

Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting Change in India and China

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[M]illions of our fellow human beings . . . live as contemporary slaves, victims of abominable practices like human trafficking, forced labour and sexual exploitation. . . . The fact that these atrocities take place in today's world should fill us all with shame. The realization that, in many instances, such practices are sanctioned, supported or ignored by those with the power and the responsibility to end them should lead us to outrage. But, above all else, the needs of the enslaved must inspire us to action.¹

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1. The Secretary-General, *Remarks at the International Day for the Abolition of Slavery*, ¶¶ 2-3, U.N. Doc. SG/SM/11306 (December 2, 2007), available at <http://www.un.org/News/Press/docs/2007/sgsm11306.doc.htm>.

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Introduction

Sixteen-year-old Shen left his small Chinese farming community for the promise of a well-paying job in a nearby city.² He was then abducted and taken to a brickyard where he was beaten repeatedly with iron bars and bricks, starved, and forced to perform heavy manual labor for twenty hours per day.³ Shanti, a ten-year-old girl from Rajasthan, India, was trafficked to Bombay where she was beaten and forced to beg on the street for fifteen hours a day.⁴ She was not allowed to bathe and was only allowed one meal per day, so her emaciated frame would help her attract more money while begging.⁵ In Phoenix, Arizona, fifteen-year-old Debbie was abducted from her own driveway, threatened and gang-raped by her captors, advertised as a prostitute on the Internet and sold for sex repeatedly for more than forty days.⁶

These stories, though shocking, are not unique. Human trafficking, the movement of persons across and within national boundaries for the purpose of coercing those persons to perform exploitive labor, including sex work,⁷ affects every country around the globe.⁸ It is “considered to be one of today’s leading criminal enterprises”⁹ and has reached “epidemic proportions,” with an annual global market of about \$42.5 billion.¹⁰ The U.S. government estimates that two to four million people per year are traf-

2. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 8 (2008)*, available at <http://www.state.gov/documents/organization/105501.pdf> [hereinafter TIP REPORT].

3. *Id.*

4. *Id.* at 10.

5. *Id.*

6. *Teen Girls’ Stories of Sex Trafficking in U.S.*, ABC NEWS, Feb. 9, 2006, available at <http://abcnews.go.com/Primetime/Story?id=1596778&page=1>.

7. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of the U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2981 (2006).

8. See LIANA SUN WYLER, ALISON SISKIN & CLARE RIBANDO SEELKE, CONG. RESEARCH SERV. REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 3 (2009), available at <http://www.fas.org/sgp/crs/misc/RL34317.pdf> [hereinafter REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS].

9. *Id.* at 2.

10. *Council of Europe Says Human Trafficking Has Reached ‘Epidemic Proportions,’* THE ASSOCIATED PRESS, Dec. 5, 2006 [hereinafter *Epidemic Proportions*].

ficked domestically and across national borders.¹¹

In recent years, there has been an international outcry¹² to stop this modern form of slavery and for countries around the world to “combat poverty, social exclusion, illiteracy, ignorance and discrimination, which increase vulnerability and are part of the underlying context for this scourge.”¹³ In the United States and abroad, news media have focused their attention on human trafficking, and the reports are shocking countries into action.¹⁴

To address the global human trafficking problem, the United Nations member states adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), by resolution on November 15, 2000.¹⁵ Parties to the Palermo Protocol agreed to prosecute traffickers, protect trafficking victims, and cooperate with other countries to eliminate human trafficking.¹⁶ As is the case with many international laws, critics of the Palermo Protocol feel that it lacks adequate enforcement measures.¹⁷

Thousands of people are trafficked into the United States each year for the purposes of forced labor and sexual servitude.¹⁸ In response to the growing human trafficking problem, the United States promulgated a com-

11. See REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS, *supra* note 8, at 2. But see U.S. Government Accountability Office, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad*, GAO-06-825, at 2 (July 2006), available at <http://www.gao.gov/new.items/d06825.pdf> [hereinafter GAO Report] (stating that there is some doubt as to the reliability of these estimates due to methodological weaknesses, gaps in data, and numerical discrepancies).

12. See Mohamed Y. Mattar, *Trafficking in Persons: An Annotated Legal Bibliography*, 96 LAW LIBR. J. 669, 670 (2004); see also Alexandra Amiel, *Integrating a Human Rights Perspective Into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 BUFF. HUM. RTS. L. REV. 5, 6 (2006).

13. The Secretary-General, *Secretary-General Underlines Need For Zero Tolerance in Message to Observe International Day For Abolition of Slavery*, ¶ 4, U.N. Doc. SG/SM/10223 (November 21, 2005), available at <http://www.un.org/News/Press/docs/2005/sgsm10223.doc.htm>.

14. See *Developments in the Law: Jobs and Borders*, 118 HARV. L. REV. 2171, 2181 (2005) (discussing the media attention garnered by the “Deaf Mexican” case and a case of Thai nationals being forced to work in a guarded, barbed-wired factory) [hereinafter *Developments*]; see also Sonia Merzon, Note, *Extraterritorial Reach of the Trafficking Victims Protection Act*, 39 GEO. WASH. INT’L L. REV. 887, 887 (2007) (highlighting the U.S. Department of State’s dedication of the TIP Report to a thirteen-year-old sex trafficking victim whose captors escaped just before being prosecuted).

15. 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. Doc. A/RES/55/25 (Nov. 15, 2000), available at <http://www.un.org/disarmament/convarms/ArmsTradeTreaty/docs/Background%20documents/Firearms%20Protocol%20-%20E.pdf> [hereinafter Palermo Protocol].

16. *Id.*

17. See Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1, 3 (2001).

18. See TIP REPORT, *supra* note 2, at 51.

prehensive domestic law to combat trafficking in persons.¹⁹ The Trafficking Victims Protection Act (TVPA), signed into law on October 28, 2000, focuses on the protection of trafficking victims, the prosecution of those persons trafficking in human beings, and the prevention of human trafficking.²⁰ The TVPA comprehensively addresses anti-trafficking efforts domestically, and it also reaches beyond the United States and affects anti-trafficking efforts abroad.²¹

It is still unclear, however, whether the TVPA is effective in changing human trafficking in other countries.²² The law includes a complex ranking system, with the worst ranked countries subject to non-humanitarian, non-trade related foreign assistance sanctions from the United States.²³ This Note argues that India and the People's Republic of China (China), both of which have been ranked on a special "Watch List" for several years,²⁴ illustrate the ineffectiveness of the TVPA's enforcement mechanisms. Both India and China are source, destination, and transit countries for victims of human trafficking, and their severe and widespread trafficking problems affect millions of people.²⁵ While the United States is aware of the severe human rights violations occurring in both countries, often with the complicity of the local police and governmental officials,²⁶ it has been unable to compel the countries to improve enough to move from the Watch List. This Note argues that this failure to influence change is illustrative of a larger problem in the TVPA's ability to affect countries that are emerging markets and are important to the United States' economic interests, and signals the need for new legal enforcement measures.

19. See Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 439 (2006) (stating that the TVPA has teeth that the international law lacks).

20. Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386 §§ 106-108, 114 Stat. 1464, 1466 (2000) (amended 2008) [hereinafter TVPA]. The abbreviation TVPA is also used in connection with a separate statute, the Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1991). It is used here, however, to refer only to the trafficking statute.

21. See TVPA §§ 106-108.

22. See Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 2 LOY. U. CHI. INT'L L. REV. 193, 206-16 (2005).

23. TVPA § 110(d)(1).

24. TIP REPORT, *supra* note 2, at 91, 139.

25. See *id.* at 91-92, 139 (citing the "enormous size of [China's] trafficking problem and estimating that India's bonded labor problem affects 20 to 65 million Indians"); *Combating Human Trafficking in China: Domestic and International Efforts: Hearing Before the Congressional-Executive Commission on China*, 109th Cong. 1 (2006) (opening statement of Hon. Chuck Hagel, Chairman, Cong.-Exec. Commission on China) (stating that human trafficking in China is a serious problem and that estimates from 2002 show that there were about 250,000 victims of human trafficking in China).

26. See SUSAN DEWEY, *HOLLOW BODIES: INSTITUTIONAL RESPONSES TO SEX TRAFFICKING IN ARMENIA, BOSNIA, AND INDIA* 133 (2008) (describing the weekly bribes paid to local police officers in Bombay's red light district); see also TIP REPORT, *supra* note 2, at 92 (stating that there is a "significant level of corruption and complicity in trafficking by some local government officials" in China).

Part I of this Note summarizes the international problem of human trafficking and the related international treaty regime. Part II explores the United States' response to human trafficking in the TVPA and its goal of affecting human trafficking domestically and internationally. Part III discusses the human trafficking problems in India and China, the domestic laws their governments have promulgated, and the United States' response to those human trafficking standards. Part IV explores the problems with the TVPA enforcement techniques generally and argues that the traditional threat of sanctions and reliance on naming and shaming are especially ineffective with respect to countries like India and China. Part IV also discusses possible solutions and proposes that the United States could narrow the waiver provision in the TVPA, focus on a new regime for shaming noncompliant countries, concentrate more on victim protection, or push for more enforcement to come from the Palermo Protocol through a designated central agency. This Note concludes that the most viable option is for the United States to revise its ranking regime and create a structure of naming and shaming with consequences to countries that turn a blind eye to human trafficking.

I. The Worldwide Epidemic of Human Trafficking and the Multilateral Response

A. The International Scope of Human Trafficking

Human trafficking has reached “epidemic proportions,” with the U.S. government estimating that between 600,000 and 800,000 people are trafficked across borders annually.²⁷ When trafficking within countries is included, the estimate rises to two to four million people trafficked each year.²⁸ It has a global annual market of about \$42.5 billion,²⁹ and is “considered to be one of today’s leading criminal enterprises.”³⁰ The International Labor Organization estimates that 2.4 million of the 12.3 million people who are victims of forced labor have been trafficked,³¹ and the majority of those trafficking victims are women and children.³²

It should be noted that there is some doubt as to the accuracy of the U.S. statistics, as well as to other international human trafficking statistics.³³ For example, obtaining an accurate estimate is difficult because there is an obvious gap between the number of rescued victims of human trafficking, who form the basis for the statistical data, and the total num-

27. See REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS, *supra* note 8, at 2.

28. *Id.*

29. See *Epidemic Proportions*, *supra* note 10.

30. REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS, *supra* note 8, at 2.

31. *Id.*

32. See, e.g., U.N. OFFICE ON DRUGS & CRIME (UNODC), GLOBAL REPORT ON TRAFFICKING IN PERSONS 48 (2009), available at http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf [hereinafter GLOBAL REPORT] (finding that sixty-six percent of the reported victims were women and twenty-two percent were children).

