



## Implications of U.S. Policy Restrictions for Programs Aimed at Commercial Sex Workers and Victims of Trafficking Worldwide

November 2005

### Background

In May 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (Global AIDS Act);<sup>1</sup> and, in December 2003, it passed the Trafficking Victims Protection Reauthorization Act (TVPRA).<sup>2</sup> The U.S. Global AIDS Act bars the use of federal funds to “promote, support, or advocate the legalization or practice of prostitution.”<sup>3</sup> Organizations receiving U.S. global HIV/AIDS funding also must adopt specific organization-wide positions opposing prostitution.<sup>4</sup>

These restrictions were first applied to foreign non-governmental organizations only,<sup>5</sup> with the law specifically exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization (WHO), International AIDS Vaccine Initiative, and any “United Nations agency.”<sup>6</sup> In June 2005, however, the U.S. Agency for International Development issued a directive requiring that funding for AIDS programs be given **only** to those organizations – both U.S. and foreign – with policies explicitly opposing prostitution and sex trafficking.<sup>7</sup> Such funding restrictions follow other similar – and increasing – efforts to force organizations working in public health to comply with ideological litmus tests that often run counter to both public health practice and human rights standards.<sup>8</sup>

### What does the law say?

#### The Global AIDS Act:

- No funds . . . may be used to *promote or advocate the legalization or practice* of prostitution or sex trafficking.<sup>9</sup>
- No funds . . . may be used to provide assistance to any group or organization that does not have a *policy explicitly opposing* prostitution and sex trafficking.<sup>10</sup>

#### The TVPRA:

- No funds . . . be used to *promote, support, or advocate the legalization or practice* of prostitution.<sup>11</sup>
- No funds . . . may be used to implement any program . . . through 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.<sup>12</sup>

### How are the laws translated into policy?

The U.S. Department of State (DOS), Office of the Global AIDS Coordinator (OGAC), Agency for International Development (USAID), Department of Health and Human Services (HHS), and Centers for Disease Control (CDC) all require non-governmental organizations (NGOs) receiving global AIDS or anti-trafficking funds to comply with the funding restrictions related to sex trafficking and prostitution.

- An NGO applying for or receiving federal **anti-trafficking funds** must sign a statement in the grant application or grant agreement that it “does not promote, support, or advocate the legalization or practice of prostitution.” The primary grantee NGO must ensure that all sub-grantees are also in compliance with this policy.<sup>13</sup>
- An NGO applying for or signing a contract or agreement for federal **global HIV/AIDS funding** must have a policy explicitly opposing prostitution and sex trafficking. Although the law does not specify how an NGO must evidence such a policy, U.S. Senate Majority Leader Bill Frist has stated that “a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking . . . would satisfy the intent of the provision.”<sup>14</sup>

## Who must adopt an organizational policy opposing sex trafficking and prostitution?

### The Global AIDS Act:

- **Foreign NGOs** receiving bilateral U.S. HIV/AIDS funds from the DOS, USAID, and HHS have been subject to these restrictions since the implementation of Global AIDS Act.<sup>15</sup>
- **U.S.-based NGOs working abroad:** The U.S. Constitution prohibits compelling speech from U.S.-based NGOs.<sup>16</sup> Notwithstanding the Constitution, however, a September 2004 U.S. Department of Justice opinion letter argued that Global AIDS Act restrictions could apply to U.S.-based organizations.<sup>17</sup> The administrative regulation implementing this decision – a USAID Acquisition & Assistance Policy Directive – was released June 9, 2005.<sup>18</sup> In 2005, two lawsuits were filed protesting the application of this policy. (See Timeline, Center for Health and Gender Equity, 2005.)

