



*The City University of New York*

**CUNY SCHOOL OF LAW**

*Law in the Service of Human Needs*



Human Rights Committee Secretariat  
Office of the United National High Commissioner for Human Rights  
8-14 Avenue de la Paix  
CH 1211 Geneva 10  
Switzerland  
Attention: Kate Fox/Sindu Thodiyil

December 19, 2012

Dear Committee Members:

The International Women’s Human Rights Clinic at the City University of New York School of Law (IWHRC),<sup>1</sup> the Legal Aid Society,<sup>2</sup> and The Sex Workers Project at the Urban Justice Center (UJC)<sup>3</sup> have prepared this letter to assist the Human Rights Committee Country Report Task Force for the United States (U.S.) at its 107th regular session, which will be held from March 11-28, 2013, in its review of the State Party’s compliance with the International Covenant on Civil and Political Rights (ICCPR or the Covenant) and the formulation of the list of issues for review. This letter focuses specifically on issues related to human trafficking into prostitution in the U.S., arguing that the U.S. has failed to take appropriate measures to prevent the criminalization of trafficking victims in violation of the ICCPR and must do more to provide an effective remedy for the harms of that criminalization, as required under the Covenant. While human trafficking affects many industries and labor sectors, for the purposes of this letter, all references to “trafficking” are understood to denote “human trafficking into prostitution.”

It is well established that people who have been victims of the crime of human trafficking have experienced a violation of their fundamental rights. All too often, though, instead of being treated as victims of human rights abuses, these individuals are treated as criminals. They are arrested, detained, and prosecuted, and then burdened with the stigma and collateral harms of having a criminal record—all for having engaged in criminal acts that they are forced into by their traffickers. International human rights law has recognized that treating trafficked persons as criminals violates their fundamental human rights.<sup>4</sup> While the U.S. has taken many steps to combat and punish human trafficking, victims of trafficking continue to face arrest, detention and prosecution in the U.S. for crimes they were compelled to commit. The failure to take adequate steps to prevent criminalization of trafficked persons violates the U.S.’s obligations under the ICCPR.

In addition to preventing the criminalization of trafficking victims, the U.S. has a clear obligation to provide an effective remedy to individuals who are improperly prosecuted and convicted.<sup>5</sup> Several individual states in the U.S. have taken strides toward establishing one such remedy—legislation that would allow trafficked persons who have been criminalized to vacate their criminal convictions. Although these vacatur provisions are a good first step to establishing an effective remedy,<sup>6</sup> they are not sufficient by themselves. The U.S. has an obligation to ensure that, where trafficked persons are criminalized, they have access to a range of remedies—including medical and psychological care,<sup>7</sup> compensation, and public apologies—to redress the harms that stem from the criminalization.

## **I. Criminalization of trafficking victims violates the ICCPR (Articles 7 and 8)**

Criminalization of victims of trafficking includes arresting, detaining, charging and prosecuting trafficked persons for crimes associated with their trafficking, such as violating immigration laws, working illegally, or engaging in prostitution.<sup>8</sup> Trafficked persons are more vulnerable to arrest, detention, and prosecution based on circumstances directly related to the trafficking; for example, “their identity documents may be forged or have been taken away from them, and the exploitative activities in which they are or have been engaged, such as prostitution, soliciting or begging, may be illegal in the State of destination.”<sup>9</sup> These arrests typically occur as a result of ineffective victim identification strategies and inadequate investigation and prosecution of trafficking offenses.

In addition to the physical and psychological trauma associated with the trafficking situation, trafficked persons endure additional mental suffering as a result of being treated like a criminal. Furthermore, criminal convictions create enormous barriers for individuals to move beyond the abuses of the trafficking and rebuild their lives once they finally escape from the trafficking situation. In many cases, criminalization can reinforce many of the factors that contribute to a vulnerability to trafficking in the first place, such as by limiting employment and safe housing options.

While this Committee has not explicitly addressed the criminalization of trafficking victims in its concluding observations or General Comments, the severity of the harms caused by such criminalization requires the Committee’s attention. Human rights experts, including the Special Rapporteur on Trafficking and the High Commissioner on Human Rights, recognize that criminalization of trafficked persons violates their fundamental rights.<sup>10</sup> We urge this Committee to reinforce this recognition by clarifying that State obligations to respect, protect, and fulfil the rights protected under the Covenant include a duty to ensure that victims of human trafficking are not criminalized for offenses committed as a result of having been trafficked. Specifically, States’ due diligence obligations include an obligation to take steps to identify trafficking victims to ensure that they are not put through the criminal justice system (article 8). States further have an obligation to refrain from arresting, detaining, prosecuting, and convicting victims of human trafficking where such actions result in severe pain and suffering or humiliation (article 7).