33. See, e.g., GAO Report, *supra* note 11, at 2-3 (stating that there is some doubt as to the reliability of these estimates due to methodological weaknesses, gaps in data, and numerical discrepancies).

ber of trafficking victims in existence.³⁴ Human trafficking is an illegal act, and its clandestine nature makes it difficult to collect accurate statistics about its prevalence.³⁵ Many victims of trafficking do not come forward for fear of retaliation from traffickers or legal authorities.³⁶ Also, many countries do not have laws against human trafficking, and if laws do exist, they differ as to the definition of human trafficking.³⁷ This leads to problems with identification of victims, as many victims are considered by the governments to be smuggled migrants instead of victims of trafficking.³⁸ Furthermore, many governments fail to collect data on the prevalence of human trafficking and would find they lack the requisite centralized agency or coordinated statistical system to do so.³⁹ But, as stated by the United Nations Office on Drugs and Crime, “[a] strict focus on numbers can distract from the ultimate purpose of anti-human trafficking efforts, which must be to end, not reduce, this practice.”⁴⁰ While the United Nations and its members, especially the United States, are working to develop a mechanism that would give a reliable global trafficking estimate, they are focusing most of their efforts on stopping human trafficking altogether.⁴¹

Human trafficking is a global problem that affects every country in our international community.⁴² It generally flows from less developed countries to more industrialized nations or to neighboring countries with higher standards of living.⁴³ For some countries, human trafficking is a cornerstone of the economy.⁴⁴ In Thailand, for example, the sale of women and girls into sex work is a staple of the tourism industry.⁴⁵

There are two typical scenarios in human trafficking. The first is when an individual is taken by force, often abducted, drugged, or sold to the trafficker.⁴⁶ The second and more common scenario is when an individual is deceived by the promise of a better life and accepts a job only to find out later that the actual conditions and employment are not as prom-

34. See, e.g., UNITED NATIONS OFFICE ON DRUGS AND CRIME, *TRAFFICKING IN PERSONS: GLOBAL PATTERNS* 43 (2006), available at http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf [hereinafter *GLOBAL PATTERNS*].

35. VIDYAMALI SAMARASINGHE, *FEMALE SEX TRAFFICKING IN ASIA: THE RESILIENCE OF PATRIARCHY IN A CHANGING WORLD* 16 (Janet Henshall Momsen & Janice Monk eds., 2008).

36. *GLOBAL PATTERNS*, *supra* note 34, at 44.

37. *Id.*

38. See SAMARASINGHE, *supra* note 35, at 16 (describing the inherent problems of conceptual and practical identification of victims of human trafficking); see also, *GLOBAL REPORT*, *supra* note 32, at 51 (stating that victims of human trafficking may be seen as smuggled migrants rather than victims).

39. See *GLOBAL PATTERNS*, *supra* note 34, at 44 (noting that in countries that lack a centralized agency, any data collection that is actually done, is done on an ad hoc basis).

40. *Id.* at 45.

41. *Id.*

42. *REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS*, *supra* note 8, at 1.

43. *Id.* at 4.

44. See *Developments*, *supra* note 14, at 2186.

45. *Id.*

46. *Id.* at 2184.

ised.⁴⁷ While each case of human trafficking is different, most people, after being abducted or recruited from their country of origin, are transferred through a transit region, and then exploited in the destination country.⁴⁸ While this is typical, movement of the victim is not required for the crime to be one of human trafficking.⁴⁹

Human trafficking includes both sexual exploitation and forced labor.⁵⁰ The major forms of sexual exploitation as characterized by the TVPA include sex trafficking and prostitution, child exploitation for commercial sex, and child sex tourism.⁵¹ While there is a heated debate over whether voluntary adult prostitution constitutes trafficking, it is clearly agreed that forced prostitution does.⁵² There is also a huge problem with the sexual exploitation of children.⁵³ More than two million children are exploited in the global commercial sex trade every year, and there is a large market for travel from one country to another to engage in commercial sex with children.⁵⁴

The major forms of forced labor, according to the TVPA, are bonded labor, debt bondage and involuntary servitude among migrant laborers, involuntary domestic servitude, forced child labor, and child soldiers.⁵⁵ Bonded labor occurs when a trafficker uses a debt to subjugate a person.⁵⁶ Often, traffickers exploit a perceived debt incurred up front and force the victim to work until they are able to pay it off.⁵⁷ For example, in South Asia, it is common for an indigent person to borrow money and agree to pay back the debt through labor.⁵⁸ The debtors are unable to repay the growing debt and their children are subsequently born into debt as well, creating generations of enslaved laborers.⁵⁹

While sex trafficking accounts for a substantial amount of the overall human trafficking problem and garners most of the international discussion and media attention, the international community should not ignore the severe problem of forced labor.⁶⁰ Unfortunately, many of the countries that have domestic anti-trafficking legislation do not even consider forced labor to be human trafficking.⁶¹ Instead, forced labor is sometimes seen as

47. *Id.* at 2184-85.

48. *See, e.g.,* GLOBAL PATTERNS, *supra* note 34, at 57.

49. TIP REPORT, *supra* note 2, at 19.

50. *Id.* at 18.

51. *Id.* at 23-25.

52. Chuang, *supra* note 19, at 442-43 (discussing the differing views of “abolitionists” who feel that prostitution is inherently exploitive and those who believe that women may make an economic choice to do sex work).

53. TIP REPORT, *supra* note 2, at 24.

54. *Id.*

55. *Id.* at 18-23.

56. *Id.* at 19.

57. *Id.*

58. Merzon, *supra* note 14, at 890.

59. *Id.*

60. TIP REPORT, *supra* note 2, at 23; GLOBAL REPORT, *supra* note 32, at 66 (discussing the preference of the media for stories about sexual exploitation over those about forced labor).

61. GLOBAL REPORT, *supra* note 32, at 65-66.

an issue for trade unions or labor regulations.⁶² However, both the TVPA and the Palermo Protocol regard forced labor as illegal human trafficking.⁶³

Human trafficking imposes both human and societal costs.⁶⁴ The victims suffer from physical and psychological injuries even if they are fortunate enough to be rescued.⁶⁵ Often, inhumane living conditions cause the trafficking victims to contract illnesses that may spread to other people in the community.⁶⁶ Similarly, the risk of contracting HIV/AIDS is particularly high among trafficking victims of sexual exploitation because they are forced to have unprotected sex with customers and are denied proper healthcare.⁶⁷ In terms of societal costs, human trafficking “leads to the perpetuation of crime and corruption” by funding global criminal organizations and suppressing the workforce in a way that reinforces the cycle of poverty.⁶⁸

B. The International Community Responds with the Palermo Protocol

In response to the international human trafficking problem, concerned states began to meet in 1999 to draft the Palermo Protocol.⁶⁹ The Palermo Protocol was adopted by resolution on November 15, 2000,⁷⁰ and was ratified by enough countries to enter into force on December 25, 2003.⁷¹ There are currently 117 signatories and 124 parties to the Protocol, including the United States.⁷² The purpose of the Palermo Protocol was to create a framework through which countries could work together to fight human trafficking.⁷³ Parties to the Protocol agree to prevent and combat human trafficking, to protect trafficking victims, and to cooperate with other countries to eliminate human trafficking.⁷⁴

During the drafting of the Palermo Protocol, there were heated debates over definitions of related terms and frameworks to address the global human trafficking problem.⁷⁵ The debates centered on the issue of whether the legal definition of “trafficking in persons” should include voluntary prostitution.⁷⁶ To reach a consensus, the states eventually agreed to

62. *Id.* at 66.

63. TIP REPORT, *supra* note 2, at 19; Palermo Protocol, *supra* note 15, art. 3.

64. Merzon, *supra* note 14, at 890.

65. *Id.* at 890-91.

66. *Developments*, *supra* note 14 at 2186.

67. *Id.*

68. Merzon, *supra* note 14, at 891.

69. REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS, *supra* note 8, at 13.

70. Palermo Protocol, *supra* note 15.

71. Chuang, *supra* note 19, at 442.

72. Palermo Protocol, *supra* note 15, pmb.; *see also* List of Signatories and Parties to the Palermo Protocol, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>.

73. *See* REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS, *supra* note 8, at 13.

74. Palermo Protocol, *supra* note 15, art. 2.

75. Chuang, *supra* note 19, at 438; *see also* Kara Abramson, Note, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L. J. 473, 473 (2003).

76. Chuang, *supra* note 19, at 443-44.

leave these contested issues to state discretion.⁷⁷

The drafters of the Palermo Protocol settled on the following definition of trafficking:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs⁷⁸

Following that definition, the Protocol addresses the issue of consent and determines that a person who consents to migrate can still be considered trafficked.⁷⁹ A person is considered to be trafficked if his or her acts were carried out because of the threat or use of force or other forms of coercion, or by abduction, deception or abuse of another person’s position of power, or the exploitation of the victim’s position of vulnerability.⁸⁰

In achieving the main objectives of punishing the traffickers, protecting the victims, and preventing the crime of trafficking, the Protocol requires that parties take certain actions. To punish traffickers, the parties to the Protocol are required to adopt legislative measures that criminalize human trafficking.⁸¹ The legislation must cover persons intentionally committing, or attempting to commit, the prohibited acts, including accomplices and those involved in organizing or directing others in human trafficking.⁸²

To protect victims of trafficking, state parties must protect the privacy and identity of trafficking victims and must consider providing assistance for physical, psychological, and social recovery of the trafficking victims.⁸³ They also must endeavor to protect the physical safety of victims within their territory and ensure that their domestic legal system offers compensation for victims’ suffering.⁸⁴ The Protocol further asks that state parties consider adopting legislation that allows victims to remain in the country, or, in the alternative, the state party must determine where the victim is a national and repatriate them safely and without undue delay.⁸⁵

To meet the objective of preventing human trafficking, state parties must establish policies, programs, and procedures aimed at prevention, such as conducting related research, distributing information, conducting

77. *Id.* at 438-39.

78. Palermo Protocol, *supra* note 15, art. 3(a).

79. See GLOBAL PATTERNS, *supra* note 34, at 51.

80. See Abramson, *supra* note 75 at 476-77; see also GLOBAL REPORT, *supra* note 32, at 51 (noting that children under the age of eighteen cannot give consent).

