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Eleven Years Under Our Belt:
The Efficacy of Human Trafficking Law Examined
by
Alexander W. A. Smarsch

Submitted in partial fulfillment of the requirements of the
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Michigan State University College of Law
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I. Abstract

Over the last decade, the movement to end human trafficking has gained significant support. Most notably, the international community supplemented the UN Convention Against Transnational Organized Crime by adopting the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter “Protocol”). At about the same time, the United States put into force the Trafficking Victims Protection Act (hereinafter “TVPA”). The TVPA bolstered domestic laws and initiatives aimed at eliminating human trafficking by adopting the “3P” holistic approach, first advanced by the Protocol: 1) prevention; 2) prosecution; and 3) protection.

Despite the worldwide effort to tackle the issues related to human trafficking crimes, the number of trafficking victims continues to rise. The last eleven years have shown us that the human trafficking problem will not be solved by focusing efforts on criminal prosecutions and raising awareness. In order to effectively combat human trafficking, we must actively involve other disciplines and supplement prosecution-focused attacks with prevention-based interventions directed at the crime’s root causes.

Part II offers a brief discussion of the human trafficking experience, which takes the form of modern-day slavery. Part III discusses the Protocol and its importance to international anti-trafficking law. Part III also analyzes particular flaws in the TVPA’s: 1) prosecution-based approach to fighting trafficking crimes; 2) protective mechanisms aimed at identifying and rehabilitating victims; and 3) trafficking prevention measures. Part IV addresses the root causes of human trafficking by analyzing the relationship between the failure to provide birth

· The author thanks Michigan State University Professor of Law, Susan Bitensky, for her invaluable support and editorial contributions.

registration and an increased vulnerability to exploitation, which is the cornerstone for most, if not all, potential trafficking victims. Part IV also supports a prevention-based methodology designed to address a prime source of potential trafficking victims by slightly altering the TVPA and Protocol to encourage comprehensive and accessible birth registry programs abroad.

II. The Human Trafficking Experience

Human trafficking is an international scourge and a humanitarian dilemma.¹ For over a decade now, human trafficking, or “trafficking in persons,” has been the catch phrase used to describe a situation in which one person compels another person into forced service.² According to the U.S. State Department’s latest Trafficking in Persons Report³ (hereinafter “TIP Report”), there are currently 12.3 million human beings across the Earth in a form of bonded labor, forced labor and forced prostitution.⁴ This means that 1.8 out of 1,000 human beings are victims to trafficking crimes.⁵ Some scholars believe that the current numbers are flawed and that actual figures are closer to 30 million people trapped in some form of modern day slavery.⁶ However,

¹ DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2009), *available at* <http://www.state.gov/documents/organization/123357.pdf> (“Human trafficking . . . is a crime that deprives people of their human rights and freedoms, increase global health risks, fuels growing networks of organized crime, and can sustain levels of poverty and impede development in certain areas.”). [Hereinafter “2009 TIP Report”].

² DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 8-9 (2010), *available at* <http://www.state.gov/g/tip/rls/tiprpt/2010/> [hereinafter “2010 TIP Report”].

³ The U.S. State Department issues an annual “Trafficking in Persons” Report. For reference, each report will be listed as “TIP Report” and preceded by the year in which it was issued. For example, the 2010 Trafficking in Persons Report will be “2010 TIP Report.”

⁴ 2010 TIP Report, *supra* note 2, at 7.

⁵ *Id.*

⁶ See Kevin Bales, *Modern Slavery: The Secret World of 27 Million People* (Oneworld Publications) (2009); Kevin Bales, *Disposable People: New Slavery in the Global Economy* 8-9 (University of California Press) (2004) (Bales suggests that 27 million people are current enslaved in some form or another. Bales states that “[t]his number is much smaller than the estimates put forward by some activists, who give a range as high as 200 million, but it is the number I feel I can trust; it is also the number that fits my strict definition of slavery. The biggest part of that 27 million, perhaps 15 to 20 million, is represented by *bonded labor* in India, Pakistan, Bangladesh, and Nepal.”). DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2007), *available at* <http://www.state.gov/documents/organization/82902.pdf> [hereinafter “2007 TIP Report”].

it is important to recognize that any proffered statistic is merely an estimate; the actual number of victims will likely deviate from any projection due to trafficking's seedy and clandestine nature.⁷

Human trafficking victims are frequently regarded as "society's throwaways."⁸ Victims are almost exclusively those condemned to an existence characterized by vulnerability and susceptibility to exploitation.⁹ Trafficking victimization, like any large scale burden on society, results from a multitude of factors, but the problem is generally characterized by: poverty; lack of education or lack of access to education; poor economic outlook; the lure of better work elsewhere; organized crime; violence or discrimination against women and children; racial discrimination; political instability; armed conflict; and unrest resulting from natural disasters.¹⁰

Despite common belief, the means by which a person becomes a trafficking victim is not always abduction; in many circumstances, a parent may knowingly sell a child into forced labor or forced prostitution.¹¹ In other cases, a trafficker, posing as a benevolent caretaker, will take advantage of a society's tradition of fostering, which occurs when a child is sent to work in a distant city in exchange for an agreed upon job, education, or marriage.¹² Rather than fulfilling the promise, the trafficker will sell the victim into forced sexual prostitution or a form of bonded labor.¹³ Thus, it is not surprising that those who are trafficked most frequently are poor, uneducated, children, and women.¹⁴ In fact, according to the 2005 TIP Report, 80% of those

⁷ See Raneen Khooshie Lal Panjabi, *The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century*, 28 Pace Env'tl. L. Rev. 1, 52-53 (2010) (Referring to trafficking, Panjabi discusses the variations in "[t]he modus operandi of this clandestine trafficking.").

⁸ 2010 TIP Report, *supra* note 2, at 13.

⁹ Nilanjana Ray, *Looking at Trafficking Through a New Lens*, 12 Cardozo J.L. & Gender 909, 909 (2006)

¹⁰ Kalen Fredette, *Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation*, 17 CARDOZO J. INT'L & COMP. L. 101, 105 (2009); 2007 TIP Report, *supra* note 6, at 35.

¹¹ See 2009 TIP Report, *supra* note 1, at 7 (discussing "the role of the parents in child trafficking").

¹² *Id.* at 8.

¹³ *Id.* at 35.

¹⁴ Fredette, *supra* note 10, at 105-06.

trafficked across international borders are female; 50% of those trafficked across international borders are minors.¹⁵

The U.S. Department of State says that “[f]ighting human trafficking is not a static exercise. A trafficking law passed last year must be implemented and improved this year.”¹⁶ Indeed, human trafficking takes many forms and it is this dynamic nature that has made it so difficult to address. Forms of trafficking include: 1) *forced labor*, where the victim is forced to endure tireless hours of manual labor for little or no compensation; 2) *sex trafficking*, where the victim is forced, or initially deceived, into prostitution, or where a woman or child is required to prostitute in order to pay off an unlawful debt, usually stemming from her transportation or her sale into bondage; 3) *bonded labor*, where the victim becomes indebted to her trafficker, usually by unlawful means, and the trafficker exploits the initial debt in an effort to prolong the victim’s servitude; 4) *involuntary domestic servitude*, where the victim is forced to work and live in the trafficker’s home, usually completely isolated from the outside world and required to work upwards of 20 hours per day; 5) *child soldiering*, where the victim is unlawfully recruited as a combatant or a laborer, or for sexual exploitation during times of political unrest or civil strife; and 6) *child sex trafficking*, where the minor victim is forced into the commercial sex trade.¹⁷

In many trafficking cases, victims are kept in isolation, forbidden from even exiting their captor’s domain.¹⁸ Despite the shroud of secrecy, one thing has become apparent: there is little to no evidence suggesting that the United States has been able to curtail the domestic trafficking

¹⁵ DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2005), *available at* <http://www.state.gov/documents/organization/47255.pdf> [hereinafter “2005 TIP Report”].