### **A. Article 8: The right to be free from all forms of slavery**

#### **1. States’ due diligence obligations under Article 8 include the obligation to identify trafficking victims and protect them from criminalization**

Article 8 of the ICCPR specifically prohibits all forms of slavery, the slave trade, and forced and compulsory labor,<sup>11</sup> which includes modern forms of slavery such as human trafficking into prostitution. The obligation to protect this right to be free from slavery includes due diligence obligations to prevent, investigate and punish human trafficking. This Committee has emphasized that these due diligence obligations require States not only to enact measures to prevent trafficking and impose sanctions on the perpetrators, but also to extend protective measures to victims of human trafficking.<sup>12</sup> Specifically, this Committee highlights “the apparent lack of awareness about trafficking in women and children on the part of law enforcement officials, prosecutors and judges.”<sup>13</sup> Ineffective victim identification and inadequate investigation and prosecution of trafficking foster continued trafficking in persons and constitute a violation of Article 8. This Committee has consistently expressed concern regarding the insufficient

measures that States have taken “to prevent trafficking and to provide assistance and support to the victims.”<sup>14</sup>

The Special Rapporteur on Trafficking has clarified that States have an obligation to not only criminalize trafficking, but also refrain from acts that criminalize trafficked persons.<sup>15</sup> In particular, she emphasizes that “criminalization . . . of victims of trafficking is incompatible with a rights-based approach to trafficking because it inevitably compounds the harm already experienced by trafficked persons and denies them the rights to which they are entitled.”<sup>16</sup> The Office of the High Commissioner on Human Rights, in its *Recommended Principles and Guidelines on Human Rights and Human Trafficking* has called upon States to guarantee “that law enforcement efforts do not place trafficked persons at risk of being punished for offenses committed as a consequence of their situation.”<sup>17</sup> Under the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, States are also required to establish comprehensive policies, programs, and measures to protect victims of trafficking from re-victimization.<sup>18</sup> To fully prevent re-victimization of those trafficked into prostitution under international law, States Parties must take measures to ensure that trafficked persons are not criminalized, but rather treated as victims of a crime.

## **2. The U.S.’s failure to properly identify victims violates the State’s due diligence obligations under Article 8**

While the U.S. has taken a number of steps over the past decade to improve the investigation and prosecution of human trafficking, these efforts have done little to prevent the criminalization of trafficked persons.

The U.S. is ranked as “Tier 1” in the Department of State’s 2012 Trafficking in Persons Report, indicating that the government fully complies with the minimum standards for the elimination of trafficking.<sup>19</sup> In its fourth periodic report to this Committee, the U.S. has explained that the Human Trafficking Prosecution Unit of the Department of Justice, in partnership with U.S. Attorney’s Offices, prosecutes trafficking crimes discovered in agricultural fields, sweatshops, suburban homes, brothels, escort services, bars, and strip clubs.<sup>20</sup> In fiscal years 2006 through 2010, these efforts resulted in the prosecution of 198 trafficking cases involving 494 defendants.<sup>21</sup>

As discussed above, prosecution of traffickers is only one component of the State’s obligations under Article 8; the State also has an obligation to refrain from criminalizing trafficking victims. U.S. federal law codifies this requirement in the Victims of Trafficking and Violence Protection Act of 2000 (TVPA). The TVPA states that victims should not be incarcerated or otherwise penalized for unlawful acts committed as a direct result of being trafficked<sup>22</sup> and prohibits detention of trafficking victims “in facilities inappropriate to their status as crime victims.”<sup>23</sup> Indeed, the U.S. considers efforts to prevent inappropriate incarceration of trafficking victims among the minimum standards for ranking states’ efforts to eliminate trafficking in the annual Trafficking in Persons report.<sup>24</sup> Yet, despite these international and domestic legal obligations, the U.S. continues to arrest, detain, prosecute, and convict trafficking victims—for crimes they are compelled to commit—at a consistently higher rate than their traffickers. For example, in contrast to the numbers of prosecutions of traffickers, in 2010, over 2700 individuals were arrested in New York City alone for engaging in prostitution or prostitution-related activities, yet many arrested for such crimes are victims of trafficking.<sup>25</sup>

The U.S. Department of State has explained that one of the most common forms of trafficking investigations is through raids on brothels by both federal and local police.<sup>26</sup> Yet, a