81. Palermo Protocol, *supra* note 15, art. 5(1).

82. *Id.* art. 5(2).

83. *Id.* art. 6(3).

84. *Id.* arts. 6(5)-(6).

85. *Id.* arts. 8(1)-(4).

media campaigns, and undertaking economic initiatives to combat human trafficking.⁸⁶ The Palermo Protocol also calls on state parties to take measures aimed at factors that are thought to increase a person's vulnerability to trafficking, such as poverty and lack of equal opportunity.⁸⁷ Furthermore, state parties must address the demand for trafficked persons that makes the sale of human beings a profitable industry for the traffickers.⁸⁸ Parties to the Protocol are expected to work together and exchange information; they are required to provide training for law enforcement and other officials involved in the prevention of human trafficking, prosecution of traffickers, and protection of trafficking victims.⁸⁹

C. Problems with the Palermo Protocol

Even though the Palermo Protocol successfully established a framework for addressing international human trafficking, many objections to the Protocol quickly arose.⁹⁰ As is the case with many international laws, critics of the Palermo Protocol feel that it lacks adequate enforcement capabilities.⁹¹ Currently, there are no mechanisms in place to determine whether state parties have properly implemented the Protocol. This absence of oversight leaves the Protocol without the power to monitor whether state parties are adhering to its provisions and to enforce them if they are not.⁹² Where the Protocol has been implemented, critics say it only focuses on human trafficking situations that are related to organized crime and cross-border migrations, ignoring the magnitude of other human trafficking situations.⁹³

The Palermo Protocol also has been widely criticized from a human rights perspective. Human rights advocates are concerned about the emphasis placed on prosecution and possible disregard for the human rights of the victims.⁹⁴ These human rights issues did not receive the attention in the Protocol that the advocates hoped; to the extent that human rights are addressed at all, they are mostly described as something the state parties should try to do, rather than concrete obligations for all members of the Protocol.⁹⁵

Additionally, critics have called attention to the Protocol's requirement

86. *Id.* arts. 9(1)-(2).

87. *Id.* art. 9(4).

88. *Id.* art. 9(5).

89. *Id.* art. 10.

90. Chuang, *supra* note 19, at 448.

91. *See id.* at 439 (stating that the TVPA has teeth that the international law lacks).

92. *See* REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS, *supra* note 8, at 15; *see also* Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, 36 DENV. J. INT'L L. & POL'Y 9, 52 (2007) (noting that a lack of effective oversight and enforcement capabilities in international human trafficking instruments lead implementations to be weak).

93. SAMARASINGHE, *supra* note 35, at 22.

94. *Id.*; *see also* Chuang, *supra* note 19, at 447 (stating that human rights advocates tried to convince drafters that human rights protections were integral to crime and border control objectives).

95. *See* Chuang, *supra* note 19, at 448.

that trafficking victims become informants to the police.⁹⁶ If they do not become informants, they are often “treated as illegal immigrants and criminals, and as threats to national security”;⁹⁷ if they do cooperate with the authorities, the victims often find the criminal proceedings to merely be a “stay of deportation,” and they are quickly deported when their help is no longer needed.⁹⁸ Victims who are repatriated face the shame and humiliation of being deported, fear of reprisal from traffickers, and stigma in their home communities.⁹⁹ For example, Nepali women rescued from human trafficking situations in India are often required to go to special homes upon their return to the country because they are stigmatized and unable to return to their former communities.¹⁰⁰ These victims are returned to the same, or worse, conditions than those from which they originally fled, and thus are made vulnerable to re-trafficking.¹⁰¹

II. The United States Responds with the Trafficking Victims Protection Act

Thousands of people are trafficked into the United States each year for the purposes of sexual and labor exploitation.¹⁰² They are trafficked largely from East Asia, Mexico, and Central America, and many are attracted by fraudulent offers of employment and then subject to debt bondage or work in the commercial sex trade.¹⁰³

Two high-profile U.S. cases of human trafficking in the 1990s heightened public awareness of the problem and pushed the United States to take domestic action.¹⁰⁴ First, in 1995, a police raid of a garment factory in El Monte, California, uncovered Thai nationals being forced to work in slave-like conditions.¹⁰⁵ The seventy-two rescued workers had been promised jobs in the United States, but when they arrived they were confined to the compound and threatened with physical harm to themselves and their families if they did not comply.¹⁰⁶ They were forced to work for less than sixty cents per hour for up to eighteen hours a day, seven days per week.¹⁰⁷ Second, in 1997, the New York City Police Department discovered a human trafficking ring in which as many as sixty-two deaf-mute Mexican nationals were forced to peddle trinkets in the New York City subways for twelve to

96. Kamala Kempadoo, *From Moral Panic to Global Justice: Changing Perspectives on Trafficking*, in *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS* vii, xv (Kamala Kempadoo ed., 2005).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at xv-xvi.

101. *Id.* at xvi-xvii.

102. See TIP REPORT, *supra* note 2, at 51.

103. *Id.*

104. Chacón, *supra* note 7, at 2987-89; see also *Developments*, *supra* note 14, at 2180-82.

105. See Chacón, *supra* note 7, at 2987.

106. *Developments*, *supra* note 14, at 2182.

107. Chacón, *supra* note 7, at 2987. *But see Developments*, *supra* note 14, at 2182 (citing that the workers were forced to work for seventeen hours per day).

eighteen hours per day, seven days per week, with two days off every other month.¹⁰⁸ The workers were forced to turn over all their earnings to their traffickers and were physically and sexually abused.¹⁰⁹ They too were lured to the United States by promises of a good job and a better life.¹¹⁰

In the aftermath of these highly publicized stories, the United States took action to deal with human trafficking domestically, as well as abroad. The United States promulgated its first comprehensive domestic legislation to combat human trafficking, the Trafficking Victims Protection Act (TVPA).¹¹¹

A. Understanding the Goals and Structure of the TVPA

President Clinton signed the TVPA into law on October 28, 2000.¹¹² Both the Trafficking Victims Protection Reauthorization Act of 2003, which was signed into law on December 19, 2003,¹¹³ and the Trafficking Victims Protection Reauthorization Act of 2005, which was signed into law on January 10, 2006,¹¹⁴ supplemented the TVPA. Most recently, the Trafficking Victims Protection Act of 2008 (TVPRA 2008), which was signed into law on December 23, 2008¹¹⁵ amended the TVPA. The TVPA's purpose is "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominately women and children, to ensure just and effective punishment of traffickers, and to protect their victims."¹¹⁶

Using the "three P's" structure of protection of trafficking victims, prosecution of those persons trafficking in human beings, and prevention of human trafficking, the TVPA provides innovative measures for eliminating human trafficking.¹¹⁷ It sets "minimum standards for the elimination of trafficking" applicable to governments of countries that are places of "origin, transit, or destination for a significant number of victims of severe

108. There is some confusion over how many Mexican nations were trafficked in this scheme. See Chacón, *supra* note 7, at 2987 (citing the number as "as many as sixty-two"). But see *Developments*, *supra* note 14, at 2181 (stating that "police discovered fifty-seven of these recruits"); see also Mark Fineman, *Deaf Migrants' Families Had Feared Abuse*, L.A. TIMES, July 22, 1997, at A1; Deborah Sontag, *Poor and Deaf From Mexico Betrayed in Their Dreams*, N.Y. TIMES, July 25, 1997, at A1.

109. Sontag, *supra* note 108, at A1.

110. *Id.*

111. TVPA, Pub. L. No. 106-386 §§ 106-108, 114 Stat. 1464, 1466.

112. *Id.* §§ 106-108; Chacón, *supra* note 7, at 2989.

113. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (amended 2005, 2008).

114. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558.

115. Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 [hereinafter TVPRA 2008]. The Trafficking Victims Protection Reauthorization Act of 2008 was passed after the original writing of this article so its provisions are not addressed in full detail. The Trafficking Victims Protection Reauthorization Act of 2008 was passed after the original writing of this article so its provisions are not addressed in full detail.

116. TVPA § 102, 114 Stat. 1464 at 1466.

117. Chuang, *supra* note 19, at 450.

trafficking.”¹¹⁸ Under these standards, the governments of such countries must “prohibit severe forms of trafficking in persons and punish acts of such trafficking.”¹¹⁹ The punishment for human trafficking must be commensurate with punishment for other serious crimes and must be stringent enough to deter those acts.¹²⁰ Additionally, the government “should make serious and sustained efforts to eliminate severe forms of trafficking in persons.”¹²¹ These measures include: investigating and prosecuting traffickers, protecting victims and encouraging them to cooperate with the investigation, informing and educating the public, cooperating with other governments to investigate and prosecute severe forms of trafficking, extraditing persons charged with trafficking, monitoring immigration patterns, and investigating and prosecuting public officials who participate in or facilitate human trafficking.¹²²

The TVPA also addresses many of the issues that critics have lodged against the Palermo Protocol. First, it takes the human rights aspirations from the Protocol and turns them into hard obligations that governments are required to meet.¹²³ To deal with the problems that trafficking victims often face when deported back to their countries of origin, the TVPA provides the possibility of temporary or permanent resident status if the victims cooperate with prosecution efforts.¹²⁴ It also allows for trafficking victims to receive federal public assistance benefits.¹²⁵ For the victims that do return to their countries of origin, the TVPA requires that there be “programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement, as appropriate, of victims of trafficking.”¹²⁶

The TVPA also criminalizes trafficking related acts, such as obtaining labor or services through threats of physical harm, abuse or restraint, or benefiting financially from such coerced labor.¹²⁷ In this way, the TVPA targets the profitability of human trafficking.¹²⁸ It also provides a method to determine whether countries are meeting the minimum standards¹²⁹ and employs a sanctions regime for those countries that do not comply or attempt to comply.¹³⁰

B. Exploring the Tier System

The TVPA requires the Secretary of State to submit an annual report to Congress describing the efforts taken by foreign governments to eliminate

118. TVPA § 108(a), 114 Stat. 1464 at 1480.

119. *Id.* § 108(a)(1).

120. *Id.* §§ 108(a)(2)-(3).

121. *Id.* § 108(a)(4).

122. *Id.* §§ 108(b)(1)-(7).

123. Chuang, *supra* note 19, at 451.

124. TVPA §§ 106-108, 114 Stat. 1464, 1476.

125. *Id.*

126. *Id.* § 107(a)(1).