¹⁶ 2010 TIP Report, *supra* note 2, at 6.

¹⁷ *Id.* at 9-12.

¹⁸ United Nations Office on Drugs and Crime, http://www.unodc.org/unodc/en/human-trafficking/faqs.html#How_widespread_is_human_trafficking (last visited Feb. 2, 2011) (explaining how “the crime takes place underground and is often not identified or misidentified”).

epidemic.¹⁹ The evidence actually suggests that the number of trafficked persons is continually rising, regardless of the increase in both prosecutions and awareness.²⁰ Thus, although we have recently seen a modest increase in the number of traffickers convicted and the number of victims rescued, the overall prevalence of modern day slavery has not diminished.²¹

III. Prominent International and Domestic Anti-Trafficking Instruments

A. UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons²² (“Protocol”) is the most prominent and instructive international document aimed at eliminating human trafficking in all its forms.²³ The Protocol is important for several reasons, but most significantly for “facilitat[ing] convergence in national approaches” to combating trafficking crimes.²⁴ By providing a single definition for human trafficking, the Protocol promotes “efficient international cooperation.”²⁵ Within the Protocol’s definition, three separate elements must be satisfied for a

¹⁹ Jonathan Todres, *Moving Upstream: The Merits of a Public Health Approach to Human Trafficking*, 89 N.C. L. Rev. 447, 447 (2011) (“There is no evidence, however, that these efforts have reduced the incidence of trafficking.”).

²⁰ DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2008), available at <http://www.state.gov/documents/organization/105501.pdf> [hereinafter “2008 TIP Report”].

²¹ See Todres, *supra* note 19, at 460-63.

²² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49 at 60, U.N. Doc. A/45/49 (Vol. I) (Nov. 15, 2000) (entered into force Sept. 9, 2003), available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

²³ Rebecca L. Wharton, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 766 (2010).

²⁴ United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and its Protocols*, <http://www.unodc.org/unodc/en/treaties/CTOC/index.html> (last visited Feb. 2, 2011).

²⁵ *Id.*

person to engage in trafficking: 1) an act; 2) a means; and 3) a purpose.²⁶ Thus, Article 3 of the Protocol defines “trafficking in persons” as:

[1] the recruitment, transportation, transfer, harbouring or receipt of persons, [2] 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 the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for [3] the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]²⁷

The Protocol is primarily a law enforcement instrument, rather than a human rights instrument, as it was developed by the UN Crime Commission, which is essentially a law enforcement body.^{28,29} Despite the Protocol’s genesis as a law enforcement document,³⁰ its breadth is evidenced by the inclusion of: 1) “prevent[ing] and combat[ing] trafficking in persons,”³¹ and 2) “protect[ing] and assist[ing] the victims of trafficking.”³² As a result, even though the Protocol contains “relatively weak” protection and prevention mechanisms, States

²⁶ Protocol, *supra* note 22, Art. III.a. See Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 811 (2009) (“Under Article 2 of the . . . Protocol, trafficking comprises three (not four) separate elements.”). But see James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 9 (2008) (arguing that trafficking, as defined under the Protocol, requires a fourth element, a “transnational element.”).

²⁷ Protocol, *supra* note 22, art. 3.

²⁸ Ann D. Jordan, THE ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL at 2, *available at* http://www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723#search=%22%22Annotated%20Guide%20to%20the%20Complete%20UN%20Trafficking%20Protocol%22%22 (last visited May 2, 2011) [hereinafter ANNOTATED GUIDE].

²⁹ *Id.*

³⁰ ANNOTATED GUIDE, *supra* note 28, at 2.

³¹ Protocol, *supra* note 22, art. 2(a).

³² *Id.* art. 2(b)

Parties are still obligated to do more than prosecute perpetrators; they must also implement domestic laws that protect victims and prevent trafficking from occurring in the first place.³³

The Protocol is important for a few additional reasons. First, movement of the victim, or “translocation,” is not required.³⁴ Second, the Protocol requires the victim’s consent to be irrelevant;³⁵ UN delegates, as explained in Footnote 19 of the Protocol, demanded that once the elements for the crime of trafficking are satisfied, the accused cannot use victim consent as a defense.^{36,37} Third, the Protocol introduced the “3P” approach to combating trafficking: criminal *prosecution*, victim *protection*, and trafficking *prevention*.³⁸

1. Prosecution

Article 5 of the Protocol addresses trafficking prosecution and requires each State Party to adopt legislation criminalizing the three part definition of trafficking discussed above. In addition, Article 5 requires the adopted legislation to impose stringent punishments for violating criminal laws.³⁹ The latter was likely a response to the numerous states that maintained lenient laws on their books; in the majority of foreign prosecutions, states enforced their laws by: 1) punishing traffickers with mild sentences; 2) penalizing the victim; or 3) doing both.⁴⁰ The lack

³³ ANNOTATED GUIDE, *supra* note 28, at 6.

³⁴ See FN 26, *supra*.

³⁵ Protocol, *supra* note 22, art. 3(b).

³⁶ ANNOTATED GUIDE, *supra* note 28, at 11.

³⁷ The annotations to the Protocol give the following example:

a woman can consent to migrate to work in prostitution in a particular city, at a particular brothel, for a certain sum of money. However, if the defendant intended actually to hold the women in forced or coerced sex work, then there is no consent because everything the defendant trafficker told the woman is a lie. No one can consent to a lie. Even if a person agrees to work in very bad conditions, for very little money, with very little freedom, he would still be a victim of trafficking if the trafficker intended to hold him in debt bondage, involuntary or forced condition.

Id.

³⁸ See 2010 TIP Report, *supra* note 2 at 5.

³⁹ Protocol, *supra* note 22, art. 5.

⁴⁰ Fredette, *supra* note 10, at 121.

of meaningful law enforcement has proven disastrous, given trafficking's profitable nature,⁴¹ and the Protocol mandates each State Party to correct the flaws in its criminal schemes.

2. Protection

Articles 6 through 8 deal specifically with the Protocol's 2nd "P": protection. The articles instruct States Parties in ways to adequately protect trafficking victims,⁴² and when doing so, to show "full respect for their human rights."⁴³

Article 6 begins by attempting to make the legal process more victim-friendly: the victim's privacy is placed in higher priority; the judicial proceedings are designed with the victim's interests in mind; and the victim's physical, psychological and social health are taken into account.⁴⁴ Further, the Protocol mandates that States Parties take "appropriate measures" to allow trafficking victims to remain within its territory, either permanently or temporarily.⁴⁵ The Protocol acknowledges that retaliation may occur if the victim's identity is disclosed to the public.⁴⁶ However, identity protection is not required; U.N. delegates refused to implement mandatory identity protection mechanisms and instead used the paltry language "in appropriate cases and to the extent possible."⁴⁷ In addition, the Protocol carries weak language requiring only that States Parties "shall consider" adopting measures to provide for the victim's physical, social and psychological recovery.⁴⁸ Measures aimed at assisting the victim's recovery in these regards include providing: 1) appropriate housing,^{49,50} counseling and information;^{51,52} medical

⁴¹ *Id.* ("In comparison to other lucrative activities of organized crime (e.g., trafficking drugs and arms), human trafficking has promised comparatively low risk of detection, prosecution and severe penalties. . . . [T]his lack of criminal liability only entices traffickers to offend.").

⁴² Protocol, *supra* note 22, arts. 6, 7, 8.

⁴³ *Id.* art. II(b).

⁴⁴ *Id.* art. 6.

⁴⁵ *Id.* art. 7.

⁴⁶ ANNOTATED GUIDE, *supra* note 28, at 19.

⁴⁷ Protocol, *supra* note 22, art. 6(1).

⁴⁸ *Id.* art 6(3).