2009 study by UJC revealed that such raids have often resulted in arrests of the women on prostitution charges—of the women interviewed for the UJC report, the vast majority were victims of trafficking,<sup>27</sup> yet sixty percent of them had been arrested in local police raids.<sup>28</sup> Women who had been through such raids reported that “raids are chaotic and often traumatic events which left them frightened and confused, with no sense of what was happening or would happen to them.”<sup>29</sup> It was not clear to them which government agents were conducting the raid, the only perceived purpose was to arrest and deport them, and the potential outcomes of the raid were unknown.<sup>30</sup> The UJC report also notes that raids are an ineffective way to identify trafficked women or liberate them from their situation. One supervisor with a national organization providing victim services said, “Ninety percent of our [trafficking] cases are not from raids, not even law enforcement identified.”<sup>31</sup> The U.S.’s reliance on raids effectively deters the identification of trafficking victims and the prosecution of traffickers by instilling within victims an inherent fear of law enforcement. Such practices also illustrate the lack of protective measures available to trafficking victims in the U.S.; instead, the measures taken often result in jail time for trafficking victims and a mistrust of the criminal justice system.

Although anti-trafficking training for law enforcement personnel is growing, these efforts have not led to a reduction in the criminalization of trafficked persons. By failing to properly identify victims of trafficking, and then detaining and charging them with crimes committed as a result of their trafficking, the U.S. is in violation of its obligations under Article 8 of the ICCPR.

#### **B. Article 7: The right to be free from torture or cruel, inhuman, or degrading treatment or punishment**

When victims of trafficking are criminalized, their right to be free from cruel, inhuman or degrading treatment or punishment (CIDT) under Article 7 of the Covenant is also violated.<sup>32</sup> This Committee has explained that Article 7 protects both the dignity and the physical and mental integrity of the individual.<sup>33</sup> While neither Article 7 of the ICCPR nor Article 16 of the Convention against Torture<sup>34</sup> explicitly define CIDT, CIDT is generally considered to consist of an act committed by a public official—which includes police, judges, and district attorneys—that causes severe pain or suffering (for “cruel and inhuman treatment”) or is aimed at humiliating the victim (for “degrading treatment”).<sup>35</sup> In contrast to torture, the Committee against Torture has clarified that CIDT does not require that the act be committed with intent for a specific purpose,<sup>36</sup> and the former Special Rapporteur on Torture has explained that it is sufficient for the act to have been negligently inflicted.<sup>37</sup>

This Committee has expressly noted that prohibitions of CIDT include acts that cause not only physical pain, but also mental suffering.<sup>38</sup> While there are no clear criteria for measuring the severity of physical or mental pain and suffering that constitutes cruel and inhuman treatment, international human rights bodies tend to rely on both objective and subjective factors in making this determination. Objective factors can include the duration of the conduct, the physical and mental effects of the conduct, and the manner and execution of the conduct, while subjective factors might include the victim’s sex, gender identity, age, and state of health.<sup>39</sup> The Inter-American Court decision in *Miguel Castro-Castro Prison v. Peru* exemplifies how subjective factors may be used in determining whether the abuses in question constitute CIDT. In that case, female detainees, some of whom were pregnant, were stripped and subjected to physical and psychological abuse.<sup>40</sup> The Inter-American Court found that this treatment, including forcing female detainees to remain naked in front of male guards, would result in “serious psychological and moral suffering” and therefore constituted CIDT.<sup>41</sup>

## **1. The harms suffered by trafficked persons who are criminalized constitute CIDT and violate the U.S.'s obligations under Article 7**

Criminalized victims of trafficking suffer an array of harms during arrest, detention, and prosecution, and as a result of their criminal convictions, that amount to CIDT. These harms are exacerbated when the psychological and physical health of trafficking victims is taken into consideration. Survivors of trafficking commonly exhibit symptoms of post-traumatic stress disorder, depression, and anxiety, and they may also suffer from malnutrition, exhaustion and a compromised immune system, as a result of denials of food and sleep during their exploitation.<sup>42</sup> Health status is a subjective factor that should be taken into consideration when determining whether the harms suffered as a result of criminalization amount to CIDT.

Putting trafficking victims through the humiliating and often traumatic arrest process constitutes CIDT. During an arrest for prostitution, law enforcement personnel frequently expose persons engaged in prostitution—many of whom are trafficking victims—to inappropriate police conduct, including lewd comments, making the arrested individuals “remain naked or unclothed in front of various officers for extended periods of time,” propositioning the arrested individuals, or requesting sex in exchange for not arresting them.<sup>43</sup> This police treatment during arrest is analogous to the treatment the female detainees in *Miguel Castro-Castro Prison* suffered, and similarly rises to the level of CIDT.