127. *Id.* §112

128. Chuang, *supra* note 19, at 450-51.

129. TVPA § 108, 114 Stat. 1464, 1482 (requiring that a report be submitted to Congress annually about the status of human trafficking in other countries).

130. *Id.* § 110 (d)(1).

human trafficking.¹³¹ The Trafficking in Persons Report (the TIP Report) is “the most comprehensive worldwide report on the efforts of governments to combat severe forms of trafficking in persons.”¹³² The countries assessed in the Report are those determined to be countries of origin, transit or destination in human trafficking, and the Report contains narratives about each one, including information about the scope and nature of the problem and the government’s efforts to eliminate trafficking.¹³³

Based on those assessments, the U.S. State Department (the Department) places countries into categories of Tier 1, Tier 2, Tier 2 Watch List, or Tier 3.¹³⁴ To categorize a country, the Department first assesses the government’s adherence to the TVPA’s minimum standards for the elimination of trafficking.¹³⁵ If the government of a country fully complies with the minimum standards, that country is placed in Tier 1.¹³⁶ If a government does not fully comply, the Department considers whether the government is making significant efforts to comply.¹³⁷ It also considers the extent of the human trafficking problem in the country, the extent of the noncompliance with the minimum standards, and the resources and capabilities of the government to address and eliminate human trafficking.¹³⁸ Countries that do not currently comply with minimum standards but that are making significant efforts to comply are placed in Tier 2.¹³⁹ The Department places countries that are noncompliant with the minimum standards and not making an effort to comply in Tier 3.¹⁴⁰ Finally, the Department considers the Special Watch List criteria and determines whether Tier 2 countries should be placed on the Tier 2 Watch List.¹⁴¹ Specifically, the list is composed of three types of countries: (1) countries where the number of trafficking victims is very significant or is significantly increasing; (2) countries whose governments are failing to show increased efforts to combat trafficking from the previous year; or (3) countries that are on the Tier 2 list, instead of Tier 3, because they committed to make efforts to comply with minimum standards over the next year.¹⁴² Recently, as part of the TVPRA 2008, Congress amended the TVPA to say that if a county has been on the Tier 2 Watch List for two consecutive years, it will then be ranked in Tier 3, unless the President waives the standard.¹⁴³

131. *Id.* § 110 (b)(1)

132. *Id.* § 110; *see also* TIP REPORT, *supra* note 2, at 8.

133. TVPA § 110(b)(3), 114 Stat. 1464, 1482; *see also* TIP REPORT, *supra* note 2, at 10.

134. *See* TIP REPORT, *supra* note 2, at 11-12 (describing the methodologies to placing countries in the tier categories).

135. TVPA § 108, 114 Stat. 1464, 1480; *see also* TIP REPORT, *supra* note 2, at 11.

136. TIP REPORT, *supra* note 2, at 12.

137. *Id.*

138. *Id.* at 11.

139. *Id.* at 12.

140. *Id.*

141. *Id.*

142. *Id.* at 12-13.

143. *See* TVPRA 2008, Pub. L. No. 110-457 §107, 122 Stat. 5044. Since this change will not take effect until the 2009 TIP Report, its efficacy will be unknown for several years.

In the 2008 TIP Report¹⁴⁴ there are twenty-nine countries on the Tier 1 list, seventy countries on the Tier 2 list, forty countries on the Tier 2 Watch List, and fourteen countries on the Tier 3 list.¹⁴⁵ Many of the countries on the Tier 2 Watch List have been listed there for two years or more.¹⁴⁶ Countries that are not included in the report are still likely to have trafficking problems because the effects of human trafficking reach every country in the world; they are not included due to a lack of adequate information.¹⁴⁷

C. Enforcing the TVPA with Economic Sanctions

Under the TVPA, the U.S. government has the power to institute sanctions on Tier 3 countries in the form of removing non-humanitarian, non-trade related foreign assistance.¹⁴⁸ The government will also vote against and otherwise try to deny the Tier 3 countries non-humanitarian, non-trade related assistance from international financial institutions, multilateral development banks, and the International Monetary Fund.¹⁴⁹ The countries on the Tier 3 list have ninety days to bring themselves into compliance, during which time the United States Trafficking in Persons Office works closely with the government to help them achieve that goal.¹⁵⁰ The TVPA gives the President the power to waive the economic sanctions if continued assistance is in the national interest of the United States¹⁵¹ or if a waiver is necessary to protect vulnerable populations, including women and children.¹⁵²

The desirability of unilateral sanctions to enforce a U.S. federal law is a hotly debated issue.¹⁵³ Similarly, there is disagreement about the efficacy of the TVPA sanctions.¹⁵⁴ Despite the debate over the sanctions sys-

144. In the interim between the writing and publication of this Note, the State Department released the 2009 TIP Report. This Note, however, does not include the contents of the 2009 Report. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT (2009)*, available at <http://www.state.gov/documents/organization/123357.pdf> [hereinafter *TIP REPORT 2009*].

145. *TIP REPORT*, *supra* note 2, at 44.

146. *Id. passim*.

147. *Id.* at 10.

148. TVPA, Pub. L. No. 106-386 § 110(d)(1), 114 Stat. 1464, 1483.

149. *Id.* §§ 103(7), 110(d)(1)(B) (excluding from the definition of non-humanitarian, non-trade related assistance: narcotics-related assistance, disaster relief assistance, antiterrorism assistance, assistance for refugees, or assistance for humanitarian and development programs).

150. *See* Chuang, *supra* note 19, at 454.

151. TVPA § 110(d)(4), 114 Stat. 1464, 1483.

152. *Id.* § 110(d)(5).

153. *See* Chuang, *supra* note 19, at 456-57 (proposing moral and legal objections to the TVPA sanctions because the United States is promoting norms to which it is not also legally bound and arguing that the sanctions undermine enforcement of international human rights law). *But see* Cleveland, *supra* note 17, at 7 (arguing that unilateral sanctions contribute to domestic internalization by "incorporating attention to human rights concerns into the political processes of the sanctioning state").

154. *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, 268 (2006-2007) (suggesting that at least some states have taken imme-

tem, the above-mentioned TVPRA 2008 amendment would, in theory, allow for more sanctions; countries moved down to Tier 3 due to their presence on the Tier 2 Watch List for two years would then be subject to sanctions.¹⁵⁵

III. Human Trafficking in Emerging Markets: A Closer Look at India and China

Trafficking of women and children across Asia has been described as the “largest slave trade in history.”¹⁵⁶ India and China are both on the 2008 Tier 2 Watch List.¹⁵⁷ India has been on the list for five years, consistently since 2004, and China has been on the list for four years, consistently since 2005.¹⁵⁸

A. Human Trafficking in India

India is a source, destination, and transit country for victims of human trafficking, especially bonded labor.¹⁵⁹ Human trafficking affects an estimated twenty to sixty-five million Indians.¹⁶⁰ While internal forced labor is the largest human trafficking problem in India, the country also is plagued by international trafficking in persons.¹⁶¹ There is a booming industry in India for women and girls trafficked into the country, often from neighboring Nepal, and sexually exploited or sold into forced marriage.¹⁶² There is also a prevalence of trafficking children into India for forced labor, begging, or for use as child soldiers by terrorist groups,¹⁶³ and many Nepali children are subjected to forced labor in circus shows.¹⁶⁴

For example, a case study of the neighborhood of Kamathipura, which is the red light district of Bombay, revealed the widespread practice of forcing young women to engage in commercial sex because of “debt bondage.”¹⁶⁵ Even though prostitution is outlawed in India, there are “carefully maintained arrangements between the police and the *gharwali*, who manage the brothels.”¹⁶⁶ Weekly bribes to the police are called *hafta*, the Hindi

diate steps to move out of the Tier 3 status after being placed there in the TIP Report). *But see* Meril Eugene Anthes, Jr., *Chester James Taylor 2005 Grand Prize Winner: Regarding Women & Children: Using International Trade Relations to Stem the Growing Tide of the Sexual Exploitation of Women and Children*, CURRENTS: INT’L TRADE L. J., Summer 2005, at 69, 69 (suggesting that the TVPA is internationally ineffective).

155. TVPRA 2008, Pub. L. No. 110-457 §107, 122 Stat. 5044.

156. *Asia’s Sex Trade is ‘Slavery,’* BBC NEWS, Feb. 20, 2003, available at <http://news.bbc.co.uk/2/hi/asia-pacific/2783655.stm>.

157. TIP REPORT, *supra* note 2, at 92, 139.

158. *Id.* Both continue to be on the Tier 2 Watch List on the recently published 2009 Tip Report. TIP REPORT 2009, *supra* note 144, at 105, 156.

159. TIP REPORT, *supra* note 2, at 139.

160. *Id.*

161. *Id.*

162. *Id.*; see DEWEY, *supra* note 26, at 133.

163. TIP REPORT, *supra* note 2, at 139.

164. *Id.* at 139; see DEWEY, *supra* note 26, at 133.

165. DEWEY, *supra* note 26, at 132.

166. *Id.* at 133.

word for “week,” and they ensure that the police allow the illegal sex industry to function.¹⁶⁷ In Goa, an Indian state known for attracting tourism, the trafficking is more clandestine, but it still exists.¹⁶⁸ It has garnered a reputation for being a destination for pedophiles from Western Europe.¹⁶⁹ Just like in Kamathipura, the police in Goa are often bribed and become complicit in the trafficking.¹⁷⁰

Human trafficking is prohibited in India by Article 23 of the Indian Constitution, and, under Article 21, Indians are guaranteed a right to life and personal liberty.¹⁷¹ The Indian government also promulgated the Suppression of Immoral Traffic in Women and Girls Act, 1956, as amended in 1978, and amended and renamed as the Immoral Traffic Prevention Act (the ITP Act) in 1986.¹⁷² The ITP Act prohibits prostitution, but does not make prostitution a legal offense, *per se*.¹⁷³ Instead, the ITP Act declares other acts required to carry out prostitution illegal, such as maintaining a brothel or living off of earnings procured by prostitution.¹⁷⁴ It holds a person guilty of consorting with prostitutes if the person engages in sex acts with a sex worker within 200 yards of a public place.¹⁷⁵ The Act provides for the detainment and reform of female offenders in correctional institutions.¹⁷⁶

As India’s only central anti-trafficking legislation, the ITP Act is extremely problematic and is unable to address adequately the magnitude of the human trafficking in the country.¹⁷⁷ The ITP Act is the only legislation that India has promulgated that deals directly with the issue of trafficking in human beings, but it fails even to define what the term “human trafficking” means.¹⁷⁸ The Act does not create an adequate system of punishment for the clients in cases of forced prostitution and has no clear plan for bringing traffickers to justice.¹⁷⁹ Despite abundant research showing that a majority of those involved in prostitution in India were brought into prostitution as children, the ITP Act fails to address children as a separate category or provide for any special treatment of rescued children.¹⁸⁰

167. *Id.* at 131.