⁴⁹ *Id.* art. 6(3)(a).

and psychological assistance;⁵³ and educational and employment opportunities.⁵⁴ Article 6 also requires each State Party to “endeavor” to protect the victim’s physical safety while in its territory.⁵⁵ Despite the Protocol’s apparently vague and meager language, this provision is very important because it stresses the “need to protect *all* trafficked persons, not just witnesses” and those able to supplement criminal investigations.⁵⁶

Article 7 specifically addresses States Parties that receive rescued trafficking victims and instructs each of them to “consider adopting” legislation or “other appropriate measures” that will allow a trafficking victim to remain in its territory, either temporarily or permanently, “in appropriate cases.”⁵⁷ Thus, although Article 7 acknowledges the need for providing trafficking victims with legal immigration status, it fails to impose any hard-and-fast obligations.⁵⁸ Article 7 also mandates that if a State Party does adopt domestic legislation in this regard, it must “give appropriate consideration to humanitarian and compassionate factors.”⁵⁹ Thus, in deciding whether to grant the victim prolonged residency in her destination country, a State Party is only required to *consider* whether she will be revictimized upon return to her country of origin.⁶⁰

⁵⁰ ANNOTATED GUIDE, *supra* note 28, at 20 (“In many countries, trafficked persons are deported immediately or held in prisons or detention centers because there is no appropriate shelter This section recognizes that trafficked persons are victims who should be provided with ‘appropriate housing’ and that they should not be held in detention centers or prisons.”).

⁵¹ Protocol, *supra* note 22, art. 6(3)(b).

⁵² Annotated Guide, *supra* note 28, at 21 (“Although the term ‘counseling’ could be interpreted to mean legal advice only, it must have a broader meaning. . . . Legal counseling must be provided by a lawyer . . . at all stages of any legal proceedings involving the trafficked person.”).

⁵³ Protocol, *supra* note 22, art. 6(3)(c).

⁵⁴ *Id.* art. 6(3)(d).

⁵⁵ *Id.* art. 6(5).

⁵⁶ ANNOTATED GUIDE, *supra* note 28, at 22.

⁵⁷ Protocol, *supra* note 22, art. 7(1).

⁵⁸ ANNOTATED GUIDE, *supra* note 28, at 26.

⁵⁹ Protocol, *supra* note 22, art. 7(2).

⁶⁰ Meredith Flowe, *The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply and Demand*, 35 N.C. J. INT’L L. & COM. REG. 669, 698 (2010).

This provision is inadequate because when a state passively allows for revictimization to occur, the supply of potential trafficking victims is never actually reduced and the crime continues on.⁶¹

Article 8 deals with protecting trafficking victim's during the repatriation process.⁶² Most immediately, a State Party to the Protocol must "accept" and "facilitate" the return of trafficking victim's who are nationals "with due regard for . . . safety" and "without undue or unreasonable delay."⁶³ Thus, there is a positive obligation on the State Party to whose territory the victim is returned to make sure retaliation or unlawful arrests do not occur.⁶⁴ However, "without undue or unreasonable delay" means only that the government must arrange for repatriation only after the victim exhausts her legal rights; the government cannot deport a trafficked victim immediately.⁶⁵ Further, Article 8 also provides that the victim's return to her country of origin "shall preferably be voluntary."⁶⁶ Footnote 29 of the Protocol clearly states that returns may also be involuntary.⁶⁷ Despite its allowance for involuntary deportation, the Protocol will likely improve the repatriation process because a State Party is now required to take back its citizens and at least provide for a base level of protection.⁶⁸

3. Prevention

In Article 9, the Protocol addresses the 3rd "P": prevention. States Parties to the Protocol must establish policies and programs to prevent and combat human trafficking and to protect against revictimization.⁶⁹ Research, media campaigns and socio-economic initiatives must be

⁶¹ *Id.*

⁶² Protocol, *supra* note 22, art. 8.

⁶³ *Id.* art. 8(1).

⁶⁴ ANNOTATED GUIDE, *supra* note 28, at 27.

⁶⁵ *Id.*

⁶⁶ Protocol, *supra* note 22, art. 8(2).

⁶⁷ *Id.* art. 8(2) FN 29.

⁶⁸ It is important to note that the Protocol does not address the issue of the trafficking victim who does not have a registered nationality.

⁶⁹ Protocol, *supra* note 22, arts. 9(1)(a) & (b).

employed⁷⁰ and should involve cooperation with non-governmental organizations and “other elements of civil society.”⁷¹

Most importantly under the Protocol, “States Parties shall take or strengthen measures . . . to alleviate the factors that make persons . . . vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.”⁷² What this means is that States Parties are absolutely required to “take positive steps to address the underlying causes of trafficking.”⁷³ The Protocol recognizes that many governments across the world do not have the resources necessary to implement programs aimed at reducing poverty; but, at the very least a State Party can enact equal-opportunity legislation.⁷⁴ In addition, States Parties must “adopt or strengthen legislation . . . to discourage the demand that fosters all forms of exploitation of persons[.]” Thus, Article 9 specifically reflects the Protocol’s overall recognition that effective trafficking prevention entails efforts directed at the crime’s root causes.⁷⁵

B. Trafficking Victims Protection Act

In October of 2000, U.S. President Bill Clinton signed the Trafficking Victims Protections Act (“TVPA” or “Act”) into power.⁷⁶ The TVPA was enacted due to Congress’s finding that “the degrading institution of slavery continues throughout the world.”⁷⁷ The Act labels human trafficking as “severe forms of trafficking in persons,” and defines the crime as:

sex trafficking in which a commercial act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the

⁷⁰ *Id.* art. 9(2).

⁷¹ *Id.* art. 9(3).

⁷² *Id.* art. 9.

⁷³ ANNOTATED GUIDE, *supra* note 28, at 29.

⁷⁴ *Id.*

⁷⁵ *Id.* at 29-30.

⁷⁶ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in various sections of titles 8, 18, and 22 U.S.C.) [hereinafter “TVPA”].

⁷⁷ 22 USC § 7101(b)(1).

recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.⁷⁸

Just as in the Protocol, the TVPA does not require the trafficker to transport the victim to a different location in order for the act to apply.⁷⁹ A further similarity is found with the TVPA's incorporation of the "3P" approach discussed above:

The "3P" paradigm is an interlocking one. It is not enough to prosecute traffickers if we do not also provide assistance to the survivors and work to ensure that no one else is victimized. No country has yet attained a truly comprehensive response to this massive, ever increasing, ever changing crime. Ten years of focused efforts is the mere infancy of this modern movement; many countries are still learning about human trafficking and the best responses to it.⁸⁰

1. Prosecution

Prior to the TVPA's enactment, traffickers were rarely brought to justice due to ineffective trafficking legislation, costly prosecutions, and investigative difficulties.⁸¹ Although the TVPA first appeared to be an effective tool for fighting off the ills of human trafficking, many scholars have criticized the Act as focusing almost exclusively on criminal prosecutions.⁸² During the TVPA's drafting process, it was widely known throughout the international community that "[t]raffickers often go unpunished for their crimes where there is little rule of

⁷⁸ *Id.* § 7102(8).

⁷⁹ 2009 TIP Report, *supra* note 1, at 7.

⁸⁰ *Id.* at 5.

⁸¹ Susan Tiefenbrun, *The Saga of Susannah A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 160 (2002).

