the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking” (Article 1(3)). In an attempt to promote cooperation for the prevention and suppression of trafficking and for the rehabilitation and repatriation of victims, the SAARC Convention requires that states: criminalise trafficking, managing or knowingly financing a brothel, and knowingly renting a property for the purpose of prostitution (Article 3(1) and (2)); ensure that the confidentiality of victims is maintained and that they are provided with appropriate counselling and legal assistance (Article 5); establish a system for repatriation and collaborate with NGOs to provide for the care and maintenance of victims by, among other things, making shelters, legal advice and job training available to those victims (Article 9). The prevention measures that states ratifying the Convention are required to adopt include training relevant officials, exchanging information about offenders, supervising employment agencies and using the media to promote awareness about the underlying causes of trafficking “including the projection of negative images of women” (Article 8).

The SAARC Convention is in some ways disturbingly reminiscent of the UN Suppression of Traffic Convention. It conflates trafficking with prostitution; deals only with the trafficking of women and children and then makes relatively little distinction between the two; deems consent irrelevant and thereby encompasses voluntary prostitution; fails to consider the consent or safety of trafficked persons in relation to repatriation; and lists a host of prevention mechanisms that encourage the surveillance of a broad range of female workers and that in no way require the involvement of trafficked persons, vulnerable groups or the community. Even the prevention measure aimed at creating awareness of the underlying causes of trafficking is more concerned with reducing temptations for traffickers than it is with empowering and educating people who are vulnerable to being trafficked. The consequence of such initiatives has been to undermine the rights of migrant women and make them even more susceptible to exploitation.

The SAARC Convention is much more concerned with eliminating “the evil” of prostitution than with restoring the human rights of trafficked persons. It conflates trafficking with prostitution and seeks to criminalise prostitution-related activities that do not necessarily involve coercion or harm. The SAARC Convention is yet to be ratified by all South Asian countries, and hence it has not yet come into force.

US Victims of Trafficking and Violence Protection Act of 2000

An important source of external pressure on India to amend its trafficking laws and policies emanates from the United States (US) *Victims of Trafficking and Violence Protection Act of 2000* (TVPA) and its subsequent reauthorisations, the details of which have been set out in the introduction to this book.

The annual tier placements announced in the US Department of State's Trafficking in Persons Report (TIP Report) are regarded with considerable suspicion by some state and non-state actors, as they are frequently based on criteria that has little to do with trafficking. The impact of the US TVPA has at best been questionable, and at worst, harmful to the rights of the very constituency it is intended to help (Shapiro, 2004; Katayama, 2005). For example, India has been placed on the Tier 2 Watch List for the third consecutive year because of its apparent "failure to show evidence of increasing efforts to address trafficking in persons" (US TIP Report, 2006). While India has a range of laws on trafficking, kidnapping and slavery, it does not have a law outlawing prostitution, but rather regulates the sex industry. Yet the threat of sanctions has pressurised the Indian government to draft a new law that focuses on trafficking for prostitution, targeting, at the expense of their human rights, a broad range of consensual sexual relationships where some exchange takes place, as well as women in the sex industry.

The *Immoral Traffic (Prevention) Act (ITPA) Amendment Bill, 2006*, completely ignores trafficking into other sectors and criminalises clients, omitting employers or companies that use trafficked labour. The proposed amendments to the Indian law will do little to control trafficking, but could actually increase trafficking, as sex workers will be unable to unionise or check that no underage girl or woman is forced into the profession, as is currently done through the self-regulation boards set up by a union of sex workers in Calcutta. The sex workers have mounted a very public and vocal opposition to these reforms supported by some feminists, community-based migrant groups, and those aware of the US pressure.

With its clear emphasis on law and order, the minimum standards set out in the TVPA fail to adequately address the need to promote and protect the human rights of trafficked persons and to adopt broader prevention strategies that address the underlying causes of trafficking.

4. Migration Laws and Policies

India's constitutional safeguards against trafficking and specific legislation on trafficking are significant. Yet the laws do not provide a comprehensive approach to trafficking, that is, they do not address the issue of trafficking within the broader framework of migration. No comprehensive migration policy exists in India and the legal provisions that do exist to address migration adopt different standards for dealing with emigration, immigration and repatriation (especially with regard to sex workers). The impact of these provisions is further mediated by the class, gender and religion of the migrant subject.

At a general level, laws that deal with issues of concern to migrant workers apply mainly to documented and skilled workers rather than to undocumented workers or those working in the unorganised sector. With respect

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to women, there is a dearth of primary research on migrant women and the impact of laws and policies on the rights of migrant women. In the name of protecting women, especially from trafficking, India has imposed some restrictions on the emigration of women, particularly unskilled or semi-skilled women, which have served to push these very women who are seeking to migrate to do so through clandestine means.

The Emigration Act, 1983

The *Emigration Act, 1983*, and the accompanying Emigration Rules are the main legal instruments relating to Indian citizens who leave India with the intention of taking up a job outside India. The *Emigration Act* is primarily regulatory in nature and lays out the procedures by which an emigration check is to be conducted in relation to those countries or workers that are not exempted from such a check. It sets out the powers and duties of the Protector General of Emigrants, who is appointed by the central government to deal with protection of and aid to emigrants (section 3). It further requires that all recruiting agents can only carry on the business of recruitment after acquiring the Recruitment Certificate from the Protector General of Emigrants (section 10). Certificates are granted after taking into consideration the agent's financial soundness, trustworthiness, experience and after obtaining a security from the agent to meet the costs of repatriation and other related expenses. Employers are only permitted to employ Indian citizens who have been recruited through an authorised recruiting agent or by directly applying for the issuance of a permit from the relevant Indian authority that enables them to employ Indian citizens directly (sections 15 and 16). The issuance of a permit can be denied on several grounds, including that the type of work involved is against public policy or public interest, or that it violates human dignity and decency. The *Emigration Act* further provides that emigrants must also seek clearance from the Protector General of Emigrants in order to emigrate. Such clearance can be denied on several grounds, including that the proposed work is considered to be exploitative or discriminatory, or that the working and living conditions are substandard, or the work is considered violative of public interest, public policy or human dignity and decency.

The proposed Emigration (Amendment) Bill, 2002, introduces certain specific amendments that include the establishment of a welfare fund and a central manpower export promotion council to provide training and counselling to workers going abroad. The aim of the amendments, which have yet to be enacted, is to ensure that more workers will be deployed abroad on a contractual basis resulting in a direct increase in remittances of foreign exchange and providing timely financial assistance to the emigrants.

The central government has the power to prohibit emigration of any class or category of persons in the interests of the general public (section 32). The government has issued such an order prohibiting any female household worker below the age of 30 from being employed in the Kingdom of Saudi Arabia under any circumstance, "following complaints that many of them are being forced into the sex trade" (timesofindia.com, 2006). Such restrictive policies are conditioned by implicit and explicit assumptions about women within the family and in society – primarily that women are victims and lack decision-making capacity. In this context, the former Indian Labour Minister, Sahib Singh Verma, stated that women emigrant workers were a "particularly vulnerable lot" and that the government often received complaints regarding the maltreatment and physical abuse of emigrant women. "*We had, therefore, consulted the National Commission on Women, and based on their recommendation, have taken steps to regulate the emigration of women below 30 years for employment as housemaids and domestic workers*"³(emphasis added).

COLLATERAL DAMAGE

The concern is therefore, that women may be sexually/physically abused or trafficked into exploitative conditions and the solution to preventing such abuse serves primarily to restrict women's migration. Such paternalistic restrictions infantilise women and refuse to recognise their desire and ability to move, clandestinely, if legal means are not available to them. They are not only contrary to the human rights of the persons whose freedom they restrict, but also counterproductive. Women will either not emigrate (and consequently perhaps remain in oppressive or abusive situations), or they will emigrate and will engage potential smugglers or traffickers in an effort to do so. And finally, it fails to recognise women as economically productive agents (UN Social and Economic Affairs, 2006).

Inter-state Migration in India

According to the 2001 Census, 29.90 million people within the country have moved for work to places away from their home. In its 2002–2003 Annual Report, the Ministry of Labour declared, "Freedom of movement in any part of the territory of India and freedom to pursue any vocation of one's choice is a fundamental right guaranteed by Article 19 of the Constitution" (Ministry of Labour, 2002). The Report also acknowledged that, despite hardships and exploitation, the income of migrant labour is likely to be higher than what they would have been able to earn without migration. However, in the 2005–2006 Annual Report, there is little focus on migrant workers and no mention is made of the fundamental right to migrate for work. Instead the Report states that while the *Inter State Migrant Workmen Act* (discussed below) has been enacted to protect the rights and safeguard the interests of the migrant workers, the main objective of the government is to prevent or control migration, which is referred to as a problem. According to the 2005–2006 Report, "The problem of migration is sought to be checked through a multi-dimensional course of action through rural development, provision of improved infrastructure facilities, equitable dispersal of resources to remove regional disparities, employment generation, land reforms, increased literacy, financial assistance etc" (Ministry of Labour, 2006, para. 8.20). In this context, the government has launched several schemes, including the *National Rural Employment Guarantee Act*, which guarantees 100 days employment to rural households.

The Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (ISMWA)

The ISMWA is intended to regulate the employment of inter-state migrant workers, to provide for their conditions of service and prevent the exploitation of such workers. The Act lays out provisions for the registration of establishments employing inter-state migrant workers, sets out the basis for payment of wages and hours of work (section 13), and provides for the welfare of migrant workers. The Act directs that the employers also provide equal pay for equal work irrespective of sex, ensure suitable conditions of work, residential accommodation, medical facilities, and protective clothing (section 16).

The National Commission for Women (NCW) has recommended certain changes be made to the Act in the interest of migrant women. It recommends that where women are recruited for work to another state, a family member should be permitted to accompany them to that state and their place of work at the employer's expense. The justification is "to avoid the possibility of trafficking". Another recommendation is to establish an office of migrant workers where all the particulars of the migrant worker and the contractor/employer are recorded as another means to check that migrants are not being trafficked. While the Act is geared towards protecting migrant workers and not restricting their movement, the recommendations by the NCW can have a downside.

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Women who travel to other states without being accompanied by another family member may be deemed to have been trafficked.

The NCW has also not addressed the broader issue of migration and the effects of the ISMWA. The ISMWA is the only legislation available to migrant workers within India. The conditions of migrant workers are often such that they have a limited ability to access or demand the enforcement of some of the more rights-oriented measures in this legislation (Arya and Roy, 2006, 43). Rights under other national labour laws remain unavailable to them as they work in the informal sector and also often lack proof of residence in the host state where they work.

Transgressing Gender Norms

The judicial pronouncements on inter-state migrant workers have tended to be in favour of the promotion of migrant workers' rights, though the courts have completely ignored the rights of women migrant workers. None of the pronouncements acknowledge women's labour migration. One important case highlights the failure of the judiciary to guarantee migrant women their right to work. In Maharashtra, the state government imposed a ban on bar dancers from dancing in beer bars, eating halls and permit rooms.⁴ The new law specifically exempted dance performances in theatres, cinemas, auditoriums, sports clubs and luxury hotels (section 33B). The justifications cited for the ban included the need to prevent obscenity and protect the dignity of women, prevent the trafficking of women into the bars, in compliance with India's commitment to combat such activity under the UN Suppression of Traffic Convention, and stop the inflow of women from outside the state and outside of India, especially from Bangladesh, who were introducing a culture into the state that was against Maharashtra's tradition, and "likely to deprave, corrupt or injure the public morality or morals". The Deputy Chief Minister of Bombay, RR Patil, stated that the dance bars were "dens of crime" and "anti-national activities" and needed to be controlled (Tribune, 2005).

The ban was challenged by the Bharatiya Bargirls Union, representing 75,000 workers in bars and hotels in Bombay, as well as in other districts of Maharashtra, together with several women's groups, HIV/AIDS groups, sex workers groups, and hotel associations, on the ground that the ban violated their fundamental rights under the Indian Constitution, including the rights to equality (Article 14), freedom of speech and expression (Article 19(1)(g)), and livelihood and life (Article 21). The Bombay High Court struck down the ban without addressing the issue of trafficking, but primarily on the grounds that it should apply to all establishments and all women working in these establishments. Although the Bombay High Court upheld the validity of dance bars to function, the decision did not guarantee the women their right to migrate for work.

As regards the presence of foreigners in the bars, especially Bangladeshi migrants, several NGOs insisted that there were no Bangladeshis among the arrested bar dancers (SNDT Report, 2005, 12). However, one lawyer representing the bar dancers, found that every one

of the bar dancers who had been kept in jail was in fact Bangladeshi. Although presumably motivated by a desire to protect the Bangladeshi bar dancers and to douse the flames of the nationalist polemic about the corrupting influence of foreigners, by denying the bar dancers' foreign nationality, these NGOs ultimately bought into the nationalist argument by claiming that the sanctions imposed on the bar dancers were not justified as there were no foreigners among them. In this situation, then, with the state government claiming that 70 per cent of the arrested bar dancers were Bangladeshi, and women's groups claiming that none of the arrested bar dancers were Bangladeshi, and one lawyer stating that all of the imprisoned bar dancers were Bangladeshi, it seemed as though the migrant women were utterly expendable.⁵

In the context of women migrants, the bar dancers' case also illustrates the tensions that are produced when women do migrate for economic empowerment within the country. Internal female migrants who transgress a nation's normative boundaries of gender and assumptions about women's place in the home as strong mothers and wives, and of women as upholders of the honour and purity of the nation, can be denied a whole host of rights. Undermining the purity of women is equated with undermining the purity of the nation. Her migration constitutes a direct challenge to this construction, and even if she is a citizen, her ability to enjoy the fruits of citizenship is consequently denied. These normative boundaries have given rise to the ultimate legal paradox of the female migrant in India: that, for the most part at least, she simply does not exist.

Repatriation

There is currently no law on repatriation in India and there are no repatriation agreements in place between India and neighbouring countries such as Bangladesh, Nepal or Pakistan (ADB, 2003, 22 and 104). However, the courts in India and a number of NGOs have successfully repatriated a number of trafficking victims (Sen and Nair, 2004, 24 and 28). Furthermore, the NHRC has taken up the issue of repatriation, and formal repatriation arrangements between India and Bangladesh and between India and Nepal are being considered (Sen and Nair, 2004, 304; ADB, 2003, 104). While the Open Border Treaty, 1950 between India and Nepal means that all Nepalis have the right to reside in India, women and children trafficked from Nepal are generally treated as foreigners who need to be repatriated (ADB, 2003, 104).

Open Border Agreement, 1950

The *Open Border Agreement* allows Indian and Nepali nationals to travel freely between the two countries and to enjoy equal rights in both countries in relation to employment and residency. The expansive open border between India and Nepal, as well as the long history of the migration of Nepalis to India for employment, are considered to be key factors in fuelling cross-border trafficking in recent years, along with deteriorating economic conditions in Nepal's countryside and the chronically low status of women and girls. Trafficking is an integral offshoot of the need for emigration in Nepal. Organisations working on trafficking issues estimate that thousands of women and children are trafficked out of Nepal each year into neighbouring countries, including in particular to

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India, though the evidence on which their estimates are made is not disclosed or referenced (e.g. Human Rights Watch, 1995). Most of the estimates tend to focus on trafficking into prostitution rather than other sites of exploitation and the data is based on assumptions that cannot be readily verified.

The increased concern over the movement of women and girls crossing from Nepal into India has invited some troubling responses from a human rights perspective. For example, in 1995 Human Rights Watch recommended that the SAARC cooperate with Interpol to stem the increase in trafficking in women between India and Nepal (Human Rights Watch, 1995, 90).⁶ The report criticised the open border policy, which permits people to pass freely between the two countries without a passport, visa, or residential permit. Instead of contextualising the strengths and limitations of an open border policy in a region closed and isolated from its neighbours, Human Rights Watch stated that the policy “makes it extremely difficult for border police to check illegal activity. Traffickers and their victims move easily across the border and the onus is on individual police officers to stop and question suspicious-looking travellers” (Human Rights Watch, 1995, 12). The report recommended that Nepal and India should establish a system for strictly monitoring the border to guard against the trafficking in women and girls. Such recommendations were evidently directed towards the curtailment and restriction of rights rather than their facilitation.

Section 12 of Nepal’s *Foreign Employment Act* prohibits the employment of Nepali women and children by foreign employers without obtaining the permission of the government and the employees’ guardians. Furthermore, the Foreign Employment Order issued by Nepal’s Ministry of Labour restricts the ability of women under 35 to travel overseas without a relative or a male guardian’s written consent, and the Passport Order stipulates that women must show permission letters from their fathers or husbands if they wish to leave Nepal (ADB, 2003, 64). The interim government in power in Nepal in late 2006 was reported to be reconsidering the ban, though no decision had been taken by the end of the year.

In *Sabin Shrestha v. Ministry of Law Justice and Parliamentary Affairs* (Supreme Court Bulletin, 2001, issue no. 19, vol. 229, 4), the Court upheld the validity of the ban, stating that the law had been made in accordance with another constitutional provision that promoted the enactment of special laws for the protection and development of women, and hence did not violate women’s equality rights. In reaching this decision, the Court utilised the special measures provision of the Constitution to justify the imposition of barriers on women attempting to exercise their rights to movement and employment on the ground that such women were particularly vulnerable to exploitation. However, when women are having difficulties exercising their constitutionally enshrined rights, the special measures provision of the Constitution should be used to facilitate measures that foster the enjoyment of rights rather than their eradication. With respect to the facts before the Court in this case, for example, sound special measures would include the development of legal channels of migration for women as well as pre-departure training for female migrants on how to safeguard their rights in their country of destination.

The treatment of migrants is partly dependant on the class status and skills of the worker. Despite the large demand for cheap labour around the world, many more formal channels for migration are made available to middle and upper class women than to poor women. Indeed, the migrant label, which for many is tainted with connotations of immorality, illegality and, more recently, terrorism, is often not applied to wealthy migrants, who are instead referred to as *expatriates* or *members of a diaspora*, or whose foreigner status is simply ignored, as if their entitlement to belong is beyond question. In India this distinction is made evident in the recent amendments to its citizenship laws. Citizenship can be acquired through birth, descent or naturalisation. While the first two

modes of acquiring citizenship are clearly tied to ethnicity – in both its cultural and racial senses, the third is tied to a related understanding of ‘the good citizen’. Although the illegal immigrant clearly falls outside the realm of ‘the desirable citizen’, half-Indian and half-illegal-immigrant children are denied citizenship rights.

Foreigners Act, 1946, and the Illegal Migrants Detention Act, 1983

In 2005, in the *Sarbananda Sonowal v. Union of India* (2005) 5 S.C.C. 665) (Sonowal Case), the Indian Supreme Court was asked to resolve a conflict that had arisen in relation to two pieces of legislation that allowed for the deportation of Bangladeshis from India. The *Illegal Migrants Detention Act* placed the onus on the police to prove that the person in question was not an Indian and could therefore be deported. *The Foreigners Act, 1946*, placed the onus on the person in question to prove that he or she was Indian and could therefore not be deported. The Court struck down the first piece of legislation as unconstitutional on grounds that were based upon the assumption that the massive influx of migrants from Bangladesh into the north-eastern states of India was akin to acts of aggression, a word that should be broadly defined and not limited to acts of war. The interests of the state prevailed over the rights of the migrant.

Although it is not only Muslim migrants whose entitlement to belong is undermined by this arbitrary system for determining who can stay and who cannot, in the present political climate – in India and around the world – Muslims are disproportionately disadvantaged. From the early 1990s in India, there was a sharp rise in propaganda against the Bangladeshi migrants in which it was claimed that they were changing the demographic character of India, engaging in anti-national activities, and – a sentiment that has clearly spread much farther than India since September 11 – plotting acts of terrorism. So tainted are Muslims in North-East India, that some activists who have campaigned for their rights and highlighted the plight of Bangladeshi migrants in the area have been accused of supporting the *jihadis* (CFLR, 2007, 30).

In a related case, *Chetan Dutt v. Union of India & Ors* (civil writ no. 3170, 2001), the Delhi High Court ordered that 100 Bangladeshis had to be sent back to Bangladesh everyday, resulting in aggressive police action to round up and deport ‘Bangladeshis’ from New Delhi. However, one NGO has documented that it was not citizens of Bangladesh who were sent back, but those who the police identified as Bangladeshis and who could not afford the bribe, or the proof of property ownership, necessary to secure their release (Hazards Centre, 2005). A similar situation has been identified in North-East India where Muslims are allowed to set up their homes and work on the land but are not entitled to reciprocal rights of state protection (Barbora, 2003). In accordance with this “inchoate legal plurality of belonging”, non-nationals are allowed to reside in India if they contribute to the wellbeing of the state, but only as long as it remains in the state’s interests for them to be there (CFLR, 2007, 35). Both of these accounts thus depict an informal regime of belonging whereby migrant non-citizens have an inferior right to temporary residency that has no short- or long-term legal protections attached.

5. Human Rights Impact of Laws and Policies

A morally conservative approach to trafficking is prevalent throughout India’s position on human trafficking. Defined as the commercial sexual exploitation of women and children, its legislation, enforcement initiatives, NPA and protection initiatives all focus on this ‘immoral’ activity to the exclusion of all other forms of exploitation

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associated with trafficking, such as forced labour. Moreover, for the most part, no distinction is made between women and children and the agency of both is denied. Thus, not only do the human rights violations experienced by trafficked persons go unrecognised, it is the state that is responsible for the perpetuation of human rights violations against them.

In addition, the anti-trafficking initiatives of the government as well as of NGOs are largely informed by a law and order and criminal justice approach rather than a human rights approach. India has become increasingly concerned about 'infiltration' into the country, especially from Bangladesh, and hence has been turning to more stringent border controls and arbitrary deportation measures, especially in relation to Bangladeshi migrants. The security of the nation, rather than the security of the migrant, is being foregrounded and this, in turn, is impacting on the country's response to trafficking. Anti-trafficking measures become a tool for reinforcing border security without necessarily doing much in terms of protecting the rights and interests of trafficked persons or preventing trafficking. In fact, such measures serve to drive migrants underground and render them even more vulnerable to trafficking and exploitation.

Several laws explicitly contravene a number of human rights norms. For instance, the legislation that authorises the removal of children from women engaged in prostitution as well as the detention of women and their children for their own protection. Preventing women from engaging in sex work and from emigrating to obtain employment constitutes a violation of human rights.

The number of convictions secured against traffickers is extremely low in India. Human trafficking is simply not treated as a matter of priority for the state or its law enforcement personnel. In addition, the maltreatment of trafficked persons by law enforcement officials, including, for example, the punishment of trafficked persons for trafficking-related crimes, is indicative of the need to revisit these laws and policies and their harmful impact on the rights of trafficked persons.

Addressing the underlying causes of human trafficking in the NPA as India has done is important. The multifaceted nature of human trafficking should make the coexistence of NPAs on related issues beneficial in combating human trafficking. However, India's NPA is focussed solely on the trafficking of women and children. While it is conceivable that in some circumstances it would be desirable to have separate NPAs for different classes of trafficked persons, one for trafficked adults and another for trafficked children for example, only addressing the needs of women and children to the exclusion of men, or only addressing the needs of children to the exclusion of adults, is exclusive and myopic.

Conducting raids that violate the rights of the 'rescued' persons, immediately deporting people who may well have been trafficked, providing no services for trafficked persons or a particular class of trafficked persons, and entering into agreements that facilitate the forced repatriation of trafficked persons, are all practices that have a detrimental impact on the rights of trafficked persons. In India, the exploitation of prostitution is prohibited. Yet the raids have resulted in the arrest of sex workers in circumstances when it is reasonable to suspect that they have been trafficked rather than the arrest of possible traffickers. The 'spiral of exploitation' that occurs as a consequence of arresting trafficked sex workers is particularly egregious.

Similarly, the immediate deportation or forced repatriation, as a matter of policy, of all illegal immigrants without first ascertaining if they have been trafficked is a human rights violation. By doing this, a state not only fails to

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restore the human rights of trafficked persons within its territory, but it runs the risk that the trafficked persons it deports will be re-trafficked or subjected to torture or other reprisals after their arrival in their country of origin.

The Indian government provides no services for trafficked persons, or to any particular class of trafficked persons, apart from placing women in protective institutions or correction facilities. Men, sex workers, or even transgendered or transsexual persons do not receive assistance or do not receive assistance that is of use to them, as they do not fit the stereotype of a particular category of trafficked persons.

Promoting Human Rights Based Laws and Policies to Combat Trafficking

If the harmful impacts of India's anti-trafficking laws are to be reduced, a number of issues must be addressed. Important among these are: the lack of understanding of human rights and human trafficking among the police and members of the judiciary, police corruption and police harassment. Clearly the extent to which these issues can be adequately remedied within the framework provided by the ITPA is limited.

The question of raids and rescue operations has been a constant source of concern for human rights activists. These are carried out arbitrarily, focused almost exclusively on the brothel districts and on arresting sex workers, regardless of whether or not there is any evidence of them having been trafficked. India is a member of the Asia Pacific Forum on National Human Rights Institutions, which has recommended procedural guidelines for raids and rescues to ensure that the human rights of trafficked persons are protected. These guidelines include recommendations that the raids should not occur without adequate planning in advance for the protection and support of trafficked people and that adults identified as victims in the raids should only be removed from their situation if they want to be removed (Asia Pacific Forum of National Human Rights Institutions Workshop, 2005).

With respect to the protection services it provides, the Indian government's focus on offering a broad range of rehabilitation services, such as vocational training, is important. At the same time, these rehabilitation services cannot be divorced from the people to whom they are offered, and the circumstances in which they are offered. While India's protection scheme fails to provide protection to a number of classes of trafficked persons in India, it may also act as a means of further oppressing the one class of trafficked persons it was designed to protect. Forcing sex workers to engage in these activities after 'rescuing' them, denies them their agency and further violates their human rights.

India's efforts in relation to repatriation are also problematic. India should enter into repatriation agreements with other countries in order to facilitate the voluntary repatriation of their nationals. It should also support the efforts of NGOs and/or international organisations in this respect. In addition, trafficked persons from Nepal should be able to enjoy the residency rights given to them under the 1950 *Treaty of Peace and Friendship* rather than being detained and deported.

India's trafficking prevention initiatives, which focus on promoting public awareness as well as eliminating the underlying causes of trafficking, are important, although this assessment, of course, depends on the extent to which they are carried through to fruition. In conducting its comprehensive report on trafficking in India, the NHRC has also acted as an important prevention mechanism by monitoring and assessing the current situation. The findings of this report ought to be harnessed by the Indian government as a vehicle for change.

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Addressing the underlying causes of trafficking is one of the most important anti-trafficking prevention strategies. India has adopted an economic reform programme designed to open up her markets to foreign investment and enable Indian entrepreneurs and businesses to invest and conduct business in other parts of the world. The reforms have been lobbied as the best possible route to alleviating poverty. While, undoubtedly, millions of working class Indians have been elevated into the middle class, and constitute the over 320 million who now make up the middle class, millions of people remain in dire situations of poverty. While these policies address the push factors, they do not, however, address the pull factors. There is a distinction made between facilitating the migration and investment of young business entrepreneurs, and those who are less well off, though not in dire poverty, for whom a migration policy is desperately needed to ensure their safe, legal passage.

India is also surrounded by countries that are in political flux or crisis. Being the largest economy in the region, it remains incumbent on India to take the lead in developing strong regional economic and trade initiatives that will enable freer movement across borders and produce conditions of economic stability and growth within the region. Yet the country remains preoccupied with its historic animosity with Pakistan, as well as fearful of migrants crossing into India through the north-east. Cooperation with other South Asian states can assist in preventing trafficking. While the SAARC Convention provides a prime example of such cooperation, it has not seriously addressed the central issue of migration, and instead produced a morally conservative consensus on the issue of women and girls in prostitution.

6. Conclusion

The anti-trafficking laws in India display a profound misunderstanding of the phenomenon of human trafficking. Failing to make a distinction between human smuggling, irregular movement, illegal migration and trafficking, denies the agency of those who choose to migrate for better life opportunities and undermines the gravity of the abuses suffered by trafficked persons. Criminalising various aspects of prostitution in order to prevent trafficking, as is the case with the existing law or criminalising the purchase of sexual services, as is being proposed by the government penalises those trafficked for sexual exploitation rather than their traffickers. It renders persons trafficked for sexual exploitation more vulnerable to their traffickers, their clients and the police. Finally, failing to expand the application of anti-trafficking legislation beyond cases of trafficking for sexual exploitation has the effect of denying the harm done to persons who experience similar abuses but who are trafficked for other purposes.

The anti-trafficking initiatives reproduce assumptions about women as passive, incapable of decision-making, and in need of protection. These initiatives also fail to address the concerns of anti-trafficking advocates, as they are frequently used merely as a façade to deter the entry of certain categories of migrants or to clean up establishments within the sex industry. The anti-trafficking framework has not succeeded in detaching itself from these hidden agendas, and consequently it has proven to do little good for the trafficked person and great harm to migrants and women in the sex industry (Empower, 2003; Ditmore and Wijers, 2003; Thobani, 2001; Doezeema, 1998).

The success of anti-trafficking programmes is too often measured – if it is measured at all – in accordance with the output of the department or organisation responsible, irrespective of whether or not there have been tangible improvements in the lives of the women concerned. Undertaking an assessment of the ongoing human rights

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impact of migration policies on migrant women must thus be incorporated into the policy development process. And such, a rights-based approach to migration needs to put female migrants at the centre and truly empower them.

ENDNOTES

- ¹ Zari is a type of fine gold or silver wire used in many traditional Indian garments.
- ² A practice in some communities in India where a young woman is married to a temple deity.
- ³ <http://moia.gov.in/shared/sublinkimages/382.%20Sahib%20Singh%20Verma>
- ⁴ Section 33A(1)(a) of the *Bombay Police (Amendment) Act, Maharashtra Act No. 35 of 2005, Maharashtra Government Gazette, 2005*.
- ⁵ The arrival of Bangladeshis into the north-eastern state of Assam has been a source of considerable tension since the creation of Bangladesh in 1971. The local Assamese complain that their arrival has threatened the cultural survival of the Assamese and that the migrants are also taking jobs away from the local residents. There is considerable similarity in terms of language, culture and ethnicity between these communities. The tension has been exploited by the Hindu nationalists who conflate the threat to Assam with the threat of Muslims infiltrating into (Hindu) India, as most of the Bangladeshis are Muslims (and those who are Hindus are referred to as refugees). The local politics together with the rhetoric of the Hindu Right has resulted in the targeting of poor migrants, especially Muslims, whether or not they are from Bangladesh. It has threatened the sense of belonging of the Muslim, especially the poor Muslim, who is an Indian citizen, and whose position is rendered unstable with threats of deportation in case he or she is unable to provide proof of residence, as well as discrimination and continuous police harassment.
- ⁶ Human Rights Watch has subsequently published quite different recommendations relating to immigration and border control, suggesting that the organisation no longer stands by the measures recommended in its 1995 report. In an article entitled “Globalization Comes Home: Migrant Domestic Workers’ Rights” in Human Rights Watch’s 2007 World Report (www.hrw.org/wr2k7), the organisation recommended that, “Governments should tackle the links between poverty, unsafe migration, and inadequate labor standards by reforming immigration policies that drive migrants underground to unlicensed recruiters and smugglers. *Anti-trafficking programs monitoring borders and women’s mobility also threaten to compound the problem.* Rather than restricting women’s and girls’ right to migrate and seek work, the real challenge lies in creating the guarantees for them to do so safely and with dignity” (emphasis added).

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Nigeria

Victoria Ijeoma Nwogu

1. Introduction

Nigeria has a population of some 140 million.¹ With increasing poverty and tough economic reform policies, Nigerians constitute the largest population in a significant flow of migrants from developing countries in Africa to industrialised countries in Europe and elsewhere. Migrants come from all classes, irrespective of age, educational background and ethnic origin. As a result of this growing trend to migrate, fanned by globalisation and improved technology, many destination countries have reacted by imposing strict immigration laws on Nigerians, while in Nigeria itself, administrative structures and measures neither hinder nor facilitate the movement of citizens outside the country beyond the normal emigration requirements for all travellers. One of the significant reflections of this is the recent international concern about the trafficking of Nigerian women and girls to various parts of the world.

Nigerian women are trafficked to Europe predominantly to earn money for others from commercial sex, especially in Belgium, France, Italy, the Netherlands and Spain. The UNICEF has reported that 80 per cent of young women engaged in sex work in Italy are Nigerians (UNICEF, 2002). South Africa and the United States are also destination countries, while the United Kingdom and Ireland are countries of transit as well as destination for Nigerian women. There is confusion about how many Nigerian migrants earning money in Europe's sex industry have in fact been trafficked and are being coerced. Alongside the trafficked women in these countries, there are others who are earning money from commercial sex but who have not been trafficked and distinguishing between them has proved difficult.

