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Human Trafficking: International Regulatory Problems and Solutions

Introduction

Known as one of the oldest crimes on Earth, slavery and human trafficking are industries that have existed for eons and continue to affect millions of people in every country worldwide. To some, it may be hard to believe that the purchase and sale of human beings still thrives in the 21st century, but it remains a lucrative business, raking in billions of dollars in revenue each year.¹ Human Trafficking is a crime against humanity. According to article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, human trafficking is defined as the recruitment, transportation, transfer, harboring 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.² Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.³ Every year, thousands of men, women and

¹Alison Hill, 10 Facts About Human Trafficking, 2011 Listosaur, <http://listosaur.com/politics/10-facts-about-human-trafficking.html>.

² United Nations Gen. Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (See Art. 3) available at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. [accessed 3 December 2012]

³ *Id.*

children fall into the hands of traffickers, in their own countries and abroad. Every country in the world is affected by trafficking, whether as a country of origin, transit or destination for victims.⁴

As such, this paper examines the history of human trafficking and the regulatory schemes implemented globally to aid in the prevention and stifling of Human Trafficking worldwide. In particular, this paper focuses on the primary regulatory initiatives used to combat human trafficking internationally, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (UN Protocol) and the Trafficking Victims Protection Act (TVPA). To date, the UN Protocol and the TVPA are the most reputable and recent instruments of international law that have set the course for how to define, prevent, and prosecute human trafficking. The UN Protocol is a wide-ranging international agreement addressing the crime of trafficking in persons, especially women and children.⁵ It creates a global language and legislation to define trafficking in persons, especially women and children; assist victims of trafficking; and prevent trafficking in persons.⁶ The UN Protocol entered into force in 2003 and by 2012, 117 countries had ratified the Protocol.⁷ In line with the principles of the UN Protocol, the United States Congress enacted the TVPA for the purpose of combat trafficking in persons.⁸ The TVPA criminalizes and enhances the penalties for human trafficking, provides social

⁴ United Nations: Off. of Drugs & Crime, *Human Trafficking* (Nov. 11, 2012, 9:15 AM), <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menu>.

⁵ Janice G. Raymond, *Guide to the New UN Trafficking Protocol, in Coalition Against Trafficking in Women 1* (2001). See available at: http://www.no-trafficking.org/content/pdf/guide_to_the_new_un_trafficking_protocol.pdf [accessed 3 December 2012]

⁶ *Id.*

⁷ *Id.*

⁸ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in 22 U.S.C. § 7101). available at: <http://www.state.gov/documents/organization/10492.pdf>. See Div. A, Sec. 102 [accessed 3 December 2012]

services and legal benefits, including visas to some trafficking victims, provides millions of dollars in funding to support programs domestically and abroad, and includes provisions to monitor and eliminate trafficking internationally.⁹

This paper's thesis is twofold. First, the TVPA and UN Protocol's lack of impact on the human trafficking industry have led to the conclusion that these statutory regulations are flawed and could be improved with the implementation of clear and concise language that outline the criminal offenses of human trafficking and the appropriate punishment for offenders. Second, the ramifications outlined in the TVPA for countries that do not comply with the minimum standards for the elimination of trafficking does not effectively motivate those countries to introduce anti-human trafficking legislation because many of the same countries that would be denied non-humanitarian assistance qualify for humanitarian assistance nullifying the effect of the sanctions. Therefore, the TVPA should be revised to mandate that in order to receive humanitarian or trade-related assistance, a nation must introduce anti-trafficking legislation. As such, this paper will examine the history of human trafficking, exploring the types of offenses fall within the realm of human trafficking and early regulatory schemes that helped shape the UN Protocol and TVPA. Also, this paper will review the purpose, content, and the shortcomings of the UN Protocol and TVPA as well as proposed legislation that could improve the impact of both articles.

The History and Current State of Human Trafficking

The term "human trafficking" encompasses many different offenses dealing with the recruitment, transfer, and ultimately the unlawful control of another person. The trafficking of persons can be classified under one of the following: (1) the act of to hold a person in debt servitude, known as peonage; (2) the act of holding a person in a condition of slavery, that is, a

⁹ *Id.*

condition of compulsory service or labor against their will, known as involuntary servitude; (3) the act of providing or obtaining the labor or services of a person for peonage, slavery, involuntary servitude, or forced labor; (4) the act of causing, through force or otherwise, an individual to engage in a commercial sex act, that is any sex act in which anything of value is given to or received by any person; (5) and the act of seizing documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or Forced Labor.¹⁰

According to the U.S. State Department's 2011 Trafficking in Persons Report (TIP), there are as many as 27 million victims of human trafficking, with as many as 100,000 in the United States. According to the organization "Free the Slaves", there is a concentration of slaves in South Asia, South East Asia, North Africa and West Africa, but slavery occurs everywhere, including the United States.¹¹ Of those 27 million victims, less than 50,000 have been identified.¹² Recent studies show the majority of human trafficking in the world takes the form of involuntary servitude.¹³ According to the International Labour Organization, for every trafficking victim subjected to forced prostitution, nine people are forced to work.¹⁴ Involuntary servitude may result when unscrupulous employers exploit workers made more vulnerable by high rates of unemployment, poverty, crime, discrimination, corruption, political conflict, or cultural acceptance of the practice.¹⁵ Immigrants are particularly vulnerable, but individuals also may be

¹⁰ The U.S. Dep't of Justice, Hum. Trafficking (Nov. 11, 2012, 9:16 AM), <http://www.justice.gov/crt/about/crm/statutes.php#trafficking>.