168. *Id.* at 134.

169. *Id.*

170. *Id.* at 135.

171. INDIA CONST. art. 23; HUMAN RIGHTS LAW NETWORK, *TRAFFICKING & THE LAW* 33 (2006) [hereinafter *TRAFFICKING & THE LAW*].

172. The Suppression of Immoral Traffic in Women and Girls Act, 1956, No. 104, Acts of Parliament, 1957 [hereinafter ITP Act]; The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1978, No. 46, Acts of Parliament, 1979; The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44, Acts of Parliament, 1987; *TRAFFICKING & THE LAW*, *supra* note 171, at 83.

173. ITP Act; *TRAFFICKING & THE LAW*, *supra* note 171, at 49.

174. ITP Act §§ 3, 4; *TRAFFICKING & THE LAW*, *supra* note 171, at 53.

175. ITP Act § 7.

176. *Id.* § 21; *TRAFFICKING & THE LAW*, *supra* note 171, at 54.

177. *TRAFFICKING & THE LAW*, *supra* note 171, at 83.

178. ITP Act § 2; *TRAFFICKING & THE LAW*, *supra* note 171, at 34.

179. *TRAFFICKING & THE LAW*, *supra* note 171, at 54.

180. *Id.* at 55 (citing statistics from the Mahajan Committee Report finding that sixty percent of persons found in prostitution were brought into it as children and that in

In addition to the ITP Act, which addresses human trafficking directly, the Indian government has promulgated national legislation that deals with the problem indirectly.¹⁸¹ For example, the Indian Penal Code criminalizes the sale of minors for prostitution, and the Juvenile Justice (Care and Protection of Children) Act, 2000, provides for the protection of children, including those children that are vulnerable to trafficking.¹⁸² There are also several state and regional measures that address the human trafficking problem in India.¹⁸³ Regionally, the South Asian Association for Regional Cooperation's (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution in 2002 was adopted to prevent and suppress trafficking in women and children for prostitution and to protect victims.¹⁸⁴ The SAARC Convention is criticized for focusing solely on commercial sexual exploitation, ignoring the broader problem of human trafficking, and lacking clarity in the rights of the victims and in government accountability.¹⁸⁵

The measures taken by the Indian government, therefore, have all proven to be inadequate. The U.S. State Department placed India on the Tier 2 Watch List in 2008, its fifth consecutive year on the list, because it failed to show increased efforts in combating human trafficking from the prior year.¹⁸⁶ It found that the Indian government makes uneven efforts to prosecute traffickers and protect victims.¹⁸⁷ It stated that the "lack of significant federal government action to address bonded labor, the reported complicity of some law enforcement officials in trafficking and related criminal activity, and the critical need for an effective national-level law enforcement authority impeded India's ability to effectively combat its trafficking in person problem."¹⁸⁸

B. Human Trafficking in China

China also is a source, transit, and destination country for human trafficking.¹⁸⁹ According to a 2002 UNICEF estimate, China is home to

metropolitan areas, more than seventy-five percent of those found in prostitution were under the age of twenty).

181. *Id.* at 33 (stating that the Indian Penal Code, Juvenile Justice (Care and Protection of Children) Act 2000, Child Labour (Prohibition and Regulation) Act 1986, Child Marriage Restraint Act 1929, Bonded Labour System (Abolition) Act 1976 all attempt to address the issue indirectly).

182. INDIA PEN. CODE § 372; Juvenile Justice (Care and Protection of Children) Act, 2000 § 2(d)(vii).

183. See *TRAFFICKING & THE LAW*, *supra* note 171, at 34 (describing acts in Indian States to address trafficking for prostitution and trafficking in children).

184. SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION, CONVENTION ON PREVENTING AND COMBATING TRAFFICKING IN WOMEN AND CHILDREN FOR PROSTITUTION (2002), available at http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking_Prostitution.pdf.

185. *TRAFFICKING & THE LAW*, *supra* note 171, at 82.

186. TIP REPORT, *supra* note 2, at 139.

187. *Id.*

188. *Id.*

189. *Id.* at 91-92.

approximately 250,000 victims of human trafficking.¹⁹⁰ There is a significant internal trafficking problem in China, as well as considerable international trafficking of Chinese citizens to other countries.¹⁹¹ Additionally, many North Korean citizens voluntarily cross the border into China looking for a better life.¹⁹² When they arrive in the country, undocumented and vulnerable, they are often sold into commercial sexual exploitation, forced marriage, or forced labor.¹⁹³ According to some theorists, China's trafficking problems are compounded by its "one child per couple" policy, which causes mass gendercide of female babies and increases the demand for women to be trafficked into the country for marriage.¹⁹⁴ This trafficking for the bridal market in China's poorer areas and for prostitution in metropolitan areas increasingly is linked to organized crime.¹⁹⁵ Forced labor is also a very large problem in China, especially in regard to trafficked children.¹⁹⁶

The Chinese government publicly has acknowledged the human trafficking problem, and there are laws in place to combat it, including China's Law on the Protection of Rights and Interests of Women and Article 240 of the Criminal Code.¹⁹⁷ Article 240 of the Criminal Code of China provides penalties for traffickers, including the possibility of the death penalty for particularly serious circumstances.¹⁹⁸ In its Law on the Protection of Rights and Interests of Women, the Chinese Government prohibits the abduction and trafficking of women and requires government departments to rescue trafficked women and guard them against discrimination.¹⁹⁹ Additionally, during the 2007–2008 reporting year, the Chinese government established the Office for Preventing and Combating Crimes of Trafficking in Women and Children and released a National Action Plan to Combat Trafficking.²⁰⁰ Under this plan there is now an appointed coordinator of the government's anti-trafficking efforts and there are responsibili-

190. *Combating Human Trafficking in China*, *supra* note 25, at 1 (statement of Sen. Chuck Hagel, Chairman, Cong.-Exec. Commission on China).

191. TIP REPORT, *supra* note 2, at 91.

192. *Id.* at 92.

193. *Id.*

194. *See Combating Human Trafficking in China*, *supra* note 25, at 6 (statement of Hon. Christopher H. Smith, A U.S. Rep. from N.J.).

195. CRIMINAL CODE, art. 240 (P.R.C.); Law on the Protection of Rights and Interests of Women (P.R.C.) (1992), available at http://www.womenofchina.cn/Policies_Laws/Laws_Regulations/1466.jsp; *see also Combating Human Trafficking in China*, *supra* note 25, at 1 (statement of Hon. Chuck Hagel, Chairman, Cong.-Exec. Commission on China).

196. TIP REPORT, *supra* note 2, at 92; *see also Chinese Children Sold "Like Cabbages" into Slavery*, REUTERS, April 29, 2008, <http://www.reuters.com/article/newsOne/idUSPEK27749620080429> (describing the large scope of the problem of forced labor of poor farmers, children, and mentally disabled people in kilns located in mines).

197. *Combating Human Trafficking in China*, *supra* note 25, at 1 (statement of Hon. Chuck Hagel, Chairman, Cong.-Exec. Commission on China).

198. CRIMINAL CODE (P.R.C.), art. 240.

199. Law on the Protection of the Rights and Interests of Women (P.R.C.), *supra* note 195, art. 36.

200. China National Plan of Action on Combating Trafficking in Women and Children (2008–2012) (issued by the State Council of China, Dec. 13, 2007), available at

ties meted out to twenty-eight ministries for the purpose of combating human trafficking.²⁰¹

Even though the Chinese government is making efforts to eliminate trafficking, its response still is inadequate. China punishes individuals for acts that were committed as a result of trafficking, such as prostitution, and deports North Korean trafficking victims back to horrible conditions.²⁰² China's anti-trafficking laws also do not properly cover forced labor.²⁰³ In terms of protection, China has not created a system for referring victims of trafficking to places that provide shelter and care.²⁰⁴ The new measures implemented in the last year do not allocate resources to local governments to facilitate implementation, and they still fail to include forms of trafficking beyond the sexual exploitation of women and children.²⁰⁵

Recent cases in which child trafficking victims have been rescued provide an example of the severe problems China faces when attempting to implement anti-trafficking programs. Some children rescued from human trafficking are taken to protection centers in Urumqi, the capital of the Xinjiang region of China.²⁰⁶ While this seems to be a step in the right direction under the protection prong of the TVPA, the lack of proper oversight has caused many of these rescues to be incomplete.²⁰⁷ The children in the protection centers are released when an individual claiming to be a family member comes for them, but it often turns out that the child is released to a trafficker posing as a family member.²⁰⁸

The fight against human trafficking in China is also plagued by corruption and complicity within the local governments and by the overall lack of transparency in the Chinese government.²⁰⁹ Corrupt law enforcement and government officials often are bribed by pimps and traffickers.²¹⁰ Even where officials are not directly bribed by those involved in human trafficking, the situation is often ignored as an embarrassment to the Communist Party, a government system that is proud of its ability to cure social problems.²¹¹

Due to these problems with the Chinese government's response to the trafficking problem, the U.S. State Department placed China on the Tier 2

<http://www.humantrafficking.org/publications/612>; see also TIP REPORT, *supra* note 2, at 92.

201. China National Plan of Action on Combating Trafficking in Women and Children (2008-2012), *supra* note 200, at 4.

202. TIP REPORT, *supra* note 2, at 91-92.

203. *Combating Human Trafficking in China*, *supra* note 25, at 10 (statement of Hon. John R. Miller, Ambassador-at-Large and Director, Office to Monitor and Combat Trafficking in Persons, U.S. Dep't of State).

204. *Id.* at 39 (prepared statement of Hon. John R. Miller).

205. TIP REPORT, *supra* note 2, at 92.

206. *Id.* at 30.

207. *Id.*

208. *Id.*

209. *Id.* at 92.

210. Emily E. Schuckman, *Antitrafficking Policies in Asia and the Russian Far East: A Comparative Perspective*, 14 DEMOKRATIZATSIYA 85, 89 (2006).