People from Ghana, Togo, and Benin are trafficked into Nigeria.² Young women are trafficked both within Nigeria and to other West African countries (such as Cameroon, Gabon, Guinea, Mali and Côte d'Ivoire) for domestic work, sex work and to work as street vendors. Children from Nigeria's southern and eastern states are trafficked to cities in the north and west of Nigeria and to other West African countries for exploitation as domestic servants, street hawkers and forced labourers. Children from Togo and Benin are trafficked to Nigeria for forced labour.

The Nigerian government has developed several sets of measures to address the issue of trafficking in women, especially for sexual exploitation abroad. These include: the passage of an anti-trafficking legislation, the establishment of a specialised anti-trafficking agency, prosecution of offenders and massive awareness raising. NGOs have also played a significant role in prevention and elimination of human trafficking, as well as providing rehabilitation and support services to returnees.

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This chapter looks at the various anti-trafficking interventions in Nigeria, initiated by the government and its partners³ in order to assess their compliance with human rights standards. In so doing, it will compare experiences and methods in anti-child trafficking interventions with other forms of trafficking, including trafficking of women for sexual exploitation.

Defining Human Trafficking in Nigeria

Section 50 of the *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003* of Nigeria (routinely referred to by Nigerians as the NAPTIP Act) defines trafficking as including:

...all acts and attempted acts involved in the recruitment, transportation within or across Nigerian borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in force or bonded labour, or in slavery-like conditions.

This definition draws greatly on Article 5(2a) of the UN Trafficking Protocol in making attempts to traffic a person a criminal offence. This has enabled law enforcement agents to institute criminal proceedings when they suspect that an offence related to human trafficking is about to be committed, even where the act is yet incomplete. However, such proceedings can also impede other lawful activities (such as migration), owing to a suspicion of an attempt at human trafficking. In applying this clause, law enforcement agents are confronted with the problem of proving that there will be actual exploitation of the intercepted 'victims' upon arrival at their destination. Illustratively, on 14 March 2004, the police intercepted a bus-load of children along the Calabar to Itu road on their way to Cameroon. The children, ranging in age from 14 to 16 years (eight girls and seven boys), were told by the adults arranging their journey that some were going to work while others would go to school. Both the suspected traffickers and the children were brought to the Cross River State Central Intelligence Division for interrogation. Due to lack of facilities for their care, the children were sent home to their parents and guardians (Imogbo, 2004, 1).

The definition also covers cases of internal trafficking, providing impetus for initiatives to address cases of child trafficking for domestic servitude, begging and other purposes within Nigeria's borders. Previously these activities were routinely regarded as so closely linked to indigenous cultural practices (involving child fostering) that they were allowed to continue uninhibited. The Act takes an original step in criminalising commercial carriers with knowledge of the trafficking transaction. However, the element of *guilt due to knowledge* may be difficult to prove in order to secure the conviction of a commercial carrier and no prosecutions have yet occurred.

The NAPTIP Act does not define sexual exploitation, even though the words are used widely within the Act, with the effect that acts which would not ordinarily constitute sexual exploitation are misinterpreted by government authorities to be forms of exploitation, such as voluntary sex work by adult women abroad. Again, the Nigerian definition ignores the problem of trafficking for the removal of organs. While in Europe and elsewhere, this practice is often perpetrated for the purpose of unlawful organ transplants, in Nigeria organs are most often removed unlawfully for the purpose of rituals associated with traditional religious beliefs, and the possibility that some intended victims for such rituals are trafficked is unfortunately overlooked by its absence from the definition in the law.

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Despite the definition it gives to human trafficking, the NAPTIP Act does not specifically punish human trafficking as one single offence. All provisions in the offences section deal with women and girls in various situations that could form all or part of the offence, thus bringing together all of the existing Nigerian laws on sexual offences with a few changes and increased penalties. These other Nigerian laws include the *Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria, 1990* (the Criminal Code), which covers the southern parts of the country, and the *Penal Code (Northern States) Federal Provisions Act, 1960* (the Penal Code), which applies in the north.

In Nigeria, human trafficking is often conflated with sex work. This misconception became obvious in a particular incident in the 1990s involving the massive deportation from Italy of trafficked women and girls who mostly came from Nigeria's Edo State in the south. Most of the women and girls had been trafficked for sexual purposes. The reaction of the public to these deportations and the subsequent sensational media coverage of the incidents were to assume erroneously that all cases of trafficking were for purposes of sex work, and, worse still, to stereotype victims of trafficking as women from Edo State only. Trafficking for labour exploitation, internal trafficking and trafficking of persons into Nigeria have not so far received commensurate attention.

The equation of human trafficking with sex work has further worsened the abuse suffered by trafficked persons, who, irrespective of the form of labour they are trafficked for, on arrival back in Nigeria, are considered sex workers. This is best appreciated in the case of the deportation of Nigerian girls from Europe. An Anti-Slavery International report (Pearson, 2002, 169) referred to the Nigerian situation thus: "The procedures facing deported nationals in Nigeria violate basic human rights by discriminating against and stigmatising women as sex workers, forcing them to undergo STD tests and preventing them from leaving the country legally again."

This misunderstanding of concepts ignores the fact that some migrants travel abroad expecting to earn a living from any form of labour (including sex work), and that many of these migrants do not have the resources to pay for their travel costs and so have to borrow money for which they make ritual oaths or other forms of agreements to repay. These kinds of transactions are not necessarily linked with human trafficking and often the migrant in question is not under obligation to engage in a specific form of work to repay the debts incurred. Thus it is wrong to construe that they are in a form of debt bondage and have been trafficked.

The question then arises of how Nigerian women earning money from commercial sex in Europe should be categorised. Is it really practical to assume that all those who are caught on Italian streets and repatriated are 'victims of trafficking', when there seems to be evidence that many have not been trafficked – rather, they are migrants who find there are few alternatives to earning money apart from commercial sex and who also (but separately) feel under pressure to earn money, both to repay moneylenders in Nigeria and to provide themselves and their relatives with an income. In view of this, it becomes mandatory for European authorities to investigate each case in more detail and decide on the basis of its merits whether it is appropriate to repatriate the migrant concerned.

Further, the persistent equation of trafficking with sex work makes it convenient for governments and some activists to call for the criminalisation of sex work in their attempts to combat human trafficking. Sex work is prohibited in the northern part of Nigeria, and in the year 2000, Edo State, from where the largest number of women and girls are trafficked for sexual exploitation, reacted by amending its existing Criminal Code on the issue of trafficking.⁴ The amendment criminalises sex work, exposing women who have been trafficked into sex work to the risk of being prosecuted.

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This conflation has also resulted in a poor understanding of what comprises trafficking (especially of children) for other rampant forms of exploitation that have been ongoing for decades, such as domestic work or farm labour in circumstances involving force or coercion. Policy and other interventions of UN agencies such as the UNICEF and the ILO-IPEC to try and stop child trafficking and child labour in Nigeria have resulted in some distinction being made between child trafficking and child labour on the one side, and human trafficking on the other, though there is not much coordination of efforts in addressing the related issues. When the NAPTIP Act was first drafted, it largely ignored the situation of children who are exploited in forms of forced labour, servitude and bondage beyond commercial sexual exploitation.

2. Current Legal Frameworks: Examining Specific Laws and Extent of their Application

The Nigerian legal system is derived from the British Common Law, Islamic Law and customary laws. These different laws operate geographically, giving rise to different court systems – the British-derived laws have effect nationally, except in criminal matters where the Penal Code (influenced by Islamic Law) prevails in the north and the Criminal Code, drawn from the British laws, operates in the south. Customary laws apply in the south only in matters of marriage and family. There is a common constitution which guarantees the civil and political rights of every citizen as well as the democratic values of human dignity, equality and freedom. In practice, however, power tends to be distorted in favour of the state.⁵ Observance of the rule of law has been criticised as weak, due to long years of military intervention in governance. But in the new democratic dispensation, the judiciary has remained vibrant, striving to ensure checks and balances in the executive and legislature.

The various laws which govern all facets of civil and criminal life in Nigeria are largely active, but there is need for enhancement of the capacities of the institutions responsible for their enforcement. There is also the question of differences in provisions of these laws on similar issues, raising ambiguities in their effective application. For instance, in 2003 Nigeria became the first country in West Africa to adopt national legislation to deal specifically with the issue of human trafficking. The Act is the *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003*, or the NAPTIP Act. Prior to the enactment of the NAPTIP Act, the Criminal Code and Penal Code of Nigeria were the only sources of reference for addressing offences related to, or similar to, human trafficking. Being criminal codes, they only made provisions for offences and their punishments, without regard to the need for protection of the victims. In these codes, provisions for offences such as slave dealing, unlawful confinement or detention of a person and procurement of girls under the age of 18 to become a prostitute within or outside Nigeria could be used to prosecute the offence of trafficking.

Upon its enactment, the NAPTIP Act restated some of the offences in the Criminal and Penal Codes and prescribed stiffer penalties for them, but all three laws exist alongside and are equally applicable.⁶ A common thread that runs through all these laws is the strong focus on trafficking of women and girls abroad for purposes of sexual exploitation. Women are generally assumed to be victims and men to be perpetrators.⁷ This focus has equally affected the perception of the authorities (especially law enforcement officials) about which acts constitute trafficking in persons, with the effect that majority of interventions highlight the phenomenon of sexual exploitation while placing less emphasis on the broader problem of trafficking of men, women and children for other purposes and also paying scant attention to the trafficking of boys for sexual exploitation (Jordan, 2002, 2). All three laws

need to be harmonised to properly reflect international standards (notably the principle of non-discrimination) and create uniformity.

Nigeria is signatory to several international conventions that are relevant in addressing trafficking in persons and its forced labour dimensions. Of special significance in this study is the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* and the UN *Convention against Transnational Organized Crime*, which Nigeria has signed, ratified and given domestic effect through the enactment of a local legislation. The Nigerian domesticated laws are *The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially women and children (Ratification and Enforcement) Act, 2003* and the UN *Convention against Transnational Organised Crime (Ratification and Enforcement) Act, 2003*. Nigeria has also ratified a number of ILO Conventions that are instrumental in combating forced labour and other labour abuses.⁸

A holistic approach will be taken in this section to analyse how these laws (both national and international) have impacted on the phenomenon of human trafficking in Nigeria. The analysis looks first at the role of the UN Trafficking Protocol and regional initiatives and next at national legislation. A brief look will also be taken at the prosecutions based on the existing laws and the extent to which, in practice, they serve to protect victims.

International Instruments and Regional Initiatives

The UN Trafficking Protocol and The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially women and children (ratification and enforcement) Act, 2003

Being one of the first countries in Sub-Saharan Africa to ratify the UN Trafficking Protocol and make its provisions applicable locally⁹ shows the political will of the government to combat human trafficking in Nigeria. However, the new law, which has a domestic application, is a verbatim reproduction of the UN Trafficking Protocol, and there are inherent difficulties in this. The UN Trafficking Protocol is largely preoccupied with the relationship between State Parties in dealing with cases of human trafficking, while national legislation should address situations known to arise in the country adopting the legislation. Some of the provisions are inappropriate in the socio-political context of the country. Furthermore, the UN Trafficking Protocol assumes the commission of crimes by organised crime syndicates, while in Nigeria most crimes relating to human trafficking are committed by individuals who are sometimes close relatives or neighbours of those being trafficked and who are not concealed in sophisticated networks.

Local application of the UN Trafficking Protocol, in the form of the Protocol (Ratification and Enforcement Act, 2003), should strengthen the national legal framework for combating human trafficking and forced labour in several major areas. First, the definition of human trafficking in this Act has made it possible to include, within the ambit of trafficking, acts committed by parents or guardians who give out their children to intermediaries who then place them in forms of exploitation or slavery-like conditions. Second, since the NAPTIP Act deals mainly with trafficking for sexual exploitation to the neglect of trafficking for other forms of labour, prosecutors could potentially cite the Protocol to cover these other forms of exploitation. Also, since the NAPTIP Act does not provide for trafficking for removal of organs, the Protocol could be cited to address such offences which are also covered by the Criminal and Penal Codes. Finally and more importantly, the Protocol could cover the gaps in the NAPTIP Act with regard to protection for victims of human trafficking. It is noteworthy that the Protocol also provides for legal measures to ensure the possibility of compensation to victims. This provision is replicated in section 25 of

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the NAPTIP Act and its implementation should in no small measure assist victims in their rehabilitation. In practice though, the Protocol is not being applied alongside the NAPTIP Act due to the difficulties highlighted above.

The ECOWAS Initial Plan of Action on Human Trafficking

On 17 December 2001, at a ministerial meeting in Dakar (Senegal), Ministers of Foreign Affairs from the states belonging to the Economic Community of West African States (ECOWAS) adopted a Political Declaration and the Action Plan against Trafficking in Persons within the region. The Action Plan called for countries to ratify and fully implement crucial international instruments adopted by the ECOWAS or the UN that would have the effect of strengthening national laws against human trafficking and provide protection for victims of trafficking. It also recommended the following: the formation of special police units to combat human trafficking; law enforcement training to focus on the methods used in preventing trafficking; prosecution of traffickers; and protection of the rights of victims, including protecting victims from their traffickers. Under the Plan, the ECOWAS will set up direct communication between their border control agencies and expand efforts to gather data on human trafficking.

The Plan of Action is yet to be fully implemented in the sub-region, though in keeping with its requirements, NAPTIP, with the support of the ILO and other stakeholders, recently developed the National Plan of Action on Human Trafficking and Forced Labour, yet to be adopted by the Federal Executive Council.

National Legislation

The Nigerian Constitution

*The Constitution of the Federal Republic of Nigeria, 1999*¹⁰ (the Constitution) in Chapter IV guarantees the protection of fundamental human rights. Section 34 of the Constitution guarantees the right to the dignity of the human person, prohibiting the subjection of any person to slavery, servitude or forced labour. It provides that: “Every individual is entitled to respect for the dignity of the person and accordingly no person shall be subjected to torture or to inhuman or degrading treatment; no person shall be held in slavery or servitude; and no person shall be required to perform forced or compulsory labour.” By the provision of section 46 of the Constitution, any violation of its fundamental human rights provisions is remediable by the High Court in the state where the violation occurs. In practice, however, no case of violation of human rights as a consequence of human trafficking has been heard before a Nigerian court.

The Criminal Code

The Criminal Code¹¹ does not define what constitutes trafficking nor does it deal with the various forms of trafficking. However, it deals with offences which may constitute cross-border trafficking for prostitution and slavery. For example, the Criminal Code makes it an offence to procure women and girls for prostitution in or outside Nigeria (section 223(2)) and also makes slave dealing an offence (section 369), in accordance with international law. However, the Criminal Code penalties for offences that constitute human trafficking seem surprisingly lenient. The penalties seem to regard the offences as mere misdemeanours (rather than felonies), and penalties range from fines and imprisonment of two to seven years, which seem unlikely to deter traffickers.¹² In Edo State, where the incidence of human trafficking for commercial sexual exploitation is particularly high, the Criminal Code has been amended to increase the penalties substantially.

The Penal Code

The Penal Code is fashioned after the Sudanese Criminal Code, which in turn was based on the Indian Penal Code.¹³ Trafficking in women is recognised as an offence in the Penal Code with special provisions according to the age of the victim. In general, there are stronger provisions in the Penal Code against offences related to human trafficking than in the Criminal Code, and while the Criminal Code treats some of these offences as mere misdemeanours, the Penal Code categorises them as felonies and provides stricter punishments.

Section 276 of the Penal Code prohibits trafficking of women into Nigeria, but does not refer to women being trafficked abroad from Nigeria. In addition, section 270 of the Penal Code prohibits forced labour and imposes a penalty of imprisonment for a term that may extend to one year or a fine. Human trafficking being a lucrative business (ILO, 2005), traffickers will find it much easier and a relief to pay the fines and continue with their trade. Interestingly, it is only the Penal Code that provides for the offence of *traffic in persons* though the provision also relates the offence to slavery. This is contained in section 279 of the Penal Code, which states that:

Whoever imports, exports, removes, buys, sells, disposes, traffics or deals in any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

Furthermore, the Penal Code provides in sections 271, 272 and 273 for severe penalties (maximum of 10 years and a fine) for offences relating to enticement, deceit and inducement of children (below 14 years for boys and below 16 years for girls) into prostitution without the consent of the guardian. This provision is inconsistent with international law that prohibits the prostitution of minors (below 18 for boys and girls) under any circumstances. The notion of 'consent' should be simply deleted as, under the terms of international law, it is irrelevant and may not be taken into consideration, unless to punish the lawful guardian as well.

Edo State Law against Human Trafficking

The *Law to amend some of the provisions of the Criminal Code Cap 48 Laws of Bendel State 1976 as applicable to Edo State, 2000* (the Edo State Law) was passed by the Edo State House of Assembly in 2000 to amend the existing Criminal Code to specifically refer to the offence of human trafficking. Although the Edo State Law extended the reach of the law to criminalise accomplices such as family members, religious leaders and anyone who facilitates the trafficking of women and children, it criminalises prostitution as well, creating the possibility that individuals who have been trafficked and subjected to commercial sexual exploitation may be liable to prosecution, even if their exploitation occurs outside Nigeria. The sections of the State Criminal Code that this law has amended are 222a, 223, and 225a.

The law addresses trafficking indirectly and does not specifically cover situations where children and young women are trafficked abroad for the purpose of other forms of exploitation besides sexual exploitation.

Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003

In July 2003, the Federal Government of Nigeria enacted the *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003* (the NAPTIP Act) and in 2004 it set up a special Agency, the

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National Agency for the Prohibition of Trafficking in Persons (NAPTIP), to oversee matters relating to human trafficking and related issues. This law is the first attempt to develop a national legal framework to combat human trafficking in Nigeria through legislation.

The NAPTIP Act introduced severe penalties for several offences relating to human trafficking ranging from two years¹⁴ to life imprisonment.¹⁵ Penalties for trafficking offences related to sexual purposes and involving minors under the age of 18 are much more severe than other penalties.¹⁶ The NAPTIP Act does not cover trafficking for the “removal of body organs” as mentioned in the UN Trafficking Protocol. This offence occurs in Nigeria and is not covered adequately by other laws. Other laws refer only to the use of human ‘remains’ in *juju* worship,¹⁷ suggesting that the crime involves the use of body parts of corpses rather than procuring living people especially so that parts of the body can be used.

Examining the NAPTIP Act as a whole, one finds that the legislation is oriented more towards the prosecution of traffickers than towards the prevention of trafficking or the protection of trafficked persons. Another major flaw is that the offences mentioned in the NAPTIP Act focus on trafficking for sexual purposes to the neglect of offences relating to trafficking for other forms of exploitation.

The deficiencies in the NAPTIP Act regarding the protection of victims and witnesses have made it difficult to secure the testimonies of victims and witnesses for use in prosecutions, as they fear reprisals from traffickers. In its first two years of existence, only two cases were successfully prosecuted to conviction under the law, despite the thousands of trafficking transactions taking place in Nigeria. To the extent that the NAPTIP Act lacks effective victim or witness protection, it has not complied with the UN High Commissioner for Human Rights’ *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (Guidelines 6 and 9).

It is pertinent to mention that section 45 of the NAPTIP Act provides that: “Where a person volunteers to the Agency or an official of the Agency any information, which may be useful in the investigation of an offence under this Act, the Agency shall take all reasonable measures to protect the identity of that person and the information so volunteered shall be treated as confidential.” Despite this provision, the requirement that trials be conducted in public (except where children are involved) poses a threat to victims and witnesses, creating the need for their protection.

Section 36 of the NAPTIP Act concerns the treatment of trafficked persons. Sub-section (a) essentially requires NAPTIP to take action to prevent discrimination against trafficked persons, to provide access to social services and to guarantee protection of identity to the trafficked person. Section 37 of the NAPTIP Act also provides that:

Where the circumstances so justify, trafficked persons shall not be detained, imprisoned or prosecuted for offences related to being a victim of trafficking, including non-possession of a valid travel or stay permit or use of false travel or other documents.

The clause, “Where the circumstances so justify” creates a loophole for violation of the provision. Rather than stating that victims of crime should not be detained and specifying a few exceptional circumstances when they can be, it suggests to law enforcement officials that the norm is to detain trafficked persons.

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Amendments to the NAPTIP Act

In 2005, the NAPTIP Act was amended by the *Trafficking in Persons (Prohibition Law Enforcement and Administration (Amendment) Act, 2005*, at the instance of the NAPTIP Agency. The amendments concerned administrative issues, such as membership of the Agency's board and which government ministry it belonged to. They also established the Victims of Trafficking Trust Fund into which forfeited assets of traffickers would be paid (with no explicit provisions as to the uses of the trust fund), and introduced provisions creating an offence of employing forced labour and punishing employers responsible for unlawful employment of a child as well as provisions for the forfeiture of traffickers' property following conviction.

Prosecutions under the NAPTIP Act

Since the NAPTIP Act was adopted, there have been eleven successful prosecutions of traffickers and thirty-two cases pending in court. The kinds of trafficking involved ranged from outright sale, child domestic work, forced prostitution and other forms. Two of the earliest convictions secured by the NAPTIP are reported below.

Attorney General of the Federation v. Sarah Okoya (High Court of Justice, Benin City, Edo State)

This is a case of human trafficking where the accused procured six young women with the promise of assisting them with jobs in Spain. The accused was charged with 18 counts ranging from procurement for prostitution, punishable under section 15, to deceitful inducement under section 19 of the NAPTIP Act, 2003. Judgment was delivered on 18 November 2004 and the accused was sentenced to three years' imprisonment without option of fine. This was the first conviction secured by the NAPTIP Agency.

Attorney General of the Federation v. Hussaina Ibrahim & Another (High Court of Justice, Kano State)

This case involved 15 Nigerian women who were deported from Saudi Arabia and reported to the NAPTIP for investigation. The accused were arraigned on four counts, charges ranging from procurement of persons for prostitution under section 15 to slave dealing, punishable under section 24 of the NAPTIP Act, 2003. The first accused was sentenced to three years on the first count and two years' imprisonment without option of fines, while the second accused was sentenced to two years' imprisonment without option of fine.

In both cases, the proceedings were not treated with confidentiality,¹⁸ as the Nigerian criminal procedure rules require trials to be conducted in public (except where children are involved). Special efforts by the courts to ensure the psychological and physical wellbeing of the trafficked women and other witnesses included clearing the gallery to hear the testimony of victims and ensuring they left the court as soon as their testimony had been heard. The NAPTIP ensured that the victims arrived at the court premises in vehicles that had shaded or tinted windows to protect their identity. The victims were also given adequate information regarding the court proceedings. However, while their testimony helped secure convictions, no order for compensation was made as criminal procedures do not always guarantee 'automatic' compensation within criminal trials. No civil suits were instituted in their favour for damages or compensation as well.

The Child Rights Act, 2003

The *Child Rights Act, 2003* (CRA) gives effect in Nigeria to the critical provisions of the *Convention on the*

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*Rights of The Child*¹⁹ and *ILO Convention 182 on the Elimination of the Worst Forms of Child Labour*. In addition, some states have enacted their own state laws on child rights.

Children in Nigeria are routinely trafficked for purposes that constitute the ‘worst forms of labour’ prohibited by ILO Convention 182. UNICEF estimates that about eight million Nigerian children are engaged in exploitative child labour.²⁰ Such forms of labour include domestic servitude, prostitution, begging, farm labour, work in illegal mining sites and quarries. Not only are Nigerian children taken across borders, but children from other neighbouring countries are also trafficked to Nigeria. In 2003, hundreds of Beninese children were rescued from Ogun State where they had been employed in illegal quarries digging for stones with their bare hands, underfed and living in the open air in the bush (Terre des Hommes, 2005).

Some of the provisions discussed earlier in the Criminal Code, Penal Code, Edo State Law and NAPTIP Act are relevant to the prosecution of child traffickers, but the CRA is the most comprehensive law in Nigeria today for the protection of the rights of the child. In accordance with international norms, section 277 of the CRA defines a child as a person below the age of 18 years. Section 14 of the CRA states that a child must not be separated from the parents against the will of the child, except where it is in the child’s best interests. Trafficking of a child for any purpose, whether with or without the consent of the parents, is a clear violation of the child’s right to parental care, protection and maintenance (ILO-PATWA, 2006).

Some elements of trafficking in persons, such as exploitative labour and the unlawful removal of a child from the lawful custody of another, are also covered under the CRA. Section 28 prohibits exploitative and forced labour of children, employment of children in any capacity except where the child is employed by a member of the family on light work of an agricultural, horticultural or domestic nature. This section is the same as section 59 of the Labour Act, and the penalty for contravening the provisions of this section is five years’ imprisonment or ₦50,000 (US\$385) fine.

Similarly, section 30 of the CRA that prohibits the buying, selling, hiring or otherwise dealing in children for the purpose of hawking or begging for alms or prostitution reflects the provisions of ILO Convention 182. This section is also wide enough to cover practices under the *almajiri*²¹ system of semi-formal Qur’anic education²² which has, in some cases, come to rely on forced begging by pupils to support their *mallams* (Islamic teachers). This practice has been going on for decades in many cities of northern Nigeria and neighbouring parts of West Africa’s Sahel and has grown to gain some inferred acceptance by society. These children are migrant students from within and outside Nigeria, and can be seen in hundreds around the cities begging for alms. However, some are also observed committing crimes such as stealing and drug peddling.

Sections 31, 32 and 33 of the CRA prohibit sexual intercourse with a child, other forms of sexual abuse and exploitation, and punish these offences with imprisonment of up to 14 years, while section 34 prohibits recruitment into the armed forces in accordance with ILO Convention 182. In 2005, Nigerian immigration officials arrested a security man at the Banki border who was trying to traffic young secondary school boys into Chad to join an armed rebel group.²³

The Labour Act

*The Labour Act Chapter 198, Laws of the Federation of Nigeria, 1990*²⁴ (the Labour Act) applies to all

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workers and to all employers except the armed forces and the police, prisons and intelligence agencies. Section 73 of the Labour Act, in keeping with the Nigerian Constitution, prohibits forced or compulsory labour. The NAPTIP Act also has similar provisions with much higher penalties: while the penalty in the Labour Act is two years' imprisonment or ₦1000 (US\$7.70) fine for private individuals and six months' imprisonment or ₦200 (US\$1.55) fine for public officers, the NAPTIP Act provides a penalty of five years' imprisonment or a fine of ₦100,000 (US\$770) or both. Both laws are in conflict in relation to their penalties and could create difficulties in prosecution and sentencing. In reality, the law which is most applied in such cases is the NAPTIP Act.

Sections 49 and 59 of the Labour Act set the minimum age at 12 years for employment and apprenticeships, except for light agricultural or domestic work performed for the family. Sections 59 and 61 prohibit children of less than 12 years from lifting or carrying any load likely to inhibit a child's physical development and establish a minimum age of 15 years for industrial work and maritime employment. The Labour Act also prohibits children less than 18 years from any employment that is dangerous or immoral, but it does not apply to domestic service.

The Ministry of Employment, Labour and Productivity is responsible for enforcing legal provisions regarding working conditions and protection of workers through a specialised department that has a unit dealing with child labour. Section 78 of the Labour Act states that in addition to other powers conferred on labour officers, an authorised labour officer may, for the purpose of ensuring the enforcement of the Act, enter and inspect certain premises including labour encampments, farms, hospital buildings, factories, etc. Private homes are, however, not included, though many people who are trafficked internally end up as domestic workers. Since labour inspectors have the power to do whatever is needful to ensure the proper implementation of the Act, it is implied that they have the power to prosecute offenders, and this covers issues of child labour and forced labour but not domestic or artisanal work. In reality, there are few labour inspectors and few resources to visit sites which are isolated or far away from their offices. Inspectors also need specialised training to become more effective in the execution of their mandate and more adept at the recognition of situations of trafficking or forced labour. Inspections are conducted only in the formal business sector where there are few occurrences of forced and child labour.²⁵

Another aspect of the Labour Act that has provided an avenue for the supply of trafficked persons to the local and international labour market is the *de facto* unregulated operation of recruitment agencies in Nigeria. While section 23 of the Labour Act prohibits recruitment by intermediaries except those under permit or licence, section 25 provides that the Minister may license fit and proper persons to recruit citizens of Nigeria for the purpose of employment as a worker in or outside Nigeria. In reality, however, these recruitment agencies operate without the required licences and without effective control on the part of the government, with the effect that they provide a ready source of cheap labour and inhibit the power of collective bargaining of workers.

3. Laws and Policies on Immigration and Emigration and Efforts to Protect Migrants

The Nigerian government has a *laissez-faire* emigration policy, leaving it up to individuals to decide for themselves whether to accept employment offers abroad and under what terms. This is due, perhaps, to the inherent difficulties of making policy applicable beyond the limits of national borders (Nightingale, 2002).²⁶ As a result, administrative structures and measures neither hinder nor facilitate the movement of citizens outside the country beyond the normal immigration requirements for all travellers. The resultant effect of this is that Nigerians emigrate mostly through neighbouring countries of the ECOWAS in largely undocumented flows towards Europe, Africa and

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other parts of the world, without any guarantee of the protection of their rights either by the Government of Nigeria or of the destination countries. In an unpublished study recently conducted by the Institute for Migration and Economic Studies of the University of Amsterdam, Nigerians and Ghanaians are reported to form the largest groups of African migrants in the Netherlands. In 2004 alone, there were 18,727 immigrants from Ghana and 7,298 from Nigeria, with over a thousand irregular migrants from each country. Many countries of the world are beginning to develop solutions or strategies for managing migration into and out of their countries. Nigeria too can seek examples of good practices from other countries and use these to develop a unique model for negotiating the protection of the rights of its migrants, wherever their services are needed. The current situation is that many countries of the world source Nigerian migrants into informal sectors of their economy without the direct involvement of the Nigerian government.

For women, Nigerian emigration requirements have discriminatory overtones and the *laissez-faire* attitude is more damaging in view of the fact that they could be subject to higher levels of exploitation and abuse than their male counterparts in the migration process. To acquire a Nigerian passport for instance, a married Nigerian woman has to present a declaration (in standard format) from her husband showing that she has obtained his permission to secure a passport for the purpose of travelling. The same declaration is also required for the purpose of securing a certificate of clearance from the Nigerian Drug Law Enforcement Agency (NDLEA) for travel to certain countries. This certificate is an attestation that the intended traveller is not known to be a drug trafficker. Passport and other immigration requirements, immigration policies of many foreign countries, limited exposure and knowledge of their rights and lack of access to better job opportunities all serve to increase negative outcomes of migration for Nigerian women.²⁷

Nigeria's immigration laws do not take account of the demand for labour in informal labour sectors such as agriculture, handicrafts, traditional manufacturing and domestic work. Section 34 of the *Immigration Act, 1963* gives conditions under which an immigrant can seek employment in the country. It states:

Where any person in Nigeria is desirous of employing a person who is a national of any other country, he shall, unless exempted under this section, make application to the Director of Immigration in such manner as may be prescribed and shall give such information as to the provision to be made for repatriation of that national and his dependants as the Director of Immigration may reasonably require. No such person shall be employed without the permission of the Director of Immigration given on such terms as he thinks fit.

In Nigeria, illegal immigrants, if detected, are usually deported. On the other hand, the legal system permits civil proceedings to claim damages against offenders convicted under the NAPTIP Act, and, as such, victims of human trafficking can, in theory, institute civil actions to claim recovery of lost wages, compensation for unpaid work, and restitution and damage claims for human rights abuses. The situation, however, does not always work favourably for victims. Trafficked persons of other nationalities when identified in Nigeria have invariably been treated as illegal migrants and deported. The labour law of the country does not respect the rights of irregular immigrants, even if they are nationals of the ECOWAS.

Section 18 of the Immigration Act contains provisions on prohibited immigrants, liable to be refused entry into the country or deported. Among those listed is:

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A prostitute or any person who is or who has been a person trading in prostitution, a procurer, a brothel keeper, etc.

On the basis of this provision, someone who is trafficked into Nigeria for sex work (or sexual exploitation) should automatically be deported once she (or he) is caught, without an attempt to find out the circumstances under which the person became a prostitute. The Edo State Law and the Penal Code that is applicable in northern Nigeria make sex work an offence. Sex work is generally frowned on but is not prohibited in the southern part of the country where the Criminal Code operates. However, indecent dressing, soliciting and owning of brothels are illegal. In spite of these provisions, if by any chance a person trafficked into Nigeria is still in the country after the conviction of the trafficker, section 38 of the NAPTIP Act gives such a person the right to institute civil action against a trafficker or any other person, and is entitled to compensation and restitution.

Bilateral Agreements on Migration²⁸

Nigeria has entered into various bilateral agreements and Memorandums of Understanding (MoUs) with individual countries within and outside Africa on immigration matters that relate directly to human trafficking, forced labour and migration in general. In entering into these bilateral agreements, Nigeria has overlooked the importance of negotiating better conditions of admittance and residence for its migrant labourers. The agreements focus mostly on procedures for repatriation of Nigerian nationals (Nwogu, *Forced Migration Review*, 2006). Among the countries with which Nigeria has signed agreements are:

Italy (2000): In theory, Italy is committed to ensuring that trafficked persons who denounce their abusers and testify against them will be given the same scale and type of protection as those who speak out against the Mafia. In practice, there is vagueness and ambiguity. Over the past few years, there has been a wave of repatriations of young Nigerian women from Italy, most of who appear to have been trafficked. The agreement does not make any specific mention of human trafficking, nor clarify the conditions under which victims of human trafficking are repatriated. Indeed, the vagueness seems to be a deliberate ploy to allow the Italian authorities to avoid investigating the specific circumstances of each Nigerian migrant's situation and to avoid meeting their obligations as far as those who have been trafficked are concerned. Deported women have claimed they were denied the opportunity to take advantage of legal provisions in Italy. Many Nigerian women deported from Italy have worrying tales of the indignities suffered. Held in detention centres prior to being put on flights to Nigeria, they are not allowed to return to places of residence to collect clothes and other belongings they had acquired during their stay in Italy.