In addition, survivors of trafficking suffer abuses amounting to CIDT when law enforcement officials place them in closed shelters, rehabilitation centers or other welfare facilities in conditions akin to detention, sometimes for extended periods.<sup>44</sup> Confining trafficking victims to detention-like facilities inflicts emotional suffering because detention-like conditions can cause the trafficking victim to re-experience his or her sense of confinement when under the trafficker’s control, resulting in psychological stress tantamount to severe mental harm.<sup>45</sup>

Trafficking victims not only face harms from arrest and detention, but also suffer the long-term consequences of having a criminal record after they escape from the trafficking situation. A criminal record, particularly for engaging in prostitution—itself a highly stigmatized activity—carries significant stigma and results in mental suffering. Criminal records can impede a trafficking survivor’s ability to apply for certain types of housing and pursue educational and employment goals, which can exacerbate the difficulties faced in trying to move beyond the trafficking situation. For example, G.M., a survivor of human trafficking, was fired from her position as a home health care attendant when the Department of Health carried out a background check and discovered her criminal record, leading to embarrassment, humiliation, and financial hardship.<sup>46</sup> Additionally, victims with criminal records may be haunted by the fear that their criminal record could expose their past to family and friends.<sup>47</sup> This fear of exposure can result in psychological suffering and continued feelings of humiliation.

The harms of criminalization amount to CIDT because they are the result of being arrested and prosecuted, acts committed by state actors; the harms were negligently inflicted because the state actors did not exercise due diligence in identifying the victim as a trafficked person; and the act results in both humiliation (a form of degrading treatment) and severe mental suffering (a form of cruel and inhuman treatment).

### **RECOMMENDED QUESTION:**

**What steps is the United States taking to ensure that survivors of trafficking are not criminalized, but rather recognized as crime victims?**

## II. Trafficking victims who have been criminalized have the right to an effective remedy (Article 2 in conjunction with Articles 7 & 8)

### A. Article 2.3: The right to an effective remedy

As demonstrated above, criminalization of trafficking victims is a violation of the human rights guaranteed under Articles 7 and 8 of the ICCPR. Article 2.3 of the ICCPR requires States Parties to provide an effective remedy to individuals whose substantive rights under the ICCPR have been violated.<sup>48</sup> General Comment No. 31 explains that remedies can include restitution, rehabilitation, compensation, as well as bringing the perpetrators of violence to justice.<sup>49</sup> This Committee has recognized that States Parties have an obligation to provide effective remedies specifically for victims of trafficking, including offering compensation and rehabilitative services,<sup>50</sup> and providing “adequate access for victims to lawyers and interpreters, health care and counseling, and to other forms of assistance and support....”<sup>51</sup>

Where the State has further victimized the trafficked person by treating her or him as a criminal, the obligation to remedy the harm of trafficking must respond to the distinctive harms of the criminalization. Secondary sources of international law have thus set forth several specific actions that States Parties must take to effectively remedy the violations criminalized trafficking victims experience:

**Trafficked persons should not be prosecuted and convictions should be vacated.** States Parties must not prosecute crimes that were committed as a result of being trafficked, and in the event that survivors are convicted of crimes related to the trafficking, they must be able to vacate such convictions.<sup>52</sup> The Special Rapporteur on Trafficking has clarified that States should not prosecute *any crime* that was committed as a result of being trafficked, and should allow convicted survivors to vacate any such convictions, including convictions for “sex crimes, begging, working or immigration violations.”<sup>53</sup> Her recommendation is thus not limited to arrests related to prostitution, but includes all crimes committed as a result of being a victim of trafficking.

**Proper training to prevent recurrence.** States must prevent recurrence of the violation,<sup>54</sup> including training law enforcement to recognize victims.<sup>55</sup> The Special Rapporteur on Trafficking has recognized that “criminalization is tied to a failure of the State to identify the victim correctly....”<sup>56</sup> Therefore, a fully effective remedy for criminalization would ensure that state and federal law enforcement agencies are properly trained to identify victims and to recognize which populations are at a high risk for trafficking, so that criminalization is less likely to occur. The Special Rapporteur on Trafficking suggests that States employ the identification tools developed by the International Labor Organization, the International Organization for Migration, and the United Nations Office on Drugs and Crime to better identify trafficked persons from the beginning.<sup>57</sup>

**Medical and psychological care and compensation.** States must provide medical and psychological care and social services to survivors,<sup>58</sup> or offer

compensation for expenses incurred by accessing these services to remedy the mental harms resulting from criminalization.<sup>59</sup> As discussed above, trafficking survivors may suffer severe psychological harm as a result of their interaction with the police and the criminalization they endure. To remedy the mental suffering survivors endure, both the Special Rapporteur on Trafficking and the U.N. General Assembly's *Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law (Principles and Guidelines)* have stated that remedies should include funding for medical and psychological care,<sup>60</sup> and compensation for any economically-assessable physical or mental harm and moral damage.<sup>61</sup>

**Public Apology.** States Parties must offer measures of “satisfaction.”<sup>62</sup> The *Principles and Guidelines* explain that the remedy of “satisfaction” may consist of a public apology or judicial declaration acknowledging the violations of the survivor’s rights and accepting responsibility.<sup>63</sup> This symbolic remedy is particularly appropriate in the context of criminalization, as it calls upon police departments, prosecutors, and judges to apologize for their failure to treat survivors of trafficking as crime victims, not as criminals.