Global AIDS Act funding restrictions are not currently being applied to:

- **Multilateral Agencies:** To date, UN Agencies, including the Global Fund for AIDS, Tuberculosis and Malaria, the World Health Organization (WHO), regional WHO subsidiaries, and UNAIDS remain exempt from these restrictions.<sup>19</sup> In May 2005, the CDC attempted to apply the restrictions to UNAIDS and WHO sub-grantees.<sup>20</sup> After public outcry, the Global AIDS Coordinator, Ambassador Randall Tobias, called on the CDC to rescind the language in the grant expanding restrictions to multilateral organizations.<sup>21</sup> However, concern remains that expansion of these restrictions to multilaterals may yet occur.

### The TVPRA:

- **Foreign NGOs** receiving bilateral U.S. anti-trafficking funds from the DOS, USAID, and HHS have been subject to these restrictions since the implementation of the TVPRA.

- **U.S.-based NGOs working abroad:** The U.S. Constitution prohibits compelling speech from U.S.-based NGOs.<sup>22</sup> The Constitution notwithstanding, a September 2004 U.S. Department of Justice opinion letter opined that TVPRA restrictions apply to U.S.-based organizations.<sup>23</sup> The DOS appears to restrict funding to organizations “that are and have been supportive, in policy and programs, of U.S. Government policies on combating trafficking in persons and prostitution.”<sup>24</sup>

## What are the implications of these policies?

These policies and restrictions have numerous adverse implications for effective HIV prevention, and the promotion of both human rights and public health.

First, and most importantly, these policies run contrary to best practices in public health and will undermine efforts to stem the spread of HIV and human trafficking. The restrictions preclude recipients of U.S. funds from using the best practices at their disposal to prevent the spread of HIV among marginalized populations, and undermine efforts to promote the fundamental human rights of all persons.

Women and men in prostitution, some of whom have been trafficked, are among the most marginalized

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persons in any society. The organizations with the most effective anti-AIDS and anti-trafficking strategies build their efforts on a sophisticated understanding of the social and personal dynamics faced by marginalized

populations, and start by building trust and credibility among the populations in question. They recognize that it is both possible and often necessary to provide social, legal and health services to men and women in prostitution without judging them, and without adopting positions on issues such as

prostitution.<sup>25</sup> They may work to provide persons in prostitution with new skills essential to moving out of the commercial sex sector, to secure the legal rights of men and women in prostitution to be free from violence and discrimination, or to empower them to demand universal condom use, thereby preventing the further spread of HIV infection within and outside this sector.<sup>26</sup> They may also work to prevent people from being trafficked into the sex sector and to assist trafficking victims. Requiring organizations to adopt these policies makes it extremely difficult, if not impossible, to establish the trust necessary to provide services to these hard-to-reach groups.

The Sonagachi Project in Calcutta, India, has reached more than 30,000 persons working in the commercial sex sector at risk of HIV, in large part through peer-based outreach services. Sonagachi's peer educators work to stop the spread of HIV among women and men in prostitution in part through strategies intended to earn their trust, reduce their social isolation, increase their participation in public life, and confront stigma and discrimination.<sup>27</sup> Sonagachi's work has received strong positive evaluations from both UNAIDS and the World Bank, and has been cited by UNAIDS as a "best-practice" model of working with women and men in prostitution.<sup>28</sup> These initiatives focus on promoting the fundamental human rights and health of persons working in prostitution, but do not equal the promotion of prostitution. Yet valuable programs such as those run by Sonagachi and organizations like it are exactly the type threatened by current U.S. laws and policies.

The broad language of the restrictions increases the risk that organizations will self-censor or curtail effective programs for fear of being seen as supporting or promoting prostitution. In fact, the restrictions are already having a chilling effect on work in the field. In Cambodia, for example, NGOs discontinued plans to provide English language training classes for people working in the commercial sex sector for fear such programs would be interpreted as "promoting prostitution."<sup>29</sup> Yet in Phnom Penh alone, the rapid growth of job opportunities in government, in non-

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governmental organizations, and in the tourist industry makes English language skills a valuable commodity and a means of accessing opportunities outside the sex sector. In Jamaica, health workers working with men and women in prostitution have expressed concern that these restrictions curtail their ability to support the efforts of people working in the commercial sex sector to protect their rights.<sup>30</sup>