Spain (2001): The agreement with Spain does refer to victims of human trafficking and provides guarantees that those repatriated may take with them any legally acquired personal belongings. The agreement specifies joint measures to combat illegal migration, facilitate repatriation, exchange information on trafficking networks and establish skills acquisition centres in Nigeria for those who have been repatriated, as well as mechanisms for legal access by Nigerian workers to Spain. The extent of actual implementation of this agreement is still vague.

United Kingdom (UK) (2004): The MoU refers to the joint need to combat human trafficking and address the poverty which drives Nigerians to entrust their fate to traffickers. Recognising the need for greater sensitivity by UK immigration and law enforcement officers, it is less condescending than the other agreements, which assume a one-way flow of technical assistance, with Nigeria always at the receiving end. It calls for common strategies to ensure the protection of trafficked persons and technical and institutional capacity building to prevent trafficking,

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protect victims and prosecute offenders. It also refers to programmes to provide counselling for the physical, psychological and social recovery of trafficked persons. Here again as in the preceding agreement, information on the extent of its application is vague and difficult to obtain.

Benin (2003): Concern about smuggling, cross-border crimes, human and drug trafficking and illegal immigration led Nigeria and the neighbouring Republic of Benin to sign an agreement in 2003 to work together to identify, investigate and prosecute agents and traffickers and return victims to their country of origin. In implementing the terms of this agreement, both governments have been preoccupied with repatriation and neglected the human rights of trafficked persons. A notorious case involved a large group of Beninese children found working in illegal quarries in Ogun State in 2003. They were repatriated without proper investigation of their circumstances, wishes and best interests.²⁹ This case is outlined in more detail below.

The ECOWAS Protocol on the Free Movement of Persons (1979)

Nigeria is a signatory to the *ECOWAS Treaty and the Protocol (No. A/P1/5/79) Relating to the Free Movement of Persons, Residence and Establishment* (hereafter the ECOWAS Protocol).³⁰ The ECOWAS Protocol provides in Article 2, among other things, for the following rights to be enjoyed by all citizens of ECOWAS member states and which were to be established in the course of a transitional period (of 15 years) in three phases, namely, Phase I: the right of entry and (consequently) the abolition of visas; Phase II: the right of residency; and Phase III: the right of establishment, which includes the right to employment.

These rights are, however, conditional on the migrant's acquisition of a valid passport or identification certificate or travel documents, the possession of a valid international health certificate and the official record of the migrant's entry. In practice, most migrants within the ECOWAS region move from country to country without such documents.

The initial grant of stay is for a period of 90 days which may be renewed on application to the relevant authority of the host country (Article 3). The ECOWAS Protocol also allows the free movement of privately-owned vehicles subject to the possession of valid documents.

It is significant to note that the ECOWAS Protocol provides for the situation where, if the need arises to repatriate the citizen of a member state, then the security of such a person and his/her family will be guaranteed by the host country and the person's properties will be protected and returned on departure. This provision echoes a similar provision in the High Commissioner for Human Rights' Recommended Principles and Guidelines and ought to be persuasive, especially in view of the fact that Article 12 of the ECOWAS Protocol allows states to resort to other bilateral agreements in a case where the ECOWAS Protocol is silent.

The ECOWAS Protocol is ostensibly designed to facilitate free movement, especially for the buoyant economic activities within the sub-region, but the manner of its implementation has tended to impact negatively on other socio-economic factors, as well as encouraged the rate of transnational crimes. First, the corrupt and inept attitude of border officials in the different states has resulted in the poor implementation of the ECOWAS Protocol. Thousands of ECOWAS nationals cross various borders in the sub-region daily without possessing valid travel documents or any documents at all. There is also a poor (almost non-existent) mode of recording movements, especially at the land border posts. In addition, with as little as ₦100, 1000 Ghanaian Cedi or 200 CFA Francs (all equivalent to less than US\$1) paid to the border or immigration officials, an ECOWAS citizen can cross the border to another country without any documents at all.

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These lapses in effective and efficient implementation of the ECOWAS Protocol have, apart from allowing free passage to human traffickers to traffic their victims, also made crime detection very difficult. There is in fact no information to the general public on the ECOWAS Protocol and the extent of its formal implication.

Multilateral Cooperation Agreement to Combat Trafficking in Persons especially Women and Children in West and Central Africa (Abuja, 6 July 2006)

This agreement aims to help both sub-regions, i.e. the ECOWAS and the ECCAS (Economic Community of Central African States) develop concrete strategies for mutual assistance in the investigation, arrest and prosecution of offenders. It also covers issues of prevention, protection, reunification, reintegration, rehabilitation, repression and cooperation. The agreement imposes special obligations on origin, destination and transit countries with regard to rescue, protection, access to information, repatriation and reintegration of victims. Member countries resolved to set up a Joint Permanent Monitoring Commission to monitor implementation of the agreement.

The Migration Industry in Nigeria

The migration industry in Nigeria is largely informal, with those planning on migrating abroad dependent on networks of friends and family already living abroad or with connections overseas to help facilitate their emigration. These informal networks underscore the peculiar situation that, contrary to the inherent assumption in the UN Trafficking Protocol that traffickers belong to organised criminal networks, human trafficking in Nigeria (and indeed in many parts of Africa) is most often perpetrated by family members, relations, friends or acquaintances.

An emerging trend is the use of the recent information communication technology ‘explosion’ among young Nigerians to seek for better fortunes abroad. In a practice called *yahoo-yahoo* in local vernacular, unemployed Nigerians spend hours surfing internet chat sites in the hope of making romantic connections with foreigners that could possibly lead to a life abroad or, in a criminal twist, to advance fee fraud whereby these youngsters prey on gullibility and greed to defraud foreigners of their money.³¹

Nigerian newspapers are regularly crammed with advertisements by so-called private employment agencies (PEAs) offering immigration services to persons seeking to work or study and live abroad. Only a minute number of these advertisements are easy to verify, while many others raise suspicions when the only contact information accompanying the advertisement is a mobile phone number. Recently, NAPTIP intercepted two men as they obtained over ₦500,000 (about US\$3,900) from two young girls on the promise of helping them secure admission to institutions of higher studies abroad. The young men claimed the entire deal was a scam intended to dispossess the girls only of their money, but to NAPTIP it was not clear (for the purpose of prosecution) whether they had plans to attract the girls abroad and exploit them.³²

Private employment agencies

The evolution of job placement as a lucrative private business has not been lost on Nigerians. Many PEAs operate on a small scale and provide job placement services, mostly into the informal sectors such as domestic work, cleaning services, private security services, sports, and modelling. These PEAs operate without any licences and without being regulated by the government and many have the potential to recruit people fraudulently and for the recruitment to be a form of trafficking.

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In reaction to this development, in 2005 the Ministry of Labour amended the existing provisions of the Labour Act for licensing and monitoring recruitment agencies, and with regard to penalties for offences. There are plans for labour officers to be trained to check if the regulations are respected. Part of the checks provided by the regulations is the empowerment of the labour officer to enter, inspect and examine all premises or places of economic activity, including those used for PEA operations. It is also mandatory for the labour officer to locate, identify and confirm places of operation before issuing licences to applicants. Both the employer and employee could report each other to the nearest labour office in case of any violation of the employment contract. It is difficult to ascertain whether this provision is being taken advantage of by either employers or employees. In practice, over a year after the licensing regulations were finalised, no licences had yet been issued. Private recruiters continued to operate on their own terms without any government involvement to check possible excesses or violations of the law. The private recruiters are also not self-organised and so the possibilities for self-regulation are non-existent.

In July 2005, the ILO's Action Programme against Human Trafficking and Forced Labour in West Africa (PATWA) facilitated a workshop for government officials of the Ministry of Labour and Productivity, owners of recruitment agencies, and representatives of the Nigerian Labour Congress. The workshop clarified certain concepts relating to private recruitment. There were discussions on the evolution of PEAs, monitoring models, definitions of forced labour and trafficking, existing labour laws and regulations in Nigeria, problems of enforcement, experience of recruitment agencies, public information and links with migration management. The overall aim of the workshop was to improve the capacity of the labour ministry to promote law-abiding PEAs and control fraudulent ones.

Migration for sex work

Throughout Nigeria, taking money in exchange for sex is generally regarded as contrary to religious and local cultural norms, although it is defined as a crime in the Penal Code and the Edo State Trafficking Law. Sex workers work on the streets, in bars/hotels and in brothels. There is the subtle form of sex work in which young female university undergraduates provide sexual services to wealthy middle-aged men³³ in exchange for money and gifts such as jewellery. However, there is no 'culturally acceptable' sex work. Sex work in Nigeria does not seem to be well organised, and most women work independently; in some cases, older sex workers do organise younger ones (Pearson, 2003, 32).

Migration within Nigeria and abroad is mostly informally organised with little interference from the government beyond administrative concerns. Thus migration for sex work is only confronted as an issue within the realm of anti-trafficking interventions. Due to NGO sensitisation and increased media coverage of the issue, many women seeking to work abroad are aware that they will be earning money from commercial sex, but are largely unaware of the specific conditions of work, i.e. that their identity documents may be confiscated to control their movements, they may be forced to work long hours on the street every day, forced to serve a minimum number of clients per day, or subjected to physical abuse, threats and debt bondage (Pearson, 2003, 29).

Interviews conducted with six sex workers in Lagos and Benin City found in all cases the women were well informed about the trafficking of women to Europe as they had heard stories from other sex workers who had been to Europe. Several stated that they did not go to Europe because they did not have enough money to pay the required deposit (Pearson, 2003, 32).

Regulations and Practices Concerning Internal Migration

Nigerians (adults and children) migrate freely within the country as section 41 of the Nigerian Constitution guarantees that:

Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereby or exit therefrom.

There are no regulations concerning internal migration in Nigeria. The government will only interfere in cases where there is suspicion that an offence such as human trafficking or related offences within the definition of the NAPTIP Act and other relevant laws has occurred or is about to occur. This most often happens when policemen monitoring checkpoints along the highways detect suspicious movements of children in large numbers that create doubt as to whether they are siblings and whether they are accompanied by adults or otherwise. In 2005, for example, a woman was intercepted with a cold-truck (usually used for transporting frozen food) containing over 65 children (including her own daughter) from Niger State on their way to Lagos. The children varied in ages from 8 to 16 years. Upon interrogation, she claimed that she was on her way to Lagos to place the children in domestic service for a small fee. This, according to her, was a seasonal migratory practice endorsed by the children and their families and she was well known and respected in the community for rendering them this service. The children were distressed that their journey and the hopes of earning a living were interrupted. The community and the families of the children condemned NAPTIP loudly for interfering in their livelihoods and arresting a woman who they regarded as a heroine. NAPTIP undertook several sensitisation visits to the community to convince them of the dangers and criminality³⁴ of sending out their young children into domestic service. The Agency also set up a rehabilitation scheme for the children in their home community. While it is clear that NAPTIP was acting, according to their perception, in the children's best interests, such interventions have been known to result in gross detriment to the interests of the child, especially as the children and their families are not offered any practical or feasible alternative sources of livelihood.

Inconsistencies in Approach by the Police and Immigration

NAPTIP is a specialised government agency, empowered with law enforcement and prosecution of trafficking cases. The Agency has an investigation unit and a legal department which are primarily responsible for prosecuting all trafficking cases in Nigeria. Section 8(2) of the NATPIP Act (as newly amended) gives powers to the police, immigration, customs and NAPTIP to arrest suspected offenders, but the powers of prosecution rest solely with the NAPTIP. Thus where arrests are made by these other agencies, the suspects have to be handed over to the NAPTIP for prosecution. In order to carry out this role, the NAPTIP Agency instituted a National Investigation Task Force, consisting of the Nigerian police, immigration and the Directorate of State Services to effectively monitor, investigate and respond to requests of victims and their families.

The Nigeria Police Force (NPF) is designated by section 194 of the Constitution as the national police with exclusive jurisdiction throughout the country. The NPF performs conventional police functions and is responsible for internal security generally, and for supporting the prison, immigration, and customs services and performing military duties within or outside Nigeria as directed. The mandate of the police concerning human trafficking includes investigating, apprehending and prosecuting traffickers as well as raising awareness of the public about

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the phenomenon.³⁵ The NPF had been handling the problem of human trafficking before the establishment of the NAPTIP in 2004 and had established specialised Anti-Human Trafficking Units (AHTU) at its headquarters and in Juvenile Welfare Centres in 12 of the Federation's³⁶ states. The police usually assist in receiving deported victims on their arrival in Nigeria, after which they are documented. Victims are provided temporary shelter, although such facilities are limited and prone to overcrowding.

The Nigerian Immigration Service (NIS) is concerned with the issuing of travel documents and controlling the country's borders. In 2003, the immigration service created anti-trafficking units to help tackle the problem of trafficking in women and children,³⁶ following the increasing number of cases of human trafficking involving Nigerians. Several cases have been investigated since the creation of the units but they are not working at full capacity.

In any given case of human trafficking, there is always some level of coordination between NAPTIP, the police and the immigration service from the point of detection to apprehension, investigation and finally prosecution. There have often been inconsistencies of approach in handling cases. For example, in the case of the 65 children from Niger State mentioned above, the children were apprehended by the police and were kept in custody for a few days while preliminary investigations were concluded. NAPTIP, on the other hand, was concerned with the welfare of the children and the need to relocate them from police custody as fast as possible.

4. Human Rights Impact of Anti-Trafficking Measures

Reliable data is a critical factor in determining the impact of anti-trafficking initiatives, but the clandestine nature of human trafficking makes it difficult to obtain much needed data. It has also not been a government priority to collect accurate data or commission research. In the case of the 261 children repatriated to the Benin Republic, the lack of data resulted in a faulty prognosis of the scale of the problem: anecdotal reports suggested thousands of children were working in gravel pits scattered all over the region, but there were no clear or credible figures. Evidently, the reluctance of victims to report their experiences to the authorities, in large part because they are not convinced that this is in their best interests is also instrumental in preventing the emergence of a clear picture of the scale or trends of trafficking.

Anti-trafficking interventions in Nigeria can be classified into two types: those that aim to prevent trafficking from occurring (public education and sensitisation) and those that protect and assist people who have already been trafficked (provision of shelter, rehabilitation, skills acquisition, family tracing, provision of scholarships and health care, legal aid, reintegration, counselling and financial assistance). But efforts to stop human trafficking have not had much impact on trafficking flows because they often seem to be too narrowly focused on achieving a particular aim, such as preventing trafficking exclusively via public information programmes or securing convictions of traffickers, as if these activities were not part of achieving a larger objective (of putting an end to trafficking). For example, information and awareness raising campaigns alone, without efforts to provide concrete alternatives to the desperate financial circumstances of vulnerable populations, seem bound to ensure that these campaigns will not yield positive results. Reports of the trafficking and re-trafficking of young girls from Edo and Delta states illustrate that prevention strategies have not adequately addressed the root causes of the problem. Poverty is one of the major push factors. Therefore, any prevention project which does not address poverty directly, by economically empowering communities or households where disproportionate numbers of trafficking cases occur,

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seems unlikely to achieve positive results. Other push factors include violations of human rights (these include mass violations of civil and political rights that affect whole communities, as well as discrimination against particular groups, such as girls, women or minorities), natural disasters, conflicts, harmful traditional practices, social exclusion, lack of functioning governments and political persecution. If these factors are ignored, people will continue to explore unsafe migration channels and ultimately find their way into the arms of traffickers (Nwogu, *Alliance News*, 2004, 26).

Illustratively, in the case of the 261 children above, their discovery was the result of a ‘war’ between different traffickers in which there were high economic stakes and one trafficker decided to blow the whistle on the others. Prior to this chance event, government and NGO efforts met with surveillance and alarm systems preventing penetration (Feneyrol, 2005, 21). After their repatriation, the traffic in children between Nigeria and Benin appears in fact not to have declined. The Terre des Hommes report claims that the gravel pit scandal is still alive and well (Feneyrol, 2005, 32). The practice which had flourished for the last two decades and become acceptable in the eyes of the different local populations was rooted in the structural realities that characterise their present economic situation caused by lack of livelihoods or too many children to feed. In one of the interviews conducted during the Terre des Hommes research, a villager claimed, “When families don’t have enough money to send a child to school, even if the child works well, they take the child out of school and send him to Nigeria, (meaning – to the stone pits).” While another villager asked, “What are we going to receive from the people who won’t allow us to send our children away?”

Many young migrants are enticed by the affluent lifestyles of other returnees and so view public information campaigns as government propaganda. A baseline survey conducted by the ILO Programme against Trafficking and Forced Labour in West Africa (PATWA) in Nigeria revealed that young persons rely on their perception³⁷ of a better life outside their local communities and beyond the shores of Nigeria and entrust their lives to strangers or acquaintances (including friends and relations) in the hope that they can secure them an easy passage to the land of their dreams. In the Terre des Hommes research, a 15-year-old ex-gang leader and brother of a trafficker claimed, “My parents decided to send me because my brother came back with many things: a radio, a motorbike and clothes. The motorbike is now used as a *zemidjan* (motorbike-taxi) and my mother uses it.”

Corrupt border officials also ensure that those wanting to migrate continue to find irregular means of exit from Nigeria and entry into their target countries. The UNODC/UNICRI 2005 report recounts some victims’ experiences, suggesting that local law enforcement agents connived with traffickers to obtain false papers and rendered assistance at airports to smuggle victims into the country.

Impact of Legal Proceedings on Trafficked Persons

Since its establishment in 2003 to date, NAPTIP has successfully prosecuted nine cases resulting in eleven convictions, while thirty-five more cases are on-going. NAPTIP investigators routinely experience difficulty in persuading trafficking victims to divulge the names of traffickers, both because of the victims’ fear of supernatural consequences (if they have taken a ritual oath) and because the NAPTIP does not provide meaningful protection either to victims or to their close relatives. There are no other strong witness protection laws that could be taken advantage of here. Sections 204–213³⁸ of the Criminal Code, which prohibit trial by ordeal, witchcraft, *juju* and criminal charms, are not used by NAPTIP prosecutors because they do not have the fiat to prosecute such offences, even though it is precisely by using such charms that people smugglers and traffickers are reported to

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keep control over their victims. The Agency has only been able to circumvent this by arresting the *juju* men (who administer ritual oaths) as accomplices and then offering them a mitigated sentence if they act as informants and witnesses. This has helped victims in a few cases to break the oath of silence. In the case of *Attorney General of the Federation v. Sarah Okoya*, Ms B³⁹ did not have any fears about confronting the trafficker even to give her testimony in the court. But in many other cases, proceedings have been stalled because the victims suddenly reneged on their testimony due to threats from the traffickers or fear of the *juju* oath which they had been forced to take, binding them not to reveal facts about their traffickers.

During a national hearing organised in Abuja in 2002 by the Enugu-based NGO Civil Resource Development and Documentation Centre, a Nigerian who was trafficked to Italy testified that some months after she was deported from Italy, her sister was killed in mysterious circumstances. She believes it is the work of the trafficker because a threat was issued after she escaped (ILO-PATWA, 2006, 25).

Other issues relating to legal proceedings include the lack of information provided to trafficked persons on their legal rights and possible remedies against the traffickers. This is due to the fact that securing access to justice for the victim is not high on the agenda of the government; rather, all initiatives focus on securing convictions of traffickers and redeeming the image of the country abroad. Again, all the prosecutions involve Nigerian victims and Nigerian traffickers, so the provisions of the law which allow a foreign victim to remain in Nigeria after the conviction of the trafficker are yet to be tested.

There has not been a single reported case of a Nigerian receiving legal aid to seek redress or compensation against their traffickers. Payment of compensation to victims of crime is not a very prominent feature in the administration of criminal justice in Nigeria⁴⁰ and as such there are scant resources available from donors or government sources for legal aid to victims of other crimes. Under the Nigerian legal system, damages are awarded when a victim brings a civil action after the criminal action has been discharged and the guilt of the accused person determined. This is certainly unrealistic in Nigeria, just as it is in many other countries where trafficked persons are poor and intimidated by legal procedures. The NAPTIP Agency is currently working on an amendment to the NAPTIP Act to guarantee that upon conclusion of criminal proceedings and conviction, the trial judge can make a proclamation in restitution for the victim against the trafficker. This is different from an award of damages and would not affect a subsequent civil claim for damages.

Impact on Sex Workers

Sex work is sternly discouraged in Nigeria on moral grounds and sex workers are routinely stigmatised. This

attitude is brought to bear upon returnee victims of human trafficking, especially where the fact of their involvement in sex work abroad is made public knowledge (through the media) by the government agencies that receive them and work to reintegrate or rehabilitate them. Nevertheless, this does not deter young women interested in working in the sex industry from finding ways to migrate and achieve their aims. This is because the inequalities and desperation they face by staying are more pressing and so they tend to ignore the stigma. Public information programmes have exposed the mystery shrouding job quests abroad, but despite this young women continue to seek opportunities to go abroad and engage in sex work, especially from Edo and Delta states from where mainly young Nigerian women head for the sex industry in Europe.

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Much of the awareness raising efforts by NAPTIP and its international partners focus on women and sex work. These campaigns have created a more suspicious crop of law enforcement officers who take extra caution in investigating travel documentation of women and young girls travelling abroad. Such detailed scrutiny has helped the NAPTIP Agency to intercept women who were being taken abroad in suspicious circumstances.⁴¹ On the negative side, such gender-specific controls tend to stereotype and stigmatise women as prostitutes.

Although these anti-sex work campaigns have not been aimed at deterring women from moving within Nigeria to earn money from sex work, there are reported cases of interception of young female victims of commercial sexual exploitation in big cities within the country. It is worth commenting, however, that the campaigns resulting in these interceptions suggest that the government's main intention is to protect the country's image (as opposed to protecting the rights of victims), with slogans such as, "Make your country proud, stay and build up the nation..." etc.

Impact on Migrant Workers Generally

Anti-trafficking interventions seem to be making little impact in terms of deterring prospective migrants who fall prey to traffickers. Statistics from the police and immigration reveal that there has been an increase of over 1,000 per cent in the repatriation of Nigerians between 1997 and 2004 – evidence of the limited impact of anti-trafficking measures on people's desire to migrate for labour, as Nigerians have continued to find alternative ways to migrate in order to escape their harsh economic circumstances. Although many destination countries impose stricter immigration requirements on Nigerians (many European governments have imposed stricter conditions for issuance of visas to single young Nigerian women than for Nigerian men), these only serve to drive them further into finding irregular ways to migrate rather than deter them from the venture entirely. The harm here is that Nigerians, in seeking unorthodox migration routes, routinely have no alternative but to seek the assistance of traffickers and smugglers. Young women are especially vulnerable as the discriminatory immigration procedures and repressive policies of foreign governments force them to lower their sense of caution in seeking to realise their dreams. This is evidenced in print and electronic news reports of numerous Nigerians trying to get into Europe along with other West Africans.

Many migrant workers do not perceive the Nigerian government as having a tangible or positive role to play in ordering their affairs; in fact they avoid any contact with Nigeria's embassies due to their largely undocumented status and fear that they may face reproach from the government.⁴²

Impact on Migrant Children

Between September and October 2003, amidst much media attention, the Government of Nigeria repatriated 261 Beninese children to the Republic of Benin.⁴³ The children had been rescued from gravel quarries in Abeokuta, Ogun State, where they had been held in near captivity for months and years at a time. The children ranged in age from 8 to 14 years and were exploited for eight hours a day, six days a week for two-year cycles and then allowed to return home for a few weeks before being made to return by parents or guardians to complete further two-year cycles. The condition of the children was pitiful; they were deprived of education, affection and leisure and often faced molestation from stronger, more senior members of their work gangs. Their living conditions were harsh and abusive and dangerous to their health, wellbeing and moral integrity. These children were migrants from Zakpota Commune in the Zou Province of the Republic of Benin. They had followed their parents and siblings in a migratory route established by trade between Nigeria and Benin in the eighteenth century which had

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transformed into a pathway for labour migration of children and thereby their exploitation in the gravel pits and plantations dotting the area.

The case was celebrated at the time as a successful government rescue intervention. But the Nigerian authorities did not contribute financially to any of the costs incurred in assisting the children after they arrived back in Benin and neither did they make any attempt to recover the wages owed to the children or to secure any payments as damages. Two years later, an assessment on the return and reintegration process (Feneyrol, 2005) revealed inherent concerns and raised critical questions about the effectiveness of the return in improving the lives of the migrant children and their families, the adequacy of support from government authorities and other organisations involved, and whether the exploitation of children in the gravel pits had really ceased to occur. The answers to these questions are largely negative. Most importantly, the assessment found that, two years on, the flow of child migrants from Benin into the gravel pits in Nigeria continued unabated. The same is the case with the flows of migrant children from all over West Africa into Nigeria and from Nigeria outwards. The flows continue and the lack of accurate statistics makes it difficult to determine the scale or the trend.

Impact of Anti-Trafficking Initiatives on Trafficked Persons

Most assistance programmes in Nigeria are based on the ‘rescue and rehabilitation’ model. Though these programmes are designed to benefit trafficked persons, the individuals managing them seem to have little understanding of the issues. Recovery work most often focuses on repatriated victims and children who have been rescued through raids on labour camps or who have been deported as illegal immigrants engaged in sex work abroad. Many NGOs which help trafficked persons in the recovery process round up returnee victims and run vocational courses without assessing their interest or aptitude for that specific skill. Victims have no involvement in making decisions about the courses or their contents, nor are there systematic efforts to find out if they benefited from the courses afterwards or if these should be modified to be more useful. An example of a rehabilitation project that has proved to be less successful (though not significantly less successful than a lot of others) was the ALNIMA Project in Edo State, instituted in 2003 by the European Network for HIV/STI Prevention and Health Promotion Among Migrant Sex Workers (TAMPEP – a European network of NGOs, based in Italy). The project, which lasted for one year, was evaluated as recording only 40 per cent success because of poor planning, lack of consultation and improper assessment of the needs of the beneficiaries. Eighty per cent of the beneficiaries reportedly walked out on the rehabilitation programme and found their way back to Italy. Many of them had been working voluntarily in the sex industry and were resentful at being ‘rescued’ and deported against their wishes, as it resulted in the deprivation of their livelihood.⁴⁴ The ‘rehabilitation’ mentality is also reflected in the NAPTIP Act, which, for instance, uses the term broadly and permits detention⁴⁵ of trafficked persons “where the circumstances so justify”. Some of the actions construed by the Act as rehabilitation include: counselling, skills acquisition, and family tracing and reunion. The real issue here and throughout this study is whether NGOs and government agencies often assume Nigerians to have been trafficked when they have not been or whether these people were in fact trafficked, but were so keen to go on earning a living that they felt propelled back to Europe and other destinations where they were previously exploited.

The process of return/repatriation of trafficked persons is fraught with abuses of their human rights. Most of the deported persons are not treated as victims of trafficking, but are regarded as criminals and illegal aliens by law enforcement agents both in the countries from which they are deported and in Nigeria. There have been reports

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of Nigerian women being subjected to various forms of physical abuse and humiliation while in the custody of law enforcement agents (UNODC/UNICRI, 2004, 35). International standards require that return and repatriation procedures should ensure the security of victims and their subsequent reintegration (UN High Commissioner for Human Rights' Recommended Principles and Guidelines, Guideline 6.8). Usually Nigerians who have been making money from commercial sex in Europe are repatriated on chartered aircraft, escorted by security agents and sometimes still wearing the same clothes they had on when trying to earn money on the streets. There are also reports that, contrary to human rights principles, the repatriated trafficked persons are not permitted to return with their money or properties, thus violating Article 17 of the Universal Declaration of Human Rights, which states that *No one shall be arbitrarily deprived of his property*, and Article 15 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. They are also not allowed to remain in the country long enough to obtain money they are owed (for example, as unpaid earnings), let alone to seek compensation or damages. In fact, trafficked persons should be allowed to stay in the host country for the period necessary to undertake penal proceedings against the traffickers and make a civil law case for recovery of unpaid wages and other compensation.

When recovery involves children, the issues appear easier to deal with as they are often returned home or sent to school, but there is still need to consider whether the solution is as simple as that or more practical solutions are required to address the situations that led to their being trafficked in the first place. In the case of the 261 children repatriated to Benin, there was poor planning and lack of a strategic operational rescue framework, due in large part to the relatively recent formation of the NAPTIP and the fact that an unexpected trigger effect had started the 'crisis' which led to the discovery of the children. The repatriations had many of the hallmarks of previous mass repatriations in West Africa of 'illegal aliens'. It was evident that the authorities appeared more preoccupied with getting some good publicity, by letting journalists photograph the repatriated children, than in following any internationally-recognised good practice concerning the treatment of unaccompanied or trafficked children.

The Terre des Hommes report notes the following bad practices:

- In Nigeria in 2003, the intervention carried out to assist the exploited children from the Abeokuta gravel pits was affected by a lack of any real intervention plan, guidelines, procedures and clear method of action centred on the children as well as on respecting their rights and their higher interest.
- The intervention hindered the detection and potential rescue of hundreds of other children exploited in the gravel pits. It did not respect minimum standards for protecting victims.⁴⁶ In some cases, traffickers bought children back; no one was attentive to the children's needs on their release from the worksites; there was forced repatriation; children were transported with their traffickers, etc.
- Correct identification of victims and their circumstances was not achieved by the intervention and led to certain cases being incorrectly handled.⁴⁷
- The parents were promised some welfare aid from the state and from development partners to NOT send their children back to Nigeria, thus re-enforcing their perception of the child as a money-earner, or as a sort of bargaining commodity.

Some successful examples of an assistance programme for trafficked victims (UNODC/UNICRI, 2004, 42) include:

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- The activities of the Committee for the Support of the Dignity of Women (COSUDOW), an NGO run by the Catholic Church in Benin City, which infuses continuous counselling with skills acquisition and continues to monitor and follow the progress of the young women and girls they have resettled to ensure their stability. The NAPTIP is currently adopting this model of continuous counselling and long-term follow-up in resettling victims.
- The establishment of the National Investigation Task Force (NITF), a referral mechanism consisting of the Nigerian police, immigration and the Directorate of State Services, to coordinate efforts and effectively monitor, investigate and respond to distress requests of victims and their families. The NITF has set up small units in 11 states of the Federation with the worst trafficking problems. The task force members were trained in the provisions of the anti-trafficking law, care of victims, Interpol standards, corruption and human rights issues.
- The Universal Basic Education (UBE) programme and the National Poverty Eradication Programme (NAPEP) of the Nigerian government both guarantee free basic education and poverty reduction through micro-credit loans and job creation for youth and the unemployed generally. They are excellent initiatives that could strike at poverty and lack of information, which seem to be the core of the problem.
- UNICEF, ILO-IPEC and Terre des Hommes' re-insertion projects which combined economic support for the families with follow-up to ensure children's welfare and support for their reinsertion into school or the work force. These projects reported that they had enabled 90 per cent of the children repatriated from Nigeria to enrol in school or vocational training and remain enrolled. The projects also set up informal protection networks comprising people from the village and social circle of the child being re-integrated with the aim of ensuring minimal surveillance of the child and preservation of his or her fundamental rights.

Impact of Other Initiatives to Stop Trafficking

In 2004, Nigeria was moved from Tier 2 to the Tier 2 Watch List of the US TIP Report. The reason given was that Nigerian security personnel were still complicit in trafficking in a significant way and there was a lack of evidence of government efforts to address this complicity.⁴⁸ The report urged the Nigerian government to move quickly to implement the new law through vigorous high court prosecutions of corrupt officials and traffickers. It was also urged to give adequate support to the new anti-trafficking agency and to improve protection facilities or funding for protection activities of NGOs.

In 2005, the US TIP Report promoted Nigeria to Tier 2 again because more than 40 cases of suspected trafficking were reported to have been investigated, leading to eight new prosecutions and the first conviction under the new NAPTIP Act. This move also 'qualified' Nigeria for increased US funding to improve law enforcement capacity to combat the problem. These developments met with much celebration by the NAPTIP, as though the whole point of its interventions had been to impress the international community (and particularly the US), to confirm that it was doing a good job and to receive a 'pat on the back'. While the US focus on prosecutions may have encouraged the NAPTIP to drive for efficiency in arresting and prosecuting offenders, it also served to transfer attention from the more complex problem of victim reintegration and prevention which fall squarely within its mandate.

Already critics perceive the NAPTIP Act as being a hurried response to international furore over the involvement of Nigerian women in sex work in European countries in conditions that often amounted to human trafficking.