¹¹ The U.S. Dep't of State, *Trafficking in Persons Report 2011*, (Nov. 11, 2012, 9:28 AM), <http://www.state.gov/documents/organization/164452.pdf>.

¹² The U.S. Dep't of State, *Trafficking in Persons Report 2010*, (Nov. 11, 2012, 9:30 AM), <http://www.state.gov/documents/organization/142979.pdf>.

¹³ *Trafficking in Persons Report 2010* at 7.

¹⁴ *Id.*

¹⁵ *Id.*

forced into labor in their own countries.¹⁶

As mentioned above, Slavery has a history dating back thousands of years. It existed in prehistoric hunting societies and has persisted throughout the history of the mankind as a universal institution.¹⁷ The international trade of women came into focus with the movement against white slavery. The concept of “white slavery” was originally developed by activists intent on abolishing systems of regulated prostitution in Europe. It served to distinguish “female sexual slavery” from the enslavement of Africans, while at the same time serving to draw a moral comparison between the two types of exploitation.¹⁸ By the second half of the nineteenth century, the concept of “white slavery” was associated with recruitment to prostitution by force and fraud.¹⁹ The sensationalized image of young and innocent white women being coerced into prostitution in foreign lands was at least partially responsible for the internationalization of the abolitionist movement and the resulting emphasis on trafficking.²⁰

Many contemporary historians share the view that the number of white slavery cases was actually very low and that the increased number of women migrants from Europe seeking work abroad triggered the discussion at that time.²¹ On the other hand, some figures show that trade in women did exist in the end of 1800 and beginning of 1900.²² In 1912, police in Hamburg listed

¹⁶ *Id.*

¹⁷ Kristina Kangaspunta, *A Short Hist. of Trafficking in Persons*, 2010 *Freedom In Fear Magazine* (Dec. 2, 2012, 9:15 AM), http://www.freedomfromfearmagazine.org/index.php?option=com_content&view=article&id=99:a-short-history-of-trafficking-in-persons&catid=37:issue-1&Itemid=159.

¹⁸ Anne Gallagher, *The International Law of Human Trafficking* 54-64 (2010).

¹⁹ *Id.* at 55.

²⁰ See Kristina Kangaspunta, *A Short Hist. of Trafficking in Persons*, 2010 *Freedom, Fear Magazine*, (2010).

²¹ *Id.*

²² *Id.*

402 known traders in women and identified another 644 in Eastern Europe.²³ The US Immigration Bureau investigated traffic in women in London, Berlin and Hamburg and identified 578 individuals involved in the trade.²⁴ An investigation on the “Importation and Harboring of Women for Immoral Purposes” in the USA from 1908 to 1909 showed that a large number of alien women and girls were being brought to the country to be distributed for the purpose of prostitution.²⁵

Between 1904 and 1933, four different international conventions dealing with the trafficking of woman and children were concluded, including the 1904 Convention that emphasized the centralization of information as a means of facilitating cross-border cooperation.²⁶ Cross-border cooperation has been seen as a pivotal tool in the fight against human trafficking, and the Convention contained a number of substantive and procedural provisions dealing with such. It suggests extradition of offenders, as well as the prosecution and punishment of nationals for offenses committed abroad.²⁷ Detailed guidance is also provided on the internal coordination and centralization of anti-trafficking efforts.²⁸ Protection and rehabilitation are central themes. Foreign victims of trafficking are to have the same rights as nationals with respect to their being party to proceedings against traffickers²⁹—presumably including equality of access to compensation for crimes. Victims of both prostitution and trafficking are to be provided with social services for prevention of prostitution, as well as for

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ C.C. Jones-Pauly, *Report on Anti-Trafficking Laws in Six Countries and Compliance with the International Conventions against Trafficking* 162 (1999).

²⁷ United Nations Gen. Assembly, *supra* Arts. 8-9.

²⁸ *Id.* at Art. 14.

²⁹ *Id.* at Art. 5.

“rehabilitation and social adjustment.”³⁰ In addition, The Convention set out a range of measures to be taken by State Parties to prevent trafficking including instituting public warnings of the dangers of trafficking, supervision of employment agencies, railways stations, airports, and other public places.³¹

Today, many of the early principles set out in the 1904 Convention have been adopted into the some of the most substantial anti-human trafficking policies enacted. On the international front, there continues to be multiple efforts to reduce or eliminate human trafficking. Organizations such as the Global Survival Network and Human Rights Watch are leaders in their attempts to raise awareness and reduce incidents of human trafficking internationally.³² In addition, governmental organizations such as the International Labour Organization are committed to helping child victims of commercial sexual exploitation, often through trafficking.³³ One of the more notable touchstones in the advancement of anti-human trafficking policy took place at a convention sponsored by the United Nations in 2004.³⁴ This convention introduced the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which was created to make a significant difference in the policy and prosecution of human trafficking offenses.