⁸² See Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 253-64 (2006-2007); see generally Todres, *supra* note 19; Dina Francesca Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77 (2008).

law, lack of enforcement of existing anti-trafficking laws, and corruption of law enforcement institutions.”⁸³ It is certainly true that the human trafficking boom has been caused in part by a lack of law enforcement abroad. However, trafficking results from a multitude of factors, and a prosecution-based trafficking initiative, by itself, is not sufficient.⁸⁴

Between 2001 and 2007, the U.S. Department of Justice prosecuted 156 trafficking cases, convicted 342 traffickers, and rescued roughly 1400 victims.⁸⁵ When compared to the years 1994-2000, this represents a 700 percent increase in domestic prosecutions.⁸⁶ Initially, the large percentage increase sounds great; however, when you factor in trafficking’s ubiquitous nature, it becomes readily apparent that “the numbers of prosecutions each year are dismally low in comparison to the scope of the problem.”⁸⁷ For example, it is estimated that between 14,500 and 17,500 people are trafficked into the United States each year.⁸⁸ Thus, crunching the numbers above, roughly 1% of victims within the United States are eventually rescued. Congress’s intentions should certainly be commended. However, despite the increased focus on prosecution, both the number of victims rescued and the number of traffickers prosecuted remain dispiritingly low.

⁸³ DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 9 (2003), *available at* <http://www.state.gov/documents/organization/21555.pdf> [hereinafter “2003 TIP Report”].

⁸⁴ ANNOTATED GUIDE, *supra* note 28, at 4 (“A law enforcement response, by itself, may endanger trafficked persons and it often results in the immediate deportation of potential witnesses or else arrest and imprisonment. . . . On the other hand, a human rights-based response . . . empowers trafficked persons . . . and provides them with safety and offers justice.”). *See* 2010 TIP Report, *supra* note 2, at 13 (“Just as passage of a law without its enforcement is an empty promise, law enforcement alone without victim protections is an inadequate response.”).

⁸⁵ Facts About the Department of Justice’s Anti-Trafficking Efforts, <http://www.justice.gov/olp/pdf/myths-and-facts.pdf> (last visited Feb. 20, 2011).

⁸⁶ *Id.*

⁸⁷ 2010 TIP Report, *supra* note 2, at 13.

⁸⁸ DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 23 (2004), *available at* <http://www.state.gov/documents/organization/34158.pdf> [hereinafter “2004 TIP Report”].

2. Protection

The TVPA affords certain human trafficking victims significant protection.⁸⁹ Initially, the TVPA requires the U.S. Department of Justice and the U.S. Department of State to train law enforcement officers, prosecutors, INS officials, T visa adjudicators,⁹⁰ the U.S. Department of Labor, the Federal Bureau of Investigation, and numerous NGOs how to identify victims of sex trafficking and how to care for the victims' particular needs.⁹¹ In addition, the Department of Health and Human Services (DHHS) and the Office of Refugee Re-Settlement (ORR) are required to work in tandem to protect and assist trafficking victims.⁹² Examples of the benefits DHHS and OOR provide are: 1) outreach programs, which raise awareness about the human trafficking epidemic; and 2) certification programs, which allow victims to gain access to immediate assistance, as well as to prolonged or even permanent residence in the United States.⁹³

Unfortunately, the availability of the TVPA's protective provisions leaves much to be desired. The Act follows a migrant model,⁹⁴ which requires a victim to cooperate with law enforcement before protection and assistance is provided.⁹⁵ If the victim refuses to assist law enforcement, or if the victim is unable to prove that she was a victim of trafficking, she will not

⁸⁹ 22 USC § 7105.

⁹⁰ A victim who receives a T visa has four years of eligibility to remain in the United States. T visa status is available to an alien who

(1) [i]s or has been a victim of a severe form of trafficking in persons; (2) [i]s physically present in the United States, American Samoa, or at a port-of-entry thereto, on account of such trafficking in persons; (3) [e]ither: (i) [h]as complied with any reasonable request for assistance in the investigation or prosecution of acts of such trafficking in persons, or (ii) [i]s less than 15 years of age; and (4) [w]ould suffer extreme hardship involving unusual and severe harm upon removal. . . .

Alien Victims of Severe Forms of Trafficking in Persons, 8 C.F.R. §214.11(b) (2009).

⁹¹ Tiefenbrun, *supra* note 82, at 260 (*citing* TIP report 2005, *supra* note 19, at 242-43 (discussing what services are available to trafficking victims)).

⁹² *Id.* at 261 (discussing the HHS and ORR's responsibilities under the TVPA).

⁹³ *Id.*

⁹⁴ Geneva Brown, *Women and Children Last: The Prosecution of Sex Traffickers as Sex Offenders and the Need for a Sex Trafficker Registry*, 31 B.C. THIRD WORLD L.J. 1, 12-14 (2011) (discussing how "[t]he Migrant Model is a law and order approach that does not fully recognize trafficked persons as victims").

⁹⁵ *Id.* at 24-28 ("Similar to the European Union, the United States uses the migrant model in combating human trafficking.").

be able to access the TVPA's protection mechanisms. The reason why: federally funded assistance, such as victim shelters and medical care, is only available to "certified" victims.⁹⁶ Certification, put simply, is a series of steps the victim must climb in order to receive government assistance.⁹⁷ First, the victim must qualify as a "victim" as that term is used in the TVPA.⁹⁸ Second, the victim must be "willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons[.]"⁹⁹ A victim may bypass the second requirement only if she can show that she suffers from physical or psychological harm to the extent that cooperation is not possible.¹⁰⁰ Third, the victim must either complete a T visa¹⁰¹ application or receive "Continued Presence"¹⁰² from the Department of Homeland Security so as to assist in the prosecution of traffickers.¹⁰³

⁹⁶ See Haynes, *supra* note 82, at 84 ("Without certification, there is no place for the victim to go."); see also Department of Health & Human Services, *Certification For Victims of Trafficking Fact Sheet*, http://www.acf.hhs.gov/trafficking/about/cert_victims.pdf (last visited Feb. 28, 2011).

⁹⁷ 22 USC 7105(8)(1)(C)(ii)(I) (Under the TVPA, minor victims of sex trafficking are not required to have certification in order to receive assistance.).

⁹⁸ A "victim" under the TVPA a person who is the victim of "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age;" or "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery," 22 USC §§ 7102(8)(A) & (B), or a person who is "recruit[ed], harbor[ed], transport[ed] . . . or obtain[ed] . . . for the purpose of a commercial sex act[.]" 22 USC § 7101(9)

⁹⁹ 22 USC 7105 §§ 107(b)(1) (C) & (b)(1)(E).

¹⁰⁰ See Department of Health & Human Services, *Certification For Victims of Trafficking Fact Sheet*, http://www.acf.hhs.gov/trafficking/about/cert_victims.pdf (last visited Feb. 28, 2011).

¹⁰¹ A T visa allows alien trafficking victims to gain temporary residence in the United States. A victim who receives a T visa has four years of eligibility to remain in the United States. T visa status is available to an alien who (1) [i]s or has been a victim of a severe form of trafficking in persons; (2) [i]s physically present in the United States, American Samoa, or at a port-of-entry thereto, on account of such trafficking in persons; (3) [e]ither: (i) [h]as complied with any reasonable request for assistance in the investigation or prosecution of acts of such trafficking in persons, or (ii) [i]s less than 15 years of age; and (4) [w]ould suffer extreme hardship involving unusual and severe harm upon removal. . . .

CFR, Alien Victims of Severe Forms of Trafficking in Persons, *supra* note 90.

¹⁰² Authority to permit continued presence in the United States for victims of severe forms of trafficking in persons, 28 C.F.R. § 1100.35 (2001) ("Federal law enforcement official who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking may request that the Immigration and Naturalization Service (INS) grant the continued presence of such aliens in the United States.").

¹⁰³ Department of Health & Human Services, *supra* note 100.

The experience of being trafficked “wreaks a severe psychological effect on the victim” and subjects her to severe, physical violence.^{104,105} Victims are not only afraid of repercussions by their captors,¹⁰⁶ but also by the traffickers still on the prowl back in their countries of origin, who facilitated the crime in the first place. Victims may very well fear that assisting law enforcement will only result in more harm being inflicted upon their families, or upon themselves.^{107,108} Thus, the victim’s refusal to assist law enforcements, even if based on objectively reasonable fear, ultimately leads to the refusal of federal assistance.¹⁰⁹

A serious problems results when a trafficking victim: 1) cannot or will not provide meaningful assistance to federal law enforcement officers and prosecutors,¹¹⁰ and/or 2) is unable to provide sufficient evidence proving that she is a legitimate victim of a severe form of trafficking.¹¹¹ In many circumstances, the victim is not physically rescued from the trafficker’s

¹⁰⁴ See Wharton, *supra* note 23, at 773-74 (2010); see also TIP Report 2009, *supra* note 1, at 22 (“Sex trafficking has devastating consequences for minors, including long-lasting physical and psychological trauma, disease (including HIV/AIDS), drug addiction, unwanted pregnancy, malnutrition, social ostracism, and possible death.”).

¹⁰⁵ Brooke Woodland, *The Psychological Trauma of Modern Day Slavery: Sex Trafficking and its Impact on the Field of Psychology in Thailand*, 9 (April 14, 2008), available at <http://www.philau.edu/schools/liberalarts/news/documents/Woodland.pdf> (“Human trafficking has a tremendous psychological impact on its victims as a result of the manipulation, abuse, and cultural shock These effects are most prominent in women and children trafficked into the commercial sex industry, and commonly involve depression, anxiety, post-traumatic stress disorder, and substance abuse.”).

¹⁰⁶ Brown, *supra* note 94, at 25-26 (“The lure of receiving a T-visa and aid puts trafficked women in precarious and dangerous predicaments. Trafficked women who choose to cooperate with U.S. law enforcement risk violent reprisals.”).

¹⁰⁷ *Id.* (“Trafficked women who do not cooperate face detention and deportation, regardless of whether or not they are convicted for working in the illegal sex trade. Once deported, they face a ten-year ban on reentering the United States.”).

¹⁰⁸ Fredette, *supra* note 10, at 130 (“A principal consideration for strong victim protection is that trafficker prosecution often requires victim cooperation, particularly in their role as witnesses. However, victims are commonly intimidated by traffickers who threaten reprisal if victims seek assistance of local authorities. Consequently, rescued persons who fear injury to themselves or families are reluctant to testify against their handlers during criminal trials.”).

¹⁰⁹ See Brown, *supra* note 94, at 25-26.

¹¹⁰ CRS Report for Congress, *Trafficking in Persons: U.S. Policy and Issue for Congress* at 4 (July 2, 2009), available at <http://fpc.state.gov/documents/organization/126528.pdf> (Human trafficking continues to be a problem because “[t]he tendency to treat trafficking victims as criminals has made many victims reluctant to cooperate with law enforcement.”).

¹¹¹ See generally Haynes, *supra* note 82 (discussing the impediment prosecutors and law enforcement officers pose to trafficking victims trying to acquire protection).

control; rather, the victim escapes from her captor and seeks help on her own.¹¹² When this occurs, the migrant model mandates benefits to be withheld and deportation proceedings to begin.¹¹³

As explained above, a major impediment preventing the TVPA from adequately “protecting” victims is the role played by law enforcement and prosecutors in determining whether the victim will ultimately receive assistance.¹¹⁴ The prosecutor’s lack of resources and the law enforcement officer’s lack of evidence may prevent a difficult case from receiving attention.¹¹⁵ As a result, a dismal fate is likely guaranteed for those who survive the human trafficking experience but are unable to reasonably provide assistance or unable to prove victimization.¹¹⁶ Thus, unless the victim assumes the risk of retaliatory conduct and is capable of assisting law enforcement, no protection will actually be afforded, and revictimization is the likely result.¹¹⁷

3. Prevention

Throughout the last decade in which the TVPA has been in force, preventative measures aimed at addressing human trafficking’s root causes have received little to no attention within the United States.¹¹⁸ For example, the incidence of domestic sex trafficking has continued to increase annually; the United States has not responded with methodologies aimed at preventing discrimination against women and children, nor with increasing educational opportunities for

¹¹² See, e.g., TIP Report 2010, *supra* note 2, at 17 (discussing the story of a girl who had to save enough money through forced prostitution to flee and buy a plane ticket home).

¹¹³ *Id.*

¹¹⁴ Haynes, *supra* note 82, at 82.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 82-84.

¹¹⁷ *Id.* at 82.

¹¹⁸ *Id.* at 450-51, 57 (The United States has implemented “almost no measures addressing the root causes of the problem.”).

those susceptible to exploitation. State and federal legislators have simply imposed more rigorous criminal laws and punishments.¹¹⁹

Section 106 of the TVPA governs trafficking prevention.¹²⁰ What it boils down to is that the President must 1) establish certain “economic alternatives to prevent and deter trafficking,” both in the United States and internationally, and 2) implement programs designed to raise public awareness, especially for those suffering from increased susceptibility to exploitation.¹²¹ The TVPA is remarkably vague as to how domestic trafficking prevention should be implemented, and to date, little has been done in this regard.¹²²

The TVPA also contains additional provisions that provide the President with helpful means to influence trafficking abroad. First, sections 109 and 110 of the TVPA amend the Foreign Assistance Act of 1961 to provide the President with the ability to grant assistance to foreign nations that meet “minimum standards” for fighting trafficking.¹²³ The President may also refuse to provide non-humanitarian, non-trade related foreign assistance to any foreign government that fails to meet the same “minimum standards.”¹²⁴

According to section 108 of the TVPA:

¹¹⁹ See Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 304-05 (1997).

¹²⁰ 22 USC § 7104.

¹²¹ *Id.* §§ (a) & (b).

¹²² I am not trying to say that the United States has done nothing in regards to preventing human trafficking. Deputy Assistant Attorney General, Laurence E. Rothenberg, recently reported on the matter of prevention to the House of Representatives Committee on the Judiciary. According to Rothenberg, the Justice Department has: 1) “spoke over 130 times at public events or training sessions on the issue of trafficking[,] 2) trained over 700 specialty law enforcement on the issue of child prostitution, 3) given a grant to Northeastern University to construct a national Human Trafficking Reporting System, and 4) funded additional research projects to better understand the crime. *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Before the U.S. House of Representatives Committee on the Judiciary*, 110th Cong. 10-15 (2007) (statement of Laurence E. Rothenberg, Deputy Assistant Attorney General). *But see* Jonathan Todres, *The Importance of Realizing “Other Rights” to Prevent Sex Trafficking*, 12 CARDOZO J.L. & GENDER 885, 885-86 (2006) (“To date, efforts undertaken by various countries have focused primarily on [prosecution], with comparatively minimal resources being allocated to prevention or victim assistance programs.”).

¹²³ 22 USC § 2152(d).

¹²⁴ 22 USC § 7106(a).

(a) [T]he 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 prohibit severe forms of trafficking in persons and punish acts of such trafficking.
- (2) For the knowing commission of any act of sex trafficking . . . the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.
- (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.
- (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.¹²⁵

Here, despite being labeled “prevention,” we see the TVPA attempting to eliminate trafficking with a prosecution-based approach that pays little attention to prophylactic measures.¹²⁶ This flawed methodology has the effect of contributing to the growing trafficking epidemic because the industry’s root causes are simply not addressed.¹²⁷

¹²⁵ *Id.*

¹²⁶ Article 9 of the Protocol requires each State Party to “take or strengthen measures, including through bilateral or multilateral, cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.” Protocol, *supra* note 22, art. 9(4). It appears as though the TVPA’s “minimum standards” do not live up to the Protocol’s prevention-based requirements. The “minimum standards” do not call for mechanisms that allow for bilateral or multilateral cooperation focused on alleviating the factors that make persons vulnerable to trafficking. See 22 USC § 7106.

¹²⁷ Todres, *supra* note 122, at 887 (“Ultimately, current prevention efforts fall short because they do little to address the systemic issues that permit sex trafficking to occur.”).

Until the 2008 reauthorization and amendments,¹²⁸ the TVPA's minimum standards remained paltry. Congress' subsequent reauthorizations of the TVPA added several sets of factors the President "should" considered when establishing whether, under section (a)(4) above, a foreign government has made "serious and sustained efforts to eliminate severe forms of trafficking in persons." The amended factors are: 1) whether the foreign government has investigated, prosecuted, convicted, and sentenced persons responsible for the crime; 2) whether the foreign government has protected trafficking victims and encouraged their assistance in investigating persons responsible for the crime; 3) "[w]hether the foreign government has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, and measures to establish the identity of local populations, including birth registration, citizenship, and nationality[;]" 4) whether the foreign government cooperated with international trafficking investigations and prosecutions; 5) whether the foreign government extradited persons charged with committing trafficking crimes; 6) whether the foreign government analyzed immigration and emigration patterns to detect incidents of trafficking; 7) whether the foreign government investigated, prosecuted, convicted, and sentenced public officials charged with facilitating trafficking; and 8) whether the foreign government has shown "appreciable progress" in eliminating trafficking within its borders.¹²⁹

The above factors are a step in the right direction. However, most of the factors are still based on increasing prosecutions, assisting international investigations, and protecting trafficking victims; the factors only briefly touch upon alleviating trafficking's root causes.¹³⁰ In addition, the Act imposes no mandatory, positive obligations on foreign governments; the amendment is merely a list of factors that "should" be considered. Further, sanctions against an offending

¹²⁸ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 (2008).

¹²⁹ TVPA, Div. A of Pub. L. No. 106-386, § 108, as amended.

¹³⁰ *Id.*

nation may ultimately be waived if the president determines such a waiver would “promote the purposes of the statute” or are “necessary to avoid significant adverse effects on vulnerable populations[.]”¹³¹ As a result, although many nations have begun to bolster anti-trafficking infrastructures and pass anti-trafficking legislation, many more nations have dragged their heels, citing that they are doing the best with what they’ve got.¹³² Thus, the “minimum standards” continue to lack teeth and ultimately give foreign nations far too much discretion in determining the manner in which to combat human trafficking. In order to effectively eliminate human trafficking, we must focus more heavily on mitigating the crime’s underlying causes by imposing mandatory obligations on foreign governments that entail human trafficking prevention.

IV. A Successful, Prevention-Based Approach Addresses

Human Trafficking’s Root Causes

The environment in which trafficking operates most effectively is one rich in potential victims and one that trivializes the unobstructed exploitation of human beings.¹³³ Despite popular belief, the vast majority of trafficking crimes result from exploitation or coercion that occurs after the victim enters into some arrangement with the trafficker.¹³⁴ In other words, the victim enters the relationship with the trafficker willingly; however, the trafficker eventually uses some form of leverage as a “weapon”¹³⁵ to exploit the victim’s vulnerabilities.¹³⁶ Leverage

¹³¹ See 2010 TIP Report, *supra* note 2, at 28.

¹³² Jane Kim, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT’L L. 443, 450-51 (2011).

¹³³ See 2010 TIP Report, *supra* note 2, at 8-9; see also 2009 TIP Report, *supra* note 1, at 4 (human trafficking is defined by a “the myriad forms of exploitation”).

¹³⁴ 2010 TIP Report, *supra* note 2, at 5.

¹³⁵ *Id.* at 5.

¹³⁶ In regards to children trafficking victims, the Protocol explicitly states that “[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in [the crime’s definition].” Protocol, *supra* note 22, art. 3(c).

may be: 1) threats of violence or deportation; 2) psychological torture; 3) sexual violence; 4) empty promises to educate or employ; or 5) underlying debts.¹³⁷ In order to effectively prevent victimization before the trafficker acquires leverage, it is important to address the crime's root causes.¹³⁸

A. The Root Causes of Human Trafficking

Many factors exacerbate a potential trafficking victim's susceptibility to exploitation. Most frequently, a victim suffers from: 1) lack of economic or educational opportunities; 2) marginalized political status; and/or 3) poverty.¹³⁹ Poverty is human trafficking's prime driving factor and is especially prevalent in the realm of sex trafficking, forced labor and child labor.^{140,141} Along with illiteracy and discrimination, poverty is often a major characteristic of the female trafficking victim's background.¹⁴² Poverty is a significant cause of trafficking crimes because it tends to operate effectively on two levels: 1) poverty is a significant *cause* of human susceptibility to trafficking, and 2) trafficking is a *means* of alleviating a family's impoverished lifestyle.¹⁴³ For example: 1) a vulnerable person may rely on a false promise to educate or employ in a distant city, perhaps due to ignorance, in an attempt to overcome poverty;

¹³⁷ 2010 TIP Report, *supra* note 2, at 8-9 (noting that poverty is a major contributor to the success of the trafficking industry).

¹³⁸ See Todres, *supra* note 19, at 450-51 (suggesting the United States' approach to human trafficking is flawed because it has employed "almost no measures addressing the root causes of the problem"); see also Rozi Pati, *States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia*, 29 B.U. INT'L L.J. 79, 124 (2011) ("It is important [to] . . . utilize[] a comprehensive methodology which will enable assessment and monitoring of state action towards prevention and addressing root causes of human trafficking, and not merely the state's efforts in suppressing human trafficking through immigration control.").

¹³⁹ 2009 TIP Report, *supra* note 1, at 29.

¹⁴⁰ 2010 TIP Report, *supra* note 2, at 8.

¹⁴¹ See Pati, *supra* note 138, at 113-15 (discussing the International Labor Organization's adoption of the Worst Forms of Child Labor Convention (No. 182) and its view that "poverty is the root cause of child labor").

¹⁴² Brown, *supra* note 94, at 6-7.

¹⁴³ Sovereign Hager, *Farm Workers and Forced Labor: Why Including Agricultural Guest Workers in the Migrant and Seasonal Worker Protection Act Prevents Human Trafficking*, 38 SYRACUSE J. INT'L. L. & COM. 173, 176-77 (2010) (The factors that 'push' people into situations where they become victims of trafficking have also been identified as factors that lead people to migrate, even if they do not fall victim to trafficking. Examples of these factors include poverty, unemployment, and civil strife.").

and 2) a child or other family member may be sold into a position of illegal servitude to provide monetary support for the victim's family.¹⁴⁴

Lack of education is another substantial cause of human trafficking.¹⁴⁵ Today, one hundred million children worldwide are not enrolled in school,¹⁴⁶ which is unfortunate because poverty and education are heavily intertwined.¹⁴⁷ A child who is denied access to education is more likely to experience poverty, is more likely to enter the work force at an early age, and is less likely to learn skills necessary to gain meaningful employment.¹⁴⁸ This, in turn, makes the child far more susceptible to exploitation.¹⁴⁹ On the relation between education and susceptibility to exploitation, one commentator's description is particularly informative:

Education provides value not only in the long-term, it is also crucial to helping keep children out of exploitative work environments, including sex trafficking. . . . Children are pressed to work in a variety of settings, including domestic servants, agricultural workers, prostitutes, and factory workers. The less education a child receives, the earlier she enters the workforce and the more limited her skills are, making her a prime target for sex traffickers.¹⁵⁰

¹⁴⁴ *Id.*

¹⁴⁵ See Todres, *supra* note 122, at 906.

¹⁴⁶ UNICEF, Basic Education and Gender Equality, (estimating that 101 million children do not attend school), available at http://www.unicef.org/education/index_access.html, (last visited Mar. 25, 2011).

¹⁴⁷ See Gary Orfield and John T. Yun, The Civil Rights Project Harvard University, *Resegregation in American Schools* 16 (1999), available at http://w3.uchastings.edu/wingate/PDF/Resegregation_American_Schools99.pdf (analyzing the correlation between segregation in school, access to education, and poverty; subsequently determining that “[c]oncentrated poverty is strongly linked to many forms of educational inequality”).

¹⁴⁸ See Todres, *supra* note 122, at 903 (arguing that education is one of five other rights relevant to combating trafficking).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

At the most basic level, an education will give the child a better chance at a meaningful life and will also drastically reduce his or her susceptibility both to poverty and to exploitation.¹⁵¹ As a means of further preventing exploitation, children who receive an education are better able to exercise their civil, political, economic, social, and cultural rights.¹⁵² By providing accessible educational opportunities, potential victims and their families will be less susceptible to relying upon a trafficker's empty promise of receiving schooling or learning a trade abroad. In many situations, the trafficker lures in his victim by offering a better life.¹⁵³ If an education is provided to the child, the trafficker loses the upper hand, rendering deceptive and coercive tactics less persuasive. A prevention-based measure aimed at alleviating poverty and increasing access to education in locations found to be prominent sources of victims may help dissipate the trafficking industry's vast pool of human resources.¹⁵⁴

In order to effectively reduce human susceptibility to exploitation, it is important to understand: 1) how persons become poverty-stricken and 2) how persons increase their access to education. This section's ultimate goal is to offer a prevention-based framework as guidance on how to effectively amend and strengthen the Protocol and the TVPA. Specifically, by incentivizing foreign governments to implement and strengthen comprehensive birth registries,¹⁵⁵ the Protocol and TVPA can increase the number of individuals across the world

¹⁵¹ See *id.* at 906 ("Education can be a vehicle for breaking the cycle of poverty and reducing the incidence of trafficking and commercial sexual exploitation.").

¹⁵² *Id.* 905.

¹⁵³ 2009 TIP Report, *supra* note 1, at 8-9 ("Women, eager for a better future, are susceptible to promises of jobs abroad as babysitters, housekeepers, waitresses, or models-jobs that traffickers turn into the nightmare of force prostitution without exit.").

¹⁵⁴ See generally Flowe, *supra* note 60 (characterizing human trafficking as "a human rights abuse that depends upon the supply of trafficking victims in countries of origin" and discussing how current legislation effects supply and demand).

¹⁵⁵ Childinfo, Rural poverty may negatively affect numbers of registered children. (July, 2008), available at http://www.childinfo.org/birth_registration, (last visited Mar. 26, 2011) ("Children under five who have been denied [birth registration] tend to be poor, live in rural areas, have limited access to health care, are not attending

who have meaningful access to education, health care, and other resources, which may help decrease worldwide prevalence of poverty and lack of access to education.

B. Birth Registration Reduces the Incidence of Trafficking by Increasing Access to Education and Decreasing the Potential for Poverty

The act of providing a newborn child with proper birth registration¹⁵⁶ discourages the incidence of human trafficking because registration reduces a person's susceptibility to exploitation.^{157,158,159} According to UNICEF Director Marta Santos Pais,

Unregistered children are, almost inevitably, the children of the poor and excluded. Lack of registration exacerbates their poverty and underscores their marginalization. While birth registration does not of itself guarantee education, health, protection or participation, its absence can put these fundamental rights beyond the reach of those already on the margins of society.¹⁶⁰

In order to implement effective national development strategies, a government must have strong civil registration systems.¹⁶¹ The failure to register newborns impedes a government's

early childhood education, have higher levels of malnutrition and have higher mortality rates." See generally Todres, *supra* note 122, at 897-99 (discussing the failure to register newborns and its relation to human trafficking).

¹⁵⁶ UNICEF, *Basic Education and Gender* website, *supra* note 145 ("Birth registration is the official recording of the birth of a child by some administrative level of the state and coordinated by a particular branch of government.").

¹⁵⁷ 2010 TIP Report, *supra* note 2, at 31 (stating that "without birth certificates, national identification cards, or other identity documents, stateless persons and some indigenous groups are vulnerable to being trafficked"); see generally UNICEF, *Child protection from violence, exploitation and abuse: Birth Registration*, http://www.unicef.org/protection/index_birthregistration.html, (discussing how "[b]irth registration is a crucial strategy in creating a protective environment for children and defending their rights).

¹⁵⁸ *Poverty Causes Low Birth Registration*, *The News Today*, available at http://www.newstoday.com.bd/index.php?option=details&news_id=23059&date=2011-03-20 (last visited Apr. 2, 2011).

¹⁵⁹ A child's right to birth registration is required in the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 2, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 24(2) ("Every child shall be registered immediately after birth and shall have a name."). In addition, Article 7 of the Convention on the Rights of the Child states that "[t]he child shall be registered immediately after birth . . ." G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

¹⁶⁰ UNICEF, *Birth Registration: Right From The Start*, at 1 (last visited May 2, 2011), http://www.childinfo.org/files/birthregistration_Digestenglish.pdf.

¹⁶¹ *Poverty Causes Low Birth Registration*, *supra* note 158.

ability to effectively administrate and provide benefits for all of its natural born citizens.¹⁶² What this means is that the registration process allows for children to be acknowledged by decision-makers.¹⁶³ This ensures that she will receive all the rights and responsibilities a citizen is entitled to, as well as gain recognition that she is a member of society.¹⁶⁴ Unregistered children are likely to go unaccounted for by local and national governments, causing the unregistered to be overlooked during social development planning, which results in a lack of available resources.¹⁶⁵ In addition, an unregistered trafficking victim's lack of nationality makes it difficult to provide for proper repatriation back to her country of origin.¹⁶⁶ What may end up happening is no government will accept the victim as a citizen without the proper documentation, which results in the victim remaining "stateless,"¹⁶⁷ increasing the chances that she will be revictimized.¹⁶⁸

The failure to register a newborn causes her to lose more than a sense of national identity: she lacks a recognized name and often times cannot even meaningfully participate in society.¹⁶⁹ Non-registration results in many long-term, detrimental effects that are almost inevitably characterized by a loss or lack of education and low potential.¹⁷⁰ For example, in many countries birth registration is a prerequisite for: 1) attending public school; 2) acquiring health care; 3) registering a child, a marriage, or a death; 4) attaining legitimate work or travel; 5) owning

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ ANNOTATED GUIDE, *supra* note 28, at 28.

¹⁶⁷ 2009 TIP Report, *supra* note 1, at 31 ("A stateless person is someone who, under national laws, does not have nationality – the legal bond between a government and an individual – in any country.").

¹⁶⁸ ANNOTATED GUIDE, *supra* note 28, at 28.

¹⁶⁹ 2009 TIP Report, *supra* note 1, at 31.

¹⁷⁰ UNICEF, Birth Registration: Right From The Start, *supra* note 160, at 5 ("[O]ne of the factors that determine whether or not a child attends school, birth registration and a birth certificate – or the lack of one – can be crucial.").

property; and/or 6) opening a bank account.¹⁷¹ These negative consequences all work to further marginalize the stateless person over time, exacerbating her susceptibility to exploitation.¹⁷²

Conversely, a registered person is less susceptible to becoming trafficked because she is more difficult to relocate transnationally.¹⁷³ When a victim has no birth record evidencing age or citizenship, it is nearly impossible for authorities to recognize when a trafficker has manipulated a victim's travel documents.¹⁷⁴ As a result, a trafficker can secure falsified birth certificates, identification cards, and passports with greater ease.¹⁷⁵ In addition, when a child is registered her age is rooted in place, allowing for access to special laws providing supplemental care and relaxed certification procedures for minors.¹⁷⁶

Finally, it is important to acknowledge the abundance of unregistered persons throughout the world. In 2000, roughly 50 million children went unregistered, representing 41% of births that year worldwide.¹⁷⁷ Given the potential for cumulative effect, birth registries are likely to have an immense influence on reducing the incidence of trafficking worldwide.

C. A Prevention-Based Approach

An effective, prevention-based approach to combating human trafficking must assure children access to education, reduce the likelihood of poverty, and address the other causes of human susceptibility to trafficking victimization.¹⁷⁸ Under most circumstances, the unregistered

¹⁷¹ 2009 TIP Report, *supra* note 1, at 31.

¹⁷² *Id.*

¹⁷³ 2010 TIP Report, *supra* note 2, at 31 (“Without birth certificates, national identification cards, or other identity documents, stateless persons and some indigenous groups are vulnerable to being trafficked.”). *See generally* UNICEF, Child protection from violence, exploitation and abuse, *supra* note 157 (discussing how “[b]irth registration is a crucial strategy in creating a protective environment for children and defending their rights”).

¹⁷⁴ *See* Jonathan Todres, *Birth Registration: An Essential First Step Toward Ensuring the Rights of All Children*, 10 HUM. RTS. BRIEF 32, 33 (2003) (“Birth registration officially records a child’s birth, providing the first legal recognition of the child and generally is required in order to obtain a birth certificate.”).

¹⁷⁵ *Id.* at 33-34.

¹⁷⁶ *Id.*

¹⁷⁷ UNICEF, *Birth Registration: Right From The Start*, *supra* note 160, at 1.

¹⁷⁸ *Id.*

are hyper-marginalized and extremely vulnerable to exploitation because they lack meaningful access to education and are far more likely to live in poverty.¹⁷⁹ Human trafficking is a supply and demand industry; its existence depends on a large supply of potential victims and a demand elsewhere for laborers or prostitutes.¹⁸⁰ Because prosecution-based methodologies have proven ineffective at reducing the pool of potential victims and the demand for trafficked persons, a prevention-based approach that promotes birth registration would likely alleviate trafficking's worldwide persistence.

A manageable way to encourage the development of birth registries abroad is to amend the Protocol to explicitly require foreign governments to develop and implement their own effective birth registration systems. The Protocol currently requires States Parties to “take or strengthen measures . . . to alleviate the factors that make persons . . . vulnerable to trafficking.”¹⁸¹ But, the Protocol's prevention-based standards have proven to be vague and have left too much discretion to States Parties.¹⁸² Mandatory prevention measures, including the incorporation of effective birth registries, would provide each State Party with much needed guidance and help ensure meaningful compliance with human trafficking prevention goals.

The TVPA should also be slightly amended to compel birth registry implementation abroad. In order to achieve such a goal, the TVPA could adopt provisions giving the President necessary tools to influence foreign governments into fostering effective birth registries. As discussed above, sections 109¹⁸³ and 110¹⁸⁴ of the TVPA already grant the President the authority to reward or reprimand foreign governments that either meet or fail to comply with the

¹⁷⁹ 2010 TIP Report, *supra* note 2, at 31.

¹⁸⁰ See Flowe, *supra* note 60, at 679-82.

¹⁸¹ Protocol, *supra* note 22, art. 9(4).

¹⁸² See generally 2010 TIP Report, *supra* note 2 (analyzing the varied prevention measures employed by roughly 180 nations).

¹⁸³ 22 USC § 2152(d).

¹⁸⁴ 22 USC § 7107.

“minimum standards”¹⁸⁵ for combating trafficking.¹⁸⁶ What I would like to see is the “minimum standards” modified to require foreign governments to work diligently to achieve specific, mandatory, minimum standards for birth registration compliance. The decision whether to provide or withdraw assistance to foreign governments must be predicated on a thorough birth registry examination of each participating State.¹⁸⁷

Mere implementation of a birth registration system by a foreign government would not be considered compliance under the Protocol and TVPA amendments I propose. There are many factors that lead to the failure to register births, and foreign governments must take additional steps to assure naturally born citizens have access to the registration process. For example, in Southeast Asia, many unmarried women fail to register their children because the women are embarrassed or because only a married parent is legally entitled to register a newborn.¹⁸⁸ In Nicaragua, women are prevented from registering a child if the father does not sign the birth record; many Nicaraguan men refuse to sign the birth record because his signature acts as a legal acknowledgment of paternity.¹⁸⁹ Numerous countries across the world refuse to allow birth registration where the parents are of different nationalities or the parents themselves are unregistered.¹⁹⁰ When one of these impediments is implemented, or when foreign birth registration systems charge fees or deny registration because one parent refuses to consent, a substantial (or even insurmountable) hurdle is placed before the child. Given the numerous

¹⁸⁵ See Section III(B)(3), *supra*. The minimum standards mention education, but only in a cursory manner, asking “[w]hether the government of the country has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, about the causes and consequences of severe forms of trafficking in persons.” 22 U.S.C. § 7106(b)(3).

¹⁸⁶ *Id.*

¹⁸⁷ One of the primary problems with implementing such a scheme is ensuring that the scrutinized country is actually abiding by the birth registry “minimum standards.” The author concedes that it may be difficult to document the number of unregistered children in a foreign country without implementing on-site investigations.

¹⁸⁸ UNICEF, *Birth Registration: Right From The Start*, *supra* note 160, at 10-11.

¹⁸⁹ *Id.* at 11.

¹⁹⁰ *Id.*

obstructions to birth registration abroad, it is important for compliance under the Protocol and the TVPA to require that registration: 1) occurs immediately upon birth;¹⁹¹ 2) is guaranteed to all with no strings attached; 3) is geographically accessible to all; and 4) is prominently sponsored by the government.

The modifications I propose would not only entail minimal amending to an already existing domestic law and international treaty, any encroachment upon state sovereignty and security would also be minute, which is a concern for many foreign nations.¹⁹² In addition, state sponsored birth registry programs are relatively inexpensive.¹⁹³ Lastly, the amendments I propose would further evidence the United States' and the United Nations' commitment to fettering out the social injustices lying at the root of the human trafficking problem.

V. Conclusion

Strong anti-trafficking laws are absolutely necessary for deterring crime in an industry characterized by high profits and low risks of detection.¹⁹⁴ However, the numbers suggest that the TVPA's prosecution-based commitment to fighting human trafficking is not as effective as once perceived.¹⁹⁵ A prevention-based approach directed at human trafficking's root causes would likely reduce a potential victim's susceptibility to exploitation and consequently reduce trafficking victimization in the first instance.

¹⁹¹ *Id.* at 12 (“The probability of registration is far greater immediately after a child is born and, if a mother gives birth in a hospital, one of the best opportunities for registration is lost once she is discharged with her baby.”).

¹⁹² Erick Gjerdingen, *Suffocation Inside a Cold Storage Truck and Other Problems with Trafficking as “Exploitation” and Smuggling as “Choice” Along the Thai-Burmese Border*, 26 ARIZ. J. INT’L & COMP. L. 699, 700 (2009) (explaining how many states are concerned about expansive anti-trafficking laws and the effects on sovereignty and security).

¹⁹³ See, e.g., UNICEF, *Birth Registration: Right From The Start*, *supra* note 160, at 10-11 (discussion how at a cost of \$324,000, a birth registration campaign in Ecuador registered 130,000 children out of the 390,000 believed to be unregistered).

¹⁹⁴ See Fredette, *supra* note 10, at 121.

¹⁹⁵ See Tiefenbrun, *supra* note 82, at 253-64; see generally Todres, *supra* note 19.

The implementation of comprehensive birth registration systems in foreign countries would likely cause a decrease in potential trafficking victims because birth registration reduces a human's vulnerability to exploitation. The Protocol requires prevention measures generally, but it fails to mandate States Parties to implement civil registration systems. The TVPA already has measures in place that, if slightly amended, could allow the President to incentivize foreign aid by requiring governments to meet mandatory minimum birth registration standards. The imposition of a birth registration requirement on foreign governments would not be overburdensome, which increases the likelihood of compliance. As a result, the increased international support would likely prove very effective in preventing human trafficking and increasing social welfare overall.