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This international notoriety was not helped by earlier US TIP Reports citing the Nigerian government's lack of commitment to addressing the problem of trafficking and its subsequent 'demotion' to the Tier 2 Watch List. Indeed, the preamble of the NAPTIP Act refers to "the international image of Nigeria and Nigerians" while omitting any mention of the rights of trafficked persons and their need to be protected.

In a bid to support the NAPTIP Agency, USAID recently committed its largest donation for a single initiative to combat human trafficking in Nigeria. Interestingly, the main focus of the aid is on improving law enforcement's capacity to prosecute traffickers. Consequently it is likely to starve other critical areas where resources are much needed.

Edo State, the area of origin of so many trafficked to Europe, looks like a funding wilderness as far as anti-trafficking projects are concerned. Many donors, including the governments of European countries where women from Edo State are involved in sex work, have supported initiatives aimed ultimately at preventing women and girls from Edo State from finding their way into their countries. The reality of the matter is that the flow of people will almost certainly go on, so long as these interventions continue to ignore root causes and fail to invest in developing concrete alternatives to migration, or in regulating migration in such a way that the contributions of migrants are recognised and rewarded and their numbers are controlled in a manner that does not infringe upon their rights.

5. Conclusion

Throughout human history, migration has been a courageous expression of the individual's will to overcome adversity and live a better life. Today, globalisation, together with advances in communications and transportation, has greatly increased the number of people who have the desire and the capacity to move to other places.⁴⁹ The pressure to migrate is increasingly affecting women in the same proportion as men – as the case of the female migrants from Nigeria to Europe for sex work can evidence. The idea that one specific way in which women migrants are able to earn money (commercial sex) is intrinsically more unacceptable than a range of other ways in which Nigerian migrants earn money abroad in the informal sector, sometimes in situations of forced labour and frequently paid below the minimum wage, seems absurd and discriminatory.

Children from neighbouring countries are trafficked into Nigeria for cheap and harmful labour, while Nigerian children are moved all over the country and abroad for the same purposes. Instead of regarding migration as a matter of personal concern only, the government must take responsibility of ensuring that Nigerian migrants have the protection of their government to rely on as they venture abroad in search of livelihoods, and that children are adequately protected from being exploited by their parents, other family members in their immediate environment or even strangers, in a quest to gain financial or material benefits.

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ENDNOTES

- ¹ Nigerian Census 2006, figures released by the National Population Commission.
- ² Human Rights Watch at <http://www.hrw.org/press/2001/07/traffick-0712.htm>.
- ³ Nigerian NGOs, international NGOs and governments of other countries.
- ⁴ Law to amend some of the provisions of *the Criminal Code Cap 48 Laws of Bendel State 1976 as applicable to Edo State 2000*.
- ⁵ UN Economic Commission for Africa (UNECA), *Africa Governance Report 2005*, chapter 6, page 75.
- ⁶ While the Criminal Code is applicable in southern Nigeria, the Penal Code is applicable in northern Nigeria and the NAPTIP Act has national applicability.
- ⁷ ILO-PATWA, 2006, Review of Human Trafficking Legislation in Nigeria.
- ⁸ These include the *Forced Labour Convention, 1930* (No. 29), *The Abolition of Forced Labour Convention, 1957* (No. 105), *The Minimum Age Convention, 1973* (No. 138), *The Worst Forms of Child Labour Convention, 1999* (No. 182), *The Discrimination (Employment and Occupation) Convention, 1958* (No. 111), *The Equal Remuneration Convention, 1951* (No. 100), *The Freedom of Association and Protection of the Right to Organize Convention, 1948* (No. 87), and the *Right to Organize and Collective Bargaining Convention, 1949* (No. 98).
- ⁹ Nigeria signed and ratified the *Convention Against Transnational Organized Crime* and the UN Trafficking Protocol on 13 December 2000 and 28 June 2001 respectively and made them applicable domestically by an Act of the National Assembly signed into law in 2003.
- ¹⁰ <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>
- ¹¹ <http://www.nigeria-law.org/CriminalCodeAct-Tables.htm>
- ¹² See the *Attorney General of the Federation v. Sarah Okoya case*.
- ¹³ Shari'a law is practised in Sudan and northern Nigeria.
- ¹⁴ Section 29(1) *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003*.
- ¹⁵ *Ibid.* Section 11.
- ¹⁶ *Ibid.* Section 19(1) (a-f).
- ¹⁷ Chapter 20 of the Criminal Code (Ordeal, Witchcraft, Juju and Criminal Charms).
- ¹⁸ The case of *Attorney General of the Federation v. Sarah Okoya* is illustrative; the trial was conducted in the High Court in Edo State with members of the press privy to the entire proceedings.
- ¹⁹ Nigeria ratified the *Convention on the Rights of the Child* on 19 April 1991.
- ²⁰ NAPTIP Fact sheet
- ²¹ Literally meaning – 'Qur'anic student'. Similar itinerant Qur'anic students are referred to elsewhere in West Africa as *talibé*.
- ²² Education based on the Qur'an.
- ²³ Ikpeme Anne. Interview with Ogbole Elijah, and M.D. Mohammed of the immigration anti-trafficking unit on 22 February 2005.

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<http://www.nigeria-law.org/LabourAct.htm>

US Department of State Country Reports, 2002, Nigeria, Section 6d.

<http://www.ilo.org/public/english/employment/gems/download/swmnig.pdf>

Women in Nigeria suffer great disparities in development than their male counterparts. According to the UNDP Human Development Report for 2005, the gender disparity in education is 82.2 girls per 100 boys, while women in wage employment other than agriculture constitute 79.4 per 100 men.

Copies of these agreements can be obtained from the Nigerian Immigration Service and the Federal Ministry of Justice.

See Principle 10 of the UN High Commissioner for Human Rights' Recommended Principles and Guidelines.

Adopted in Dakar on 29 May 1979 and ratified by Nigeria on 12 September 1979.

Popularly called 419, as the offence is described in section 419 of the Criminal Code; advance fee fraud is the crime of obtaining money by false pretences.

Interview, Ikpeme Anne, Staff Attorney, American Bar Association's Anti-trafficking Initiative in Nigeria, 28 November 2006.

These men are called *sugar daddies* while the girls are referred to as *aristos* in popular local parlance.

Section 22 of the NAPTIP Act as amended makes it a criminal offence to employ a child as a domestic help outside her or his own home or family environment.

Presentation by Ms Dorothee Gimba, Assistant Commissioner of Police at the 11th UN Congress on Crime Prevention and Criminal Justice, 18–25 April 2005, Bangkok, Thailand.

Vanguard (Nigeria) News of 6 January 2003, reporting an interview with the Minister of Internal Affairs, Dr. Mohammed Shata, in Abuja

The baseline survey revealed that a major contributor to the urban migration of youth has been the perception (in all the communities studied) that regardless of the prevailing conditions in the urban areas, life there is still better than life in the rural areas.

Section 210 (c, d, & e) states:

Any person who:

- c) makes or sells or uses, or assists or takes part in making or selling or using, or has in his possession or represents himself to be in possession of any juju, drug or charm which is intended to be used or reported to possess the power to prevent or delay any person from doing an act which such person has a legal right to do, or to compel any person to do an act which such person has a legal right to refrain from doing, or which is alleged or reported to possess the power of causing any natural phenomenon or any disease or epidemic; or
 - d) directs or controls or presides at or is present at or takes part in the worship or invocation of any juju which is prohibited by an order of the State Commissioner; or
 - e) is in possession of or has control over any human remains which are used or are intended to be used in connection with the worship or invocation of any juju;
- ... is guilty of a misdemeanor, and is liable to imprisonment for two years.

One of the victims (not her real name)

This is a heritage from the Common Law system whereby the role of the criminal courts is seen as punitive and that of the civil courts as compensatory. The focus of criminal law is on the offender and the imposition of punitive sanctions and rehabilitative measures against him, where appropriate.

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- ⁴¹ NAPTIP reported several such cases across the country in 2005 and 2006.
- ⁴² Personal interaction with author and migrants on various visits to Europe between 2003–2006.
- ⁴³ Subsequently this case will be referred to as the case of the 261 children.
- ⁴⁴ Research conducted by Professor Hope Obianwu, Professor of Pharmacology, presented at the workshop on Global Threats, Personal Risks, Local Options, Abuja, 2004.
- ⁴⁵ See section 37 of the NAPTIP Act.
- ⁴⁶ It would be fair to note that the UNICEF *Guidelines on the Protection of Child Victims of Trafficking* had only just been published in Europe in 2003 and had not arrived in West Africa at the time.
- ⁴⁷ Later in Benin, it became apparent that 26 ‘children’ were in fact over 18 years old, that 50 teenagers were between 14 and 16 years old and that 48 others were between 16 and 18 years old (consequently entitled to be working by national and international law, although, in the case of those under 18, not to be involved in dangerous work or in ‘worst forms of child labour’; they could no longer be sent to school but could legally work). This leaves a big question mark on the pertinence of their forced repatriation in place of seeking solutions in Nigeria to end their exploitation while taking into account their own wishes, capabilities and intentions.
- ⁴⁸ US TIP Report 2004.
- ⁴⁹ Report of the UN Secretary General on International Migration and Development, 6 June 2006.

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Thailand

Jackie Pollock

In order to contextualise the various responses to trafficking in Thailand, this chapter briefly outlines patterns of migration out of, into and within Thailand. While the chapter includes some responses to the trafficking of Thai workers overseas, it is not possible within the scope of this paper to explore the legal frameworks of all countries to which Thais migrate or are trafficked. Instead, cases have been chosen from countries covered in other chapters in this book, and as a comparison to the responses in Thailand. The primary focus of this chapter is the human rights impact of the trafficking responses within Thailand. Since the lives of migrants fleeing human rights abuses of military dictatorships in countries like Myanmar/Burma, or even those migrating for survival from desperately poor countries such as Cambodia and Lao People's Democratic Republic (Lao PDR), are not easily categorised into the international or national definitions of economic migrants, refugees and trafficked persons, the paper explores the legal frameworks and responses which may impact on the lives of all people who migrate to Thailand without documents, some of whom may be in trafficked situations. The chapter specifically looks at these issues within the framework of immigration, labour and trafficking.

1. Patterns of Migration – Some Issues

Outgoing Migration

During the 1970s, Thailand exported workers to the Gulf countries to fill labour shortages as the economies of the Organization of Petroleum Exporting Countries (OPEC) member states boomed. In the next decade, the export of Thai workers was promoted as a means of reducing unemployment, alleviating rural poverty, and generating remittance income. By the 1990s, Thailand was sending workers to the newly industrialised countries of Asia, Korea, Taiwan and Singapore, as well as Japan. Between 1998 and 2005, 656,508 Thai workers requested permission to work in Taiwan and 115,634 in Singapore (MAP Foundation, 2006).

At the beginning of this modern-day migration, Thailand had some systems in place to facilitate the migration of Thai workers overseas, such as systems for issuing passports, recruitment processes, and money-lending schemes. Nevertheless, for many workers coming from rural areas of Thailand, the systems were complicated and expensive, requiring several trips to the capital, Bangkok. Potential migrants, therefore, were often more inclined to make use of local expertise and experience, asking friends or brokers to facilitate the migration process. State mechanisms designed to protect the rights of migrants through bilateral agreements or the placement of labour attaches in embassies were put in place later as a response to the problems faced by migrants overseas.

Internal Migration

Over this same period, Thailand itself was rapidly developing its tourist and export industries. The distribution of work in Thailand changed dramatically as small farm holdings were sold and contractors took over the land to grow agricultural products for export, develop industrial zones, and build hotels, resorts, and golf courses for tourists. As the capital, Bangkok, continued to expand, workers were needed in every sector. Farmers or members of their families moved within Thailand to take up casual labouring jobs. Although millions of Thai villagers migrated for work, the majority of attention was focused on young women migrating for sex work within Thailand, with considerable blame directed towards parents for allegedly selling their daughters.

There was very little response to the highly exploitative and difficult situations other internal migrants faced in Bangkok – in factories, private households, as *tuk-tuk* (motor rickshaw) drivers, or salespeople. In contrast, the places women or girls had migrated to in order to sell sex were frequently raided and girls or women taken to a government rehabilitation home near Bangkok, at Barn Kredtrakarn.

Incoming Migration

The work created by the economic boom of Thailand could not be filled entirely by the internal movement of people, especially as the country's demographics changed dramatically with successful intensive family planning programmes. To maintain the level of economic growth, workers from other countries were needed to fill labour shortages.

On the western border, the population of Burma was facing social, political and economic hardships and, for many, escaping to Thailand was a matter of survival. With the violent repression of the pro-democracy uprising in 1988 and on-going military offensives by the ruling military regime against ethnic nationalities in Burma, hundreds of thousands of people from Burma fled and continue to flee across the borders to Thailand. While the Thai government set up refugee camps for ethnic groups they considered to be “fleeing direct fighting”, other ethnic groups had to find work in the labour market to survive. Meanwhile on the eastern borders, Cambodia and Lao PDR were opening up politically, but were desperately poor with little employment available. All three countries had been closed to the outside world for years and few people had access to passports or even national identification. Thus, all workers who arrived in Thailand travelled without any documentation, leaving their own country illegally, and entering Thailand illegally. There were no systems in place to facilitate this migration from their home countries, or to protect the rights of migrants once they had entered Thailand.

For many years, the Burmese and Laotian regimes refused to acknowledge the existence of refugees or migrants in Thailand, only agreeing to Memorandums of Understanding (MoUs) on Cooperation of the Employment of Workers in the early 2000s,¹ even then taking several years to begin implementing them. It was not until 2007, following the release of several hundred workers from highly exploitative conditions in a seafood processing factory at Samut Prakarn in Thailand, that the Burmese state-controlled media mentioned mass migration, and then only to acknowledge 80,000 migrants (*New Light of Myanmar*, 2007). At the time, 800,000 migrants from Burma were registered to work in Thailand, with possibly an equal number unregistered.

When workers from Burma, Cambodia and Lao PDR entered Thailand, there was some work available along

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the borders: agricultural work in the north, newly established garment factories in Mae Sot, and fishing and seafood processing factories in Ranong and along the eastern seaboard. The demand for work, however, was not confined to the borders. Construction workers, domestic workers, entertainment workers and plantation workers were needed all over Thailand. By 1996, the Thai government enacted the first of a series of annual cabinet resolutions to allow for the temporary employment of the Cambodian, Burmese, and Lao migrant workers, who had entered the country illegally. In the first registration in 1996, 303,088 migrants registered; by 2004, 1.28 million migrants had registered.

A Role for Brokers

With migration an almost spontaneous event in many Asian countries in response to the labour shortages in receiving countries as well as a lack of employment and human rights in countries of origin, people relied on brokers to facilitate their migration.

For Burmese and Cambodian villagers, an experienced broker was essential to navigate the numerous checkpoints and landmines between home and the border. Once across the border, brokers were needed to transport migrants to workplaces throughout Thailand. Without any documents, cross-border migrants cannot travel independently within Thailand and require brokers to negotiate the numerous army and police checkpoints.

Restrictions on the rights of the ethnic populations of Thailand (commonly called hill-tribes) also encourage people to use brokers. Thailand has ratified several international human rights instruments that legally obligate the government to protect the rights of those who live in Thailand, including migrants and ethnic minorities. Both the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), and the *International Covenant on Civil and Political Rights* (ICCPR) stress the principle of non-discrimination (between citizens and non-citizens). However, many of the ethnic populations have not been granted full citizenship and are restricted in their rights to vote, travel, access health care, and employment. The ethnic minorities, thus, have fewer opportunities to choose their employment or to travel safely to find employment. While many brokers are simply facilitating the livelihood and survival of ethnic minorities, the lack of legal protection in the system allows for opportunistic brokers and for traffickers to abuse and exploit those needing to travel.

Despite having full citizenship rights and more access to information, Thai migrants often prefer private labour brokers to the government-run Thailand Overseas Employment Agency. They make this choice because private brokers are faster and more efficient than the state agency. Samarn Laodumrongchai, a researcher at the Asian Research Center for Migration (ARCM) at Chulalongkorn University, reported that brokers charge steep placement fees, exceeding the limit set by the government, (approximately US\$1,650). For Taiwan, fees generally range from US\$4,631 to US\$7,718, and for Singapore, about US\$3,087 (Laodumrongchai, 2000).

For both incoming and outgoing migrants, the cost of migrating is a root cause of vulnerability. Migrants may sell their assets (land, buffaloes, etc.) or borrow money, either directly from brokers or from moneylenders who charge huge interest rates. In some cases, employers pay upfront and the money is then deducted from the worker's subsequent salary. In all of these situations, migrants are bonded by debt, either to the moneylender or the employer. The pressure of making money to repay the broker or employer or buy back assets at home increases the level of migrants' tolerance to exploitation, as the greatest fear is returning home with no money.

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The flow of migrants is constant and, thus, a real business opportunity. Many brokers run an efficient, competitive business in order to attract new clients. However, the unmonitored nature of the business allows for brokers who are opportunists to cheat potential migrants of their recruitment fees. Laodumrongchai cites situations in which brokers take Thai workers to the airport and then disappear with their money, or workers have paid higher fees to work in the area of their choice, only to find they are siphoned off into other work. Migrants from Burma have reported paying a broker to take them to Thailand, only to be abandoned to the police at the first border checkpoint.

It is clear that the lack of any form of recruitment services for incoming migrants and inaccessible recruitment services for Thai migrants creates a dependency on an unmonitored network of brokers, which has the potential for abuse. Corruption is pervasive and, thus, the formal state recruitment services also expose migrants to abuse. The case of 1,700 Thai workers recruited from the north and north-east of Thailand to work in Taiwan on a major infrastructure project of the subway in Kaohsiung exposed corruption at various levels. Three Thai brokers who supplied workers had their licences suspended and were ordered to reimburse workers with US\$4 million for illegally collected fees. Thailand also recalled its top labour envoy in Taipei and Kaohsiung. In Taiwan, two Taiwanese labour brokers and more than a dozen government officials were indicted for corruption.

Migration and the Entertainment Industry

The sex industry in Thailand has been in the international public eye since American troops used Thailand as a centre for rest and recreation from the war in Vietnam. It continues to attract attention from the American government, concerned about public health issues as both American troops and tourists continue to be clients of the sex industry.

In 1984, a fire broke out in a brothel in Phuket. The women working there were unable to escape because they were chained to beds. The case caused both national and international consternation and started debates among the nascent NGO community over appropriate responses to sex work in Thailand. During 1991–1993, a series of raids on brothels across the country further exposed the presence of migrant sex workers, sometimes in conditions similar to the Phuket brothel. In one case, a raid on a brothel in Ranong, conducted in the middle of the night with fully armed police, released 150 Burmese women. During the raid, all the personal possessions of the women were confiscated and, according to someone present at the raid, the belongings were never returned. The women were initially sent to the Ranong police detention cell where they were locked in cramped and frightening conditions (*Burma Issues Annual Report*, 1992; Human Rights Watch, 1995).

In many of these raids in the south of Thailand, the women and girls released were tested for HIV, with many finding they were HIV positive (*Far Eastern Economic Review*, 1992). When one group of women was officially deported to Burma, the Director-General of the Public Welfare Department of Myanmar (Burma) received the women and girls at the border in Chiang Rai. Almost immediately, a rumour began circulating, allegedly started by a Thai general, that the girls had been killed in Burma using cyanide (*The Nation*, 1992). The reports could not be substantiated, and the Swiss-based NGO, the Association Francois Xavier Bagnoud (AFXB), went to Burma to search for the girls. Some, but not all, of the girls were found.² It was assumed that the other girls had migrated back to Thailand. AFXB then established a home in Rangoon to provide services for girls already under custody of the Myanmar Social Welfare Service and for a few girls returned from Thailand.³

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Regardless of whether reports of the killings were true, the possibility of such abuses happening sparked debate in Thailand regarding the safe return of women to a country under a military dictatorship; one which recognised neither migrants leaving their country, nor HIV/AIDS.

Under pressure from the European Union to eradicate child labour, Prime Minister Chuan Lekpai announced plans on 3 November 1992 to rid Thailand of child labour exploitation. Almost immediately, a young woman, Passawara Samrit, was found dead outside the Social Welfare Department in Songkla, where she had sought help after escaping from a brothel (Human Rights Watch, 1993). The focus on child labour promptly shifted – almost exclusively – to child prostitution. A report published by Asia Watch in 1993 titled, *A Modern Form of Slavery* focused on the situation of Burmese women held in captivity in some brothels in Thailand. Following the report's publication, brothels all over the country were raided in what seemed more of a publicity stunt than an operation motivated by concern for the situation of migrant women and girls. In some cases, the raids forced women to leave their jobs and lose their income. In other cases, the raids released women and girls from exploitative conditions but, in the process, they lost assets (clothes, jewellery and savings) and were deported to a country in which slave labour and systematic rape were common (Burma). In all the actions, there was little, if any, consultation with sex workers on how to proceed or what was the best course of action.

HIV/AIDS

In the early 1990s, Thailand was at the height of its AIDS epidemic, and migrant women working as sex workers were serving a clientele with high HIV prevalence. The women themselves had little knowledge about HIV because neighbouring countries did not acknowledge AIDS as a problem until the following decade. Sex workers who were debt-bonded to employers had little chance of refusing a customer who wanted sex without a condom, and had to service many customers in order to earn enough to repay debts and keep any savings. The response to migrant sex work was partly fuelled by the fear of HIV spreading. Trafficking fitted this agenda well. Other initiatives to address the HIV/AIDS situation were more practical. The Ministry of Public Health initiated a 100 per cent Condom Use Programme (CUP), placing signs in all brothels and distributing free condoms to every establishment. CUP had some limitations, particularly as it threatened to close brothels in which workers were found to have sexually transmitted infections, thus, driving brothels underground. Additionally, the programme alienated sex workers because it used a system of entrapment, deploying undercover health officials to test women's resolve to insist on condoms.⁴ Nevertheless, there was an overall increase of HIV awareness and sex workers' accessibility to personal protective equipment (PPE) and society's acknowledgement of sex work as work.

Trafficking

During the 1980s and most of the 1990s, the rulers of Burma and Lao PDR were not open to discussing issues of migration since it was seen as a reflection on the state of their countries. They preferred to maintain a myth that no citizen of their countries had any desire to leave. In contrast to the issue of migration, the trafficking issue allowed for the countries to communicate. The cause of the migration was formulated in this instance, not as an immediate reflection on the country, but as the intervention of a third, unknown force. Although most trafficking reports have pointed to economic, political, and social reasons for the prevalence of trafficking from certain countries, countries of origin blamed the brokers, transnational crime gangs, and anything other than their own

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policies. Thus, while countries in the Greater Mekong Sub-Region found it difficult to sit together and discuss other issues, trafficking conferences were always well attended and, at least in the case of Burma, conferences were exploited as a political tool to give credibility to authoritarian regimes.

Regional substantive dialogue on related human rights issues such as forced labour, forced migration, labour exploitation, and migrant workers' rights have yet to share equal attention with trafficking. There are many reasons why countries have been reluctant to include these issues in a South-East Asia dialogue, including a country's financial inability to implement effective measures (Cambodia, Lao PDR) and a government's refusal to admit the extent to which these issues exist (Burma).

NGO Initiatives on Migration and Trafficking

There are networks of NGOs working to promote the rights of migrant workers in Thailand. The Action Network for Migrants (Thailand) is self-supporting and brings together NGOs and migrant workers' associations to promote and advocate for the labour rights of migrant workers. The network collaborates closely with the Thai Labour Solidarity Committee, basing their strategy on the principle that workers need to be able to organise to improve their conditions and that migrant and host workers need to work collectively to promote the rights of all workers. The Prevention of HIV/AIDS Among Migrant Workers In Thailand project (PHAMIT), funded by the Global Fund to Fight AIDS, Tuberculosis and Malaria, coordinates on health issues. Sex workers and entertainment workers are represented in these networks and also have their own organisations and networks in Thailand, pressing for their work to be protected by the labour laws and occupational health and safety standards.

At the sub-regional level, the Mekong Migration Network brings together NGOs, academic institutions, and government officials to develop collaborative resource books on issues concerning migration in the region, including the quality of life of migrants, and arrest, deportation and detention.

The United Nations Inter-Agency Project on Human Trafficking (UNIAP) hosts a profile-mapping section on the agencies involved with anti-trafficking in the Greater Mekong Sub-region (GMS). This is categorised by country, locale, and programme type. Thailand has by far the largest number of NGOs, with a range of programme diversity and the political freedom for tackling issues such as forced migration, migrant labour rights, citizenship, statelessness, and human trafficking.

In the southern part of Thailand, there is a glaring absence of NGOs working on the issues mentioned above. The UNIAP lists only two NGOs and international organisations for a region that includes the borders of Burma, Thailand and Malaysia. *Agir pour les Femmes en Situation Précaire* (Action for Women in Precarious Situations – AFESIP), an NGO based in Cambodia, identifies victims of trafficking in the sex industry and at the Thai Immigration Detention Centres in Hadyai as well as on the Cambodian border at the Aranyaprathet-Poipet border, the Laotian border at Mukdahan, and in Bangkok. Their activities also include repatriation.⁵ The other listed NGO in the southern region is World Vision, a Christian charity that approaches trafficking in persons in the traditional sense of rescuing 'at risk' women and girls, and behaviour modification. Their profile lists activities such as "removing victims from risky areas", which highlights how some NGOs view sex work and how this then influences their anti-trafficking activities.⁶

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The diversity of approaches to migration and labour rights is particularly apparent when NGO profiles are juxtaposed. For example, an NGO called EMPOWER describes its activities along the Thai-Burmese border as “promoting the right of workers in the entertainment industry to be considered part of society and therefore receive the same benefits and protections”.⁷ EMPOWER uses less judgmental language and their activities translate into supporting safe employment environments rather than paternalistic protection from immorality.

The northern part of Thailand has an array of NGOs specifically targeting hill tribes, migrant workers and stateless peoples. Many, such as Save the Children UK, follow the general theme of intervention programmes for youth, which include: education, vocational training and encouraging youth groups.⁸ Some programmes, such as the Mirror Art Group Foundation in Chiang Rai, are more holistic than others and become involved in wider issues, such as land and cultural rights, as a way of decreasing migration to cities or slave labour situations, rather than simply providing conventional ‘preventive measures for at risk groups’, which tends to focus on keeping women and children from falling into immoral lifestyles.⁹ The Anti-Trafficking Coordination Unit of Northern Thailand, TRAFCORD, acts as a medium for provincial government agencies and NGOs working on human trafficking. It is funded by the Asia Foundation, UNICEF, and the US government.¹⁰

In the north-east of Thailand (the region known as Isaan), many NGOs connect anti-trafficking efforts with the promotion of traditional Isaan culture and lifestyles by providing women and children with vocational training and education in such areas as: weaving, basket-making, organic agriculture and fishing. These practices are aimed at stemming domestic migration to the larger cities of Bangkok or Chiang Mai. One such project, the Nareesawat Welfare Protection and Vocational Training Centre for Women, takes the stance that a major way to curb human trafficking is to “change the behaviour of the women and child victims” on a case-by-case basis. Most of their activities fall under the protection section on the profile page and include a service of “victim isolation” which is a recurring term on many of the website profiles and seems to imply keeping the person concerned in *de facto* detention.¹¹

Central Thailand is mostly characterised by classic anti-trafficking activities such as brothel raids, family searches, and repatriation. One government agency, the Department of Social Development and Welfare (DSDW), states in its profile that it acts as a “network for woman and child trafficking victims, as well as the leader in problem-solving concerning women and children in the case *where no agency has yet taken the responsibility*”.¹² The DSDW does not specify whether it considers governmental or non-governmental agencies responsible for trafficking victims. The National Commission on Human Rights is also based in the capital. However, its activities and influence were greatly reduced following the September 2006 military coup and the limited time left on its charter. Bangkok also hosts offices of numerous UN branches. Many local NGOs have a main office in Bangkok for repatriation services or lobbying/watchdog/research activities. One organisation, the Thai Action Committee for Democracy in Burma, is listed on UNIAP’s website as an anti-trafficking NGO, but approaches the issue from an awareness raising, policy-pushing, education standpoint to change the way Thailand’s government deals with the Burmese junta as well as the general Thai public’s understanding of labour rights.¹³

Men were not listed as a target group, to any notable extent, in the anti-trafficking services listed by the NGOs in Thailand on the UNIAP mapping site. The most common references were to “women and girls” or “trafficked victims”. Current approaches to trafficking emphasise the importance of criminal justice outcomes. A focus that is primarily directed to the prosecution of traffickers has the potential to ignore or undermine the human rights of

those who have been trafficked by failing to protect trafficked women adequately in destination countries.

In terms of the trafficking of Thai people abroad, local NGOs seek to prevent trafficking through pre-departure sessions, counselling and advocacy, and providing services to returnees. The Ministry of Social Development and Human Security has worked to strengthen coordination with Thai NGO networks in destination countries. NGOs from Germany, France, Switzerland, Netherlands and Denmark have joined the Thai Women Network in Europe. There is, however, no such network in Asia, and NGOs in Japan, Macau and Taiwan complain that it is difficult to refer people who are returning to Thailand or find agencies willing to advocate on behalf of detained Thai migrants whether they be over-stayers, trafficked persons or criminals.¹⁴

2. Legal Framework in Thailand

Thailand has developed different legal frameworks to address migration, trafficking, labour and prostitution, both domestically and regionally. This section only examines those cabinet resolutions, MoUs, laws, and mechanisms which have affected people's ability to exercise their human rights.

Cabinet Resolutions on the Employment of Illegal Aliens for temporary employment while awaiting deportation

Since 1996, cabinet resolutions have been passed in Thailand using section 17 of the *Immigration Law* to allow migrant workers entering the country illegally from Burma, Cambodia and Lao PDR to apply for temporary work permits while awaiting deportation. Since 2001, domestic workers have been allowed to register for work permits, but none of the registration policies have allowed entertainment workers to do the same. Registered workers are eligible to access the National Health Service, and are permitted to join existing trade unions, but not form their own. Employers are also required to register and are told to respect the labour laws, including paying minimum wage and not withholding migrants' documentation. Registered migrants, however, are not allowed to travel outside the province where they are registered. While providing some protection, the fact that registrations bind the worker to the employer increases the vulnerability of migrants.¹⁵

Memorandums of Understanding (MoUs) on Cooperation on the Employment of Workers

In an attempt to regularise migration for employment, Thailand signed MoUs with Lao PDR (2002), Burma (2003), and Cambodia (2003). The first step to implementing the MoUs required countries of origin to verify the nationality of migrants already in Thailand and issue Certificates of Identity or temporary 'passports' so migrants could apply for legal visas and work permits in Thailand. Under the MoUs, migrants would be allowed to work in Thailand for two successive two-year periods. At the end of the four-year period, they would not be allowed to return to Thailand for three years.¹⁶

The Labour Protection Act, 1998

The *Labour Protection Act, 1998*, covers all workers in Thailand regardless of their immigration status. It specifies restrictions on the employment of 15 to 18-year-olds in particularly dangerous conditions. It also does

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not allow for payments owing to young workers to be given to anyone else or for any deductions to be taken from the young worker's salary. While the *Labour Protection Act* protects all workers regardless of their immigration status, certain categories of work are not covered. These include domestic workers, sex workers, entertainment workers, agricultural workers, seafarers and beggars.

The Prevention and Suppression of Prostitution Act, BE 2539 (1996)

In anti-prostitution legislation prior to 1996, the selling of sex was a serious offence. During consultations (including consultations with sex workers) to draw up the 1996 Act, there was some support for the principle that adult sex workers should not be criminalised and efforts should focus on eliminating child prostitution. In the end, the 'moral lobby' succeeded in including some restrictions on adult sex work. The finalised Act focused on punishing the procurers and customers of sex workers, particularly of those under the age of 18, while making adult sex workers liable to a small fine and offering those convicted a choice of returning home or undertaking vocational training.

In terms of addressing abuses of human rights occurring in the sex industry, section 12 of the Act provided for anyone who confines a person, or causes bodily harm or threatens violence in order to force a person into prostitution to be punished. The culprit is liable to imprisonment for ten to 20 years and a fine of 200,000 to 400,000 baht (US\$ 6,139–\$12,278). The sentence is increased in cases where the offence is committed by an official or where the person is a child.

The Penal Code and the Penal Code Amendment Act (No. 14) BE 2540 (1997)¹⁷

Even without an anti-trafficking law, several of the abuses committed in the process of trafficking are offences under Thailand's Penal Code, which make it an offence to deprive an individual of liberty, or to procure or traffic a man or woman for an indecent sexual purpose (sections 282 and 283).