### **1. Several U.S. states have enacted key legislation to remedy the harms of criminalization**

The U.S. has taken great strides to try to remedy the violations trafficking survivors experience, primarily by investigating and prosecuting perpetrators,<sup>64</sup> providing immigration relief to survivors from other countries,<sup>65</sup> and supporting emergency services for victims.<sup>66</sup> Within federal law, two key statutes provide rehabilitative services to victims of trafficking. The TVPA supports trafficking victims within the U.S. through grants for victim services, including emergency aid and employment assistance,<sup>67</sup> and provides immigration relief.<sup>68</sup> Similarly, the Violence Against Women Act (VAWA) supports victims of trafficking through grants to relief service agencies, such as funding shelters for child victims.<sup>69</sup> However, none of these federal measures explicitly remedy the wrong of *criminalization* of trafficking victims.

To address this gap in relief, some U.S. states have enacted statutes to treat survivors of trafficking as victims of crimes—not as criminals. The first such statute was New York’s Criminal Procedure Law § 440.10, enacted in 2010, which allows trafficking victims to vacate prior prostitution-related convictions if the acts were committed as a result of having been trafficked.<sup>70</sup> As mentioned above, in 2010, “over 2,700 people were arrested and prosecuted in New York City Criminal Courts for engaging in prostitution-related activity,” and many of the individuals arrested are victims of trafficking.<sup>71</sup> Thus far, sixteen trafficking survivors have been able to have their convictions vacated under the new law,<sup>72</sup> but the New York statute has the potential to help thousands of trafficking survivors who were not properly identified as victims of crimes when they entered the criminal justice system. Because a criminal record can severely reduce employment opportunities, cause immigration consequences, and affect one’s ability to obtain public benefits, the ability to vacate one’s criminal convictions can have an immediate impact on a survivor’s wellbeing.<sup>73</sup> Vacating convictions that were a result of being trafficked can also have remedial psychological effects, as the judge’s order to vacate the prior judgments may be the first time the survivor is recognized and treated as a crime victim, rather than a criminal. Overall, the New York law is a key measure at the state level to help rehabilitate

trafficking survivors by putting them in as close a position as possible to their situation before the trafficking.

Moreover, there is an emerging trend in state legislation to vacate convictions imposed as a result of trafficking. Laws similar to New York's were passed in Nevada,<sup>74</sup> Illinois,<sup>75</sup> and Maryland,<sup>76</sup> all within a year of the New York law; and Vermont,<sup>77</sup> Hawaii,<sup>78</sup> and Washington<sup>79</sup> have also recently included vacatur provisions for trafficking survivors within their state law. This state-level movement signifies a growing consensus that those forced to perform acts against their will should not also be forced to suffer the harmful consequences for those offenses in the form of a criminal record.

## **2. A wider range of remedies is necessary to ensure effective redress of the harms of criminalization**

State vacatur laws are a crucial first step to remedying the effects of criminalization on survivors of trafficking. However, additional remedies are essential to fully redress the wrongs criminalized trafficking survivors have experienced due to the State's violations. To fulfill the U.S.'s obligations under international law, remedies must be available to trafficking survivors nation-wide and include: not prosecuting victims of trafficking and enacting laws in all states that enable them to vacate trafficking-related convictions; offering a public apology or another symbolic reparation to those criminalized; training law enforcement to better identify trafficking victims to ensure that future survivors are not criminalized; and providing psychological services to those survivors who were misidentified and mistreated in the criminal justice system.

Furthermore, existing state vacatur laws still fall short of the State's obligation not to prosecute crimes that were committed as a result of being trafficked insofar as the vacatur laws thus far only explicitly allow vacating prostitution-related convictions. This limited relief is contrary to the Special Rapporteur on Trafficking's statement that States should not prosecute *any crime* that was committed as a result of being trafficked. To truly remedy the effect of criminalization of trafficking victims, state statutes to vacate prior criminal convictions should allow judges to vacate *all* past convictions for acts committed as a result of being trafficked.