The United Nations’ Efforts to Answer an Age-Old Problem

The United Nations urged that the egregious act of human trafficking is deeply rooted in the social and economic conditions in the countries from which the victims come, facilitated by

³⁰ *Id.* at Art. 16.

³¹ *Id.* at Art. 17(3).

³² Kimberly A. McCabe, *The Trafficking of Persons: National and International Responses* 97 (2010).

³³ *Id.*

³⁴ *Id.*

practices that discriminate against women and driven by cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide.³⁵ According to United Nations Delegates, the plight that the victims of human trafficking face worldwide is a disgrace to human dignity and instituting a policy to stop trafficking should be a priority to every State, every people, and every community.³⁶ As such, the convention and the protocols presented urged the Member States to ratify not only the United Nations Convention against Transnational Organized Crime, but also the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.³⁷

The Member States that ratified the Protocol set forth by the convention were asked to organize, establish, and participate in adopting legislation that would make human trafficking a criminal offense when committed intentionally.³⁸ For the victims of trafficking, Member States were asked to protect the privacy and identity of victims of trafficking, while providing them with information on relevant court and administrative proceedings that would allow them to present their concerns, as well as give testimony that could be used in the criminal proceedings against offenders.³⁹ In addition, Member States were asked to provide for the physical safety and welfare of victims of trafficking by implementing measures to provide for the physical, psychological and social recovery of victims.⁴⁰ These accommodations could include Member

³⁵UN General Assembly, *supra* Preamble

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at Art. 5.

³⁹ *Id.* at Art. 6.

⁴⁰ *Id.*

States to help provide victims with appropriate housing, counseling services, medical assistance, employment, and educational and/or training opportunities.⁴¹

Member States were also asked to implement preventative measures to help ensure that offenders would not have the opportunity to engage in trafficking. Member States were asked to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.⁴² With that, Member States were asked to take or strengthen measures to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.⁴³

Additionally, the Protocol called for the imposition of new legislation that called for the strengthening of border controls as may be necessary to prevent and detect trafficking in persons.⁴⁴ Member States were asked to adopt legislative or other appropriate measures to prevent commercial carriers from being used by offenders for the commission of trafficking offenses.⁴⁵ In doing so, each State Party that ratified the Protocol was asked to consider that revoke the visas of persons convicted of human trafficking.⁴⁶

The Trafficking Victims Protection Act

To work in conjunction with the United Nations' Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the United States of America enacted the Trafficking Victims

⁴¹ *Id.*

⁴² *Id.* at Art. 9.

⁴³ *Id.*

⁴⁴ *Id.* Art. 11.

⁴⁵ *Id.*

⁴⁶ *Id.*

Protection Act (TVPA) in 2000. This Act was in response to the inadequacies in human trafficking legislation shared by the United States and other countries worldwide.⁴⁷ Congress found that prior to 2000, there was no comprehensive law in existence in the United States that penalized the range of offenses involved in the trafficking scheme.⁴⁸ Congress concluded that in the United States, the seriousness of the offenses related to human trafficking was not reflected in the current sentencing guidelines, resulting in weak penalties for convicted traffickers.⁴⁹ Moreover, in some countries the prosecution of traffickers was severely hindered by official indifference, corruption, and sometimes even by official participation in trafficking.⁵⁰ As such, Congress outlines in the TVPA the regulations that the United States adopted to eliminate and prevent human trafficking domestically and abroad.

Domestically, the TVPA mandated that the President establish an interagency task force to monitor and combat trafficking.⁵¹ The task force was responsible for measuring and evaluating the progress of the United States and other countries in the areas of trafficking prevention, protection, and assisting victims of trafficking, as well as the enforcing the laws against traffickers.⁵² To aid in this initiative, the task force is charged with the collection and organization of data, including research and resource information on domestic and international trafficking.⁵³

In addition to the task force created by the TVPA, the Act mandated the strict stiffening of the penalties for offenders that were convicted of trafficking offenses that essentially doubled

⁴⁷ Victims of Trafficking and Violence Protection Act of 2000, *supra* Div. A, Sec. 102

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at Div. A, Sec. 105.

⁵² *Id.*

⁵³ *Id.*

the maximum penalties for many trafficking offenses.⁵⁴ As a result of the TVPA, any offender that participates or facilitates forced labor, trafficking with respect to peonage, slavery, or involuntary servitude faces a fine and up to twenty (20) years for each offense committed.⁵⁵ If any victim died during the commission of a trafficking offense, the penalty is elevated to a maximum term of life in prison.⁵⁶ As for anyone convicted of participating or receiving anything of value from participating sex trafficking of a child, the maximum penalty that an offender faces has been elevated from ten (10) year to life in prison.⁵⁷

One of the most significant outcomes of the TVPA was the creation of minimum standards for eliminating trafficking applicable to the government of any country of origin, transit, or destination for a significant number of victims of severe forms of trafficking.⁵⁸ Meant to work alongside the guidelines set by the United Nations, the minimum standards called for countries to make serious and sustained efforts to proscribe stiff punishment equivalent to those set out for the gravest of crimes for any offender convicted of trafficking.⁵⁹ The make sure that these stiff punishments are being carried out the TVPA created agencies to check whether a countries government vigorously investigates and prosecutes acts of human trafficking, protects victims, adopted preventative measures, cooperates with other nations in the fight against trafficking, and whether the country extradites persons charged with acts of trafficking as stringently as the law allows.⁶⁰

⁵⁴ *Id.* at Div. A, Sec. 112.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at Div. A, Sec. 108.

⁵⁹ *Id.*

⁶⁰ *Id.*

To effectuate the implement these minimum standards, the United States made it policy not to provide non-humanitarian, non-trade related foreign assistance to any government that did not comply with the minimum standards for the elimination of trafficking and was not making significant efforts to bring itself into compliance with the standards.⁶¹ By withholding non-humanitarian, the United States will not provide any funding for participation by officials or employees of such governments in educational and cultural exchange programs until such government complies or makes significant efforts to bring itself into compliance.⁶² In addition, the President will instruct the directors of the multilateral development banks, as well as the director of the International Monetary Fund to deny any loan or utilization of funds for the benefit of the resisting country.⁶³

Reauthorized by Congress in 2003, one of the key components reauthorization of the TVPA was the implementation of the Trafficking in Persons Report compiled by the United States Department of State.⁶⁴ The Department is tasked with the production of this annual report assessing the different countries application of the minimum standards outlined in the TVPA.⁶⁵ The Department places each country in the report onto one of three tiers, as mandated by the TVPA.⁶⁶ This placement is based more on the extent of government action to combat trafficking than on the size of the problem.⁶⁷ The analyses are based on the extent of governments' efforts to enact laws prohibiting severe forms of trafficking in persons, create a comprehensive victim

⁶¹ *Id.* at Div. A, Sec. 110.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Background on Hum. Trafficking*, 2012 Do Something Organization, <http://www.dosomething.org/tipsandtools/background-human-trafficking>.

⁶⁵ Trafficking in Persons Report 2011 at 11.

⁶⁶ *Id.*

⁶⁷ *Id.*

identification plan, and fund government partnerships with organizations to provide victims with access to primary health care, counseling, and shelter, allowing them to recount their trafficking experiences to trained social counselors and law enforcement in an environment of minimal pressure⁶⁸

Of the three ranked tiers, tier one is the highest ranking of compliance. Tier one indicates that a government has acknowledged the existence of human trafficking, has made efforts to address the problem, and meets the TVPA's minimum standards.⁶⁹ Tier two indicated the countries that are on the "watch list".⁷⁰ Tier two countries do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards but either the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing, there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons, or the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional steps over the next year.⁷¹

The third and final tier is the lowest tier possible and triggers the sanctions outlined in the TVPA. Tier three is designated for those countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.⁷² Three factors outline the criteria for a country to be classified in tier three.⁷³ First, the State Department examines the extent to which the country is a country of origin, transit, or destination for severe forms of

⁶⁸ *Id.*

⁶⁹ Trafficking in Persons Report 2010 at 20.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

trafficking.⁷⁴ Second, the extent to which the country's government does not comply with the TVPA's minimum standards and, in particular, the extent to which officials or government employees have been complicit in severe forms of trafficking is examined.⁷⁵ Lastly, the State Department examines the reasonable measures required to bring the country into compliance with the minimum standards in light of the government's resources and capabilities to address and eliminate severe forms of trafficking in persons.⁷⁶

A. The Problems with the UN Protocol and the TVPA

Despite the comprehensive instructions and procedures, the industry of human traffickers continues to flourish. Traffickers continue to find new victims and, in many jurisdictions, operate with impunity. Some studies have suggested that the perpetuation of human trafficking can be traced to the many countries that have failed to pursue prosecutions diligently or continue to ignore certain types of human trafficking, such as the forced labor of men and boys.⁷⁷ Others suggest that it could be the act of some countries limiting their enforcement efforts to either foreign trafficking victims or their own citizens.⁷⁸ Although these shortcomings play a significant role in the promotion of human trafficking, it is not the primary contributor. Because the protocol and regulations enacted by the United Nations and the United States embody the chief mechanisms in fight for ending human trafficking globally, the failures in the prevention and prosecution lay within the regulations; in particular, the vagueness of the regulatory

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ The U.S. Dep't of State, *Moving Toward a Decade of Delivery - Gov't Responsibility*, (Nov. 11, 2012, 11:28 AM), <http://www.state.gov/j/tip/rls/tiprpt/2011/164223.htm>.

⁷⁸ The U.S. Dep't of State, *Trafficking in Persons Report 2007*, (Nov. 11, 2012, 9:30 AM), <http://www.state.gov/documents/organization/82902.pdf>.

guidelines and the mild consequences imposed on the countries that fall below the minimum standards.

I. Proposed Revisions to the UN Protocol

Along with the TVPA, the UN Protocol leads the charge in establishing many policies to aid victims and bring awareness to the issue of trafficking. The most important goal to preventing human trafficking is to make the act itself illegal. The UN Protocol recommending that all countries criminalize human trafficking effectuates this. Article 5 of the Protocol calls for Member States to “adopt such legislative and other measures as may be necessary to establish [acts of human trafficking] as criminal offences”.⁷⁹ The passage goes on requesting states to adopt legislation and “other measures as may be necessary” to criminalize these heinous crimes.⁸⁰ These regulations are a positive step in criminalizing human trafficking, unfortunately, not every foreign nation has the same definition of what it means to undertake “measures that may be necessary” to combat human trafficking, especially the nations that are complicit in trafficking offenses.

In-depth analysis of the role of corruption in trafficking in persons is very limited.⁸¹ In spite of this, acts of government corruption are evident in the commission and success of trafficking offenses globally.⁸² The act of trafficking consists of the recruitment of victims, the forgery of documents to enable travel, border crossing, as well as the laundering of the proceeds

⁷⁹ United Nations Gen. Assembly, *supra* at Arts. 5

⁸⁰ *Id.*

⁸¹ United Nations: Off. of Drugs & Crime, The Role of Corruption in Trafficking in Persons (Nov. 11, 2012, 12:32 PM), <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menuaside>.

⁸² *Id.*

of the crime.⁸³ In many cases, corrupt actors include police, customs officers, embassies, consulates, and border control authorities are needed to turn a blind eye to offenders in order for the operation to run smoothly.⁸⁴ Appreciating that there are some nations would rather benefit from the monetary value of human trafficking instead of creating rules on their own to prevent these crimes, it is not practical that instructing those nations to take “measures that may be necessary” will have a significant effect on human trafficking in those nations. Instead, the language used in the UN Protocol should be more direct and thoroughly outlined to eliminate vague interpretations.

Article 5 begins with a mandate that each ratifying party must adopt legislation and other measures as may be necessary to establish as criminal offenses the conduct set forth in Article 3 of this Protocol⁸⁵, when committed intentionally.⁸⁶ As to the current issue, any passive wording should be removed entirely for more forceful language. As such, “as may be necessary” should be removed. The effect of this subtle change not only limits the possibility for disparity in interpretation, but it also changes the tone of the article demonstrating the seriousness of human trafficking.

In the interest of clarity and effective drafting, instead of referring back to Article 3, this article should list those acts that constitute criminal offenses. In addition, the paragraph 2 of this article along with its subparts could be summed up more effectively without being as repetitive as they appear currently. Paragraph 2 and its corresponding subparts in effect state that each ratifying nation shall adopt legislative measure to criminalize the act of attempting, participating,

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ United Nations Gen. Assembly, *supra* at Arts. 3

⁸⁶ *Id.* at Art. 9.

and organizing human trafficking. This paragraph can be eliminated completely and language equivalent to what is stated in the paragraph could be added to paragraph 1 in order to improve clarity. (See Appendix I for a complete outline of the proposed changes to Article 5 of the UN Protocol)

II. Proposed Revisions to the Trafficking and Victims Protection Act

Similar to Article 5 of the UN Protocol, Section 108 of the TVPA contains a vague mandate enacted for the purpose of stopping international human trafficking. Section 108 of the TVPA outlines the minimum steps that need to be taken by governments around the world to ensure that strides are being made in eliminating human trafficking within their borders. Section 108 makes attempts to mandate that foreign nations create laws that “prohibit severe forms of trafficking in persons and punish acts of such trafficking,” as well as “make serious and sustained efforts to eliminate severe forms of trafficking”.⁸⁷

As alluded to previously, there are some nations that not only benefit from the existence of human trafficking but also help facilitate trafficking. Therefore, the TVPA needs to be worded in such a way that clearly outlines what acts will be criminalized as well as the type of punishment that should be imposed on offenders. Due to the ambiguous language used in the TVPA, what constitutes as “severe forms of trafficking” and what is considered to be punishment is left to the interpretation of other nations. Further, the mandate for other countries to make “serious and sustained efforts” also leaves far too much room for other nations to institute loose legislation for the sake of pacifying the international observers. For example, the act of acquiring and forcing a victim to become a house servant may not be considered “severe” in some countries, with the language currently enacted there will be no reason to prosecute the

⁸⁷ Victims of Trafficking and Violence Protection Act of 2000, *supra* Div. A, Sec. 108

offender. With such room for variance, the language used in the TVPA should outline what constitutes as a severe form of human trafficking and the punishment to be imposed.

The original language in the Act purports that the “government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.” There are several issues with this mandate. First, the use of the word “should” lacks the type of urgency that must be shown by nations in the fight against trafficking. To address that, the proposed language eliminates the passive phrasing in exchange for the word “must” giving the sentence a more aggressive tone appropriate with regulating such heinous crimes.

Second, similar to the ambiguity found in the UN Protocol, what constitutes as “severe forms of trafficking” and as well as what a suitable punishment for these acts needs to be clearly outlined. As such, the proposed revisions adopt the language used in the United States Code to define each offense of human trafficking. With this change, each offense is clearly outlined in the Act eliminating any confusion as to what is a severe form. Further, based on the most common form of punishment used for these crimes, the proposed language clearly outlines that imprisonment is to be the appropriate punishment for offenders convicted of trafficking crimes. In addition to these changes, subsection (c) was eliminated from the proposed Act and incorporated in into subsection (a) in order for the statute to read more efficiently and clearly. (See Appendix II for a complete outline of the proposed changes to Section 108 of the TVPA)

B. Actions Against Governments Failing to Meet Minimum Standards

The minimum standards requirement outlined in the TVPA is among one of the most comprehensive mechanisms not only for stopping human trafficking but also for monitoring the criminalization and prevention methods instituted by other nations. The TVPA mandates that nations enact legislation that is “sufficiently stringent to deter” acts of human trafficking. Based

on how countries adhere to this loosely worded mandate, the nations are classified in the appropriate tier. Pursuant to the Section 110(d) of the TVPA, governments of countries on Tier 3 may be subject to certain sanctions, whereby the United States government may withhold non-humanitarian non-trade-related foreign assistance. Such assistance may be withdrawn from countries receiving it, and in addition, countries on Tier 3 may not receive funding for government employees' participation in educational and cultural exchange programs. Consistent with this section of the TVPA, the governments that refuse to comply with the minimum standards would also face United States opposition to assistance from international financial institutions such as the International Monetary Fund and the World Bank. In theory, these sanctions could have significant economic effect on the nations that failed to adhere to the minimum standards. However, many of the nations that would be denied financial assistance due to the lack of anti-trafficking legislation still qualify for assistance due to humanitarian concerns.

According to the International Organization for Migration (IOM), in 2011 Haiti, a Tier 3 country, was not only the number one nation of destination for human trafficking victims, but Haiti was one of the top nations of origin for victims of human trafficking.⁸⁸ Haiti is a source, transit, and destination country for men, women, and children subjected to trafficking in persons, specifically forced labor and forced prostitution. In the months prior to the January 12, 2010 earthquake, the Government of Haiti had made limited anti-trafficking progress; prospects for additional, future progress were greatly impeded by the earthquake, which killed over 230,000 people, displaced 1.3 million people, including at least half a million children. Although there

⁸⁸ Acad. For Educ. Development, *IOM Rep. Child Trafficking & Lab. Trafficking Cases Are Rising* (Nov. 11, 2012, 12:36 PM), <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menuaside>.

was little progress in the enactment of meaningful legislation, Haiti was not subject to the sanctions prescribed by the TVPA because of the immense damage that was caused by the earthquake. Therefore, they continue to receive the financial assistance while thousands of people continue to be trafficked in and out of Haiti.

Likewise, Zimbabwe, a Tier 3 ranked nation, is a country of origin, transit, and destination for men, women, and children subjected to trafficking in persons, specifically conditions of forced labor and forced prostitution.⁸⁹ Zimbabwean women and girls from towns bordering South Africa and Zambia are forced into prostitution in brothels that cater to long-distance truck drivers.⁹⁰ Zimbabwean young men and boys illegally migrate to South Africa, where some are forced to labor for months on farms or in mines and in construction without pay before their employers report them to authorities for deportation.⁹¹ The Government of Zimbabwe does not fully comply with the minimum standards for the elimination of trafficking and is not making significant efforts to do so.⁹² Despite this, the United States Agency for International Development continues to provide Zimbabwe with assistance in various areas, including democracy and governance programs, humanitarian assistance, and agriculture.⁹³ In fact, the United States government works to promote Zimbabwe's economic recovery following years of decline, and to highlight opportunities for investment that will benefit United States and Zimbabwean businesses alike.⁹⁴

⁸⁹ Trafficking in Persons Report 2010 at 355.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ The U.S. Dep't of State, 2012 U.S. Rel. With Zimbabwe (Dec. 3, 2012, 12:36 PM), <http://www.state.gov/documents/organization/164452.pdf>.

⁹⁴ *Id.*

This is in no way condemning the humanitarian efforts of the United States or any other nation that continues to assist Tier 3 countries. Nevertheless, there needs to be a system in place that can allow for nations to continue lending financial assistance to nations in need while serving the interest of the millions of human trafficking victims that originate or are shipped to these Tier 3 countries.

The proposed language to Section 110(d) of the TVPA would serve the purpose of enabling the United States to continue assisting these Tier 3 nations while ensuring that the needs of trafficking victims were being served as well. The proposed change only pertains to subsection (4) of this section, which establishes the President's authority to provide non-humanitarian, nontrade-related foreign assistance, or the multilateral assistance despite a nations failure to comply with minimum standards for the elimination of trafficking. The proposed language adds an additional part to the subsection that mandates that before administering humanitarian or trade related assistance, the President shall propose to the government of the suffering nation legislation that will serve the purpose of eliminating trafficking. This would allow these nations to receive the assistance needed as long as they agree to introduce the suggested legislation. Moreover, this change also creates a foundation that can be built upon that could lead to strong legislative measures to prevent human trafficking in that nation. Parallels could be drawn between the proposed language and the incentives that states within the United States receive from the federal government to implement certain legislation. If those states choose not to adopt the suggested legislation, they do not receive certain federal funds. This system works effectively in the United States and could work internationally.

In the event that adverse effects could result from withholding humanitarian or trade related assistance to an ailing country, the original text in subsection (5)(B) will allow the

President to waive the imposition of anti-human trafficking legislation in order to assist the government of a nation not in compliance. The proposed language gives the United States the opportunity to lobby for legislation to be enacted and has the potential to go a long way in helping Tier 3 countries implement legislation that could eliminate human trafficking. (See Appendix III for a complete outline of the proposed changes to Section 110(d) of the TVPA)

Conclusion

Human trafficking is a form of modern-day slavery where people profit from the control and exploitation of others. Every year, human traffickers generate billions of dollars in profits by victimizing millions of people around the world, and here in the United States. In 2000, the United States enacted the Trafficking Victims Protection Act, and the United States adopted the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. These articles of legislation were created to prevent trafficking, prosecute offenders, and protect the victims of human trafficking. The most important way that these regulations have tried to achieve this has been the to mandate that nations worldwide criminalize human trafficking. In addition, the minimum standards mandate created by the TVPA has been instrumental to holding countries accountable for their role in eliminating or allow human trafficking. Still, human trafficking continues to thrive. Although the changes to the TVPA and the UN Protocol proposed in this paper are merely examples, those revisions can go a long way to strengthening the global approach on criminalizing human trafficking.

By removing the passive language used to instruct nations to create legislation to criminalize human trafficking, the new draft language sends a clear message in regards to how legislation should be structured. The effect of the proposed language clearly defines the crimes that should be criminalized, as well as the appropriate form of punishment. The existence of an

ambiguous mandate for “punishment” cannot be effective especially in areas where government entities are not overly concerned with human rights. The proposed language eliminates vagueness and has the possibility of making it more feasible to check the effectiveness of a country’s prescribed regulations.

As for the penalties imposed on Tier 3 countries, it is very difficult to balance humanitarian efforts with the protection of global human rights especially in areas facing extreme hardship. The proposed language mandating a Tier 3 nation requesting assistance to merely take the initial steps of introducing anti-human trafficking legislation can go a long way in eliminating human trafficking. Not only will the ailing nation get the assistance they need, they would have also taken a step towards elevating their Tier 3 status.

Human trafficking is considered to be one of the oldest crimes as well as the fastest growing criminal industries in the world. The idea of this paper is not to suggest that a few changes to the TVPA or UN Protocol will eliminate the problem completely. However, this paper is suggesting that the current mandates have flaws and should be revised to fix some of them. As such, the proposed legislation form one very viable solution to the issue of vagueness and ineffectiveness.

APPENDIX I

Article 5. Criminalization

1. Each State Party shall adopt such legislative and other measures ~~as may be necessary~~ to establish as ~~criminal offences the conduct set forth in paragraph 2 of this article~~ article 3 of this Protocol, when committed intentionally that, regardless of victim consent, whoever intentionally performs, attempts, participates, organizes or directs other persons to commit the following offenses shall be guilty of a criminal offence and subject to imprisonment.⁹⁵
 - a. The recruitment, transportation, transfer, harboring 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:
 - i. Prostitution of others or other forms of sexual exploitation;
 - ii. Forced labor or services;
 - iii. Slavery or practices similar to slavery;
 - iv. Servitude;

⁹⁵ This section is substantially similar to Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Paragraph 1 begins exactly the same as the original version but the phrase “as may be necessary” is removed to give the paragraph a more direct tone. Additionally, to improve efficiency and clarity, Paragraph 2 and the following subparts have been eliminated and incorporated in Paragraph 1. This shortens the Article 5 and makes it easier to interpret.

v. The removal of organs.⁹⁶

~~2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish attempting, participating, organizing or directing other persons to commit the following offenses as criminal offences:~~

~~(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;~~

~~(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and~~

~~(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.~~

⁹⁶ In the interest of clarity and thoroughness, instead of alluding to the sentiments of Article 3, subsection (a) incorporates the language in Article 3 and outlines exactly what are the types of victim exploitation that the Protocol is seeking to extinguish.

APPENDIX II

SEC. 108. Minimum Standards For the Elimination of Trafficking

A. MINIMUM STANDARDS. —For purposes of this division, the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination for a significant number of victims of severe forms of trafficking are the following:

- (1) The government of the country ~~should~~ must prohibit the performance, participation, organization, or the attempt of the following severe forms of trafficking in persons and mandate that offenders be subject to a term of imprisonment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense:
 - i. Knowingly holding or returning any person to a condition of peonage, or arresting any person with the intent of placing the person in or returning the person to a condition of peonage;
 - ii. Knowingly holding a person in a condition of involuntary servitude or selling into any condition of involuntary servitude;
 - iii. Knowingly providing, benefiting from, or obtaining the labor or services of a person, or by any one of, or by any combination of force, threats of force, physical restraint, or threats of physical restraint to that person or another person, serious harm or threats of serious harm to that person or another person, abuse or threatened abuse of law or legal process, or by means of any scheme, plan, or pattern intended to cause the person to

believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint;

- iv. Knowingly recruiting, harboring, transporting, providing, or obtaining by any means, any person for labor or services;⁹⁷

(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~~ must prescribe punishment a term of imprisonment commensurate with that for grave crimes, such as forcible sexual assault.⁹⁸

- e. ~~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 offense.~~⁹⁹

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

⁹⁷ This section embodies the legislative intent of the original language used in Section 108 of the Victims of Trafficking and Violence Protection Act. The changes made strengthen the emphasis and severity that should be applied to policing trafficking offenses. As for subsection (a), the most substantial change is the removal of the word “severe” in place for an outlined list of the forms of trafficking. This change moves any ambiguity on what is considered severe and what is not. The language used to describe the forms of trafficking in persons is derived from the statute United States statutes enforcing peonage (18 U.S.C. § 1581), involuntary servitude (18 U.S.C. § 1584), forced labor (18 U.S.C. § 1589), and sex trafficking (18 U.S.C. § 1591).

⁹⁸ The changes made to subsection (b) replace the term “punishment” for a defined mandate that those convicted of sex trafficking shall be subject to a term of imprisonment. The rationale of the change is that only mandating that a sex trafficker be subject to punishment can be interpreted in many ways, from the most barbaric or the most lenient solutions. Prescribing imprisonment give the Member States a less ambiguous penalty for sex traffickers.

⁹⁹ The original subsection (c) was removed and incorporated into subsection (a).

APPENDIX III

(d) PRESIDENTIAL DETERMINATIONS.—The determinations referred to in subsection (c) are the following:

1. WITHHOLDING OF NONHUMANITARIAN, NONTRADE-RELATED ASSISTANCE.—The President has determined that—

- A. (i) the United States will not provide nonhumanitarian, nontrade-related foreign assistance to the government of the country for the subsequent fiscal year until such government complies with the minimum standards or makes significant efforts to bring itself into compliance; or
- (ii) in the case of a country whose government received no nonhumanitarian, nontrade-related foreign assistance from the United States during the previous fiscal year, the United States will not provide funding for participation by officials or employees of such governments in educational and cultural exchange programs for the subsequent fiscal year until such government complies with the minimum standards or makes significant efforts to bring itself into compliance; and
- B. the President will instruct the United States Executive Director of each multilateral development bank and of the International Monetary Fund to vote against, and to use the Executive Director's best efforts to deny, any loan or other utilization of the funds of the respective institution to that country (other than for humanitarian assistance, for trade-related assistance, or for development assistance which directly addresses basic human needs, is not administered by the government of the sanctioned country, and confers no benefit to that government)

for the subsequent fiscal year until such government complies with the minimum standards or makes significant efforts to bring itself into compliance.

2. ONGOING, MULTIPLE, BROAD-BASED RESTRICTIONS ON ASSISTANCE IN RESPONSE TO HUMAN RIGHTS VIOLATIONS.—The President has determined that such country is already subject to multiple, broad-based restrictions on assistance imposed in significant part in response to human rights abuses and such restrictions are ongoing and are comparable to the restrictions provided in paragraph (1). Such determination shall be accompanied by a description of the specific restriction or restrictions that were the basis for making such determination.

3. SUBSEQUENT COMPLIANCE.—The Secretary of State has determined that the government of the country has come into compliance with the minimum standards or is making significant efforts to bring itself into compliance.

4. CONTINUATION OF ASSISTANCE IN THE NATIONAL INTEREST.—

A. Notwithstanding the failure of the government of the country to comply with minimum standards for the elimination of trafficking and to make significant efforts to bring itself into compliance, the President has determined that the provision to the country of nonhumanitarian, nontrade-related foreign assistance, or the multilateral assistance described in paragraph (1)(B), or both, would promote the purposes of this division or is otherwise in the national interest of the United States.

B. Upon deciding to administer humanitarian and trade-related foreign assistance government of a country that has failed to comply with minimum standards for the elimination of trafficking and to make significant efforts to bring itself into

compliance, as a prerequisite to receiving assistance, the President shall require that the government of that country introduce significant legislation in compliance with the minimum standards for the elimination of trafficking.¹⁰⁰

5. EXERCISE OF WAIVER AUTHORITY.—

- A. IN GENERAL.—The President may exercise the authority under paragraph (4) with respect to— (i) all nonhumanitarian, nontrade-related foreign assistance to a country; (ii) all multilateral assistance described in paragraph (1)(B) to a country; or (iii) one or more programs, projects, or activities of such assistance.
- B. AVOIDANCE OF SIGNIFICANT ADVERSE EFFECTS.— The President shall exercise the authority under paragraph (4) when necessary to avoid significant adverse effects on vulnerable populations, including women and children.

¹⁰⁰ This section is substantially identical to the original language used in Section 110(d) of the Victims of Trafficking and Violence Protection Act; the substantial additions appear in subsection (4). Subsection (4) creates a more proactive approach to punishing countries that fail to comply with the minimum standards for the elimination of trafficking. There are several countries that are classified as Tier 3 countries but due to hardships qualify to receive humanitarian or trade related foreign assistance. To serve the needs of the countries as well as take steps to eliminating human trafficking, the additional language creates the opportunity to serve both initiatives by providing humanitarian help to countries that need it as well as instituting legislation to fight human trafficking. The additional language fits well with the language in subsection (5) that gives the President the authority to use his discretion to as to whether or not to waive this mandate.