The Criminal Procedure Amendment Act (No. 20) BE 2542 (1999)

This Act increased the protection of the rights of children who are victims, witnesses or offenders. Section 273 provides for a procedure whereby a witness who may no longer be in the country at the time of a trial to provide witness before leaving the country. The protection of children was further increased by the passing of the *Child Protection Act* (2003), which increased the power of authorities to enter a place where a child was being held illegally or being abused.¹⁸

In terms of specifically addressing trafficking, Thailand has created a fairly comprehensive framework with laws, agreements, policies, committees, and coordinating mechanisms to implement them. In 1996, the National Commission on Women's Affairs headed a committee on combating sexual exploitation of children. Over the years, the mandate of this committee has widened and, in October 2002, a multi-sectoral Sub-Committee to Combat Transnational Trafficking in Children and Women was established under the Ministry of Social Development and Human Security (previously the Ministry of Social Welfare). This Ministry has operated the Kredtrakarn Protection and Occupational Centre since 1960 as a welfare home for women and girls, including trafficked women and girls.

The Measures in Prevention and Suppression of Trafficking in Women and Children Act, BE 2540 (1997)

The Act specifies law enforcement procedures for both prevention and prosecution in cases of trafficking and covers offenders committing crimes, both in Thailand and abroad. It makes conspiracy to traffic women and children an offence. Under the terms of the Act, authorities have the right to ensure that trafficked persons immediately testify against their traffickers. Evidence may be used later in a trial even if the victim is not present. In order to protect the safety of the victim, the Crimes Against Child, Juvenile and Woman Suppression Division (CCSD) of the Royal Thai Police has specialist video recording equipment to record the testimonies of victims in privacy. The Act is focused largely on the prosecution of traffickers, but only contains limited provisions on the longer term needs of the victim. She is only temporarily provided with food and shelter, but the eventual outcome is always repatriation to her country of origin.

Domestic MoUs for Agencies Addressing Trafficking

The implementation of the 1997 *Trafficking in Women and Children Act* proved challenging for the police, social workers and NGOs. In order to improve implementation, Thailand initiated a series of domestic MoUs between *State Agencies and Non-Governmental Organizations (NGOs) Engaged in Addressing Trafficking in Children and Women, 1999* (updated 2003), which covered procedures on rescue and investigation, placement, legal assistance, provision of health, psycho-social assessments, psychological and other support services. A second MoU, *Operational Guidelines for NGOs Engaged in Addressing Trafficking in Children and Women, BE 2546* (2003), was formulated to clarify the role of NGOs in addressing trafficking. In the same year, an MoU on *Common Guidelines of Practices for Agencies Concerned with Cases where Women and Children are Victims of Human Trafficking in the Nine Northern Provinces, BE 2546* (2003) was formulated to respond to the situation in the provinces bordering Lao PDR and Burma. The MoUs define four categories of trafficked victims and clearly states that there can be internal trafficking. The MoUs cover victims who have entered the country legally or illegally, as well as the ethnic minorities of Thailand, many of whom were born in Thailand, but hold coloured identity cards which have various restrictions on the rights of the holders, particularly with regard to employment and travel.¹⁹

3. Regional and International Mechanisms

In April 1999, the IOM initiated a meeting of governments from Asia on migration which concluded with *The Bangkok Declaration on Irregular/Undocumented Migration*. The Declaration proposed that the reduction of illegal migration would help reduce the numbers of people being trafficked and called on the signatories to pass legislation to criminalise people smuggling and trafficking in human beings and cooperate in the prosecution and penalisation of all offenders, especially international organised criminal groups.

The Association of Southeast Asian Nations (ASEAN) first addressed trafficking in a *Declaration Against Trafficking in Persons, Particularly Women and Children* in 2004 which talks about the spirit of the UN *Convention against Transnational Organized Crime* and its associated Protocols on trafficking and people smuggling and calls on member states to address transnational crimes, including trafficking in persons, to the

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extent permitted by their respective domestic laws and policies. In terms of assistance, it calls for the identification of the nationality of victims and for services to be provided to victims, particularly medical services and speedy repatriation. Not until three years later did ASEAN address the rights of migrant workers in a *Declaration on the Protection and Promotion of the Rights of Migrant Workers* on 13 January 2007. The preamble of this Declaration exempts countries from taking any action that is not already within their national laws or policies, thus, making any clauses in the Declaration unlikely to be enforced. Within these restricted parameters, it calls on receiving states to provide migrant workers who may be victims of discrimination, abuse, exploitation and violence with adequate access to the legal and judicial services of the receiving states. Sending countries are requested to adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts and to regulate and accredit recruitment agencies and employers and blacklist agencies that are negligent or unlawful.

UNIAP

In the late 1990s, UNIAP spearheaded an initiative to respond to trafficking in the countries of the Greater Mekong Sub-region (GMS) with the support of the Ted Turner Fund. UNIAP works in countries of the Mekong and supports projects by local NGOs. At the governmental level, it supported a process named the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) that aims at creating a sustained and effective system of cross-border cooperation and collaboration to combat human trafficking. The process began in 2004 as an MoU written in Bangkok. Since then COMMIT has held four meetings in various member states. Senior members admit COMMIT is only in its infancy and no concrete movements have yet been made to implement the three-year Sub-Regional Plans of Action in any of the countries.

Bilateral and Multilateral MoUs

In terms of prevention, the MoU between Thailand and Cambodia, *Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking* (May 2003), has clauses on vocational training and education, income generation, and employment and social services. In relation to protection, the MoU states that victims are not to be considered criminals and should not be detained by immigration authorities, but rather by social welfare services. Victims are eligible to claim restitution for any belongings confiscated by authorities and compensation for any damages by the offender. In terms of prosecution, the profit gained by the trafficker is supposed to be confiscated. The victim can claim payment for services rendered and go through due process of the law for criminal charges and recovery of damages. Again, in order to effectively implement the MoU, the *Guidelines on Reintegration of Trafficked Victims for Cambodia and Thailand* set up mechanisms between the two countries to return, repatriate and reintegrate trafficked victims. Cambodia and Thailand also signed an agreement on the extradition of perpetrators and mutual legal provisions to gather evidence at the investigation stage and to take witness testimonies through their respective Ministries of Foreign Affairs. In October 2004, an *MoU on the Cooperation Against Trafficking in Persons in the Greater Mekong Sub-Region* encouraged a common adoption of the UN Trafficking Protocol's definition of trafficking.

The 2005 *MoU Between Thailand and Lao PDR on Cooperation to Combat Trafficking in Persons, Especially Women and Children* stipulates that victims have the right to legal assistance, legal protection, temporary housing, as well as health care for themselves and their families during legal proceedings. However, the MoU also includes conditional clauses such as “in accordance with national law in each country”, which

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unfortunately provide a loophole for the two governments to do little in practice to fulfil the provisions of this and other MoUs.²⁰

International Initiatives

The International Law Enforcement Academy (ILEA), supported by the US government, was established in Bangkok in 1999 to serve as a regional training centre for law enforcement and provide a formal environment for judicial and other officers to share information on the suppression of transnational crimes.²¹

In 1999, Thailand and Australia addressed the issue of people trafficking in the context of controlling illegal migration at a one-day ministerial economic commission. At the time, Thailand was conducting a campaign to deport 600,000 workers from Burma, while Australia was aiming to hold back the arrival of people on boats from the Middle East. According to a statement issued, the foreign ministers agreed that the authorities of both countries “should coordinate closely on means for strengthening both countries to solve the problem of trafficking and illegal migration” (Australian Associated Press, 1999).

Four years later, Thailand and Australia signed an MoU concerning the Asia Regional Cooperation to Prevent People Trafficking (ARCPPT) project, based in Thailand, under a law enforcement framework.

4. Human Rights Impact of the Implementation of Law and Responses to Trafficking

Implementation of the Immigration Act of 1979

All migrants from Burma, Cambodia and Lao PDR who have entered Thailand illegally are continually vulnerable to arrest and deportation under immigration laws and, at the same time, the police and immigration can exploit this vulnerability by stopping migrants anywhere and demanding money instead of deporting them. Even registered migrants are vulnerable to this harassment and corruption. Many employers withhold the work permits of migrants, only allowing them to hold a receipt that they give them. Many migrants, particularly in border areas, report that on occasions the police tear up these receipts and treat the migrants as ‘illegal’. In other cases, migrants have been arrested by the police for being outside the area where they are registered. In other cases, migrants are arrested for not being at the workplace indicated on their work permit card. This may be because the migrants are working in jobs not covered by the registration policy (entertainment work including sex work, retail work, and restaurant or hotel work), or that their employer has sub-contracted them to another employer or worksite. This latter scenario is common for construction site workers.

During Prime Minister Chuan Leekpai’s administration in the late 1990s, a ‘one-stop’ summary deportation system was initiated, bypassing the court system. This is still in force. Migrants who are arrested for illegal entry are held in a police cell or immigration holding centre to wait for a bus-load and are then deported. The quick exit policy saves migrants the ordeal of being held and humiliated in police or immigration cells, but it also bypasses any form of screening and could result in the deportation of trafficked persons or the *refoulement* of refugees. Migrants and trafficked persons have no clear identification from their country of origin and, in some cases, this has caused mistakes in deporting to the right country of origin (Vungsiriphisal, Auasalong, Chantavanich, undated). The problems are exacerbated by the lack of interpreters and trained counsellors. When asked about the screening

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of deportees, an immigration official in Mae Sot said that anyone carrying a UNHCR document for ‘persons of concern’ was released to the UNHCR. Regarding trafficked persons, he said that no one wanted to identify themselves as a victim of trafficking because they knew that many agencies would then become involved, and they would have to go through lengthy procedures before being returned home.

The articles of the 1979 *Immigration Act* covering the transportation, sheltering and harbouring of illegal entrants, when vigorously enforced, serve to drive illegal migrants underground and leave them without any services or assistance. At various times, law enforcement campaigns have been initiated against employers and landlords. In one such example, on 9 March 2007, pre-dawn raids by over 200 officials on shanty style huts on land in the outskirts of Mae Sot resulted in the arrest and deportation of 1,000 migrants. Having sent the migrants to an unofficial crossing point to Burma, the authorities then announced that they would crackdown on landlords renting to ‘illegal’ migrants as a form of deterrence. Unable to stem the exodus of people from a country of oppression, Thailand attempts to make it impossible for them to stay on its territory. Such night raids on migrants are common, not only on land, but also on sea. This is in sharp contrast to the Thai legal guidelines on raids which specify that raids should only be carried out between sunrise and sunset, unless it is absolutely necessary.

Policies on the Employment of Migrant Workers

The system of allowing the registration of immigrants through annual cabinet resolutions is primarily concerned with controlling migrants, knowing their whereabouts and allowing for the deportation of any migrant who is not registered. In a decade of migration policies, only a few advances have been made in protecting rights through migration policies.

Migrants are required to pay for registration with a particular employer. The registration costs around US\$100, equivalent to a month’s salary of a worker at minimum wage or two or three months’ salary for most migrants, who receive well below the minimum wage. Thus, most migrants do not have enough money to pay for registration and the employer pays the registration fee and then deducts the cost from the migrant’s wages. The migrants then become debt-bonded to the employers, who justify the withholding of migrant cards by claiming that if the migrants were free to leave, they, as employers, would lose their investment in the migrants’ work permits.

Although employers have to register to employ migrant workers, there is no system for the recruitment of migrant workers. When the Thai Labour Solidarity Committee presented a list of recommendations to the Ministry of Labour on 18 December 2006 on behalf of the Action Network for Migrants (Thailand), one of their concerns was about the recruitment process. It was suggested that the Department of Employment should set up a recruitment service as they had for Thai labourers. In reply, the Ministry of Labour expressed the concern that if the Thai authorities were to recruit migrant workers, they could be accused of trafficking by human rights organisations.²²

Migrant workers and NGOs have complained for the last ten years that employers withhold the registration cards of migrants, thus breaking the law and denying migrants the few protections that registration offers. By mid-2007, there had been no prosecution of an employer for confiscating the personal documents of a migrant.

In December 2006, provincial-level restrictions were issued in Phuket, confining migrants to their worksites by imposing a curfew at 8 pm, banning gatherings of more than five migrants and restricting use of mobile phones. In

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the following months, other provinces followed suit. Migrants were isolated on worksites, completely under the control of the employer with no access or contact with mainstream society. When NGOs complained about the abuse of human rights of migrants caused by these restrictions, the governors of Phuket and Ranong defended the restrictions. The Governor of Ranong, Kanchanapa Khiman, said that mobile phone controls are meant to control human trafficking, explaining that investigations have revealed that members of trafficking gangs use mobiles to communicate with each other and numerous arrests had been made on the basis of phone records (*The Nation*, 2007).

With no other mechanisms adopted to protect the rights of migrant workers, the MoUs on the Cooperation of Employment of Workers do not hold much promise for improving the situation of migrants. During the process of verifying the nationality of migrants, some migrants have effectively become ‘stateless’ when they have not been recognised by their country of origin.

The Labour Protection Act

The Ministry of Labour in Thailand has confirmed that all workers are protected by the country’s labour laws, irrespective of their legal immigration status. Practically, however, it is extremely difficult for unregistered migrants to organise any action to improve their working conditions. As soon as unregistered migrants attempt to negotiate for better wages or working and living conditions, the employer takes action to dismiss the migrants. In some cases, employers inform immigration that there are illegal migrants in the area and immigration officials arrive to arrest and deport the migrants. In other cases, employers have called in thugs to threaten the migrants with violence or physically harm them, including sending armed men into women’s dormitories. Although workers are protected under labour laws, they are only protected while they are working. Therefore, the moment unregistered migrants make a complaint against their employer, they are dismissed and are no longer considered to be working and thus have difficulty accessing protection under the labour laws.

Despite the prevalence of poor working conditions for migrants in Thailand, there have been few prosecutions of employers for non-compliance with the labour laws, occupational health and safety standards, or for confiscation of personal documents. However, there have been an increasing number of cases taken by migrants through the Labour Protection Offices to negotiate with the employers for unpaid wages. Compensation for injuries or deaths in the workplace is most often negotiated informally between the migrant and the employer and is usually well below the legal stipulation. The workers’ welfare compensation fund is difficult for workers to access on a migrant worker card or with no card, although legally it should be possible.

Case 1: The Nut Knitting Factory²³

Workers in the Nut Knitting Factory in Mae Sot had been paid well under the minimum wage for several years. When a group of workers were arrested by immigration, they found the employer had lied to them about making their work permits. After their fellow workers started organising to negotiate for their release and for better wages, the employer brought in thugs to threaten the workers. The workers decided to consult with the local workers association (Yaung Chi Oo Workers Association) which asked MAP Foundation to contact the Labour Protection Office in Tak province. An officer

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was sent to Mae Sot after a letter was presented to the Ministry of Labour. Even then, there were many challenges. The officer did not speak Burmese, the complaint form was in Thai only, and there were no interpreters available.

Classification

The workers in the factory understood that they had paid for their work permits. In reality, the employer had registered only some of them and, having deducted money for the entire year, had registered some of the workers for only three or six months. The workers filed a labour case against their employer using the same mechanisms as Thai workers. However, since they had lost their jobs, they became illegal migrants and were liable for deportation. Even while they were filing the case, the employer harassed the workers and immigration officials tried to deport them. After negotiations, they were allowed to complete the filing of their case.

Protection of rights

The workers could not find work elsewhere after they had filed the case, as the Employers Federation had blacklisted them in Mae Sot and, at the time, there was no provision in the law for them to move to another province. They had no legal status to stay and had to cross the border to find work and wait in Burma. The support workers from the migrant workers' association and from the NGO felt threatened during the proceedings after migrants told them that their photographs had been posted in factories and workers had been told not to associate with them. Some migrants feared that the employers had a contract out on them. Thailand's National Human Rights Commission was contacted to ask the local authorities to ensure that the safety of those involved was protected.

Compensation

After the migrants had filed their case, the Labour Protection Office ordered the employer to pay US\$49,110 in compensation of unpaid wages. When the employer did not pay within the stipulated 60 days, the workers took the case to the labour court. Each worker was owed approximately US\$4,911. To attend the court hearings, a group of representatives crossed the border with border passes. At the first court hearing, the employer suggested payment of US\$307 per worker. The judge complained that this was too low and suggested US\$368 per worker. The workers refused this offer and many other such offers over a period of a year-and-a-half of cancellations and delays of court hearings. Eventually, the negotiations were settled in court at between US\$1,842 and US\$2,149 per worker. Although the settlement was well below the original order and the workers had to wait a year-and-a-half, it was a victory for migrant workers to achieve a settlement in court and prove that migrants also had the right to utilise the labour court mechanisms.

At the time migrants were not allowed to have bank accounts in Thailand, so the payment was made to the MAP Foundation, which then made the payments to the migrants in the presence of external witnesses and with photographic and video evidence to confirm that the compensation had been handed over.

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Prosecution

Only a labour case was brought against the employer, who was not held accountable for violence, threats, withholding work permits, or cheating on work permits.

Repatriation

All the migrants in the case had to cross the border on a one-day border pass to receive their compensation payments. They came with their families as, with no access to bank accounts, the workers had to carry the money in cash. Once they received the money, the migrants and their families quickly crossed back to Burma to make their way home. Some of the workers transferred the money home first via the *hundai*²⁴ system for fear of having it confiscated from them at checkpoints in Burma.

Long-term Impact

Following the settlement in court, many more workers in the area had increased confidence in taking their complaints forward. In the three months following the settlement, US\$15,347 was paid in compensation through negotiations at the Labour Protection Office. Prior to this case, employers were unlikely to negotiate at the Labour Protection Office, confident that no migrant worker would take them to court.

The Ministry of Labour responded to the case by setting up a One-Stop Centre, under the Labour Protection Office in Mae Sot, so migrants could go directly to the centre. As more migrants accessed the centre, it began to employ translators and was upgraded to a Labour Protection Office.

Migrants not only became more confident about organising themselves, but also shared their experiences with other workers and tried to set up a revolving fund to provide support in taking cases to court. However, on the negative side, employers also became more organised and prepared for such cases and were quicker to have migrants deported. Migrants taking cases to court find little support for the exercise of their rights and are told that Thai workers are willing to accept just 20 per cent of the amount owed to them. They are also informed that, if migrants receive a full minimum wage, Thailand will lose its position in the global export industry and factories will move to China.

Intervention by the Country of Origin

There was no official intervention by the Burmese regime. At times, the workers felt their security was threatened in their home country, as they were seen to be actively organising for their rights in Thailand.

The labour laws have also been used in cases of abuse against seafarers. In one case, 39 Burmese seafarers working on a Thai boat in Indonesian waters died of starvation, their bodies thrown overboard. The 61 survivors told the story of how they had been at sea for 35 months without setting foot on land. They had been told that

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they would stay in Indonesian waters on 45-day rotations for a certain number of years. Instead, supply boats brought out fresh water and food, so they did not return to land. When the boat's permit expired, the supply boats no longer came and their supplies ran out. When the rescued survivors returned to Thailand in July 2006, they were given 3,000 baht (US\$80) each. The Legal Rights Protection Network has taken the case to court and the first labour court hearing was on 26 March 2007 (*Gulf Times*, 2007).

The Prevention and Suppression of Prostitution Act

Prior to this Act being passed, anti-prostitution legislation was used to raid brothels and massage parlours where women were selling sex. Once the 1996 Act had been passed, few women were arrested on charges of prostitution, since the Act had fairly lenient penalties for women selling sex. Instead, immigration laws were used to raid brothels and women were charged with illegal entry into Thailand.

In the late 1990s and since 2000, changes have been introduced to improve the condition of sex workers, who had previously been exploited in brothels. Sex workers no longer live on-site, and thus have more freedom of movement and personal space and time. This allows sex workers to meet other women and discuss conditions. If they find they are working in worse conditions than other places, they can choose to move. The changes were partly in response to the HIV/AIDS crisis and statistics that showed women working in brothels had no control over their work and consequently had high rates of HIV (government statistics referred to them as 'direct sex workers'). On the other hand, women working in karaoke or go-go bars could refuse customers, were paid a salary, received better payment for services and could leave their work if they did not like it. They showed similar, if not lower, rates of HIV when compared to the general population. The change was also partly in response to new laws on prostitution and trafficking. The anti-trafficking responses drew attention to migrant sex workers, making it more difficult for migrant women to work in traditional brothels. The process of change took many years and, though some closed and exploitative brothels still exist, they are now the exception, rather than the rule. In 2007, as restrictions on migrants were again increasing, particularly regarding travel and gatherings, it seemed possible that sex workers would once more be forced to live on-site, isolated from other women and services and restricted from exercising their rights.

Between the passing of the *Prevention and Suppression of Prostitution Act* in 1996 and the *Measures for the Prevention and Suppression of Trafficking in Women and Children Act* in 1997, raids on brothels used the *Immigration Act* to arrest and deport women who had entered the country illegally, while women who were considered victims were taken to government shelters for health care and to await deportation or family reunion. In most cases, those who were categorised as victims were children. Only the government could provide this care prior to the *Measures for the Prevention and Suppression of Trafficking in Women and Children Act* and the subsequent MoUs. After the passing of the former, the system was quite similar except that MoUs allowed NGOs to apply for special status to look after victims of trafficking.

Case 2: Women and girls working in Barn Rom Yen brothel in Chiang Mai (2000)²⁵

An American NGO, the International Justice Mission, sent an undercover worker into the Barn Rom Yen brothel in Chiang Mai. From discussions with one woman, he determined that there were underage

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women in the brothel and that women had been trafficked. The agency contacted the police to organise a raid. The information provided by the international NGO was sufficient for the police to organise a raid at night.

Classification

The women who were released were divided into two groups according to their age, or according to the estimation of their age. Those considered over 18 years old were held in a police cell, while those considered under 18 were taken to a government home in Chiang Mai.

Protection of rights

The women who were over 18 were left in a police cell with no visitors, no information, and no support. The police did not want to keep them in the cell as they considered them to be victims, but had been instructed to do so by the agencies involved. The international NGO had told the local authorities they should be separated otherwise they would influence the younger girls. The underlying message was that the over 18-year-olds were 'bad' women while the under 18 year olds were 'innocent victims'. A makeshift centre was made in the Boys Home in Chiang Mai; at that time there was no shelter for trafficked persons in the city. A government shelter for victims of domestic violence did exist, but the girls from the brothel were not taken to this shelter. While the home attempted to make the conditions as comfortable as possible, the girls appeared depressed. Government authorities called in NGOs with translators and experience in working with girls from Burma. The girls told the NGOs they were worried about their 'older sisters' who had been taken from the brothel with them, but they did not know what had happened to them. When the authorities were asked about the 'older sisters', they said they were being held in the police cell at the request of the International Justice Mission. The NGOs visited the women in the police cell and discussed the situation with police and local authorities. The police said they had no reason to hold the women because they were victims, not criminals. Local authorities agreed to house the women in the Boys Home with the girls. Arrangements were made to collect the possessions of the women only after they complained they had lost all their belongings during the raid.

Compensation

No case for compensation was filed on behalf of the women or girls. Although they were asked many questions and interviewed several times, no one inquired about working conditions and pay. The adult women complained they had lost their wages for the week prior to the raid and had lost their income for the two months they were held in the shelter. If they returned to Thailand after repatriation, they would have to pay a broker to travel back and start all over again.

Prosecution

The manager and the *mamasan* of the brothel (the woman in charge) were put on trial. The women and girls had to attend the trial in the same courtroom as the manager and the *mamasan*. Many of the girls and women cried when the *mamasan* came in, not in fear, but rather upset to see her in shackles. The women were questioned about how they came to Thailand and asked if they were forced. All of them said they had come voluntarily. The women were given an interpreter in court. However, there

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were several misunderstandings as the local names of places in Burma's Shan state were unfamiliar to the judges.

Repatriation

Accompanied by the NGOs, the adult women were deported to the border by Thai authorities. On the Burmese side of the border, the women were taken to a local NGO to assist them in returning home. The Thai Immigration expressed displeasure that a particular NGO had been used, suggesting it was used as a centre for brokers. The young women were kept at the government rehabilitation home in Bangkok for over a year, where, in phone conversations with NGOs in Chiang Mai, they explained they were feeling isolated and lonely. They were given lessons in sewing, flower arrangement and massage techniques. They could not leave the rehabilitation home as they were not issued with any documents. The authorities made contact with their families in Burma and they were eventually repatriated.

Long-term Impact

The raid on the brothel, the follow-up treatment, and the differential treatment of women and children caused much debate among NGOs, and between NGOs, international NGOs and government authorities. These discussions led to an MoU between NGOs and the government on cases of trafficking. Before it was signed, the same American NGO (the International Justice Mission) instigated another raid on exactly the same brothel in 2003. Many of the women were regular participants of activities run by a local NGO, called EMPOWER, and complained bitterly about being 'rescued' and then held in a government rehabilitation home against their will.

Although the MoUs have improved coordination between NGOs and government authorities, the problem remains of how to differentiate between trafficked victims and other workers, and how to rescue only those who need rescuing and leave other workers with their jobs and livelihoods. The problem would, of course, not arise if all those involved in raids were given some form of documentation to stay and work in Thailand.

According to the *Cabinet Resolution on the Education of Non-Thai and Non-Documented People*, everyone can access Thai education and be provided with a 10-year ID card, which allows the holder to remain in Thailand, attend an educational establishment and travel for purposes of education. However, it appears that migrant girls or women being cared for in the government establishments are not attending regular Thai educational facilities, nor are they being issued with the necessary temporary ID card.

The following case is illustrative of how legal instruments are sometimes not activated, even in cases of severe exploitation of migrant workers. The *Child Protection Act* permits the police to enter an establishment or private home where it is suspected that children are working. Under Article 30, competent officials have the authority and duty to enter homes, any establishment or vehicle where there is reason to suspect detention or an act of torture committed against a child. The inspection can be done after the competent authority has received notification, witnessed or come to know about such acts of torture (Article 41). In addition, the persons reporting

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are to receive protection and not be held liable for any civil, criminal or administrative action. However, in reality it is often difficult to enforce and protect the safety of the child. There may be leaks of information beforehand which would lead to the child's removal to another place unknown to the authorities, or the employer may be influential enough to persuade the authorities that no abuse was taking place and the child was being well looked after, or the employer may threaten all those involved.

Case 3: Migrant Child Domestic Worker (2005–06)²⁶

The brother of a girl from Burma being held in abusive conditions as a domestic worker informed a local migrant-support NGO. This NGO had already assisted a woman to leave this exploitative employer and had facilitated her access to compensation for work done. The NGO was aware from her report that anyone working there was not allowed out and no one was allowed to make contact. The NGO therefore referred the case to a body working exclusively on trafficking. The agency collected some basic information, but did not follow up with any intervention. They feared that in trying to build a case against the employer, it could jeopardise the life of the girl. It was considered too sensitive to order an inspection or raid since the employer was influential and there were fears that there may be a leak of information from someone in the local authorities before it could take place. According to the *Child Protection Act* and the *Measures for the Prevention and Suppression of Trafficking in Women and Children Act*, a raid could have been justified on the amount of information available about the conditions the girl was being held in, but the realities of the situation made it unwise to act. The girl continued to exist in the same conditions until the day when the wife of the employer stabbed her. She ran out into the streets and the neighbours informed the authorities.

Classification

The girl had been held for several years and physically and mentally abused under severely abusive working conditions. She could not leave her place of employment and was unable to contact anyone outside the household. Her brother's last contact with her was a tape she had managed to smuggle out two years earlier. When the case reached a government agency in charge of protecting women and child victims of trafficking, she was given dispensation to stay in Thailand under trafficking laws and policies and legally treated as a victim of physical abuse.

Protection of Rights

After the young girl was stabbed by the employer's wife, she was taken to a hospital and given appropriate health care. On being discharged from hospital, she was put in the care of a local NGO which runs a shelter for young girls where she received individual psycho-social care and is well looked after. Her case is managed by the local NGO and the government department.

Compensation

The government agency took the girl's case to the labour court and she was awarded 30,000 baht (US\$921) for her six years of forced labour. The centre was also considering filing a civil suit.

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Prosecution

The wife of the employer was sentenced to six months' imprisonment for physical assault. No case was filed against the husband who had held the young girl in captivity for over six years.

Repatriation

The girl has suffered many years of physical and emotional abuse and has had no contact with her mother for many years. She continues to remain in the care of an NGO and her case is reviewed periodically to grant permission for continued stay in Thailand. Her future repatriation or reunion with her family is uncertain, although gradual, cautious contacts are being made with relatives.

Long-term Impact

Since the girl needs privacy and confidentiality in order to recuperate, the case cannot be used to advocate for change in the conditions of domestic workers. The employer has had to pay a meagre amount in compensation, much less than he would have to pay a domestic worker monthly. The wife has already been released, sending a message to the community that stabbing a foreign domestic worker is a minor crime.

Intervention by the Country of Origin

Contact is being made with the family without the need to contact any authorities. Until it can be ascertained that being reunited with the family is in the best interests of the girl, she remains under the guardianship of the Thai authorities.

It must be noted that the most common use of the clause relating to the inspection of workplaces in the *Prevention and Suppression of Trafficking in Women and Children Act* is the inspection and monitoring of entertainment places and occasionally factories, especially sweatshops in Bangkok where Laotian girls have been kept. The absence of powers to inspect private homes is a serious gap for domestic workers held in servitude.

This Act provides limited protection for migrant victims of trafficking. It allows for migrant women and children not to be treated as criminals, and to temporarily have dispensation from being categorised as illegal entrants to Thailand, although there is no provision in the Act to change this status and the eventual outcome is the same as for migrants who entered the country illegally – they are returned to their home country. According to the Act, victims of trafficking are not to be held in an immigration detention centre or other detention centres for criminals or illegal entrants, but are to be provided shelter in a government home or a shelter run by an approved NGO.²⁷

Trafficking survivors are not allowed any freedom once they leave the control of their trafficker. They cannot leave the designated shelters and no documents are issued to trafficked persons to allow them freedom of movement. At the centres, girls and women are provided counselling and are given a limited choice of traditional

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women's vocations or training courses, such as dress-making, hair-cutting, weaving, making garlands, and foot massage. Not all shelters designated to be holding centres for victims of trafficking have staff who can speak the languages of the victims. Although there are thousands of migrants in the country who have skills or the potential to learn skills required to become interpreters, counsellors, and case managers, there is no provision in the law to employ migrants in such capacities. According to the July 2005 *Cabinet Resolution on the Education of Non-Thai and Non-Documented People*, children and women in shelters should be able to access Thai state education facilities and receive a regular education while they are waiting for a decision on their future. If they wish to attend Thai schools, they should be issued with a temporary ID card for ten years, thus securing their future education. At present, it appears women and children kept in shelters are unable to benefit from this policy decision.

The final legally prescribed outcome through the Act is repatriation. Women and girls who have a safe and secure home with a livelihood for themselves and their families generally want speedy repatriation. However, it is usually several months and, in some cases, years before they are repatriated. Court cases can take several months and tracing families in countries where the population is suspicious of local authorities can be a lengthy procedure. For adult women, who have many responsibilities towards their families, months without an income or freedom are frustrating and disempowering. If only a criminal case against the trafficker is started, the women are likely to return home with no money, possibly still in debt and with no livelihood. Survival for themselves and their families will often depend on their return, once again, to Thailand or another country. If children are separated from their families and communities for a long time, they may become depressed and confused. It is unclear what happens to children whose families cannot be traced or, when traced, are deemed to be responsible for their child being trafficked or otherwise abusive. Although the Immigration Law permits the authorities to give special dispensation to people who have entered the country to be allowed to stay temporarily, the temporary nature of the implementation of this clause means that children cannot have the security and protection to build a new life, but live in a state of limbo. Some adult women also have difficulty returning home, especially those who were trafficked to Thailand when they were very young and have little memory of their homes. In the time they have been in Thailand, their villages have often been forcibly relocated or there is armed conflict in their home areas. Other women may be afraid of traffickers, brokers, or moneylenders to whom they still owe money. Nearly all migrants from Burma, Cambodia and Lao PDR arrive in Thailand without any form of documentation. Some have ID cards in their home countries but left them there for fear of loss or confiscation by Thai authorities. Others do not have any form of legal identity in their home country. This is particularly true for ethnic groups from Burma, Cham, or Cambodians of Vietnamese descent in Cambodia, and the Hmong from Lao PDR. This has been evidenced through responses to trafficking and in attempts to verify the nationality of migrants in Thailand. In these cases, neither the country of origin nor the country of destination claims the migrant or trafficked person and they become stateless, but without any recognition of their statelessness.

During 2006, some cases of highly abusive labour conditions for workers in a seafood processing factory were taken to court using anti-trafficking mechanisms. There were, however, many difficulties in providing protection to the male victims, as men are not covered by anti-trafficking laws, and most were deported immediately after being released from slavery-like conditions, with little recourse to justice. The case of the Ranya-Paew Seafood Factory is illustrative of the issues discussed above.

Case 4: Ranya-Paew Seafood Factory, Samut Sakorn

The exploitative conditions of the Ranya-Paew Seafood Factory were brought to the attention of NGOs by migrant workers who had escaped in previous years. The workers spoke of exploitative conditions and the use of child labour, but the NGOs felt they could not pursue the situation since none of the workers who managed to escape were willing to testify; afraid of the possible repercussions.

Classification

In 2007, when a worker was injured and taken to hospital, she informed her brother of the appalling conditions inside the factory and he, in turn, contacted a local NGO. A team of government and non-government agencies organised a raid on the factory. According to the NGOs present, government authorities were not cooperative and only gave them half a day to screen 288 workers. The workers were then classified as either victims of trafficking, 'illegal aliens', registered migrant workers or child workers (aged 15 and 16 years).