### **RECOMMENDED QUESTION:**

**Recognizing the remedies that some U.S. states have taken to address criminalization, what steps has the government taken to ensure that all survivors of trafficking who have been criminalized have access to effective remedies?**

The IWHRC, Legal Aid Society, and The Sex Workers Project at the UJC call upon the Committee to include these questions in its list of issues to be used when reviewing the U.S.'s compliance with the Covenant. Criminalized victims of trafficking endure a double violation of their fundamental rights under the Covenant: by being subjected to human trafficking in the first place and subsequently when the State arrests, detains, and prosecutes them for acts they were compelled to commit. The State Party must be called to account for these violations of the ICCPR to prevent continued re-victimization of survivors of human trafficking, and must ensure that such individuals have access to an effective remedy to redress these harms.



We hope that the information provided in this letter will be useful to the Task Force in drafting the list of issues to be raised with the Government during its periodic review. Please do not hesitate to contact us via phone (718-340-4602) or email ([suzannah.phillips@law.cuny.edu](mailto:suzannah.phillips@law.cuny.edu)) should you have any questions.

Sincerely,

**International Women’s Human Rights Clinic**  
**CUNY Law School**  
Cynthia Soohoo, Director  
Suzannah Phillips, Clinic Fellow

Student Attorneys:  
Carrie Coates  
Christine Ortiz  
Lisa Rast  
Jaclyn Sheltry

**Trafficking Victims Legal Defense and Advocacy Project**  
**The Legal Aid Society**  
Kate Mogulescu, Project Director

**The Sex Workers Project**  
**Urban Justice Center**  
Sienna Baskin, Project Co-Director  
Melissa Broudo, Staff Attorney

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<sup>1</sup> The International Women’s Human Rights Clinic at CUNY Law School works with domestic and international partners to advance and ensure women’s human rights, including equality and non-discrimination, sexual and reproductive rights, economic and social rights, and freedom from violence.

<sup>2</sup> The Legal Aid Society is the nation’s oldest and largest not-for-profit legal services organization, and represents low-income individuals and families across a variety of civil, criminal and juvenile rights matters, while also pursuing legal reform. The Society provides comprehensive legal services and handles more than 300,000 cases and legal matters annually.

<sup>3</sup> The Urban Justice Center serves New York City’s most vulnerable residents through a combination of direct legal service, systemic advocacy, community education, and political organizing. The Sex Workers Project provides client-centered legal and social services to individuals who engage in sex work, regardless of whether they do so by choice, circumstance, or coercion. One of the first programs in the nation to assist survivors of human trafficking, the Sex Workers Project has pioneered an approach to service grounded in human rights, harm reduction, and in the real life experiences of our clients.

<sup>4</sup> See, e.g., Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, ¶ 25, delivered to the Human Rights Council, U.N. Doc. A/HRC/20/18 (June 6, 2012) (hereinafter, Special Rapporteur on trafficking, Criminal Justice System Report); U.N. Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, U.N. Human Rights Council, E/2002/68/Add.1, 20 May 2002, Principle 7, Guidelines 2(5), 4(5), and 5(5) (hereinafter Trafficking Principles and Guidelines).

<sup>5</sup> International Covenant on Civil and Political Rights (ICCPR), art. 2.3, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. See also, Joy Ngozi Ezeilo, *Report of the Special*

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*Rapporteur on trafficking in persons, especially women and children, delivered to the Human Rights Council*, U.N. Doc. A/HRC/17/35 (Apr. 13, 2011) (hereinafter Special Rapporteur on trafficking, Effective Remedy Report); Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 28-29.

<sup>6</sup> Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 28.

<sup>7</sup> *See, generally*, Special Rapporteur on trafficking, Effective Remedy Report, *supra* note 5.

<sup>8</sup> Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 23.

<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g.*, Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶¶ 23-29; Trafficking Principles and Guidelines, *supra* note 4, at Principle 7, Guidelines 2(5), 4(5), and 5(5).

<sup>11</sup> ICCPR, *supra* note 5, at art. 8.

<sup>12</sup> Human Rights Committee, *Concluding Observations: Slovakia*, ¶ 10, U.N. Doc. CCPR/CO/58/SVK (2003).

<sup>13</sup> Human Rights Committee, *Concluding Observations: Serbia and Montenegro*, ¶ 16, U.N. Doc. CCPR/CO/59/SRB/MNE (2004).

<sup>14</sup> Human Rights Committee, *Concluding Observations: The Philippines*, ¶ 13 U.N. Doc. CCPR/CO/59/PHL (2003). *See also*, Human Rights Committee, *Concluding Observations: Georgia*, ¶ 15 U.N. Doc. CCPR/CO/57/GEO (2002).

<sup>15</sup> *See* Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶¶ 16-29.

<sup>16</sup> *Id.* ¶ 25.

<sup>17</sup> Trafficking Principles and Guidelines, *supra* note 4, at Guideline 5(5).

<sup>18</sup> U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 9, Nov. 15, 2000, 2237 U.N.T.S. 319 (hereinafter “Trafficking Protocol”).

<sup>19</sup> U.S. DEP’T OF STATE, THE 2012 TRAFFICKING IN PERSONS REPORT 51-52 (2012) (hereinafter TIP REPORT 2012).

<sup>20</sup> Human Rights Committee, *Consideration of the reports submitted by States parties under article 40: Fourth periodic report: United States of America*, ¶ 198, U.N. Doc. CCPR/C/USA/4 (2012).

<sup>21</sup> *Id.*

<sup>22</sup> Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101(b)(19) (2000) (finding that “[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked”).

<sup>23</sup> § 7105(c)(1)(A).

<sup>24</sup> TIP REPORT 2012, *supra* note 19, at 388 (including among the minimum standards for the elimination of trafficking “[w]hether the government of the country ... ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked”).

<sup>25</sup> *Oversight: Combating Sex Trafficking in NYC: Examining Law Enforcement Efforts – Prevention and Prosecution*, City of New York Committee on Women’s Issues and the Committee on Public Safety 2 (Oct. 19, 2011) (testimony of Kate Mogulescu & Katherine Mullen) (hereinafter *Combating Sex Trafficking in NYC*).

<sup>26</sup> TIP REPORT 2012, *supra* note 19, at 29.

<sup>27</sup> MELISSA DITMORE, PH.D., URBAN JUSTICE CTR., KICKING DOWN THE DOOR: THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 22 (2009) (noting that 14 of the 15 women interviewed had been recognized as trafficked persons by the U.S. government).

<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 10.

<sup>32</sup> ICCPR, *supra* note 5, at art. 7.

<sup>33</sup> Human Rights Committee, *Gen. Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (art. 7)*, ¶ 2 (44<sup>th</sup> Sess., 1992), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*.

<sup>34</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, art. 16, G.A. Res. 39/46, UN GAOR, 39<sup>th</sup> Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (entered into force June 26, 1987) (defining a CIDT as an act that does not amount to torture under article 1).

<sup>35</sup> *See, e.g.*, Manfred Nowak, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Civil and Political Rights, Including Questions of Torture and Detention*, (62<sup>nd</sup> Sess.), ¶ 37, U.N. Doc. E/CN.4/2006/6 (2005).

<sup>36</sup> Committee against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, ¶ 15, U.N. Doc. CAT/C/GC/2 (2008).

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- <sup>37</sup> Report of the Special Rapporteur on Torture, *supra* note 35, at ¶ 35.
- <sup>38</sup> Human Rights Committee, *General Comment No. 20*, *supra* note 33, ¶ 5.
- <sup>39</sup> AISLING REIDY, COUNCIL OF EUROPE, THE PROHIBITION OF TORTURE: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 12 (HUMAN RIGHTS HANDBOOK, No. 6, 2002), available at <http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC42EEBEAD50C3/0/DG2ENHRHAND062003.pdf>.
- <sup>40</sup> Miguel Castro-Castro Prison v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006).
- <sup>41</sup> *Id.* ¶ 308.
- <sup>42</sup> See, e.g., Jill Laurie Goodman, *What We Know About Human Trafficking: Research and Resources*, in LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 1, 12 (Jill Laurie Goodman and Dorchen A. Leidholdt eds., 2011), available at <http://www.courts.state.ny.us/ip/womeninthecourts/LMHT.pdf>.
- <sup>43</sup> Combating Sex Trafficking in NYC, *supra* note 25, at 2, 5-6.
- <sup>44</sup> *Id.*
- <sup>45</sup> See MELISSA DITMORE, *supra* note 27, at 45.
- <sup>46</sup> *G.M. v. the People*, 32 Misc.3d 274, 277.
- <sup>47</sup> See, e.g., Interview by IWHR Clinic with Trafficking Survivor (Dec. 5, 2011).
- <sup>48</sup> ICCPR, *supra* note 5, art. 2.3.
- <sup>49</sup> Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13.
- <sup>50</sup> Human Rights Committee, *Concluding Observations: The Kyrgyz Republic*, ¶ 14 U.N. Doc. CCPR/CO/69/KGZ (2000).
- <sup>51</sup> Human Rights Committee, *Concluding Observations: Serbia*, ¶ 16, UN Doc. CCPR/C/UNK/CO/1 (2006).
- <sup>52</sup> Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶¶ 27-28.
- <sup>53</sup> Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 89.
- <sup>54</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law, art. 23, U.N. GAOR, (60<sup>th</sup> Sess.), U.N. Doc. A/RES/60/147 (2005) (hereinafter Principles and Guidelines on the Right to a Remedy); Trafficking Protocol, *supra* note 18, art. 9; Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 34. See also Committee on the Elimination of Discrimination against Women (CEDAW Comm.), *Concluding Observations: Mauritius*, ¶ 25, UN Doc. CEDAW/C/MUS/CO/6-7 (2011).
- <sup>55</sup> Trafficking Protocol, *supra* note 18, at art. 10; Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 31. See also CEDAW Comm., *Concluding Observations: Mauritius*, *supra* note 54, ¶ 25.
- <sup>56</sup> Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 24. See also, Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, ¶ 27, delivered to the General Assembly, U.N. Doc. A/66/283 (Aug. 9, 2011) (“Accurate identification of trafficked persons is a prerequisite for trafficked persons to be able to exercise the right to an effective remedy, as it is almost impossible to do so if they are misidentified as irregular migrants or criminal offenders.”).
- <sup>57</sup> Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 33.
- <sup>58</sup> Special Rapporteur on trafficking, Effective Remedy Report, *supra* note 5, ¶¶ 24-26; Principles and Guidelines on the Right to a Remedy, *supra* note 54, at art. 21.
- <sup>59</sup> Principles and Guidelines on the Right to a Remedy, *supra* note 54, at art. 20.
- <sup>60</sup> Special Rapporteur on trafficking, Effective Remedy Report, *supra* note 5, ¶¶ 24-26; Principles and Guidelines on the Right to a Remedy, *supra* note 54, at art. 21.
- <sup>61</sup> Special Rapporteur on trafficking, Effective Remedy Report, *supra* note 5, ¶ 28; Principles and Guidelines on the Right to a Remedy, *supra* note 54, at art. 20.
- <sup>62</sup> Principles and Guidelines on the Right to a Remedy, *supra* note 54, at art. 22.
- <sup>63</sup> *Id.*
- <sup>64</sup> See, e.g., National Security Presidential Directive-22, Redacted, 65 (Dec. 16, 2002), available at <http://www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf> (last accessed Dec. 17, 2012); U.S. DEP'T OF STATE, ANNUAL MEETING OF THE PRESIDENT'S INTERAGENCY TASK FORCE TO MONITOR AND COMBAT TRAFFICKING IN PERSON (2012) (statement by Secretary of State Hillary Clinton), available at <http://www.state.gov/secretary/rm/2012/03/185905.htm> (last accessed Oct. 20, 2012).

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<sup>65</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457; Trafficking Victims Protection Reauthorization Act of 2005, P.L. 109-164; Trafficking Victims Protection Reauthorization Act of 2003, P.L. 108-193.

<sup>66</sup> The Department of Justice (DOJ) and HHS coordinate the DOJ Grants for Victim Services and HHS' Victims' Assistance program, respectively, to support recently-discovered victims. 22 U.S.C. § 7105(b); P.L. 106-386.

<sup>67</sup> 22 U.S.C. § 7105(b); P.L. 106-386.

<sup>68</sup> P.L. 110-457; P.L. 109-164; P.L. 108-193.

<sup>69</sup> CONG. RES. SERV., THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 18, 21 (2012).

<sup>70</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(i) (2012) (stating that the court may vacate a conviction where the arresting charge is for prostitution or loitering for the purpose of engaging in prostitution and the "participation in the offense was a result of having been a victim of sex trafficking").

<sup>71</sup> Combating Sex Trafficking in NYC, *supra* note 25, at 2.

<sup>72</sup> Legal Aid Society and UJC Vacatur Case Count, on file with the IWHR Clinic (Nov.21, 2012).

<sup>73</sup> THE POLARIS PROJECT, HUMAN TRAFFICKING LEGISLATIVE ISSUE BRIEF: VACATING CONVICTIONS (2012), available at

[http://www.polarisproject.org/storage/documents/policy\\_documents/Issue\\_Briefs/vacating\\_convictions\\_issue\\_brief\\_september\\_2012.pdf](http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/vacating_convictions_issue_brief_september_2012.pdf). See also Special Rapporteur on trafficking, Criminal Justice System Report, *supra* note 4, ¶ 26 ("Victims who develop a criminal record may have difficulties in recovery and reintegration.").

<sup>74</sup> NEV. REV. STAT. §176.515 (2011).

<sup>75</sup> 725 ILL. COMP. STAT. 5/116-2.1 (2012).

<sup>76</sup> MD. CODE ANN., CRIM. PROC. §8-302 (2011).

<sup>77</sup> VT. STAT. ANN. tit. 13, § 2658 (2012).

<sup>78</sup> HAW. REV. STAT. § 712-1209.6 (2012).

<sup>79</sup> WASH. REV. CODE ANN. § 9.96.060 (2012).