It is critical to address the dangers associated with prostitution and trafficking in persons. However, current U.S. policies will do little to advance this goal, and will instead exacerbate stigma and discrimination against already marginalized groups. Any anti-prostitution declaration by organizations working in the sex sector has the potential to judge and alienate the very people these organizations seek to assist, making it difficult or impossible to provide services or assistance to those at risk. Public statements against prostitution can also fuel the public opprobrium against men and women in prostitution, further driving them underground and away from lifesaving services. It was for these and other reasons that Brazil recently rejected \$40 million in U.S. global AIDS money, noting that such restrictions undermined the very programs responsible for Brazil's success in reducing the spread of HIV.<sup>31</sup>

Finally, the expansion of these restrictions to U.S.-based groups contradicts the fundamental right to freedom of speech guaranteed in the U.S. Constitution.<sup>32</sup> Requiring domestic organizations with mixed funding to adopt positions consistent with U.S. government policy compels speech, which is an unconstitutional condition on government funding in violation of the First Amendment.<sup>33</sup> While the U.S. government can legally require its funds be used to further government-approved messages,<sup>34</sup> it has not previously compelled U.S. organizations with multiple funding sources to speak explicitly on an issue in compliance with a specific U.S. objective. The courts have long held that the government does not have power to compel a U.S. grantee to pledge allegiance to the government's viewpoint in order to participate in a government program.<sup>35</sup> Compelling foreign organizations to adopt policies consistent with the government's viewpoint raises important constitutional concerns and undermines the democratic principles for which the United States stands.<sup>36</sup>

Rather than requiring organizations to adopt explicit anti-prostitution policies, the U.S. government could fulfill its goals by permitting organizations that do not have a policy on prostitution to receive U.S. funds. There is bipartisan support in Congress for this solution.<sup>37</sup> The advantage of this approach is that it does not pressure organizations, whether international or domestic, to adopt policies that run contrary to best health care practices, may have nothing to do with their work or organizational mission, and have the potential to undercut the very purpose of U.S. grants. Such a policy would allow a wide range of organizations to participate in the global struggle against AIDS, while recognizing the importance of freedom of speech and freedom to receive and impart information in promoting the health and well-being of all citizens.

## Recommendations to the President and Congress

- Request that the Department of Justice reconsider its interpretation on the application of the restrictions in the Global AIDS Act of 2003 to domestic grantees, ensuring instead that all programs are consistent with human rights and public health norms and constitutional guarantees of freedom of speech;
- Institute the practice of consultation with a broad range of experts in both the HIV/AIDS and trafficking fields before any agency or office issues program directives interpreting U.S. HIV/AIDS and trafficking laws to ensure transparency in policymaking, consistency with U.S. and international human rights law, and the promotion of best practices in public health;
- Ensure that all scientific and program evidence is regularly reviewed by experienced researchers and program managers;
- Work with Congress to amend the TVPRA and the Global AIDS Act of 2003 so that these laws are consistent with U.S. and international human rights law and with best practices in public health.

For more information on this brief:

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<sup>1</sup> *United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 22 U.S.C. §§ 7601-7682 (2003) [hereinafter, Global AIDS Act].

<sup>2</sup> *Trafficking Victims Protection Reauthorization Act of 2003*, 22 U.S.C. §§ 7101-7110 (2003) [hereinafter, TVPRA].

<sup>3</sup> See Global AIDS Act, 22 U.S.C. § 7631(e) (barring use of funds to "promote or advocate the legalization or practice of prostitution or sex trafficking"); TVPRA, 22 U.S.C. § 7110(g) (1) (barring use of funds to "promote, support, or advocate the legalization or practice of prostitution").

<sup>4</sup> See *United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 22 U.S.C. § 7631(f) (2003) [hereinafter, Global AIDS Act]; *Trafficking Victims Protection Reauthorization Act of 2003*, 22 U.S.C. § 7110(g) (2) (2003) [hereinafter, TVPRA].