211. *Id.*

Watch List for the fourth consecutive year in the 2008 TIP Report.²¹² The Report stated that China failed to improve from the past year in punishment of traffickers and protection of victims.²¹³

IV. Why is the TVPA Ineffective in Emerging Markets like India and China?

The problem of enforcement is one that often arises in international law; in many cases, “observance must depend more heavily on . . . extra-legal sanctions” than on actual enforcement.²¹⁴ The TVPA relies on two forms of extra-legal sanctions: (1) naming and shaming with the Tier Placement system,²¹⁵ and (2) economic penalties in the form of sanctions on non-humanitarian, non-trade related foreign assistance.²¹⁶ As illustrated in the above discussion of the continuing problems in India and China, the traditional threat of economic sanctions and reliance on naming and shaming are not always successful in influencing noncompliant countries to change their behavior. This Note argues that the failure of traditional extra-legal sanctions as enforcement mechanisms is based on the delicate relationships that the United States must maintain with emerging markets such as India and China and the United States’ hesitance to apply sanctions to those countries.

A. The Failure of Traditional Naming and Shaming: Problems with the Tier System

Often in international law, the group designated to monitor observance of a certain law relies on the ability to publish violators’ lack of observance, thereby shaming them into compliance.²¹⁷ The idea is that, where there is a widely held norm, like the norm against slavery, and a monitoring body can highlight the fact that a country violated this widely held norm, the rest of the international community collectively will condemn that violator’s actions.²¹⁸ The international community’s stigmatization of that violating country will encourage that country to alter its behavior, as well as discourage other countries from violating the same norm.²¹⁹ Using this kind of naming and shaming to encourage a country to change its behavior requires that the country express concern over its

212. TIP REPORT, *supra* note 2, at 92.

213. *Id.*

214. Louis Henkin, *How Nations Behave*, 42-44, 88-90, 93 (2d ed. 1979), in JEFFREY L. DUNOFF, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 1035 (2006).

215. TVPA, Pub. L. No. 106-386 § 110, 114 Stat. 1464, 1482.

216. *Id.* § 110(d)(1).

217. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L. J.* 1935, 1951-52 (2002) (discussing the institutionalist theory of compliance that views reputation as the “primary anchor of compliance for all but those countries for which compliance is costless”); see also Cleveland, *supra* note 17, at 3.

218. Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: the Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 *ARIZ. J. INT’L & COMP. L.* 561, 566 (2003).

219. *Id.* at 566-67.

reputation, which many countries do, and that there is a widespread acceptance of the norm that was violated.²²⁰

Naming and shaming has proven successful in other areas of human rights, such as with the International Campaign to Ban Landmines (ICBL).²²¹ The ICBL was able to motivate change in landmine use by raising awareness of landmine issues with the help of non-governmental organizations (NGOs), and then using that awareness to create a direct campaign of stigmatization and shaming for the countries and companies involved in land mine use and trade.²²² The campaign was successful in persuading a global audience to change their behavior and their regard for other countries involved in landmine use.²²³ This kind of model has been suggested for many other agendas, such as outlawing child soldiers or shaming countries into more responsible environmental standards.²²⁴ One of the requirements to make such a system work is that the monitoring body must deploy shame effectively against the norm violators.²²⁵

There are, however, arguments that naming and shaming is decreasing in efficacy, particularly in countries with increasing economic growth.²²⁶ The circumstances in India and China support that proposition, as the consistent naming and shaming of those countries for many years has not been successful in influencing them to bring themselves within the minimum standards required by the TVPA.²²⁷ Some critics argue that with the rise in states' sophistication about their images, pure reputational sanctions are no longer effective.²²⁸ Additionally, the results of the only large-scale econometric analysis of the success of naming and shaming were not encouraging.²²⁹ This enforcement mechanism has been particularly ineffective in countries like China and India, where rapid economic growth has caused increased competition for raw materials.²³⁰ This competition makes it very difficult for wealthy states to ignore states with an abundance of natural resources, regardless of the human rights abuses taking place in

220. *Id.* at 567; see also Henkin, *supra* note 214, at 1036 (stating that naming and shaming rests on the idea that “law observance will depend . . . on the law’s current acceptability and on the community’s—especially the victim’s—current interest in vindicating it”).

221. Wexler, *supra* note 218, at 568.

222. *See id.* at 569-72.

223. *See id.* at 572-75.

224. *See id.* at 581.

225. *See id.*

226. Patrick Keenan, *Financial Globalization and Human Rights*, 46 COLUM. J. TRANS-NAT’L L. 509, 556 (2008) (citing a study that found there is “strong evidence to show that export-led economies with a high degree of export flows may be more likely to repress human rights”).

227. TIP REPORT, *supra* note 2, at 91-92, 139.

228. *See Keenan, supra* note 226, at 26.

229. *See* Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 691-92, 713 (2006) (unpublished manuscript), available at http://www.princeton.edu/~ehafner/pdfs/sticks_stones.pdf (analyzing the relationship between naming and shaming and government human rights practices for 145 countries from 1972 to 2000).

230. Keenan, *supra* note 226, at 3.

the country.²³¹ Also, even when the U.S. government sanctions a country for violating human rights norms, there is often still the capital mobility for U.S. companies to put money into the sanctioned country in search of a profit.²³² Therefore, countries with deplorable human rights track records can still attract investment and development assistance from private companies while they are being sanctioned by the government.²³³

B. Why the Unilateral Sanctions Have No Real Teeth

The other form of enforcement used by the United States in the TVPA is sanctions on non-humanitarian, non-trade related foreign assistance.²³⁴ These unilateral sanctions, which are imposed without authorization by agreement between the member countries, are a common mechanism to encourage states to comply with international law and norms.²³⁵ The United States has had success using this tactic in many different areas, and it serves the purposes of punishing the violating country and improving future compliance.²³⁶ The hope is that economic sanctions promote respect for human rights and modify behavior by helping states to internalize certain norms,²³⁷ in addition to serving punishment and deterrent functions.²³⁸ There are proponents of the idea that unilateral sanctions by the United States that are “consistent with international law and that promote recognized human rights standards play an important and legitimate part in [the] transnational legal process and the promulgation and internalization of fundamental human rights.”²³⁹

There are, however, many potential problems with the use of unilateral sanctions and with the United States’ deployment of them as an enforcement mechanism for the TVPA. First of all, there is the issue of whether the United States has jurisdiction to impose unilateral sanctions and whether imposing them violates state sovereignty.²⁴⁰ Many critics feel that the use of unilateral sanctions by the United States displays the “hegemonic actions of a global ‘hyperpower,’ which violate state sovereignty and the principles of the U.N. system.”²⁴¹ While the United Nations Charter and customary international law do not bar unilateral economic sanctions, there is the question of whether the United States is bypassing multilateral enforcement mechanisms and enforcing rules to which it does not itself

231. *See id.*

232. *See id.*

233. *See id.*

234. TVPA, Pub. L. No. 106-386 § 110, 114 Stat. 1464, 1483.

235. Cleveland, *supra* note 17, at 4.

236. *Id.* at 5 (discussing the use of unilateral sanctions by the United States to deal with human and labor rights standards, as well as to target specific abusing countries).

237. According to Harold Koh, norm internationalization is “the process by which nations incorporate international law concepts in their domestic practice. Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 *YALE L. J.* 2599 (1997).

238. Cleveland, *supra* note 17, at 6.

239. *Id.* at 7.

240. *Id.* at 48-49.

241. *Id.* at 48.

have to submit.²⁴² In dealing with these critiques it is important to note that the economic sanction employed by the United States in regards to the TVPA is the withdrawal of assistance that was voluntarily given by the United States in the first place.²⁴³ Even so, critics feel that the United States uses its sanctioning power to “selectively and hypocritically enforce human and labor rights,” by enforcing its own human rights standards instead of international standards.²⁴⁴

Furthermore, there are doubts about the effectiveness of sanctions.²⁴⁵ Many critics feel that when the United States uses economic sanctions, it is the innocent population of the sanctioned country that suffers instead of the government that the United States is attempting to influence.²⁴⁶ All unilateral economic sanctions by the United States are subject to presidential waiver “based on a finding that certain circumstances exist, such as improved human rights conditions, ‘extraordinary circumstances,’ or simply a finding that waiver is in the U.S. national security interests.”²⁴⁷ Critics of the sanctions say that instead of issuing blanket sanctions based on behavior, the United States picks and chooses which countries to sanction, ignoring ones that are strategically important to the United States, like China.²⁴⁸ They claim that the United States targets countries it already sanctions for other reasons, like Cuba and Iran, or those in which the United States has little economic strategy, like Burma and Haiti.²⁴⁹ Out of the fourteen countries on the Tier 3 List in the 2008 TIP Report, former President George W. Bush only fully sanctioned Burma, the Democratic People’s Republic of Korea (DPRK), Syria, Cuba and Iran, with partial waivers for DPRK and Iran.²⁵⁰ Additionally, as only Tier 3 countries can be sanctioned, there has been some debate over whether countries that should be placed in Tier 3 are instead placed in Tier 2 to fit United States’ interests.²⁵¹ For example, in 2007, when India was placed on the Tier 2 Watch List instead of the Tier 3 list, CNN reported that there was a heated debate between former Secretary of State Condoleezza Rice and former Deputy Secretary of State John Negroponte in which Rice overruled Negroponte’s wish to place them on the Tier 3 list due to “concern about alienating the

242. Chuang, *supra* note 19, at 458; Cleveland *supra* note 17, at 56, 69.

243. Cleveland *supra* note 17, at 56, 69

244. *Id.*

245. Chuang, *supra* note 19, at 459.

246. *Id.*

247. Cleveland, *supra* note 17, at 36.

248. *Id.* at 75.

249. See REPORT FOR CONGRESS ON TRAFFICKING IN PERSONS, *supra* note 8, at 34; Cleveland, *supra* note 17, at 75.

250. Memorandum from the Office of the Press Secretary to the Secretary of State, Presidential Determination with Respect to Foreign Governments’ Efforts Regarding Trafficking in Persons (Oct. 17, 2008), available at <http://2001-2009.state.gov/g/tip/rls/prsrl/08/111083.htm>.

251. See Elise Labott & Zane Verjee, *India Escapes U.S. List of Worst Human Traffickers*, CNN NEWS, June 13, 2007, available at <http://www.cnn.com/2007/US/06/12/human.trafficking/index.html>.