Protection of Rights

The workers identified as trafficked persons were put in government shelters. According to the government report, the three male victims were put in a government home for boys. According to the NGO report, the male victims were deported as there was no legal provision to protect them under the anti-trafficking measures. All the NGOs except one brought in to assist after the raid specialised in children's issues and not workers' issues.

Compensation

258 of the workers were promised back wages at a total of 558,269 baht (US\$18,057) for the first half of September 2006 (an average of US\$69 per worker). Other compensation claims were continuing in mid-2007.

Sixty-six victims of trafficking also filed a case against the company in the labour court asking for a total sum of 70,353,529 baht (US\$2,159,431), covering salaries, overtime pay and holiday pay. The court ordered the employer to give testimony on 14 December 2006 and then postponed it to 26 January 2007. The employer offered to pay 10,000 baht (US\$307) per year, per worker, but the victims have not accepted the offer and the case was continuing in 2007.

Prosecution

Local police pressed charges against the company owner and three others for sheltering illegal entrants, possessing weapons and depriving a person of their liberty. At the same time, the Ministry of Labour pressed charges of violation of the *Labour Protection Act* and issued an order for a fine to be paid of 68,000 baht (US\$2,087).

Repatriation

Workers who did not have work permits were deported. The employer and broker tried to persuade all the other workers with work permits to stay and continue working. They offered payment of wages and a cancellation of debts for those who would agree to remain. Workers were given the choice by the Department of Employment to stay with the same employer or be taken to the border.

Long-term Impact

The court case had not finished in mid-2007, so it was not possible to assess the long-term impact. However, the immediate message to workers in the area was that non-registered migrants have no rights. Although both registered and non-registered workers suffered the same highly exploitative conditions, non-registered migrants were immediately deported. It will be interesting to monitor whether those who return to the same factory will be able to organise themselves to ensure they experience better working conditions in the future, especially once the case is no longer in the limelight. The overall message to workers was that being classified as ‘trafficked’ gave them more financial benefits than being categorised as a victim of other forms of abuse. But the trafficked victims have been taken out of the workers movement, classified not as workers, but as ‘victims’, and it was unclear in mid-2007 if they would be able to return to work after the case was settled.

Intervention by the Country of Origin

In an unprecedented move for victims of labour exploitation, the Burmese authorities came to Thailand to interview the victims and the case was extensively reported in the *New Light of Myanmar*, official mouthpiece of the regime in Burma. The authorities interviewed the workers who said they were trafficked to find out more information about the trafficker/broker who brought them to the factory (*New Light of Myanmar*, 2007).

As a comparison to this case of migrant workers in a situation of exploitative working conditions, it is pertinent at this point to explore the situation of Thai workers overseas who have faced similar problems and to compare the outcomes for Thai workers overseas and migrant workers in Thailand.

Case 5: Thai Welders²⁸

Trans Bay Steel of Napa (in the US) approached Kota Manpower Inc., an employment agency, to recruit ten welders from Thailand to help manufacture piles and hinge beams for the Oakland Bay Bridge in the US. The agreement was that Trans Bay would pay US\$18.80 per hour to Kota for each worker, who would, in turn, be responsible for paying the welders directly. The Thai workers paid a US\$12,500 recruitment fee to the employment agency. The agency then used the Trans Bay documentation without their knowledge to bring in additional workers under the US legal guest worker programme.

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When the workers arrived, the employment agency did not pay the workers as specified and Trans Bay terminated the relationship. Forty-eight workers were moved to renovate a Thai restaurant in Long Beach and then work in the restaurant. They worked long hours, had their passports confiscated, lived in appalling conditions with no gas, electricity or furniture and were threatened with deportation to Thailand with huge debts if they complained. For three months of fulltime work, they were paid a total of US\$220. The Thai Community Development Center in Los Angeles took up the case for the workers.

Classification

The case, settled by the US Equal Employment Opportunity Commission and Trans Bay Steel Corporation of Napa, represents what the US Department of Health and Human Services calls the least known but most widely used method of enslaving people today: migrant labourers legally recruited but forced into servitude to repay enormous loans.

Protection of Rights

Apart from monetary settlement, the workers in the case were allocated housing, relocation, education, and other expenses. The case took four years to come to a settlement. Trans Bay also hired 22 of the welders and offered jobs to the others after getting work visas.

Compensation

The 48 welders were given a US\$1.4 million settlement, with each of the workers given between US\$5,000 and US\$7,500 by Trans Bay, who had employed them originally through an employment agency.

Prosecution

Trans Bay denies any wrongdoing, saying it was duped by an employment agency into sponsoring more workers than needed, who were then diverted to the Long Beach restaurant without the steel company's knowledge or permission. Trans Bay is suing the agency, Kota Manpower Inc. of Thailand and Los Angeles, for alleged fraud. The Equal Employment Opportunity Commission also made efforts to pursue charges against Kota, which had closed its Los Angeles office.

Repatriation

Seventeen of the workers were also granted a special visa for victims of trafficking under a 2000 US federal law that allows them to stay in the US for three years and then apply for legal permanent residency. Under these provisions, the workers could bring their families to join them in the US. Visa applications were pending for 22 of the other trafficked workers.

Long term Impact

The Trans Bay settlement provides an example of a firm taking responsibility for fraudulent recruitment practices, even when it may not have been fully aware of the abuses being committed. Trans Bay warned other businesses to investigate any potential employment agency thoroughly. Without a clear prosecution of the employment agency, however, the law is unlikely to send a strong message to employment agencies that commit fraud.

5. Conclusion

National initiatives regarding trafficking began in Thailand for reasons outlined at the beginning of this chapter: as a response to issues of child labour, HIV/AIDS and a general international focus on the sex industry in Thailand. Later influences include the comments of the Committee on the Rights of the Child in 2006, when the Committee noted the trafficking of children for both sexual exploitation and forced labour and also referred to cases of internal trafficking, particularly of tribal peoples.

Despite these various initiatives and the focus that trafficking has attracted in Thailand, the actual evidence of cases of trafficking remains minimal. According to statistics provided by the government for the US Department of State's Trafficking in Persons Report, there were only 504 trafficking-related arrests in 2002, 211 in 2003, 307 in 2004 and 352 in 2005. Prosecutions and convictions were even smaller, with only 42 trafficking-related prosecutions in 2002, 86 in 2003 and 66 in 2004. There were 21 trafficking-related convictions in 2002 and 20 in 2003. In 2004, there were 12 convictions of small operators for crimes associated with trafficking. In 2005, there were 74 convictions from cases filed in 2003 and 2004. Only one of 18 police officers dismissed in 2003 for complicity with traffickers was prosecuted, convicted and sentenced to ten years' imprisonment. In 2004, the US TIP Report stated that 11 other officers were under active investigation. Most sentences for trafficking cases were around three years' imprisonment. However, there were a few cases with sentences between ten and 50 years.¹ In early March 2005, a Cambodian woman was convicted in a Thai court for trafficking eight Cambodian girls to Thailand and Malaysia and sentenced to 85 years' imprisonment. Between July 2004 and March 2005, 137 Cambodian people found to be 'victims of human trafficking' in Thailand were deported or repatriated (MoSVY, 2005). During same period, the Thai government repatriated a total of 1,192 victims of trafficking to their countries of origin and a further 274 were awaiting repatriation. Another 614 persons were reported as being in assistance programmes, had escaped during the time awaiting repatriation, or had died (ILO, 2005).

The number of cases of labour exploitation of migrant workers being taken through the legal mechanisms has increased over the last three years. This is reflected, to some extent, although with a different focus, in the 2006 US TIP Report. The report focuses on Thailand's lack of protection for victims of forced or bonded labour, particularly for men in the construction, agriculture, and fishing industries. The report refers to this as "labour trafficking", making it a distinct category from women trafficked into sex work but possibly deflecting attention from the general poor working conditions of migrant workers and categorising labour exploitation as a transnational crime rather than what it is, a breach of labour rights with transnational elements.

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While Thailand and the immediate region have initiated many interventions, policies, laws and MoUs regarding trafficking, there has been no equivalent progress in protecting the rights of trafficked persons. The basic tenet established by the first trafficking initiatives, that is to say that the trafficked person is to be considered a victim and not a criminal, has not been developed to establish that the trafficked victim is entitled to long-term rights and is to be considered a victim of neglect of her or his country of origin. While the MoUs have tried to protect the rights of the trafficked persons in the context of the implementation of the law, they have been bound by the law which gives priority to enforcing the law against trafficker and repatriating the victim. The case of the Thai welders is an example of a more comprehensive response to trafficking, with the offer of long-term stay and citizenship. In 2007, Australia too was granting new visas to victims of trafficking and an Australian immigration officer was scheduled to be stationed full time in Bangkok to deal exclusively with such matters (*The Nation*, 2007). If trafficked persons in Thailand were able to apply for long-term stay in Thailand, they might be much more willing to go through the legal processes to give evidence against traffickers and ensure their arrest. The issuing of permanent visas to victims of trafficking or bonded labour allows migrants opportunity to rebuild their lives, have a proper livelihood without fear of repercussions from loan sharks, and be reunited with their families. Many of the more recent initiatives in Thailand have tried to take a more comprehensive approach of not merely arresting the trafficker but also pursuing reparations through the labour and civil courts for the victims. At the same time, there is currently no equivalent to the action of the Trans Bay company, which took responsibility as one of the partners in the actions that led to the abuse of the workers.

The issue of where responsibility lies in cases of trafficking has yet to be addressed in Thailand, as it does in relation to responsibility for tolerating (and failing to stop) cases of exploitation. If the labour mechanisms continue to allow Thailand's labour laws to be ignored for migrant workers and if the judicial system continues to be lax on ensuring that exploited migrants can access justice in all types of abuse cases, then the laws on trafficking will remain impossible to enforce, as an environment of acceptance, of abuse and impunity for abusers will prevail. At present, the mechanisms and laws that deal with trafficking and migration or labour do not overlap; instead, these issues are dealt with separately. As this chapter shows, migration, all forms of labour (including sex work), and trafficking need to be addressed holistically and all responses must be designed and implemented with the participation of migrants themselves.

ENDNOTES

- ¹ Statement by H.E. Mr Sora-at Klingpratoom, Minister of Social Development and Human Security, Royal Thai Government at Coordinated Mekong Ministerial Initiative Against Trafficking: COMMIT, Yangon, Union of Myanmar, 29 October 2004. Available at www.no-trafficking/content/web/30commit_process/SOM2IMM/h_e_mr_soraat_statement.doc+%22Memorandums+of+Understanding%22+%2B+Thailand+%2B+Lao+PDR&hl=th&ct=clnk&cd=1&gl=th.
- ² Personal meeting between the author and Albina du Boisrouvray, Director of Association François-Xavier Bagnoud (AFXB) in Kengtung, Burma and later visit to the AFXB home in Rangoon, 1992.
- ³ According to FXB website, one of Albina du Boisrouvray's most pioneering activities, to date, was a rescue mission she led in 1992 for 95 young Burmese women involved in the Thai sex trade. The repatriation of the young women back to Yangon was followed by a comprehensive reintegration program. For more detail, see <http://www.fxb.org/country/Myanmar.html>.
- ⁴ Interview, Liz Cameron, Coordinator, EMPOWER, Chiang Mai, 11 November 2006.
- ⁵ See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=5876.
- ⁶ See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=6102.
- ⁷ See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=6088.
- ⁸ See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=6141.
- ⁹ See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=6157.
- ¹⁰ See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=6064.
- ¹¹ See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=6124.
- ¹² See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=6180 (accessed on 18 January 2007).
- ¹³ See UNIAP agency profile at http://www.no-trafficking.org/uniap_frontend/project_detail.aspx?AgencyProfileID=6150.
- ¹⁴ This section was written with the assistance of Elisabeth Lucas, intern with MAP Foundation, Chiang Mai.
- ¹⁵ Only one registration in 2004 allowed migrants to register independently of their employers. For more detail on all migrant registration policies, see *No Human Being is Illegal 1996–2006. No Migrant Worker is Illegal*, MAP Foundation, December 2006.
- ¹⁶ For English translations of the MoUs, see *Resource Book: Migration in the Greater Mekong Subregion (Second Edition)*, Mekong Migration Network and Asian Migrant Centre with the support of the Rockefeller Foundation, November 2005.
- ¹⁷ The Act was published in the Royal Gazette, volume 114, Chapter 72 A (Kor), dated 16 November 1997 and entered into force on 17 November 1997.

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- ¹⁸ Other laws which impact on law enforcement in cases of trafficking include: *The Act on Prevention and Suppression of Money Laundering* (1999) and the *Witness Protection Act, BE 2546* (2003). In terms of impact on prevention, the July 2005 *Cabinet Resolution on Education of Non-Thai and Non-Documented Persons* allows for all children (except camp-based refugees) to attend Thai schools and education establishments and be documented for ten years.
- ¹⁹ For more detail on the individual MOUs see: *Thailand's Country Paper on "Policy Mainstreaming: The Labour and Employment Perspective in Taking Action against Human Trafficking"* 2005 at <http://www.ilo.org/public/english/region/asro/bangkok/child/trafficking/downloads/thaicountrypaper-eng.pdf>.
- ²⁰ For more detail see www.humantrafficking.org/updates/96 (accessed 10 April 2007).
- ²¹ For more detail see www.thaiembdc.org/socials/actionwc.html.
- ²² Source: Unpublished letter of reply from the Ministry of Labour to the Thai Labour Solidarity Committee January 2007.
- ²³ Sources: *No Human Being is Illegal 1996-2006. No Migrant Worker is Illegal*, MAP Foundation, December 2006; and *Trafficking News Monthly*, October 2004: Migrant Worker Developments in Thailand at <http://www.antislavery.org/homepage/traffic%20news/october2004.htm#4>.
- ²⁴ *Hundai* refers to a system whereby migrants deliver money to a broker who then makes a phone call to the destination and the money is paid to the recipient.
- ²⁵ Source: Interviews with agencies involved: GAATW, MAP Foundation, EMPOWER Chiang Mai.
- ²⁶ All identifying factors in this case study have been deleted in order to protect the identity of the girl involved. Sources: Interviews with the agencies involved.
- ²⁷ The Thai government operates 97 shelters throughout the country for abused women and children: six regional shelters exclusively for foreign victims of trafficking, and a central shelter outside Bangkok, with capacity for over 500 foreign victims of trafficking. In some areas, the shelters for trafficking are also used for migrant victims of rape, usually children, who would otherwise be at risk of further abuse.
- ²⁸ Sources: "Thai Workers Get Money, Visas in Los Angeles Human Trafficking Settlement", *International Herald Tribune*, 9 December 2006; *Los Angeles Times* articles, 8 December, 2006, accessed at http://migration.ucdavis.edu/mn/more.php?id=3260_0_3_0
<http://www.traffickinginpersons.org/Articles.html>
http://www.iht.com/articles/ap/2006/12/08/america/NA_GEN_US_Thailand_Slavery_Settlement.php
- ²⁹ For more detail on the US Department of State's Trafficking in Persons (TIP) Report see <http://www.state.gov>

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United Kingdom

Klara Skrivankova

1. What Constitutes Trafficking in the United Kingdom

The issue of trafficking has acquired a significant place in the political agenda of the United Kingdom (UK) in the past five years. Important changes in legislation and policy during this period indicate a heightened interest in the issue. Apart from new legislation, measures have been put in place to provide assistance to women trafficked for sexual exploitation and specific new police bodies have been established and given responsibility for dealing with trafficking.

UK legislation covers the crime of trafficking as required by the UN Trafficking Protocol. However, when it comes to the issue of sexual exploitation, it does not correspond to the definition, as it makes it a crime to procure people for sex work who take on such work voluntarily, where no force or coercion is present. It goes further than the UN Protocol, however, in defining more precisely what constitutes exploitation. The *Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004*, which covers trafficking for labour exploitation, defines ‘exploitation’ as slavery or forced labour, the use of threats, force or deception to obtain a service; or a request or inducement to get someone to undertake an activity that someone who was not young, disabled or a family member would be likely to refuse.

Trafficking occurs in the UK in various forms. The Home Office’s new policy document, the *UK Action Plan on Tackling Human Trafficking*, introduced in March 2007, mentions trafficking for sexual exploitation, forced labour, child trafficking, and internal trafficking. The government describes trafficking as “movement of a person by coercion or deception into a situation of exploitation”.¹ Similarly, the Home Office’s *Trafficking in Persons Crime Reduction Toolkit* also talks about exploitation of women, children and men by applying force, coercion, threats, and deception.²

In practice, however, the issue of exploitation is not considered the major determinant in identifying trafficking cases in the UK. Trafficking has, in general, been perceived as a problem of organised immigration crime. Consequently, offences involving illegal immigration receive the greatest attention. This has precipitated problems when it comes to identifying trafficked persons and protecting their human rights. Practitioners (such as social workers, NGOs, or police) often do not imagine that people legally entitled to be in the UK could possibly have been trafficked. Furthermore, too strong a focus on the immigration status of trafficked persons has created tension between those responsible for enforcing immigration law and police investigations into trafficking crimes. It also overshadows the complex nature of trafficking and the need for a holistic approach.

The proposal for a UK Action Plan on combating trafficking in human beings, published for the purposes of public consultation in January 2006, made a clear distinction between trafficking and people smuggling and

stressed that the two should not be confused. The practice shows, however, in dealing with concrete cases, confusion continues to exist. The focus on trafficking as an organised immigration crime serves here as a catalyst. One of the principal criticisms of the text of the proposed Action Plan was that it put the emphasis on techniques to tackle crimes against the state (immigration offences), rather than on crimes committed against the person, i.e. the exploitation to which trafficked persons are subjected.³ In March 2007, the government published the definitive version of its Action Plan. This is the first policy document that deals solely with combating trafficking in human beings in the UK. The text of the document demonstrates a key shift away from seeing trafficking as an immigration offence towards defining trafficking as a violation of human rights.

Those working in the field with trafficked persons suggest that the legal framework regarding trafficking in human beings in the UK is sufficient in theory, but its implementation is far from adequate. Since 2004, there has been a new law punishing trafficking for labour exploitation. However, the provisions of the 2004 Act have been used only rarely to prosecute trafficking cases and by mid-2007 there had not been a single conviction under these provisions. For example, in cases of child trafficking, according to ECPAT UK records, the UK's Crown Prosecution Service does not use anti-trafficking legislation, but instead applies provisions of the law concerning facilitation of illegal entry, which automatically confuses offences involving people smuggling with trafficking.

The current situation in the UK can be described from the policy-making perspective as one of transition, halfway towards a coherent policy response. Some academics describe the current policy and practice with regard to trafficking as one that serves only to encourage the division of migrants who have experienced human rights violations into two groups: an extremely small number of deserving 'victims' (of traffickers) who are entitled to various (limited) forms of protection and assistance, and a vastly bigger group of people who are considered to be 'undeserving' and who are not provided with any protection or assistance to enable them to exercise their rights.⁴

The next sections describe the *status quo* and the gaps and flaws in UK government policy and practice concerning protection of the human rights of trafficked persons. Apart from the strong focus on immigration offences already mentioned, state agencies take a case-by-case approach to protection and there appears to be no connection between responses to trafficking and other policy areas that have a major impact on the protection of the rights of trafficked persons. The formal legislative framework provides a basis for dealing with the issue. Its implementation has so far been inadequate with regard to upholding the human rights of victims, because more priority has been given to criminal justice strategies. The Parliamentary Joint Committee on Human Rights⁵ pointed out in 2006 that the UK's anti-trafficking legislation lacked a human rights approach that would help reinforce and promote the rights of victims. In this respect, many have said that the greatest challenge in the UK is to change the mindsets, attitudes and behaviour of those who shape policy and those who implement it on the ground.

This report was finalised only a few weeks after the introduction of the UK Action Plan. The text describes the way that policy in force up to early 2007 had an impact on the human rights of trafficked persons. The new policy promises to bring about changes and improve the situation of trafficked persons. This report, delineating the situation before the Action Plan was implemented, may be helpful in the future when it comes to monitoring improvements under the new anti-trafficking policy.

2. Current Legal Framework on Trafficking

The UK has come a long way over the past few years in introducing new legislation on trafficking in human beings. Until recently, there was no specific legal provision on trafficking in the UK. Those committing trafficking

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offences were punished via a range of other laws relating to pimping and immigration offences.⁶ The lack of specific laws on trafficking in human beings posed a major obstacle to the prosecution of traffickers, and it is hard to assess how many of the cases that were prosecuted as pimping or immigration offences actually involved trafficking. In 2002, an offence of trafficking was introduced in the UK for the first time in the *Nationality, Immigration and Asylum Act, 2002*. The offence covered only trafficking for the purposes of prostitution and was foreseen as a stopgap measure before comprehensive legislation was introduced. The *Sexual Offences Act, 2003* incorporated trafficking for sexual exploitation but did not require those committing the offence to use coercion, deception or force in the process of recruitment, as laid down in the UN Trafficking Protocol. In that sense, it also covers the offence of procuring of those who engage in sex work with consent. The same Act made the commercial sexual exploitation of children (persons under 18 years of age) an offence. The Act provides for penalties of up to 14 years' imprisonment. There have been 30 convictions in trafficking for sexual exploitation under the *Sexual Offences Act, 2003*. The prison sentences imposed in these cases for the specific counts of trafficking ranged from two to nine years, although convictions for separate counts have resulted in higher overall sentences being awarded of up to 21 years.⁷

In 2004, a law covering trafficking for labour exploitation was introduced in the *The Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004*. This law covers all forms of trafficking, or rather all the different purposes for which people might be trafficked. It also mentions the means used to induce a person (by the use of force, threats or deception) to provide services or acquire benefits for another person.⁸ Exploitation is defined as slavery or forced labour, the use of threats or deception to obtain a service, or a request or inducement to get someone to undertake an activity that someone who was not young, disabled or a family member would be likely to refuse. The law does not make any specific reference to the recruitment, transportation and receipt of persons. The maximum penalty under this Act is 14 years imprisonment. By the end of 2006, there had been no convictions in trafficking for labour exploitation under this law. The guidance on its interpretation is still very limited and hence it is unclear how it will be interpreted in practice.

The legislation making trafficking an offence does not mention any specific measures to be taken to protect the rights of trafficked persons or to provide assistance to them. The failure of the law to mention any specific measures, such as residence permits, access to statutory services, and support to be provided to trafficking victims in the UK, means that the protection afforded by the *Convention relating to the Status of Refugees (1951)* and the UK's *Human Rights Act, 1998* is currently the only means by which trafficked women (or men) can ensure that they will not be returned to their country of origin once any police proceedings against their traffickers come to an end.⁹

As a member of the European Union and the Council of Europe, the UK is obliged to harmonise its legislation with European legal standards. Some of the standards are supposed to be reflected in their entirety in national legislation, while other standards allow exceptions. The UK's approach in viewing trafficking as a problem of organised immigration crime has been visible in its reluctance to submit to some European legislation aimed at combating trafficking by making better protection available to trafficked persons. The EU Council Directive 2004/81/EC obliges all EU member states to issue residence permits to third country nationals who are victims of trafficking (or who have been the subject of an action that facilitates illegal migration) and who cooperate with the competent authorities. The UK is one of the only three EU countries opting not to implement this Directive.

In May 2005, the Council of Europe adopted the *European Convention on Action against Trafficking in*

Human Beings. The Convention goes beyond any other international instrument in addressing trafficking by seeking to balance a criminal justice approach with the protection of the rights of trafficked persons. The Convention obliges its signatory parties to guarantee minimum standards of protection to **all** trafficked persons. The protection includes measures such as a reflection period of at least 30 days and comprehensive assistance to victims to ensure their physical, psychological and social recovery.¹⁰ By the end of April 2007, the Convention had been signed by 29 States and ratified by seven.¹¹ The UK had been reluctant to sign this Convention initially, arguing: “We have a serious concern that implementing such provisions might act as a ‘pull’ factor to the UK. For example, they could be misused by individuals seeking to extend their stay in the UK, where they do not have a genuine claim as a victim of trafficking. Dealing with fraudulent applications will slow down our ability to respond to genuine claims.”¹² However, intensive lobbying by NGOs and other stakeholders, as well as political pressure from the opposition party led to the Prime Minister announcing in February 2007 the intention of the British government to sign the Convention. The Convention was finally signed on 23 March 2007. The signature coincided with the commemoration of the abolition of the Transatlantic slave trade by the UK 200 years earlier.

Apart from European legislation on trafficking, the UK is also bound by a number of international instruments on trafficking or related issues. The leading instrument is the UN Trafficking Protocol. The UK signed the *Convention against Transnational Organized Crime* and its Protocols in December 2000, but took a long time to ratify the Trafficking Protocol – it was ratified only in February 2006. Furthermore, the UK is bound by a number of other international instruments relevant to trafficking: the *International Covenant on Civil and Political Rights*; the *European Convention on Human Rights*; the *UN Slavery Convention*; the *ILO Conventions No. 29 and No. 105 on Forced Labour*; the *Protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and *ILO Convention No. 182 on the Worst Forms of Child Labour*. Protection of trafficked persons is also supported by the *Human Rights Act, 1998*, which brings UK legislation in line with the standards laid out by the *European Convention on Human Rights* (1950).¹³

Although not explicitly focusing on trafficking in human beings, the UK has a number of other legal standards connected to the regulation of employment and the workplace, which are being used to try and prevent trafficking, as well as numerous laws on immigration. These will be discussed in detail later.

Specific Policies on Trafficking

A distinct characteristic of the UK government’s policy on trafficking has been the lack of a comprehensive, holistic approach. The Home Office, the main policy-making actor in this area within the government, has undertaken several actions, although often in isolation and without coordination, allowing gaps which traffickers have found relatively easy to abuse. Positive changes have occurred over the past five years, especially the introduction of new laws and law enforcement structures, already mentioned. In light of evidence presented, the UK Parliament’s Joint Committee on Human Rights concluded in a report published in October 2006 that, although the government had started taking some significant steps to improve the protection of victims, the existing level of protection as a whole was still far from adequate.¹⁴ As will be described later, only a portion of women trafficked for sexual exploitation receive protection and assistance in the UK. Systems for protection of other groups are lacking.

A lot remains to be done. The government has recognised the “importance of having a comprehensive and effective strategy to combat this growing problem” (i.e. trafficking).¹⁵ Hence, in January 2006, it launched a consultation on the UK Action Plan on Tackling Human Trafficking. There were 206 submissions made to the

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consultation from various actors, agencies, and individuals. From the responses it became clear that, despite having an appropriate legal framework, there were shortcomings in practice, as well as misunderstandings about the very nature of human trafficking. The majority of respondents expressed concern that the draft Action Plan did not put sufficient emphasis on human rights and the protection of victims. They argued that the plan's scope should be altered to ensure the focus was as much on protecting victims as prosecuting traffickers.¹⁶

More than a year after the consultation, the first comprehensive policy in the form of a UK *Action Plan on Tackling Human Trafficking* was launched in March 2007. The Plan is expected to put in place some of the missing structures and systems. The Plan summarises activities that have been undertaken so far and proposes further action. It announces that a human rights approach will be applied and argues that "a strong enforcement arm is not effective unless the corollary victim protection and assistance is in place."¹⁷

The Action Plan addresses the issue of trafficking in four main areas: prevention, protection, prosecution and child trafficking. It lists a series of actions to tackle trafficking, suggesting the government is strongly committed to taking action. The time frame for the actions is rather ambitious and it will be difficult to achieve a shift in the practice on the ground in such a tight schedule. A major step forward is the aim to develop a national referral mechanism. This should ensure that systems that are lacking in coordination of responses of the various actors, and the missing formal procedures concerning protection and assistance will be put in place. Ensuring that victim protection is at the core of the referral mechanism will be the major challenge that needs to be dealt with for the UK to meet the minimum standards on protection specified in the Council of Europe Convention. It is difficult to depict how the actions tabled in the Plan will implement the human rights approach. Likewise, the assessment tool included at the end of the material does not include indicators to evaluate human rights impacts of the Plan.

One of the merits of the Plan's chapter on prosecution, investigation and law enforcement is the accent on including trafficking in the list of indicators by which police performance is measured. This should make a difference to the number of investigations into trafficking across the UK.

With regard to trafficking for labour exploitation, the Plan sees evidence on the incidence of forced labour as insufficient to conclude that this form of trafficking poses a significant problem in the UK, and suggests that more knowledge is needed in this area. It does, however, recommend the development of guidance for workplace inspectors to identify abuses. The guidance is intended to provide information on "when and how to share intelligence with colleagues in other government departments about these abuses".¹⁸ However, it falls short of making a connection with protection and assistance to trafficked persons. Similarly, the section of the Plan that concentrates on supporting victims through the criminal justice systems focuses predominantly on vulnerable and intimidated victims and the special measures they are eligible, along with witness protection. The chapter does not spell out how the new human rights approach will be implemented in law enforcement and prosecution responses to trafficking, nor does it foresee that applying this approach will be one of the criteria used to evaluate police performance on trafficking.

Access to redress and compensation is another issue vital to the human rights approach. Securing realistic access to compensations has not been an item in anti-trafficking policy in the UK. Despite the £5.5 million¹⁹ (approximately US\$11 million) seized from organised crime in 2005, some of which came from trafficking, trafficked persons have not been able to benefit from this money. No trafficked person has ever obtained compensation as a part of criminal proceedings against traffickers. Similarly, no compensation has been obtained through civil claims. In

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one instance, a trafficked woman, assisted by the Poppy Project, an NGO providing support to trafficked persons, received compensation through the Criminal Injuries Compensation Scheme. Unfortunately, even the new policy document does not suggest it is necessary to evaluate whether trafficked persons have, in practice, access to compensation via the routes available in the UK.

Victim protection has not been considered an essential element in practical law enforcement responses to date. Prosecution of perpetrators and enforcement of immigration regulations have been the priorities, often to the prejudice of the protection of the rights of those who have been trafficked. In 2006, the Metropolitan Police (the police service for London), in cooperation with all police forces across the UK, implemented Operation Pentameter, the first coordinated operation to enforce the law prohibiting trafficking. This focused on trafficking for sexual exploitation and, for the first time, victim protection. A victim-centred approach was proclaimed as one of the key elements of this operation. NGOs were involved in the preparation and conduct of the operation, which led to the identification of 84 trafficked women. Despite the victim-centred approach, in comparison to the operational side, the coordination on referrals was weak, probably due to the lack of general guidelines and training within the police force on referral procedures and knowledge of what action was appropriate to protect trafficked persons. Hence, there were significant differences in handling cases in different regions, as the command over individual operations lay with regional police heads. Information was made available regarding the number of arrests and of suspected traffickers who were charged, but no concrete information was made public to indicate how many trafficked women were provided with assistance. Some of them were reported as being in the care of NGOs or faith-based organisations, but overall it was not known what happened to them afterwards, either in terms of protection and assistance provided, or access to justice. After Operation Pentameter, the support centres reported that there was virtually no other police activity on trafficking.

Following Operation Pentameter, a new multi-agency anti-trafficking police-based centre, the UK Human Trafficking Centre (UKHTC), was launched in October 2006. It was presented as the first institution of its kind, with a national remit to address trafficking from a broader perspective. The authorities claim the centre has the potential to harmonise and systematise UK law enforcement responses to all forms of trafficking, while consulting and utilising input from various other stakeholders, including NGOs. One of its assets appears to be its multi-agency nature, incorporating specialist personnel from a range of law enforcement agencies, including the Immigration Service and prosecutors. Such an arrangement is a step forward in overcoming the recent lack of overall coordination and unified command of police in combating trafficking. Lack of clarity in the division of responsibilities, particularly responsibility for taking a lead, among the various law enforcement bodies has repeatedly been brought up as a problematic issue by many stakeholders. In its initial public announcements, the UKHTC said it was aiming to develop and promote a victim-centred human rights approach. This statement of intention is a positive step forward. By the end of April 2007, it was too early to assess the impacts of the work of the UKHTC in changing attitudes and ensuring better coordination of the various stakeholders.

The UK Action Plan contains a separate chapter on child trafficking. While a strong focus is given to the identification of trafficked children, it is not evident from the document how the government intends to ensure the application of the human rights approach and give priority to the best interests of the child in protection, assistance and investigation procedures. According to international law, children under 18 are a specific category among trafficked persons and are entitled to additional protection and assistance. The leading NGO dealing with child trafficking in the UK, ECPAT UK, disagreed with the government's approach in dealing with child trafficking as a form of organised immigration crime. ECPAT said, by treating child trafficking within the paradigm of immigration crime, the British

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government was undermining the principles of non-discrimination and the best interests of the child. They were also concerned that the government's approach risked ignoring situations where children have been trafficked within the European Union (so no immigration crime is committed) or within the borders of the UK (internal trafficking). ECPAT UK considered the proposals in the draft Action Plan inadequate with regard to identification and protection of trafficked children, as the proposed measures were inconsistent with existing policy and legislation for safeguarding children.²⁰ The final Action Plan deals with child trafficking in a separate section and recognises that trafficked children have specific needs.

The director of ECPAT UK, Christine Beddoe, explained that it was common for people in the UK to consider that trafficking in human beings, when it did not involve sexual exploitation, inevitably involved the trafficked person in criminal activity. In a recent case of Vietnamese children trafficked for forced labour in cannabis factories in the UK, the child victims were detained, charged and no official advocacy was conducted on their behalf. Currently, there is no single agency responsible for the welfare of trafficked children. Specific support services for children who have been trafficked are also lacking. Some voluntary agencies have adapted existing programmes, but this has been more a reactive process. No safe house model is available either. Although the best possible care for children is available within the British social care system, this is often inaccessible for child victims of trafficking as immigration policy takes precedence.²¹

Deep concerns have been expressed by the charities dealing with children, such as ECPAT, about the government's recent policy (enforced by the Home Office Immigration and Nationality Directorate) to implement a special programme called 'Enforced Returns of Failed Unaccompanied Asylum Seeking Children'. They raised concerns that this programme could increase the risk of re-trafficking and endanger children. Children's organisations have criticised the government's approach for prioritising immigration concerns rather than child protection. The UK has a reservation on the *Convention on the Rights of the Child* (CRC). Consequently, rights laid down in the Convention are restricted for children under control of the immigration service, including those who have been trafficked.

In January 2007, ECPAT UK published the results of research on child trafficking, a report entitled *Missing Out*. The findings revealed that many children trafficked to the UK go missing from the social services centre where they have been placed and are never found. The research concluded that factors contributing to this situation include the limited resources available to local authorities, lack of expertise, and the uncertain immigration status of these children. In late 2006, a national Child Exploitation and On-Line Protection Centre (CEOP) was established within the British police. The centre's aim is to create a mechanism for centralised intelligence support, as well as guidance and training for law enforcement. The other current problem, which is the lack of identification of trafficked children, could potentially be tackled through this body, provided that appropriate training and cooperation with other relevant stakeholders is undertaken.

Recently, other steps have been taken to address the lack of systematic protection for trafficked children. The Home Office undertook to match the funding provided by a charity, Comic Relief, to start the operation of a Child Trafficking Advice and Information Line in 2007. The hotline will provide advice and guidance to help practitioners. The line will be run by NSPCC (National Society for the Prevention of Cruelty to Children) in partnership with ECPAT UK and CEOP.

Notwithstanding the separate section of the Action Plan dealing with child trafficking, it does not distinctly talk about how the human rights of trafficked children and their best interests will be mainstreamed in the individual

action. Nor has the UK government suggested it intends to withdraw its reservations to the *Convention on the Rights of the Child*.

Tragedies Shaping Policy

A particular phenomenon can be seen in the way policy debates have developed and changes have subsequently occurred in the UK. It seems to be the function of tragedies to bring the subject into the public eye. These tragedies appear to make it politically unacceptable for the government not to act. An example of this was the deaths of Chinese cockle-pickers who were being subjected to forced labour. This resulted in the passing of the Gangmaster Licensing legislation and prompted the subsequent discussion on a UK Action Plan. The most recent example in 2006 concerns a series of murders of sex workers that have once again opened public debate regarding whether prostitution should be decriminalised or regulated to decrease the risks connected with it.

In the past five years, concerns have emerged over the exploitation by ‘rough gangmasters’ (a term used in the UK to describe labour providers in some sectors of the economy, such as agriculture or food processing) of migrant workers performing temporary and casual labour. In 2002, the Ethical Trading Initiative (ETI), an organisation established by business, trade unions and NGOs, established the Temporary Labour Working Group (TLWG) to look into this issue in areas supplying the UK’s imports, even though the ETI’s focus was principally on labour rights and working conditions overseas. Based on evidence gathered, the TLWG began a campaign to introduce a licensing and registration scheme to regulate the operation of gangmasters and to protect workers (mainly migrant workers) from exploitation.

The plight of Chinese cockle-pickers

In February 2004, a group of at least 21 Chinese workers drowned in rising tides while collecting cockles at Morecambe Bay on the north-west coast of England. The workers were victims of forced labour, exploited by gangmasters. The public was shocked by this incident, as it lifted the veil on exploitation practices and shed light on the plight of migrant workers whose services and products were being consumed by large parts of the UK population. As a result of the tragedy, high priority on the political agenda was accorded to the proposal for legislation to regulate gangmasters. The *Gangmaster Licensing Act* was adopted on 8 July 2004 and the associated *Gangmaster (Licensing Authority) Regulations* in 2005. This was welcomed by many trade unions. Without the Morecambe Bay tragedy, it seems unlikely that the Act would have been adopted.

As a nation we were appalled by the tragedy at Morecambe Bay and collectively vowed ‘never again’. The days of illegal gangmasters, who profit from the misery of thousands of workers, defraud the state and drive good businesses to the wall, are numbered. With effective enforcement we can banish this modern-day slavery for good. Government has demonstrated the political will to end this outrageous exploitation; we now need them to ensure sufficient resources are allocated so that registration can flourish. This is a victory for trade union political action and I would like to thank Jim Sheridan MP for his hard work.²² (Tony Woodley, General Secretary of the Transport and General Workers’ Union, which led the campaign for legislation. Jim Sheridan was the Member of Parliament who introduced the Bill.)

The original government proposal on the scope of the Act was very limited in terms of the industries be covered. It had not included shellfish-gathering and/or the associated shellfish processing industry. Many agencies were

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appalled by this shortcoming, reckoning that the new law would not prevent such tragedies from recurring and suggesting that it paid no attention to public opinion.

The entire food industry is alarmed that the Government is considering excluding the great majority of food processing and packing from the *Gangmaster (Licensing) Act*. The Act was agreed with full cross party support in both Houses under assurances from ministers that any room for exclusions and loopholes would be kept to an absolute minimum. Now, at the 11th hour, we face a real danger that the fastest growing sector of the industry – packing and processing – will be excluded from the Act. This will create huge loopholes and allow unscrupulous operators to continue to exploit vulnerable workers (ETI Director and Chair of the TLWG, Dan Rees).²³

However, as a result of pressure from various agencies pointing out the continuing exploitative practices in work done along Britain's shoreline, the scope was extended to include these too. The Gangmaster Licensing Authority began its registration work in 2006 and prosecutions under the Act consequently started before the end of 2006. Enforcement officers have the power to arrest for offences such as:

- operating without a licence;
- using an unlicensed gangmaster subject to reasonable steps;
- obtaining or possessing a false licence or false documentation which is likely to cause another person to believe that a person acting as a gangmaster is licensed; and
- obstruction of enforcement officers exercising their functions under the Act.

Offenders are liable to 12 months imprisonment if convicted of operating without a licence or possessing a false licence or documents. Repeat offenders will face up to 10 years imprisonment. Since the licensing regulations had been in effect for only a short time by early 2007, no information was available on their implementation. Nevertheless, critical voices from the field were already claiming that the industries covered by the licensing scheme (i.e. agriculture, shellfish-gathering, and associated processing and packaging) were not the only sectors where exploitation was occurring and that the legislation would have to be amended to include other industries in which use of labour providers was common practice, such as the construction industry.

The *Gangmaster Licensing Act* and the Licensing Authority is not explicitly intended to stop trafficking. Nevertheless, it represents one of a range of instruments that can be used to tackle the environment in which trafficking flourishes, targeting a specific form of exploitation. At the same time, it could help in identifying trafficked migrant workers. Yet, as neither this nor the UK's specific anti-trafficking legislation contains provisions that would guarantee protection of the rights of those who have been trafficked, it is hard to see how the Licensing Authority will contribute to the protection of trafficked persons and their rights. Hence, it is key to train and sensitise Licensing Authority staff about trafficking in persons and identification of such situations, so that trafficked migrant workers can be referred for appropriate assistance and protection:

...senior sources in the enforcement agencies doubt it will curb illegal activity and fear gangmasters will find ways around the legislation. The pattern that emerges from *The Guardian* investigation is that when one gangmaster operating unlawfully is closed down, another is alleged simply to take his place. Official investigation into allegations has been difficult because workers are frightened to talk and many fear deportation.²⁴

Murders of sex workers in England

In December 2006, several sex workers were found dead in the area around the town of Ipswich in eastern England. This series of murders precipitated a debate in the media over whether prostitution should be legalised. The UK's current legislative framework creates a situation of a legal vacuum, where sex work is neither legal (i.e. regulated or legalised), nor illegal. Similarly, as in other countries, it is an offence to solicit for prostitution. Paradoxically, it is impossible for women to sell sex without breaking a number of laws while working. For instance, street sex workers routinely commit the offence of 'soliciting' in public or quasi-public spaces (under the terms of the 1959 *Street Offences Act* and the 1982 *Civic Government (Scotland) Act*), while their clients may be arrested for kerb crawling (under the terms of the 1985 *Sexual Offences Act* and the 2001 *Criminal Justice and Police Act*). Yet, these laws are enforced selectively and inconsistently by the police, some of whom have favoured a form of regulation whereby sex work is informally tolerated within a limited, specific area, as long as public complaints or political priorities do not demand a zero tolerance crackdown.²⁵

In January 2006, the Home Office published a policy strategy on prostitution, *Paying the Price*, which was a conclusion of a public consultation and legislative review. The strategy focus is on prevention, tackling demand, developing routes out of prostitution (especially for drug-addicted sex workers), and tackling off-street prostitution. It did not support the creation of so-called managed areas or "zones of tolerance" where sex work could occur. The Home Secretary at the time was reportedly planning a public debate around the liberalisation of the law and the creation of managed areas. However, this debate never occurred in depth, as the minister in office who initiated the debate was replaced. The former special advisor to the Home Secretary at the time, Katharine Raymond, described the problems surrounding the strategy in her article for *The Observer*, 17 December 2006:

I helped prepare a government paper called 'Paying the Price' which described our laws as "outdated, confusing and ineffective", and called for people's views on legalised brothels, registration for prostitutes and local-authority sponsored red light zones....only a handful of politicians wanted the report to see the light of day....In January this year the government finally came up with a watered-down series of proposals that took a small step in the right direction...Almost a year later, even these mild measures have not been enacted.

Katherine Raymond went on to say that the recent murders in December 2006 had opened the call for reforms once again and that the debate on the issue of decriminalising prostitution and giving women a safer place to work through licensed brothels should be brought into the public arena again. The new Action Plan takes this issue into account and recognises that "...the current definition of a brothel encourages women to work alone in order to avoid prosecution for keeping a brothel [*maximum penalty is seven years*]. This places them in significant danger and it is for this reason alone that the Government has proposed to amend that definition..."²⁶

It can be assumed that in light of these events, the government, in the Action Plan, proposes an amendment to the present definition of a brothel: "...the maximum penalty for keeping a brothel was recently increased to 7 years. However, although the thrust of the strategy is to eliminate all forms of sexual exploitation, we recognise that, in the meantime, the current definition of a brothel, encourages women to work alone in order to avoid prosecution for keeping a brothel. This places them in significant danger and it is for this reason alone that the Government has proposed an amendment to that definition."²⁷

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The UK government's strategy on sex work scarcely addresses the issue of migrant sex workers and migrant women in the sex industry who might have been trafficked. Given the current legal environment, migrant women who decide for themselves to earn money from sex work cannot, theoretically, do so legally, as there is no provision that would entitle them to do so. Those who are in the country legally inevitably become a part of the present paradoxical situation. Migrant sex workers whose residence in the UK is illegal are likely to be treated as illegal immigrants, unless they have been in the sex industry without giving their own consent and hence are victims of trafficking. The Network of Sex Work Projects, an informal alliance of organisations as well as sex workers, provides services and promotes sexual health in the UK. The alliance unites a number of projects across the country, including those assisting migrant sex workers.²⁸

The government's strategy on prostitution is connected to its policy on combating trafficking. The UK Action Plan relates to the prostitution strategy in the section on demand reduction. In several places, the text makes links to sexual exploitation and prostitution. The overall policy seems to emphasise raising awareness about trafficking for sexual exploitation and the risks involved among potential consumers of sexual services in order to achieve change in the behaviour and attitudes of men. The police also acknowledge that, on many occasions, men paying for sex have provided valuable intelligence. In Scotland, however, a different approach to demand reduction has been applied since February 2007 with the passing of the *Prostitution (Public Places) (Scotland) Bill*, making it a statutory offence to purchase sex in public places. No information on the impact of this new law on trafficked women and their human rights was available by March 2007.

3. Impacts of Migration Policy on trafficked persons and others at risk of being trafficked

The impact of migration policy on trafficking and trafficked persons in the UK is two-fold. First, it shapes attitudes and behaviour towards trafficked persons and the way they are portrayed. Until the adoption of the Action Plan, trafficking was considered simply as organised immigration crime. This implied that immigration law is inevitably being violated in trafficking cases. Consequently, some trafficked persons who are not legally entitled to be in the UK (i.e. their status is irregular) are treated merely as illegal immigrants: they are detained and subsequently subject to arbitrary deportation, without having access to protection or justice. However, this approach fails to respond adequately to trafficking cases involving people who do have legal immigration status in the UK, as well as cases of internal trafficking. The Action Plan takes into account the lessons learnt during Operation Pentameter, when a number of identified victims had entered the UK legally. Internal trafficking is now also included in the scope of the policy, although, internal trafficking seems to be limited to looking at instances of "British girls who may have been lured into prostitution, but from which they cannot escape due to the use of violence or coercion" or "children involved in prostitution".²⁹ This approach misses out other forms of exploitation and the interpretation of what constitutes trafficking does not correspond with the definition in the UN Trafficking Protocol, and focuses narrowly on commercial sexual exploitation rather than trafficking.

Second, migration policy has a major impact on the situation of trafficked persons in the UK. A policy paper, *Secure Borders, Safe Havens*, published in 2002 by the Home Office, has shaped the government's responses to trafficking. The aim of the policy paper was to promote integration and diversity in the UK. Trafficking was mentioned in a chapter entitled 'Tackling Fraud – People Trafficking, Illegal Entry and Illegal Working'. The pivotal point of this chapter was that a range of activities connected with trafficking should be made criminal

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offences. Neither assistance nor protection of trafficked persons was mentioned. In dealing with illegal migrants and illegal working, the policy paper did not see the issue of exploitation as the cardinal problem, although it acknowledged the vulnerability of illegal workers to exploitation and suggested fining employers for employing illegal workers.

For the purposes of this White Paper the focus is on illegal migrant workers...targeting employers as well as individuals knowingly working illegally, recognising, of course, that some of these people are victims. Where workers have no right to be in the UK, they can expect to be removed.³⁰

The policy paper did not examine the migration-trafficking nexus, that is to say, the close relationship between trafficking and migration. However, it showed a shift in government thinking with regard to economic migration. Economic migration was now seen as contributing to the UK's economy and new schemes were supposed to respond to economic needs. Highly skilled migrants had been the favoured. Whereas the circumstances in which low-skilled, often temporary workers, in 'dirty and dangerous' jobs (for which there is a high demand) were allowed into the country were significantly restrictive. The policy failed to put in place safeguards to prevent migrant workers being exploited or trafficked. It did not consider the possibility of strengthening the penalties for employers who connived with traffickers or condoned exploitation.

The recent Parliamentary Joint Committee on Human Rights report assessing the policy on trafficking also called for a review of immigration laws and policies "in the context of their impact on the victims of trafficking". The Committee came to the conclusion that immigration legislation and policy were key obstacles to promoting a human rights approach. The complexities of the different regimes governing the entry of foreign nationals into the UK were identified as one of the factors that created an environment in which exploitation and trafficking could occur. The Action Plan mentions some of the issues surrounding migration policy, but on the whole it fails to lucidly identify points of friction between the two policy areas and ways to address them.

The *Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004* is of particular concern for victims who have violated immigration law. This legislation mentions both immigration offences and trafficking in human beings. Section 2 makes it an offence to enter the UK without a valid passport. Given the policy prioritising prosecution of immigration offences, the application of this provision is harmful for trafficked persons. Many trafficked persons use false documentation to enter the UK, often because they are already under the control of traffickers. Cases of women trafficked into the UK were brought to the attention of Anti-Slavery International by lawyers. In these cases, the women had been charged under section 2 and some served prison sentences lasting several months. The common denominator in these cases was the authorities' failure to identify the women as victims of a trafficking-related crime. In some instances, the women told the authorities that they had been trafficked, but this fact was disregarded when a decision to prosecute was taken, apparently because the women were not considered credible. In others, the women were too scared to speak with authorities about their experiences; the fact that they were actually victims of trafficking came out accidentally, often only when they spoke to solicitors (lawyers responsible for giving them legal advice).

One of the cases concerned an African woman who was trafficked to the UK under a promise of work. When she reached the country, her passport was taken away by the people who had organised her trip, and she was told she must work in prostitution to repay her supposed debt. She refused and managed to run away. Terrified of the traffickers, she escaped to London and worked illegally to earn money for her return to her home country.

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Unable to obtain a passport from her Embassy, she managed to obtain a fake one, but was intercepted at the time of leaving the UK. During the sentencing remarks at her trial, the judge stated that she struggled to accept the woman's story, but did accept that she had been asked to work as a prostitute. She also had difficulty in understanding why the woman had not approached authorities but commented that she was not going to punish her for that. The trafficked woman received a sentence of 12 months imprisonment.³¹

This case clearly demonstrates a failure to protect the rights of trafficked persons by criminalising a trafficked woman and even considering additional punishment for someone who failed to come forward and contact the police (which indicates a complete lack of understanding of the experience of being trafficked).

In another case, a woman was trafficked from an eastern European country to the UK several years ago. The police 'freed' her from the brothel by raiding the premises and she was deported to her country. There, the same gang of traffickers captured her again and brought her back to the UK on a false passport. After escaping the trafficking situation for a second time (this time by herself, rather than being 'freed' by the police), she was charged in the UK with using a false passport. In spring 2007, her lawyers were struggling to have the charge dropped. The credibility of her account of her experience was being called into question by the police, as well as the criminal justice system.

Both cases demonstrate how present practice favours the punishment of immigration offences over the protection of the human rights of victims of crime and even the investigation of trafficking offences. Cases where women have been brought to detention centres after police raids on brothels, without being given access to any assistance, may provide further evidence of this pattern. Several lawyers have expressed concerns that some women they have met in detention centres who have been charged with the use of false documents may have been trafficked. However, currently the authorities have no incentive to reassess cases that display certain characteristics of trafficking. The Action Plan does acknowledge that trafficked persons have been, in some instances, charged with immigration offences they committed while in a coerced situation and ascribe this to the lack of awareness and identification by officials. The Plan intends to deal with the situation by increasing awareness and giving training. This matter will require greater attention, as it is one of the requirements of the Council of Europe Convention not to punish victims for unlawful activities into which they were compelled. Additional systematic and structural changes will be needed to provide prosecutors with guidance on how to act in such cases and, especially, how to resolve a situation in which a victim has been convicted under section 2 of the above-mentioned legislation (entering the UK without a valid passport) and is serving a prison sentence.

So far the policy that has been implemented has created a tension between the enforcement of immigration legislation and police pursuit of traffickers. A paper evaluating the first three years of operation of a government-funded support for trafficked women, the Poppy Project, reported tensions among stakeholders involved in running the pilot. The most significant tension was reported between the Immigration Service and the Home Office Victims Unit (VU). The Immigration Service and the VU had taken different approaches to the government's strategy on trafficking (*Secure Borders, Safe Havens*). The Immigration Service, whilst acknowledging the victim status of the trafficked women, also viewed the women supported by the Poppy Project as immigration offenders and, as such, felt it was failing to meet government targets for dealing with irregular immigrants.³² Evidently it is the government's responsibility to manage conflicts such as these. However, the UK authorities have not appeared keen to do so and the pronouncements of senior government figures have regularly confirmed the importance of their targets concerning illegal immigrants. The government announces in its Action Plan significant

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steps to bring on board the agency in charge of immigration, the Border and Immigration Agency. Nevertheless, it will need to address concrete contradictions that exist between migration and anti-trafficking policies that are an obstacle in promoting the human rights of trafficked persons and their referral to assistance.

In late 2006, the government announced that the number of deportations of irregular migrations was going to increase. According to a BBC report, 440 police officers were being seconded to help tackle illegal immigration, to be joined by newly recruited immigration officers. The government said that it was doubling the budget to pay for deportations to nearly £300 million (US\$580 million). By the end of 2007, 650 extra detention spaces were scheduled to be available to imprison irregular immigrants.³³ This can have even more negative implications on trafficked persons and pursuit of criminals.

When victims have irregular status in the country to which they have been trafficked (in this case, the UK), there is limited incentive for them to cooperate with the police. Under policies in force in early 2007, the police could not guarantee them protection, such as a 30-day reflection period, access to services or an opportunity to regularise their status. They could only try to negotiate protection for them with the Immigration Service. While this was happening in some instances, the Immigration Service often attempted to deport victims who the police regarded as witnesses and expected to be treated as victims of crime. The Immigration Service works on a quota system for deportations. So, for immigration officials, there is limited incentive to stop the deportation of victims of trafficking even if it assists police inquiries.³⁴ Trafficked persons, including those who have been subjected to slavery, are caught in a Catch-22 of the government's making.

Once the Council of Europe Convention comes into force, the UK will have to provide a reflection period to all trafficked persons. Consequently, the authorities should cease to regard granting a reflection period as a privilege. In the first half of 2007, granting a reflection period to a trafficked person was the exception rather than the rule. In order to ensure that trafficked persons can access their right to a reflection period, the UK authorities will have to set up a referral mechanism.

Migration policy is due to see further changes in the UK in the next two years. A new system of managed migration has been proposed that is set to operate on a system involving points awarded to various categories of workers based on their skills. While one of the aims of the change is to simplify the current system (which is very complex, with a number of routes governing economic migration to the UK), it does not contain any assessment on whether these proposed changes will affect the existing environment that makes it easy for migrant workers to be exploited.

The case of migrant domestic workers in the UK illustrates clearly the authorities' failure to assess the possible repercussions of policy changes. Despite good intentions and plans to follow good practice, alterations can actually have the opposite effect, trapping people in slavery instead. Domestic workers were already coming into the UK with the families employing them in the 1970s. In the 1980s it became increasingly clear that many migrant domestics were experiencing the types of exploitation associated with trafficking: situations of forced labour or slavery from which the victims were unable to escape. Two support groups were formed, Kalayaan (the name derived from the Filipino word for freedom), which assisted those with regular status, and Waling-Waling (named after a type of orchid found in the Philippines), a self-support group uniting irregular domestic workers. Migrant domestic workers, supported by these groups, trade unions and the labour movement, campaigned and worked together with MPs in the areas where the groups were based, to lobby the opposition

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party (at that time the Labour Party, which has been the governing party since 1997) for a change in the law to allow migrant domestic workers to leave abusive employers without compromising their immigration status.

After 10 years of campaigning, the law was finally changed. In July 1998, the Home Office minister at that time, Mike O'Brien, announced the legislative changes in the immigration rules for migrant domestic workers, permitting them to change their employers within the same category of work. This measure was a progressive one, not only because it gave domestic workers an opportunity to protect themselves against abuse, but also in that it gave those who had been trafficked a chance to escape from their situation without facing the danger of being punished as immigration offenders.³⁵ Currently migrant domestic workers who enter the UK accompanying their employer can leave that employer if they are abused or exploited (as long as their employer is not a diplomat). This gives them vital protection against violence, mistreatment and exploitation. They receive basic protection under UK employment law and are entitled to the national minimum wage, statutory holiday pay and a notice period. Their visa as a worker is renewed annually and renewal is dependent on the migrant domestic worker being in fulltime employment as a domestic worker in a private household at the time of renewal. There is also the right to apply for settlement after four years, as well as the right to family reunification.³⁶

Although by no means all migrant domestic workers subjected to exploitation in the UK have been trafficked, according to the statistics compiled by Kalayaan, more than half of their clients have had their passports withheld, which is one of the constitutive elements of forced labour. Hence the rights granted to them in the UK at present are a positive measure in protection and provision of viable opportunities to trafficked migrant workers. The measure allowing migrant domestic workers to change employers within the same category of employment has been repeatedly praised by other European countries as an anti-trafficking measure that is an example of good practice. Also the British government cited the fact that domestic workers can change employers as an example of good practice in an ILO document.³⁷

Paradoxically, the same government that introduced this progressive measure was, at the end of 2006, about to revert it. The proposed points-based system on migration management does not retain the existing arrangements for migrant domestic workers. Under the new proposal, they would only be allowed to come to the UK for six months (although the employers who bring their domestic workers with them would not have such a time limit imposed on their stay) and would not be allowed to change employers. Given the experience from before 1998, this would mean that the government was *de facto* condoning a return to forced labour and slavery.

New duties for employers of migrant workers are scheduled to be imposed as a part of policy package on tackling illegal immigration and illegal employment. The new arrangements will oblige employers, for example, to check workers' documents to see that they are genuine and to report if migrant workers fail to take up their jobs. Voices from the unions as well as immigration lawyers have warned that this practice will not be effective in preventing the exploitation of workers. Cases have been reported in the past of irregular workers being exposed to the authorities by their employers in a deliberate attempt to avoid having to pay their salaries. The workers concerned were subsequently deported, without any investigation into their possible exploitation or forced labour.

The General Secretary of the UK's Trade Union Congress (TUC), Brendan Barber, has commented, "The Government's concern about the number of UK employers who employ undocumented workers shows that bosses at the low end of the labour market know that it is too easy to get away with ignoring employment rights. The best way to meet government concerns is to ensure that workers are not exploited in any workplace and that

existing protections are properly enforced. Requiring all employers to police immigration status would simply give good employers more red tape, while giving bad employers more power to exploit migrant workers. What the Government must do is crackdown on rough employers, full-stop.”³⁸

Steve Cohen, a former immigration lawyer, argues that the real targets of sanctions were never intended to be the employers, but rather undocumented migrants. Rather than actually criminalising employers, he maintains that the intent was to transform them into partners to be controlled through fear of criminalisation (*note: under the new proposed points system for migration management, employers will have more obligations regarding the control of immigration status and documents of their employees*). The statistics speak for themselves. In 2004, there were 1089 ‘successful operations’ (i.e. raids) by the Immigration Service, which resulted in the arrest of 3,332 workers. However, only eight employers were successfully prosecuted.³⁹

4. The Human Rights Impact of UK’s Policies

There are three distinct aspects of policy in the UK that determine how trafficked persons are treated and whether they are given protection or not. These affect individuals trafficked for sexual exploitation, those trafficked for labour exploitation as well as vulnerable migrant workers who are at risk of being trafficked and placed in forced labour.

- Policy in the UK interprets trafficking primarily as an immigration offence and one for which organised crime is chiefly responsible. This approach both affects the actions taken on the ground by the authorities and influences the attitudes and approaches of those encountering trafficked persons. Trafficking is hence reduced to an issue of crime at the expense of those whose human rights have been (and often go on being) violated. Although the new policy seems to have abandoned this perspective, changes on the ground will require investment in changing the mindsets and behaviour of those who deal with trafficked persons on a daily basis.
- Another feature of policy in the UK is reflected in the decision to provide protection and assistance to trafficked persons on a case-by-case basis (in practice, this provision is limited to women or children trafficked for sexual exploitation, as there is no mechanism for providing protection to people trafficked into forced labour). The criteria determined by the Home Office for providing assistance to trafficked women by a project that has official funding are very narrow. Furthermore, the right to remain in the UK on a temporary basis is almost always made conditional on the person in question cooperating with the authorities in the context of a prosecution. Connected to this is the emphasis put on trafficking for sexual exploitation to the detriment of other forms of trafficking. This practice should change with the development of the referral mechanism as announced in the Action Plan, but it is useful to describe the existing situation and ensure that this description is available when the impact of the new policy and improvements it brings about are evaluated in the future.
- The third characteristic of the UK approach has been to disconnect policy decisions concerning trafficking from other broader issues, such as migration and the protection of the labour rights of migrants. In particular, the authorities seemed to have failed to assess the implications that migration and labour market policies have for trafficking and on the vulnerability of certain groups to being trafficked.

Case-by-case approach to protection of trafficked persons

At present, there is no specific provision within immigration legislation to allow those who are identified as victims of trafficking to remain purely on the basis of their status as a victim. All cases are dealt with on their own individual merits and leave to remain may be granted in appropriate cases, irrespective of the willingness of the individual to cooperate with the authorities. Victims of trafficking are entitled to apply for asylum in the UK and these applications will be considered in line with normal policy and procedures.⁴⁰

In practice, the case-by-case approach means that there is no general guarantee that trafficked persons in the UK will be protected or assisted. If a person is identified or comes forward and says she (or he) has been trafficked, the case is first evaluated on its merits before the person concerned is given any assistance. It is important to point out once again that this process is applied only to women trafficked for sexual exploitation. People trafficked for other forms of forced labour do not have access to protection and assistance as no mechanism is in place to allow it. The manner in which cases of trafficked children are handled is described later in this section.

The Home Office supplies funding for one project in the whole of the UK, the Poppy Project, which provides accommodation and support to women who had been trafficked for sexual exploitation. The Home Office's criteria meant that only a woman who had been forced to make money for others in prostitution in the UK in the previous 30 days and was willing to cooperate with the authorities was eligible for support. Since the Poppy Project started operating more than three years ago, various cases have been reported of women being refused support because they did not meet the Home Office's criteria. Between March 2003 and July 2004, when 169 cases were referred to the Poppy Project, the rate of eligibility of women went down. A total of 43 women were provided fully supported accommodation services, while 126 others were not. An evaluation of the Poppy Project showed that the main reason why women were ruled ineligible was that more than 30 days had elapsed since they had stopped having to prostitute themselves. Trafficked women who were identified at the point of entry into the UK were not to be denied a right to remain in the UK if they were willing to act as witnesses, but they would nevertheless not be eligible for support from the Poppy Project.⁴¹ Capacity reasons played their role as well. The capacity of the Poppy Project was increased along with the new funding received for the project in 2006. The criteria for eligibility were still in place at the end of April 2007. The Home Office, however, pledged to amend the eligibility requirements as a part of the Action Plan implementation.

Two cases illustrate how the Home Office criteria have resulted in a failure to protect the rights of trafficked women and left them in a very vulnerable situation. The first concerns a woman from South-East Europe, and the second, a woman from an East European country.

A. was recruited in her home country for a job in the entertainment industry. When she arrived in Italy along with her recruiters, she was passed on to another man who forced her into prostitution. After several months she was sold to another person and moved to France, where she was further exploited in forced prostitution. After several months, she understood that she was going to be sold further to Germany. With the help of one of the clients, she escaped and managed to move to the UK where she intended to apply for asylum. She was put in touch with the Poppy Project; however, since she had not been forced into prostitution in the UK and was very scared to talk to the police, it was not possible for her to enter the Poppy Project's assistance programme. She contacted a lawyer to help her with an asylum

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claim, but was advised that it would be very unlikely for her to receive asylum as she had not been trafficked into the UK. She was advised to return and apply for asylum in one of the countries where she had been trafficked. Furthermore, as her home country was on a list of countries deemed “safe countries” by the UK authorities (concerning asylum claims), it would further decrease her chance of obtaining asylum.⁴²

R. was offered a bar job in the UK. Upon arrival, she was transferred to a city in the Midlands where, along with several other women from different countries, she was locked in an apartment. They were told that they would have to provide sexual services to men who would be brought to the apartment by the traffickers. All of the women initially refused. The traffickers told them that they had a day to rethink their decision and threatened them with violence. They were kept locked in the apartment, without water and food. R. and two other women eventually managed to break a window and escape, as the apartment was on the ground floor. They got on a train to London, went to a police station and recounted their story. Apparently, the police called the Home Office to ask what to do and were instructed that, because the women had not actually been forced into prostitution, there was nothing the police could do to assist them.⁴³

The facts of these two cases show that protection to trafficked persons in general is not a matter of principle in the current practice in the UK. Rather, it is on the merit of the individual case or its compliance with a ‘checklist’ that determines what decision will be taken about providing protection and assistance to a trafficked person. Practitioners all over the world agree that without proper protection, trafficked persons remain vulnerable to reprisals from traffickers and face the risk of being re trafficked, let alone other implications such as social exclusion, discrimination and stigmatisation connected to revelation of the involvement in prostitution. Making assistance conditional on having been subjected to forced prostitution in the very recent past (30 days) is unprecedented elsewhere in Europe or elsewhere in the world. The message that this sends to trafficked women is, in effect, that if they are proactive and manage to escape before actual exploitation starts, they are making a mistake. If they stayed until they are raped or otherwise exploited, then they can claim assistance. Similarly, a woman who is too scared to come forward and talk about her ordeal (for reasons that have been well documented in other publications⁴⁴) within 30 days is then too late to qualify for assistance. Such criteria do not address the real nature of trafficking or the impact of the experience of being trafficked on the physical and psychological state of a trafficked woman. Furthermore, fears have been expressed that such narrow criteria may well become contributory factors to secondary victimisation and re trafficking.

Another facet of the case-by-case approach is the practice of making temporary leave to remain and protection for trafficked women conditional on their cooperating with the authorities, both in the collection of evidence for prosecutions and beyond that. “In order to be eligible for temporary protection within the Poppy Project, victims of trafficking must be prepared to give evidence to the police. They are also required to fully cooperate with the immigration authorities, including cooperating with arrangements for their removal.”⁴⁵ This practice, although it is often described as a ‘reflection period’ (i.e. a period to ‘reflect’ on whether to cooperate with the authorities or not), does not correspond to the principle that a reflection period should not be conditional on any form of cooperation with the authorities, precisely so that during this period the person in question is able to acquire information, as well as receive urgently needed support to be able to make an informed choice about whether or

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not to cooperate with the authorities.⁴⁶ The obligations under the Council of Europe Convention will require the UK to change this practice and grant a reflection period to all trafficked persons on an unconditional basis.

After prosecution proceedings are completed, trafficked women are not entitled to any further protection and their only option for remaining in the UK, if they feel unable to return to their home countries (for example, because of fear of reprisals from their traffickers), is to apply for asylum. Most of the asylum claims of trafficked women have been refused in the first instance. The refusal letters sent by the Home Office to claimants who allege that they were trafficked often demonstrate no understanding of the issue of trafficking. Constraints faced by women who have been trafficked are demonstrated in cases documented in a report published by the Poppy Project.

S. was encouraged by a 'friend' to leave Nigeria for the UK, where she hoped to attend college. The friend later threatened to kill her if she did not repay £40,000 [US\$80,000], which was the cost of arranging her travel to the UK. S. was forced to sell sex but she eventually managed to escape after 18 months. She obtained legal advice, and the report of her trauma was submitted with her asylum claim. The Home Office refusal letter stated: It is noted that at your asylum interview you were very unsure of dates which, if your claim were true...should have been firmly impressed on your memory. Failure to collect dates integral to your asylum claim seriously undermine(s) the credibility and veracity of your account.⁴⁷

The Poppy Project's analysis shows other examples of the Home Office's refusal letters contradicting previous case law on the effects of trauma and also the Home Office's own Gender Guidelines on interviewing and credibility of asylum claimants. The woman whose case is described above was later granted her claim under both the UK's *Human Rights Act* and the UN Refugee Convention. Nevertheless, if she had not received assistance from the Poppy Project, the chances of her asylum claim being allowed would have been considerably lower.

Most of the asylum claims of trafficked women have been refused in the first instance. From the small sample that the Poppy Project has used in its analysis, 80 per cent of the cases were allowed on appeal. This is six times higher than the national average for all asylum claims in the UK during the period 2001–2004. The conclusion is that support from the Poppy Project may increase (enormously) the chances of a trafficked woman receiving asylum, or at least make it more likely that her claim will be considered credible.⁴⁸

Current policy does not provide people trafficked for other forms of exploitation with the possibility of exercising their rights, particularly their internationally-recognised right to protection. Trafficked people are left without viable options for help and protection. Either they remain in the situation of exploitation and hope that the conditions will eventually improve (as suggested in accounts by individuals who have suffered forced labour in the UK⁴⁹) or decide to be proactive and look for a way out and try and get help or turn to more desperate solutions. Recently, the media reported about *a case of a Latvian man who was trafficked and was exploited for labour in one region of England. In despair, not being able to obtain help anywhere, the man found a very precarious way to escape from his difficult situation. He committed a crime right in front of the police in order to get himself arrested and deported to his home country.*⁵⁰

The case-by-case approach should theoretically apply to cases of trafficking for forced labour as well. In practice, however, no assistance and protection has been afforded to persons trafficked for forced labour. Currently,

exploited and trafficked workers have “nowhere to turn”,⁵¹ with the single exception of an NGO, Kalayaan, that offers dedicated assistance to migrant domestic workers, some of whom have been subjected to such great levels of deception that they can be considered to have been trafficked. Despite the activities of various agencies, charities, individuals and trade unions, examples of good practice in assistance are developed in the UK at local level in an *ad hoc* manner and are not connected to any institutionalised system of referral and guaranteed protection and assistance. In the Action Plan, the government recognised the need to gather more information about trafficking for forced labour to ascertain whether this form of trafficking poses a serious problem. At the same time the government acknowledges the need to develop assistance to those trafficked for forced labour and plans to start a pilot project in this area in 2007.

Disconnection of the trafficking issue from the broader context of migration, labour rights and related policies

This section focuses on labour rights and policies connected to the labour market and their effects on the issue of trafficking and the situation of trafficked persons.

In a recent study about trafficking for forced labour,⁵² Anti-Slavery International identified the complex nature of migration and labour regulations as being one of the four main factors that affect the exploitation of migrant workers in workplaces in the UK and at the same time are underlying causes for forced labour as a result of trafficking. The complex web of regulations of entitlements to work for migrant workers and the rights as a result are also a function of their immigration status.

The system in the UK is very complex, with a great variety of visas and work permits for different categories of workers and countries of origin. Given the complexity of the labour inspection and the migration system, the wide range of departments and inspection agencies involved in different administrative procedures make it difficult for migrant workers to understand their entitlements, obligations and possibilities of help. With the addition of a language barrier, migrant workers are left to believe what dubious agents and intermediaries tell them about the rules in the country.⁵³

Lack of knowledge of their rights is, however, not the only aspect which prevents trafficked migrant workers in the UK from accessing their rights. Obstacles in the system and lack of guidance with respect to the detection of situations of exploitation in the workplace play a major role. The Institute of Employment Rights in London published in 2005 a book entitled *Labour Migration and Employment Rights*. In a review of this book,⁵⁴ Steve Cohen pointed out that this was the first publication in the UK to focus on the interaction between immigration status and employment rights. Similarly, there has been a lack of analysis and investigation into relationships between trafficking cases, policies combating trafficking and employment rights and immigration status.

Migrant workers who are legally in the UK are granted some of the employment rights of indigenous workers, depending on their immigration status or the form of visa they have. For example in a case of a Moroccan cook, who was in the UK with a legal work permit, his visa was tied to a specified employer. When his employer withheld his wages and his passport, he attempted to report his employer to the police but was, in turn, threatened with dismissal from his job and with being denounced afterwards to the authorities for remaining in the UK illegally. As he had heard about cases where irregular workers were intercepted and deported as a result of anonymous calls, he stayed in his job and put up with the violation of his human rights that his exploitation

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constituted. Furthermore, his immigration status prevented him from claiming some basic rights. “The undocumented cannot enforce their contracts of employment, secure payment of the minimum wage, claim unfair dismissal, and demand not to have unlawful deduction from wages, indeed claim to have wages at all.”⁵⁵

Even those migrant workers who have a legal status are often unable to access basic rights due to various obstacles in the system. “What ‘rights’ the documented – those migrants with permission to enter and work – possess are usually impossible to enforce. The ability to bring a case for unfair dismissal requires having been employed for a year – impossibility for short-term, temporary labour. The ‘right’ to a written statement of employment terms is pointless for those not literate in English.”⁵⁶ Added to this, as employment is often tied to accommodation, and eviction is the most common response after a worker has filed a complaint (but without being entitled to assistance such as housing, financial support, legal aid and representation and interpreting services), trafficked migrant workers have no realistic chance to exercise their employment rights.

Trafficking for forced labour also seems to be virtually invisible to those agencies that carry out various tasks of inspection at the workplace, for example concerning health and safety. Anti-Slavery International identified a number of cases of trafficking for forced labour in its recent research. However, none of these were identified as forced labour by the agencies that originally recorded the details. Hence, in instances where migrant workers had a chance to get in touch with an agency to deal with their problems connected to their exploitation (such as their wages being withheld), the agency did not investigate whether an offence linked to trafficking was occurring and the workers who had been abused remained without assistance and without having their rights protected or upheld.

Lack of coordination between agencies, along with the nature of the guidance on referral and dealing with suspected trafficking cases that is offered by central government, has led to inactivity and ignorance from the side of the various agencies that inspect workplaces. Many of them report noticing ‘suspicious things’. However, they have not been instructed to watch out for signs that would indicate the occurrence of trafficking or forced labour, nor are they encouraged to be alert to certain situations outside their specific remit. A social service employee who informed workers in a factory about national insurance numbers, noticed that the workers’ supervisor had many passports locked away in a drawer of his desk. The supervisor claimed that this was a safety precaution because there were cases of theft at the workplace. The social worker was very worried about the workers’ situation, but did not know what to do and was advised by her supervisor not to get involved in such issues.⁵⁷ The agencies concerned can thus countenance or close eyes from exploitation and slavery.

Trade unions, Citizens Advice Bureau (a non-governmental service with offices in over 3000 locations in the UK that provides free information and advice to help people resolve their legal, money and other problems) and other agencies that are in touch with migrant workers have begun to recognise the increase in the extent of exploitation and trafficking and ways to address them. However, these various agencies do not have a joint action plan. The Citizens Advice Bureau suggested the creation of a Fair Employment Commission,⁵⁸ a body that would monitor employment practices and working conditions and would link all the agencies carrying out various inspection tasks. It would establish a more coordinated system for investigation of complaints, inspections, advice, guidance and practical business support for small, low-profit employers, and pursue a proactive approach to secure compliance and, where necessary, enforcement of legal standards.

5. Conclusion

Insecurity and uncertainty are the realities of life for trafficked persons after they have escaped exploitation in the UK. The current system does not guarantee them protection, access to services, let alone justice. A legal framework exists to prosecute and punish those who traffic, but this framework does not offer protection to the victims, nor ensure that their human rights are respected. The implementation of the law in practice is often haphazard, as the anti-trafficking agenda has not been consistent with the government's priority to enforce immigration laws. The new UK *Action Plan on Tackling Human Trafficking* promises to shift this focus and introduce a human rights approach into anti-trafficking policy. In order to bring about a positive change, the challenge is to change the mindsets and behaviour of those who deal with trafficked persons on the ground, many of whom have not been seeing trafficked persons as victims of severe human rights violations. The perspective that sees trafficking as organised immigration crime has dominated in the UK. Translated into practice, an approach that involves protecting the rights of trafficked persons is *ad hoc*, often treating trafficked persons as criminals committing immigration offences rather than victims of serious crime. Interpreting trafficking as an issue of immigration crime fails to restore justice in their world or protect them from repeated exploitation.

The government has made positive alterations in the legal framework and some at the institutional level. Along with the police, it has encouraged publicity on subjects such as numbers of raids, people arrested and prosecuted. Very rarely, however, is the public offered information about victims, or what happened to them after they had been 'rescued' and what help the government offered them. It appears to be mirroring what it believes to be the public's mood, that is to say, opposed to immigration and not sympathetic to migrants. However, the outcomes of globalisation are evident in the UK. Migration flows are unprecedented from virtually all over the world, the economic benefits to the UK are clear and the labour market in many sectors has switched to outsourcing and subcontracting. It is not enough to recognise the economic benefits the UK gains from migrant workers (a portion of whom are victims of trafficking); it is also essential that the UK adopts measures to protect the rights of migrant workers and enable them to have access to remedies when their rights are violated. Trafficking does not happen in isolation. Its consequences and causes are connected to various areas of policy and social changes that are a function of economic policies and globalisation.

Supporting programmes in the countries from which people are trafficked into the UK (or subjected to forced labour) is important. Nevertheless, they are not the ultimate cure. More money and coordinated efforts have to be invested in dealing with the situation of trafficked persons. Looking at their circumstances from the human rights perspective, examining the causes and contributory factors as well as the feasibility of trafficked persons getting access to justice – this is a challenge requiring a unified, comprehensive strategy that would equally focus on prevention, prosecution and protection of the rights of trafficked persons. Such a system is still missing.

The launch of the UK Action Plan provides an opportunity to balance the hitherto unequal attention paid to enforcement and protection of trafficked persons. Rigorous application of the human rights approach to trafficked persons and prompt implementation of the Council of Europe's Convention are steps that should follow on the path opened up by the introduction of the UK anti-trafficking policy.

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- ⁹ Richards, Sarah. *Hope Betrayed: An analysis of women victims of trafficking and their claims for asylum*. Poppy Project, London, 2006, 6.
- ¹⁰ Council of Europe. *Council of Europe Convention on Action against Trafficking in Human Beings*, Article 12, para. 1.
- ¹¹ Ten ratifications are necessary for the treaty to enter into force. For an updated list of signatures and ratifications, see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=5/16/2007&CL=ENG>.
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- ²⁰ Response from ECPAT UK to the Home Office consultation on proposals for a UK Action Plan on tackling trafficking in human beings.
- ²¹ Interview with Christine Beddoe, Director of ECPAT UK, December 2006.
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United States of America

Jayne Huckerby

1. Introduction

Background

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

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

Focus on Transnational and Sex Trafficking

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

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

US Position on Prostitution and its Relationship with Trafficking

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

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

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

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

US Definition of Trafficking

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

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

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

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

Comparison between the US and UN Trafficking Protocol Definitions

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

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

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

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

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

Case of Crazy Horse Nightclub, 2001

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

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

2. Current Frameworks to Address Trafficking

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

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

TVPA, TVPRA 2003 and TVPRA 2005

TVPA

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

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

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

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

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

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

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

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

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

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

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

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

TVPRA 2003

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

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

TVPRA 2005

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

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

On signing the Act, President Bush stated that:

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

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

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

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

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

Laws and Policies Imposing Funding Restrictions for Anti-Trafficking Initiatives

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

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

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

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

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

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

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

Laws on Prostitution

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

3. An Analysis of Relevant Laws and Policies

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

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

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

Prosecution: Low Rates and Disproportionate Focus on Sex Trafficking

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Background

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

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

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

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

Immigration Options for Trafficked Persons

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

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

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

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

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

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

Continued Presence

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

T-visa

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

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

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

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

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

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

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

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

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

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

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

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

(Source: DOJ 2006a, 10)

Permanent Residency

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

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

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

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

Law Enforcement versus Immigration Objectives

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

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

5. The Human Rights Impact of Laws and Policies

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

Prosecution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Protection

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

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

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

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

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

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

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

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

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

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

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

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

Prevention

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

6. Conclusion

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

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

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

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

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ENDNOTES

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

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ANNEXE 1 **List of Acronyms**

ADB	Asian Development Bank
AFP	Australian Federal Police
ARCPPT	Asian Regional Cooperation to Prevent People Trafficking
ASEAN	Association of Southeast Asian Nations
AusAID	Australian Agency for Foreign International Development
BE	Buddhist Era (In Thailand, the dates are calculated from the date of Buddha's death.)
BNWLA	Bangladesh National Women Lawyers Association
BiH	Bosnia and Herzegovina
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFMEU	Construction, Forestry, Mining and Energy Workers Union (Australia)
CIS	Commonwealth of Independent States (countries which formerly belonged to the Soviet Union)
CRA	Child Rights Act (Nigeria)
DF	Department for Foreigners (Bosnia and Herzegovina)
DIMA	Department of Immigration and Multicultural Affairs (Australia)
DOJ	Department of Justice (US)
DPP	Director of Public Prosecutions (Australia)
DWCD	Department of Women and Child Development in India's Ministry of Human Resource Development
ECOWAS	Economic Community of West African States
ECPAT	End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (previously End Child Prostitution in Asian Tourism)
EU	European Union
GAO	US Government Accountability Office
GAATW	Global Alliance Against Traffic in Women
GMS	Greater Mekong Sub-region
GPAT	Global Programme Against Trafficking in Human Beings (run by the UNODC)
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
ICE	Immigration and Customs Enforcement (US)
ILO	International Labour Office and International Labour Organization
ILO-IPEC	See IPEC

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IOM	International Organization for Migration
IPEC	International Programme on the Elimination of Child Labour (part of ILO and referred to as ILO-IPEC)
ISMWA	India's Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979
ITPA	India's Immoral Traffic Prevention Act (1956)
MWCA	Ministry for Women and Children Affairs (Bangladesh)
NAPTIP	National Agency for the Prohibition of Trafficking in Persons (Nigeria)
NAPTIP Act	Nigeria's Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003
NCW	India's National Commission for Women
NHRC	India's National Human Rights Commission
NPA	National Plan of Action (various countries, designed to take action on a variety of issues)
ODIHR	The OSCE's Office for Democratic Institutions and Human Rights
OHCHR	United Nations Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PATWA	ILO Programme against Trafficking and Forced Labour in West Africa
SAARC	South Asian Association for Regional Cooperation
SEE	South Eastern Europe
STD	sexually transmitted disease (or infection)
TVPA	US Trafficking Victims Protection Act of 2000
TVPRA	US Trafficking Victims Protection Reauthorization Act of 2005
UKHTC	UK Human Trafficking Centre
UNHCR	United Nations High Commissioner for Refugees
UNIAP	United Nations Inter-Agency Project on Human Trafficking (covering the Greater Mekong sub-region in South East Asia)
UNICEF	United Nations Children's Fund
UNICRI	UN Interregional Crime and Justice Research Institute
UNODC	UN Office on Drugs and Crime (the secretariat within the UN for the Convention against Transnational Organized Crime and its Trafficking Protocol), which runs a Global Programme against Trafficking in Human Beings
USAID	US Agency for International Development (US government department responsible for development cooperation)
WHO	World Health Organization

ANNEXE 2

Glossary of Terms

adolescent	A person between the ages of 10 and 19.
bonded labour	See debt bondage.
child	The word ‘child’ is used in accordance with the definition contained in Article 1 of the UN Convention on the Rights of the Child: “For the purpose of this present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.”
child prostitution	The use of a child in sexual activities for remuneration or any other form of consideration.
commercial sex	Earning money from sexual activities (either sexual intercourse or other activities).
commercial sexual exploitation of children	The sexual exploitation of a child for remuneration in cash or in kind, usually but not always organised by an intermediary (parent, family member, procurer, pimp etc.), mainly for the purposes of prostitution and production of pornography.
debt bondage	“The status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined” (Article 1 (a) of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956).
exploitation	Partially defined in Article 3 (a) of the UN Trafficking Protocol: “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” No agreement was achieved when the UN Trafficking Protocol was being discussed on precise definitions of the terms ‘sexual exploitation’ and ‘exploitation of the prostitution of others’.
immigration official	Includes border police and others involved in processing new arrivals at airports, ports and other frontier crossing points.
law enforcement official	Police officer or other officials responsible for enforcing the law.
National Referral Mechanism	Title used for procedure designed by ODIHR-OSCE for ensuring coordination between ministries, NGOs and others involved in caring for victims of trafficking and making decisions about them.
non-national	Person from another country, foreigner.
Schengen visa	A single visa which gives access to 14 European Union countries and also to Iceland, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain and Sweden.
trafficker	A person who engages in trafficking in persons (as defined by the UN Trafficking Protocol).

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Trafficking Protocol	UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (2000).
UN High Commissioner for Human Rights' Recommended Principles and Guidelines	UN High Commissioner for Human Rights' Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002).
UN Suppression of Traffic Convention	UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949).
US TIP Report	The report published annually (since 2002) by the US Department of State about Trafficking in Persons.
young person	Refers to both children (under 18) and young adults who are now 18 or up to the age of 23.

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Table of Ratifications

	Australia		BiH		Brazil		India		Nigeria		Thailand		UK		USA	
Conventions	S	R	S	R	S	R	S	R	S	R	S	R	S	R	S	R
1. <i>International Covenant on Civil and Political Rights (1966)</i>	Dec. 1972	Aug. 1980		Sep. 1993		Jan. 1992		Apr. 1979		July 1993		Oct. 1996	Sep. 1968	May 1976	Oct. 1977	June 1992
2. <i>International Covenant on Economic Social and Cultural Rights (1966)</i>	Dec. 1972	Dec. 1975		Sep. 1993		Jan. 1992		Apr. 1979		July 1993		Sep. 1999	Sep. 1968	May 1976	Oct. 1977	
3. <i>Convention on the Elimination of All Forms of Racial Discrimination (1966)</i>	Oct. 1966	Sep. 1975		July 1993	Mar. 1966	Mar. 1968	Mar. 1967	Dec. 1968		Oct. 1967		Jan. 2003	Oct. 1966	Mar. 1969	Sep. 1966	Oct. 1994
4. <i>Convention on the Elimination of All Forms of Discrimination Against Women (1979)</i>	July 1980	July 1983		Sep. 1993	Mar. 1981	Feb. 1984	July 1980	July 1993	Apr. 1984	June 1985		Aug. 1985	July 1981	Apr. 1986	July 1980	
5. <i>UN Convention on the Rights of the Child (1989)</i>	Aug. 1990	Dec. 1990		Sep. 1993	Jan. 1990	Sep. 1990		Dec. 1992	Jan. 1990	Apr. 1991		Mar. 1992	Apr. 1990	Dec. 1991	Feb. 1995	
6. <i>ILO Convention on Forced or Compulsory Labour, Convention No. 29 (1930)</i>		Jan. 1932		June 1993		Apr. 1957		Nov. 1954		Oct. 1960		Feb. 1969		June 1931		
7. <i>ILO Convention on the Worst Forms of Child Labour (Convention No. 182) (1999)</i>		Dec. 2006		Oct. 2001		Feb. 2000				Oct. 2002		Feb. 2001		Mar. 2000		Dec. 1999
8. <i>Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)</i>	Sep. 1956	Jan. 1958		Sep. 1993		Jan. 1966	Sep. 1956	June 1960		June 1961			Sep. 1956	Apr. 1957		Dec. 1967
9. <i>Convention relating to the Status of Refugees (1951)</i>		Jan. 1954		Sep. 1993	July 1952	Nov. 1960				Oct. 1967			July 1951	Mar. 1954		
10. <i>Protocol relating to the Status of Refugees (1967)</i>		Dec. 1973		Sep. 1993		Apr. 1972				May 1968				Sep. 1968		Nov. 1968
11. <i>Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)</i>	Dec. 1985	Aug. 1989		Sep. 1993	Sep. 1985	Sep. 1989	Oct. 1997		July 1988	June 2001			Mar. 1985	Dec. 1988	Apr. 1988	Oct. 1994

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	Australia		BiH		Brazil		India		Nigeria		Thailand		UK		USA	
Conventions	S	R	S	R	S	R	S	R	S	R	S	R	S	R	S	R
12. <i>Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990)</i>				Dec. 1996												
13. <i>Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)</i>	Dec. 2001	Jan. 2007	Sep. 2000	Sep. 2002	Sep. 2000	Jan. 2004	Nov. 2004	Aug. 2005	Sep. 2000			Jan. 2006	Sep. 2000		July 2000	Dec. 2002
14. <i>Convention against Transnational Organized Crime (2000)</i>	Dec. 2000	May 2004	Dec. 2000	Apr. 2002	Dec. 2000	Jan. 2004	Dec. 2002		Dec. 2000	June 2001	Dec. 2000		Dec. 2000	Feb. 2006	Dec. 2000	Nov. 2005
15. <i>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)</i>	Dec. 2002	Sep. 2005	Dec. 2000	Apr. 2002	Dec. 2000	Jan. 2004	Dec. 2002		Dec. 2000	June 2001	Dec. 2001		Dec. 2000	Feb. 2006	Dec. 2000	Nov. 2005

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S – Signature

While signature does not bind a state, it does oblige the state to behave in a way which does not render the substance of the treaty meaningless when the state subsequently ratifies and solemnly undertakes to respect the treaty. <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5KZJAV>

R – Ratification

Ratification is the act of giving official sanction to a formal document such as a treaty or constitution. It includes the process of adopting an international treaty by the legislature, a constitution, or another nationally binding document (such as an amendment to a constitution) by the agreement of multiple sub-national entities. <http://en.wikipedia.org/wiki/Ratification>

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15. http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html

ANNEXE 4

About the Editor and the Researchers

Mike Dottridge, Editor of the Report

Mike Dottridge is an independent consultant on human rights, providing expert counsel and specialised services to NGOs and intergovernmental organisations. Since 1995, Mike's work has focused predominantly on child trafficking and the rights of migrant children, specifically in the areas of prevention techniques and the provision of protection and assistance to trafficked children. Mike holds a particular interest in human rights evaluation techniques and also acts as an advocate for more systematic monitoring and evaluation of work undertaken by NGOs and other organisations in this area. Prior to this, Mike was Director of Anti-Slavery International and spent 17 years with Amnesty International. Further to his editing work on *Collateral Damage*, Mike has authored a number of reports and papers on specific patterns of human rights violations, including *Action to Prevent Trafficking in South Eastern Europe: A Preliminary Assessment* and *Kids as Commodities? Child trafficking and what to do about it*. Additionally, in 2002, Mike was a member of the United Nations panel of experts that assisted in drafting the UN High Commissioner for Human Rights' *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.

Jayne Huckerby, Chapter on the United States of America

Jayne Huckerby is Research Director at the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law. Jayne holds a Bachelor of Laws with first class honours from the University of Sydney (LLB, Hons 1) and a Master's degree in Law from New York University, where she was a Vanderbilt Fellow and received the David H. Moses Memorial Prize in recognition of academic excellence. Prior to her work with CHRGJ, Jayne worked with the International Service for Human Rights in Geneva and has provided consultation services to the International Center for Transitional Justice (ICTJ) on gender and transitional justice, and to the United Nations Development Fund for Women (UNIFEM) on gender budget initiatives and human rights law.

Victoria Ijeoma Nwogu, Chapter on Nigeria

Victoria Ijeoma Nwogu is a lawyer with a Master's degree in International Affairs and Diplomacy. Victoria presently works with UNIFEM in Nigeria as Programme Specialist in gender and governance. Her current role is at the forefront of advocating for the Nigerian government to adopt more proactive measures in the protection and enhancement of the status of Nigerian migrants abroad. Prior to this, Victoria was National Programme Manager with the ILO Programme against Trafficking and Forced Labour in West Africa (ILO-PATWA), where she coordinated a baseline survey to determine the scale of the problem in selected regions of Nigeria. Victoria has also supported the Nigerian Anti-trafficking Agency (NAPTIP) in improving the organisation's data management systems and developing a National Action Plan on human trafficking. She has also worked for Global Rights: Partners for Justice and Human Rights Watch Monitor, where she undertook research on human rights issues in Nigeria, with a particular focus on human trafficking and migration. Victoria has several years experience in programming for non-profit organisations working on human rights, with a special focus on human trafficking, disability rights and development.

Ratna Kapur, Chapter on India

Professor Ratna Kapur is Director of the Centre for Feminist Legal Research and lectures at the Indian Society for International Law. She is currently a Fellow at the Programme for the Study of International Law at the International Institute for Graduate Studies in Geneva. Ratna holds an LL.M. from Harvard Law School and a Bachelor of Law (B.A. Law) from Cambridge University. She practised law for a number of years in New Delhi and now teaches and publishes extensively on issues of international law, human rights, feminist legal theory and postcolonial theory. Ratna also works as a legal consultant on issues of human rights for various UN bodies, including the Office of the High Commissioner for Human Rights, UNICEF and the Division for the Advancement of Women. Ratna is an Honorary Member of the Senior Society of Fellows, NYU Graduate School of Arts and Science, a member of the International Advisory Board of Social and Legal Studies (UK), as well as for *Feminist Theory*, an international interdisciplinary journal, and on the Advisory Board of the Centre for Feminist Legal Studies, University of British Columbia. Ratna's latest book is *Erotic Justice: Law and New Politics of Postcolonialism*.

Barbara Limanowska, Chapter on Bosnia and Herzegovina

Barbara Limanowska is an expert on human trafficking and women's rights, particularly in the Southeast European region (SEE). Barbara has worked as a consultant on anti-trafficking for the UN Office of the High Commissioner for Human Rights (OHCHR) in Bosnia and Herzegovina and as adviser to several UN and international agencies, including UNICEF and UNDP. Under the framework of the SEE RIGHTS project – a joint initiative of OHCHR, UNICEF and OSCE-ODIHR – Barbara has produced three reports on trafficking in human beings, the current situation and responses to human trafficking as well as on preventive measures. As co-founder of La Strada Poland, an NGO committed to fighting trafficking in women, Barbara has first-hand experience in working with trafficked persons.

Frans Nederstigt and Luciana Campello Ribeiro de Almeida, Chapter on Brazil

Frans Nederstigt is Coordinator of Projeto Trama in Rio de Janeiro, Brazil, an anti-trafficking consortium comprised of human rights organisation Projeto Legal, black women's rights organisation CRIOLA, grass-roots organisation IBISS and the human rights department of the law faculty at UNIGRANRIO university. Frans trained as a lawyer in The Netherlands, specialising in human rights, children's rights, international relations, immigration law and development. He worked for six years as an immigration and refugee lawyer in the Netherlands, including at Amsterdam's international airport. Frans holds a Master's degree in Political Development from the University of Manchester in the United Kingdom and is presently working towards becoming a practising lawyer in Brazil. In his current role with Projeto Trama, Frans works fulltime as an international lawyer and is responsible for networking.

Luciana Campello Ribeiro de Almeida is a psychologist with a Master's in Social Change and Development from the University of Wollongong, Australia. During her studies, Luciana specialised in the issue of trafficking in women and has since contributed her expertise to several publications in this area. Luciana has been an assistant at Projeto Trama since 2005. Projeto Trama has become one of the leading actors in the anti-trafficking framework in Brazil. Prior to this, Luciana, spent time with Ipas Brazil, an NGO working to increase women's ability to exercise sexual and reproductive rights and reduce the number of deaths and injuries stemming from unsafe abortions.

During 2007, both authors have undertaken consultation work for the UNODC Office in Brazil and advisory work for the Brazilian Ministry of Justice, Ministry of Women's Rights and the Ministry of Human Rights as part of the participative construction process for the first Brazilian Action Plan on the Confrontation of Human Trafficking.

Elaine Pearson, Chapter on Australia

Elaine Pearson works as Research Coordinator for AusAID's Asia Regional Trafficking in Persons (ARTIP) project, covering Cambodia, Indonesia, Lao PDR, Myanmar and Thailand. Additionally, she is a consultant to the International Labour Organisation's (ILO) Mekong Project to Combat Trafficking in Children and Women. Elaine initially began her anti-trafficking career with the Global Alliance Against Traffic in Women (GAATW) in 1999, following her graduation from law school in Western Australia. During her two years with GAATW, she researched and wrote *Human Rights and Trafficking in Persons: a Handbook*, a publication still in use around the world for assisting victims of trafficking. During the past six years, Elaine has worked on anti-trafficking projects in Europe, Africa, Hong Kong, Nepal and the Mekong Region for various non-governmental organisations, UN agencies and donors. She has written extensively on victim protection, the demand side of trafficking, exploitation, forced labour and the organ trade. Elaine developed and led the Trafficking Programme at Anti-Slavery International in London and, as part of this work, prepared the groundbreaking report on access to justice: *Human Traffic, Human Rights: Redefining Victim Protection*.

Jackie Pollock, Chapter on Thailand

Jackie Pollock has lived and worked in Thailand for the past twenty years. She was a founding member of the Migrant Assistance Program (MAP), a Thai NGO working on labour rights, women's rights and health issues among Burmese migrant workers in Chiang Mai, Mae Sot and Phang Nga. Prior to this, Jackie spent time volunteering with EMPOWER, a Thai sex workers' group, helping to establish a branch in Chiang Mai. Jackie is an expert in migrant issues in the region and has published extensively in this area. Currently, as part of the Mekong Migrant Network, she coordinates the Thai-Burma grassroots research team, who have contributed to two resource books on the needs and responses to migration in the Mekong region and the quality of life of migrants. Together with the team, she is presently working on an additional chapter investigating arrest, detention and deportation of migrants. Jackie has also contributed to CARAM-Asia publications, most recently to the *Foreign Domestic Workers Campaign-Kit*. In 2006, she was nominated as advocate of the year by the *Irrawaddy Magazine* for her dedication and contribution to advocating for migrants' rights.

Jyoti Sanghera, GAATW Board Member

Jyoti Sanghera has been with the Global Alliance Against Traffic in Women (GAATW) since its inception in 1994. Jyoti is Senior Associate at the Centre for Feminist Legal Research in India. She has a Master's degree in Women and Development from the ISS at The Hague and a Ph.D. in Sociology from the University of California, Berkeley, USA. Both her Master's and Ph.D. theses focused on aspects of sex work and trafficking, exploring dimensions of these issues in South and Southeast Asia. She has published numerous articles on prostitution, trafficking, human rights and globalisation, varying in genre from the academic to the journalistic. Jyoti has also taught in the

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Department of Women's Studies at the University of Victoria, Canada. Currently, Jyoti works with the Office of the UN High Commissioner for Human Rights (OHCHR) and is posted in Sri Lanka as Senior Human Rights advisor. Prior to this, Jyoti was the Advisor on Trafficking at OHCHR.

Klara Skrivankova, Chapter on the United Kingdom

Klara Skrivankova has worked with Anti-Slavery International as Trafficking Programme Coordinator since 2005, where she is responsible for research and advocacy activities focusing on the elimination of human trafficking. Klara's work has focused primarily on trafficking for forced labour and, in September 2006, she published a major report in this area in the United Kingdom. Prior to her work with Anti-Slavery International, Klara spent several years with La Strada in the Czech Republic, a member organisation of a leading European anti-trafficking network. Klara holds a BA degree in Humanities and a Master's degree in public and social policy from Charles University in Prague, Czech Republic.