<sup>5</sup> See, e.g., Centers for Disease Control and Prevention, U.S. Dept of Health and Human Svcs., *Rapid Expansion of HIV/AIDS Activities by National Ivorian Nongovernmental Organizations and Associations Serving Highly Vulnerable Populations in Cote d'Ivoire Under the President's Emergency Plan for AIDS Relief*, Funding Opportunity No. 04199, Jul. 2004, at 9 (stating, "[A]ny foreign recipient must have a policy explicitly opposing, in its activities outside the United States, prostitution and sex trafficking..."). See also Bureau of Administration, U.S. Dept of State, *Anti-Trafficking in Persons*, Funding Opportunity No. DOS-GTIP, Mar. 2005, at 11-12 (stating, "U.S. law... prohibits such funds from being used to implement any program that targets victims of severe forms of trafficking in persons involving sex trafficking by an 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. It is the responsibility of the primary grantee to ensure these criteria are met by its sub-grantees").

<sup>6</sup> See Consolidated Appropriations Act of 2004 [PL108-199](#) (2004), which amends section 301(f) of the AIDS Authorization by exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any "United Nations agency" from that section. The Statement of Managers states that the conferees "intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO)."

<sup>7</sup> "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 Prostitution and Sex Trafficking." (June 9, 2005) [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aap05\\_04.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aap05_04.pdf)

<sup>8</sup> The Mexico City Policy, also called the "Global Gag Rule" (GGR), denies U.S. family planning funding to any organization that performs, collects data on, provides referrals for, or advocates legal changes for abortions. First announced by President Reagan in 1984, the GGR was rescinded on January 22, 1993 by President Clinton and reinstated on January 22, 2001 by President G.W. Bush. In 2003, the Bush Administration threatened to expand the GGR to cover international HIV/AIDS programs, thereby disqualifying from federal funding many potential partners for the President's Emergency Plan for AIDS Relief (PEPFAR). The Administration later withdrew this threat.

<sup>9</sup> Global AIDS Act, 22 U.S.C. § 7631(e).

<sup>10</sup> Global AIDS Act, 22 U.S.C. § 7631(f).

<sup>11</sup> TVPRA, 22 U.S.C. § 7110(g) (1).

<sup>12</sup> TVPRA 22 U.S.C. § 7110(g) (2) (2003).

<sup>13</sup> See Bureau of Administration, U.S. Dep't of State, *Anti-Trafficking in Persons*, Funding Opportunity No. DOS-GTIP, Mar. 2005, at 11-12.

<sup>14</sup> See 149 Cong. Rec. S6457 (2003).

<sup>15</sup> See USAID, Acquisition & Assistance Policy Directive, AAPD 04-04, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility for Assistance, Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking (January 15, 2004), available at [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd\\_04\\_04\\_original.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd_04_04_original.pdf).

<sup>16</sup> See Brennan Ctr. for Justice, NYU School of Law, Memorandum on Constitutionality of Anti-Prostitution Pledge in the AIDS Act 7-9 (June 13, 2005).

<sup>17</sup> See Letter from Daniel Levin, Acting Assistant Attorney General, U.S. Dep't of Justice, to Alex M. Azar II, General Counsel, U.S. Dep't of Health and Human Svcs. (Sept. 20, 2004) [hereinafter, "Levin letter"].

<sup>18</sup> See USAID, Acquisition & Assistance Policy Directive, 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 Prostitution and Sex Trafficking (June 9, 2005), available at [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd\\_05\\_04.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd_05_04.pdf).

<sup>19</sup> See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199 (2004), amending Global AIDS Act §301(f).

<sup>20</sup> See Centers for Disease Control and Prevention, Dep't of Health and Human Svcs., Increasing Access to HIV Counseling and Testing (VCT) and Enhancing HIV/AIDS Communications, Prevention, and Care in Botswana, Lesotho § IV.5 (May 2005), available at <http://www.cdc.gov/od/pgo/funding/AA006.htm>.