Indian government.”²⁵² The Indian and Chinese governments’ knowledge that there is such a small chance that sanctions would ever be used against them could negatively impact the efficacy of the sanctions as enforcement tools.²⁵³

C. Exploring Possible Solutions

To deal with the problems of compliance in India and China, the United States should amend the TVPA and its enforcement regime. This Note proposes that there are many possible solutions to deal with the problem of enforcement in emerging markets, including a narrower waiver provision for economic sanctions,²⁵⁴ clearer standards for tier placement, creation of a new regime for shaming noncompliant counties,²⁵⁵ a focus on victim protection, or more U.S. support for the Palermo Protocol and the institution of a central international monitoring agency for human trafficking.²⁵⁶ While there are many possible solutions, this Note argues that, at the present time, the most practical solution for effecting change in India and China with regard to their human trafficking problems is to revamp the naming and shaming system.

While there is a lot of criticism of the TVPA, until the Palermo Protocol is able to adequately enforce human trafficking norms, unilateral economic sanctions and reputational enforcement through the TVPA are necessary enforcement tools. The United States should support international cooperation and work toward effective enforcement of the Palermo Protocol, but for the present time, some amendments will help the TVPA fill the gap. The changes suggested here attempt to address some of the criticisms of the TVPA, such as applying sanctions more evenly and making clearer standards for the tier system to avoid the criticism of favorable treatment for economically powerful countries. The main function of the sanctions and tier system, however, should remain in place until the Palermo Protocol is improved because the TVPA currently is the best international watchdog to monitor and fight against human trafficking.

1. *Strengthening the Sanctions Regime*

Because the failure of the United States to apply sanctions in an even

252. *Id.* Additionally, Mark Lagon, ambassador at large for the Trafficking in Persons Office said, “I would be perpetuating a fraud to say that we don’t look at multiple factors in our relationship with countries any time we take a step on a particular issue like human trafficking.” *Id.*

253. See Anthes, *supra* note 154, at 69 (noting that a senior congressional aide said, “[W]e all know that [cutting of aid] is never going to happen” and that U.S. laws with this enforcement mechanism have little effect on the rest of the world).

254. To address critics’ concerns that the United States selectively chooses which countries to sanction based on economic interests see Cleveland, *supra* note 17, at 75.

255. Based on theorists’ claims that naming and shaming is not effective when used on countries that are emerging markets. See Keenan, *supra* note 226, at 3.

256. To address critics’ arguments that the United States is infringing on state sovereignty with the TVPA see Cleveland, *supra* note 17, at 48, 69.

manner is so detrimental to the sanctions regime,²⁵⁷ arguably allowing emerging markets like India and China to escape punishment,²⁵⁸ instituting a narrower waiver provision in the TVPA would help to strengthen sanctions as an enforcement tool. Congress could address the problem by amending the TVPA to have a narrower waiver provision or to include mandatory sanctions. When examining the U.S. unilateral sanctions regime in general, one scholar suggested that when Congress includes broad waiver provisions into statutes, it invites executives “with competing priorities to refuse to impose sanctions on countries that would otherwise qualify.”²⁵⁹ Therefore, something much less broad than that a mere “national interest” is needed to waive sanctions to countries on the Tier 3 List,²⁶⁰ which would make it more difficult for China and India to slide under the radar for political and economic reasons.²⁶¹ Note, however, that this is not to say that Congress can force the President to impose economic sanctions; instead, Congress would narrow the scope of the provision of the legislation that gives the President waiver authority over the sanctions imposed by Congress, hopefully reducing the amount of Presidential waivers.

It is not clear, however, that the institution of a narrower waiver provision would be strong enough in effect.²⁶² Even with a much narrower waiver provision, “[g]reater specificity of language, may not always constrain executive discretion.”²⁶³ It is possible that the President would continue to waive sanctions even with a narrower and more specific waiver provision in the legislation.²⁶⁴ This problem could, in theory, be addressed by a mandatory sanctions regime.²⁶⁵ While the president may feel politically compelled to waive sanctions for India and China due to their economic impact on the United States,²⁶⁶ mandatory sanctions could “provide political leverage for the President in his efforts to urge compliance with fundamental rights by foreign states, by allowing him to argue that his hands have been tied by Congress.”²⁶⁷ The sanctions would then be implemented to every violating country, regardless of their economic ties to the United States. This knowledge that the sanctions are more than

257. *Id.* at 75 (arguing that “hypocrisy in the imposition of sanctions has done the most to undermine the normative legitimacy of U.S. unilateral sanctions”).

258. *See id.*

259. *Id.* at 80.

260. TVPA, Pub. L. No. 106-386 § 110, 114 Stat. 1464, 1483.

261. *See* Cleveland, *supra* note 17, at 75 (arguing that some countries are spared economic sanctions for economic reasons).

262. *Id.* at 80.

263. *Id.*

264. *See id.* (showing that President Clinton continued to exercise the waiver provision of the Helms-Burton Act even where the language of the provision was specific).

265. *See id.* at 85.

266. *See id.* at 75 (arguing that Presidents do not sanction countries that are economically important to the United States and quoting former presidential hopeful Pat Buchanan’s criticism of the Clinton administration that “[Clinton] blockaded, starved and invaded tiny Haiti for human rights violations, but he proudly chaperone[d] China in the WTO.”)

267. *Id.* at 84.

a mere threat would likely encourage those countries to modify their behavior.²⁶⁸

The problem here is that Congress is reluctant, understandably, to remove that discretion from the hands of the President, and even if Congress did remove the waiver provision, the President has other means to refrain from imposing sanctions.²⁶⁹ For example, Congress passed provisions for mandatory sanctions to be imposed for violations of the International Whaling Convention.²⁷⁰ Japan clearly violated the Convention, but the Reagan Administration still avoided imposing the sanctions by declining to find that Japan violated the Convention, and the Supreme Court deferred to the executive branch's determination.²⁷¹

It seems that, while theoretically less effective, narrowing the waiver provision is a more viable option for Congress. Because removing the waiver provision altogether is unlikely to be something that Congress is comfortable doing and because it has not been shown to be the perfect solution in the past,²⁷² amending the TVPA to have a narrower waiver provision is likely the most practical option to improve the sanctions regime. Perhaps drawing public attention to what the actual waiver provision says and what the President decides to do would bring the attention of voters to the issue, thereby democratically influencing the President to stay within the bounds of the provision.

There are, however, still many concerns that accompany the idea of trying to effect change in India and China through sanctions at all. For example, the Clinton Administration thought that imposing sanctions in this context went against the cooperative nature of the Palermo Protocol and would prove to be "profoundly counterproductive."²⁷³ It feared that instituting sanctions would cause countries to be less transparent about the human trafficking problems within their borders.²⁷⁴ There is also the possibility that sanctions can have an opposite result from what was intended, "by further radicalizing recalcitrant regimes and, moreover, fostering regional discontent with the United States."²⁷⁵ Many critics of sanctions also worry that the people that actually feel the economic pressure are the innocent citizens of a country and not the perpetrators of the crime.²⁷⁶ For example, economic sanctions imposed by the U.S. government in Venezuela placed many programs at risk, including those with motives such as providing cleaner drinking water and protecting the Amazon rainforest.²⁷⁷

268. *Id.* at 7 (arguing that unilateral sanctions contribute to norm internalization).

269. *Id.* at 80.

270. *Id.* at 83.

271. *Id.*

272. *See id.* (arguing that the case of Japan and the mandatory sanctions violations of the International Whaling Convention shows that mandatory sanctions have not been the perfect solution).

273. Chuang, *supra* note 19, at 455.

274. *Id.*

275. *Id.* at 487.

276. *Id.* at 459.

277. *Id.* at 487-88

Additionally, while imposing sanctions may improve enforcement of the TVPA, it also poses some economic risks to the United States. In 2008, the United States imported \$363,551.7 million in goods from China and India while exporting \$90,123.6 million in goods and services to those countries.²⁷⁸ Imposing sanctions could disrupt this profitable exchange and generate some ill will toward the United States from those countries. As mentioned above, without mandatory sanctions, this may sway the President's decision as to whether a country should face punishment.²⁷⁹ While it might be somewhat detrimental to the United States economically to employ sanctions on non-humanitarian, non-trade related foreign assistance to China and India because of U.S. reliance on trade with those countries,²⁸⁰ freedom from forced slavery and abuse is a right so fundamental that it cannot be properly evaluated in terms of a cost-benefit analysis. This is not simply an issue of cost to the United States.

But even ignoring the potential financial harm to the United States, there are many issues with using unilateral sanctions to enforce the TVPA. While focusing on improving economic sanctions is a possible solution for dealing with human trafficking problems in India and China, the non-economic concerns of possibly causing a backlash or harming the innocent populations and the dubious efficacy of these kinds of sanctions, make this a less than ideal solution.

2. TVPRA 2008 and Sanctions

Another idea to improve the efficacy of the TVPA recently was implemented through the TVPRA 2008. As noted above, the provision states that countries that have been on the Tier 2 Watch list for two consecutive years will be moved to the Tier 3 list, which allows them to be sanctioned by the U.S. government.²⁸¹ The President may, however, waive application of the provision for up to two years if he finds that the country in question has a plan to make "significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking,"²⁸² the actions in the plan would constitute significant efforts if the plan was implemented, and the country "is devoting sufficient resources to implement the plan."²⁸³ Because this new law does not take effect until the 2009 TIP Report, it will take several years to determine its effectiveness. While this is certainly a step in the right direction of holding countries accountable, there may be problems inherent in the waiver provision. The provision may not prove effective because it can be waived through a mere showing that there is a plan, and does not actually require significant efforts to be

278. See U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS, available at <http://www.census.gov/foreign-trade/balance/c5700.html#2008> (P.R.C.) and <http://www.census.gov/foreign-trade/balance/c5330.html#2008> (India).

279. See Cleveland, *supra* note 17, at 75 (arguing that Presidents do not sanction countries that are economically important to the United States).

280. Keenan, *supra* note 226, at 3.

281. TVPRA 2008, Pub. L. No. 110-457 §107(a)(D)(i), 122 Stat. 5044.

282. *Id.* §107(a)(D)(ii)(I), 122 Stat. 5044.

283. *Id.* §107(a)(D)(ii)(I), 122 Stat. 5044.

made at the time of the waiver. The same political pressures will still exist with the discretion to categorize economically powerful countries; now the discretion just exists at two levels in this situation: at the categorization level first and then at the sanctions level if the country is actually moved to Tier 3.²⁸⁴

3. *Improving the Naming and Shaming System*

To deal with the problem of countries like China and India that remain unwilling to take the necessary steps to combat human trafficking, the United States should improve the naming and shaming system.²⁸⁵ One of the main problems with the tier system, and the sanctions that follow from those tier rankings, is inconsistencies in application.²⁸⁶ The TVPA should be amended to articulate clearer standards for placing countries in one of the three tiers. It is unclear what exactly a country must do to meet the standard for Tier 1. There is no requirement that Tier 1 countries even “distinguish between smuggling and trafficking”²⁸⁷ or “refrain from penalizing trafficked persons through arrest, incarceration, or summary deportation.”²⁸⁸ This allows countries with severe trafficking problems to be placed in the Tier 1 category and to duck reputational harm, while still having grave human trafficking problems. Also, the explanations for why a country is on one of the other tiers, especially on a tier in which sanctions attach, should be more detailed. The standards for higher tier placement should “describe the bases for condemnation clearly and in detail so as to avoid allegations of bias.”²⁸⁹ With more definite standards in the tier system and more explanation in the TIP Report about the reasons why a country was placed on a particular tier, the amount of room for discretion based on factors other than treatment of human trafficking in the country would shrink. This would decrease the chance that India and China could escape a Tier 3 ranking while they still inadequately address the huge human trafficking industries that are thriving within their borders.

Traditional naming and shaming has not been entirely effective at encouraging China and India to deal with their human trafficking problems,²⁹⁰ but a new form of naming and shaming connected to the economics of the countries might change that.²⁹¹ Some scholars argue that reputational sanctions must have some instrumental effect to be salient and have found that countries that received a lot of aid and those with

284. This harkens back to the above discussion of Condoleezza Rice arguing that India should be placed on the Tier 2 Watch List instead of Tier 3 in an effort to appease the Indian government. See *supra* Part IV.B.

285. Keenan, *supra* note 226, at 3 (arguing that reputations of states have become less important).

286. Chuang, *supra* note 19, at 493.

287. *Id.*

288. *Id.*

289. *Id.*

290. See Keenan, *supra* note 226, at 3.

291. See *id.* at 46 (arguing in his article that the “international community should develop mechanisms to systematize the creation of reputations and the implications of having a particular reputation”).

more foreign investment were more responsive to shame.²⁹² Louis Henkin noted that, in the sphere of human rights, “if states do not act, sovereign companies can be induced by shaming, by NGOs, the responsible press, by stockholders, by consumers . . .” and other ways.²⁹³ Another scholar suggests that reputational harm is more effective if it affects the credit or country risk ratings, which are ratings that investors use to determine the risk that their investment will fail due to the “failure of the host country to pay its debts, enforce agreements, or maintain adequate control of its territory of investing within a certain country or with a certain company.”²⁹⁴ States and companies that seek to do international business are encouraged to maintain good ratings because they are an important part of competition in international business.²⁹⁵ Therefore, the United States should amend the TVPA to add a method of connecting the shaming of the countries to decreased foreign investment, or it should find a way to shame individual companies in the country. This would allow the shaming technique to have a much larger impact.

One option for how Congress could amend the TVPA to include reputational consequences that actually affect foreign investment would be for the TVPA to impose its own risk rating system for corporations.²⁹⁶ If a corporation or government contractor is found to be using forced laborers, is buying from manufactures that used trafficked labor, or is otherwise working with such organizations, that information should be published.²⁹⁷ Investors would be wary of investing in corporations or governments that rely on human trafficking because of the reputational problems it would cause to the investors when the information was published, and also because it is economically risky to depend on a work force that could, at any moment, be shut down if the workers are rescued.²⁹⁸ There is already a U.S. law in place, Federal Acquisition Regulation (FAR) 22.17, which authorizes the U.S. government “to terminate a contract or otherwise penalize a contractor if the contractor engages in human trafficking.”²⁹⁹ This is a step in the right direction, but the idea should be expanded to include contractors from other governments and foreign corporations. While the United States government would not be able to directly punish foreign corporations with no U.S. subsidiary or step in and force the termi-

292. *Id.* at 28.

293. Louis Henkin, *That “S” Word: Sovereignty, and Globalization, And Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 13 (1999-2000).

294. Keenan, *supra* note 226, at 49.

295. *Id.*

296. This would be in addition to the ratings already used in the Tier System. *Id.* at 50 (proposing the use of ratings similar to credit ratings to rate the human rights performance of states and companies).

297. This is based on the second approach suggested by Keenan where NGOs and others collect information about state and company behavior with regards to human rights and disseminate that information. *Id.* at 51.

298. *Id.* at 49 (stating that “[i]nformation about the ability (an inclination) to honor agreements is . . . critical to any investment decision”).

299. John G. Bradbury, *Human Trafficking and Government Contractor Liability: Is FAR 22.17 a Step in the Right Direction?*, 37 *PUB. CONT. L. J.* 907, 908 (2008).

nation of the contracts, the publishing of that information would likely be sufficient punishment to deter the behavior.³⁰⁰ Instead of harming the citizens of countries with an economic sanction that removes aid previously given by the United States, the economic loss here would be to large corporations and governments.³⁰¹ Corporations would likely try to avoid working with any kind of trafficked individuals and influence the government to make harsher laws to deter that kind of work. Such a system does not address commercial sex trafficking, but it would go a long way toward stemming bonded labor.

4. *Focusing on Protecting Victims of Trafficking*

Another way that the TVPA should be changed to deal with problem countries like India and China is to emphasize protection as well as prosecution.³⁰² Both India and China, as noted above, have failed to adequately protect victims of human trafficking. In India, the government fails to protect the victims of labor trafficking, and protects victims of sex trafficking inconsistently.³⁰³ The victims are often returned to their home countries, where they are stigmatized and subject to re-trafficking.³⁰⁴ Likewise, China has no government assistance programs to help victims of trafficking, and the Chinese government continues to deport North Korean victims back to North Korea where they often face severe punishment.³⁰⁵ In both India and China, there have been reported problems of rescued child trafficking victims being returned back to their traffickers due to a failure of the government or law enforcement to follow procedures.³⁰⁶ If protection of victims were viewed with the same kind of priority that prosecution is under the TVPA, then China and India would likely have to be moved down to Tier 3 due to the seriousness of each country's protection problems.

5. *Beyond the TVPA - Supporting the Palermo Protocol*

Outside of the scope of the TVPA, the United States should try to influence countries to become parties to the Palermo Protocol and to follow those international standards instead of the standards under the

300. See Wexler, *supra* note 218, at 566-67 (stating that public stigmatization can influence changes in behavior).

301. Responding to the argument that economic sanctions often punish the innocent population of a country. Chuang, *supra* note 19, at 459.

302. Chacón, *supra* note 7, at 3024-25 (saying that the TVPA "overemphasizes prosecution, while underemphasizing protection and prevention").

303. TIP REPORT, *supra* note 2, at 141.

304. *Id.*

305. *Id.* at 94.

306. *Id.* at 30 (describing a situation in India where a group of child sex trafficking victims were released back to traffickers when the police failed to follow the procedures in place and a situation in China where child victims were released from protection centers and given to traffickers posing as family members).

TVPA.³⁰⁷ India has signed the Palermo Protocol, but has yet to ratify it, and China has not even signed.³⁰⁸ Because there are so many parties to the Protocol and it has garnered so much international support,³⁰⁹ it might be an easier task to get India and China to implement those standards than the more stringent standards of the TVPA. Also, as one scholar noted, it can be a positive economic move for a country to enter into a human rights treaty.³¹⁰ She explains that affording human rights protection shows investors that a government “has a low discount rate and is therefore less likely to engage in expropriation,” thereby spurring economic growth in the country.³¹¹ It might be possible to incentivize China and India to join the Protocol through that economic reasoning.

Additionally, the United States should work to improve the Palermo Protocol’s ability to fight human trafficking. Most importantly, there must be a central monitoring body for the Protocol to ensure that state parties actually adhere to the Protocol’s provisions. There are currently many agencies that are working to fight against human trafficking.³¹² Some scholars have recommended that a lead authority be designated to be the head agency dealing with the human trafficking problem.³¹³ This would allow for more coordination and cooperation, and the roles and responsibilities of different agencies would become more formalized.³¹⁴ If the United States could work with the United Nations to create a central agency to oversee human trafficking, the United States likely could step back from its criticized role as international watchdog and rely on the central agency to do that work.

Conclusion

The scope and magnitude of the human trafficking epidemic is such that it affects every country in our international community. This Note focuses on the problems in India and China as examples of the particular enforcement issues that arise when dealing with countries that are emerging global markets and, therefore, key to the United States’ international trade and business; but these are not the only countries that are failing to meet the TVPA minimum standards or even the worst offenders in violating human trafficking standards.

The long-term goal should be for changes to the Palermo Protocol, perhaps based on some of the provisions of the TVPA, and for the international community to influence hold-out countries to become parties. An

307. To address the argument that U.S. efforts to impose its own law instead of the Protocol is inappropriate as a matter of International Law see Chuang, *supra* note 19, at 493.

308. TIP REPORT, *supra* note 2, at 281.

309. There are 117 signatories and 124 parties to the Palermo Protocol. See List of Signatories and Parties to the Palermo Protocol, *supra* note 72.

310. Hathaway, *supra* note 217, at 2012.

311. *Id.*

312. Edwards, *supra* note 92, at 50.

313. *Id.* at 51.

314. *Id.*

international agency should be designated to be the lead monitoring body of the amended Palermo Protocol, and all parties should be held accountable for their adherence through naming and shaming, economic sanctions, and other enforcement mechanisms. With the global community behind its enforcement, countries like China and India would be more likely to comply. Additionally, this solution would avoid the jurisdictional issues inherent in the use of U.S. law to impose standards on other countries.

Currently, the TVPA is the most effective and comprehensive system for monitoring anti-human trafficking efforts internationally, and until there is a suitable international body to take on that responsibility, the United States should continue to monitor and enforce anti-trafficking standards. Therefore, while the TVPA continues in its watchdog role, it should be changed to be more effective. The United States should revise the ranking regime of the TVPA and institute sanctions in a more consistent manner. Congress could address the problems in the sanctions regime by amending the TVPA to have a narrower Presidential waiver provision or removing the waiver provision altogether. Congress also could address the problem by amending the TVPA to include clearer standards for what is necessary for placement in each of the tiers. To deal with the ineffectiveness of naming and shaming, the TVPA should include a ranking system of corporations and countries so that reputational problems will directly affect the foreign investment in a country's corporations and government. Additionally, there should be changes to emphasize protection, instead of focusing mainly on enforcement, as China and India are both enforcing human trafficking laws but failing to protect victims, therefore perpetuating the human trafficking cycle.