<sup>21</sup> See David Brown, *U.S. Backs Off Stipulation on AIDS Funds*, WASH. POST, May 18, 2005.

<sup>22</sup> See Brennan Ctr. for Justice, *supra*.

<sup>23</sup> See Levin letter, *supra*.

<sup>24</sup> See Bureau of Administration, U.S. Dep't of State, *Anti-Trafficking in Persons*, Funding Opportunity No. DOS-GTIP 11-12 (March 2005).

<sup>25</sup> See WORLD HEALTH ORG. (WHO), TOOLKIT FOR TARGETED HIV/AIDS PREVENTION AND CARE IN SEX WORK SETTINGS (2004), available at [http://www.who.int/hiv/pub/prev\\_care/swtoolkit/en/](http://www.who.int/hiv/pub/prev_care/swtoolkit/en/).

<sup>26</sup> See *id.* at 6 (noting "The diversity of sex work settings requires flexible, locally adapted responses. However, experience shows that HIV prevention in sex work settings should work toward three main outcomes: 1. Increased condom use and safer sex 2. Increased sex worker involvement and control over working and social conditions 3. Reduced STI burden").

<sup>27</sup> See UNAIDS, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh*, UNAIDS BEST PRACTICE COLLECTION, Nov. 2000, at 57-90.

<sup>28</sup> See *id.*

<sup>29</sup> Interview by Alice Miller, Columbia Univ. Law School, with Elaine Pearson, Anti-Slavery International, Bangkok, Thailand (July 2004).

<sup>30</sup> Interview by Human Rights Watch with Jamaican health worker, Kingston, Jamaica (June 2004).

<sup>31</sup> See Michael M. Phillips and Matt Moffett, *Brazil Refuses U.S. Aids Funds, Rejects Conditions*, WALL ST. J., May 2, 2005, at A3.

<sup>32</sup> See U.S. CONST. Amend. I.

<sup>33</sup> See *FCC v. League of Women Voters*, 468 U.S. 364 (1984). See also *Regan v. Taxation w. Representation of Washington*, 461 U.S. 540 (1983) (holding permissible speech restrictions on a government subsidy because other, non-federal contributions could be used to fund prohibited speech).

<sup>34</sup> See *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (holding that the Government may make a value judgment, implement that judgment by the allocation of public funds, and "leave the grantee unfettered in its other activities" funded by other sources).

<sup>35</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a requirement that children pledge allegiance to the U.S. flag in order to attend public school). See also *Speiser v. Randall*, 357 U.S. 513 (1958) (holding unconstitutional a requirement that receipt of a tax exemption was contingent on the filing of a loyalty oath to the U.S. Government); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), citing *Barnette* (holding that forcing an individual to be "an instrument for fostering public adherence to an ideological point of view he finds unacceptable . . . 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control'").

<sup>36</sup> See *DKT Memorial Fund Ltd. v. Agency for Intern. Dev't*, 887 F.2d 275 (D.C. Cir. 1989) (Ginsberg, J., dissenting).

<sup>37</sup> See 108 Cong. Rec. H10287 (2003) (colloquy of Reps. Chris Smith and Tom Lantos during the reauthorization of the TVRPA). Congressman Smith, Republican Vice-Chair of the House International Relations Committee (HIRC), and Congressman Lantos, Ranking Democrat Member on the HIRC, agreed on the proper interpretation of the TVPRA funding restriction related to sex trafficking and prostitution. According to Congressman Smith, "an organization can satisfy the prohibition...if it states in a grant application, a grant agreement, or both that it does not promote, support, or advocate such actions since it has no policy regarding this issue." See also 149 Cong. Rec. S6457 (2003) (colloquy of Senator Leahy and Senator Frist during the authorization of the Global AIDS Act) Senator Frist, President Pro Tempore of the Senate, and Senator Leahy, Ranking Democrat Member on the Judiciary Committee, agreed on the proper interpretation of the Global AIDS Act funding restriction related to sex trafficking and prostitution. Senator Frist stated that "a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision."