

Monitoring the Status of Severe Forms of Trafficking in Foreign Countries: Sanctions Mandated Under the U.S. Trafficking Victims Protection Act

MOHAMED Y. MATTAR

Co-Director

The Protection Project

COMBATING TRAFFICKING IN PERSONS HAS become a significant United States foreign policy issue. The 2000 Trafficking Victims Protection Act (TVPA) recognizes trafficking as a human rights violation. The TVPA mandates that the United States monitors the status of severe forms of trafficking in foreign countries and government responses to the problem. To achieve this purpose the U.S. State Department issues an annual report, documenting government efforts to eliminate trafficking in persons. The TVPA creates a set of minimum standards for the elimination of severe forms of trafficking in persons and sets forth criteria for evaluating serious and sustained efforts made by foreign governments to meet such standards. The United States does not stop at reporting. It also classifies countries according to their compliance with the minimum standards set forth in the TVPA. Furthermore, the United States adopts the use of sanctions as a tool to pressure foreign governments to recognize the gravity of the problem of trafficking in persons, and to take the necessary measures to eliminate this form of slavery.

This article will examine the emergence of trafficking in persons as a foreign policy objective and its recognition as a gross violation of human rights. It will inquire into whether the reporting mechanism is adequate in assessing government efforts in the prevention of trafficking, protection of victims of trafficking, and prosecution of traffickers. Should such assessment mainly focus on criminalization of the acts of traf-

MOHAMED Y. MATTAR, LL.B., MCL., LL.M., SJD, is an Adjunct Professor of Law and the Co-Director of The Protection Project at the Johns Hopkins University School of Advanced International Studies (SAIS).

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ficking, or should more emphasis be placed on the protection of the victims? Should any evaluation of the problem of trafficking take into account the demand for prostitution as a primary reason for the proliferation of sex trafficking? How does the United States require foreign countries that lack resources to initiate programs to combat trafficking? Most importantly, can the United States compel foreign countries to provide information on the status of trafficking in persons? If the United States is unilaterally undertaking the task of reporting on foreign governments, to whom is the United States accountable, especially since trafficking in persons poses a significant problem in the United States?

The article will also study the nature of the sanctions that the United States may impose on foreign countries that do not comply with the minimum standards for the elimination of trafficking in persons and are not making significant efforts to do so bring themselves into compliance with these standards. Foreign countries oppose unilateral sanctions imposed by the United States. Some governments do not recognize the magnitude of the problem, others are not serious about initiating programs to protect victims of trafficking, and many lack the political will to punish the trafficker. Sanctions are designed to change governments' attitudes towards the problem of trafficking in persons. This article will argue, however, that sanctions must be carefully applied, otherwise, imposing sanctions would defeat the purpose of the TVPA "to combat trafficking in persons...to ensure just and effective punishment of traffickers, and to protect their victims."¹

AMERICAN FOREIGN POLICY OBJECTIVES

Nonproliferation of weapons of mass destruction (WMD), fighting terrorism, and the war on drugs are primary objectives of current United States foreign policy. The Arms Export Control Act denies credit or other U.S. financial assistance to any non nuclear weapons state testing a nuclear device. The Terrorism Sanctions Regulations, the Terrorism List Governments Sanctions Regulations and the Foreign Terrorist Organizations Sanctions Regulations are all designed to fight terrorism. The Iran and Libya Sanctions Act of 1996 asserts extraterritorial jurisdiction by imposing sanctions on foreign companies that invests in the oil industry in these two countries. The Bureau of International Narcotics and Law Enforcement Affairs in the United States Department of State monitors the production and distribution of drugs by foreign countries.

The International Religious Freedom Act² mandates that the United States "...condemn violations of religious freedom, and...promote and assist other governments in the promotion of the fundamental right to freedom of religion."³ This act requires the Office on International Religious Freedom to publish an annual report. The report,

entitled the "International Religious Freedom Report," recognizes religious persecution as a human rights violation.⁴ In the 1999 and 2000 reports, five countries, Burma, China, Iran, Iraq, and Sudan, in addition to the Taliban regime in Afghanistan, were identified as countries of "particular concern." In the 2001 report, these five countries were again identified as countries of "particular concern", and for the first time North Korea was given this distinction. All six countries were so identified in the 2002 Report. The United States Tariff Act prohibits the importation of goods made with convict, forced or indentured labor.⁵ The Helms-Burton Act targeted China's forced population control policies. On the basis of the International Emergency Economic Powers Act of 1977, the United States imposed sanctions against Iran in 1981, against Nicaragua in 1985, against South Africa in 1985, and against Burma in 1997.

Human rights have been an important foreign policy objective of the United States. The Foreign Assistance Act of 1961⁶ prohibits economic assistance to any government that engages in a "consistent pattern of gross violations of internationally recognized human rights."⁷ This policy provides that "the United States shall, in accordance with its international obligations as set forth in the charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."⁸ Trafficking in persons, especially women and children, which is a grave human rights violation, has become a significant global problem.

THE RISE OF TRAFFICKING IN PERSONS: CONDITIONS OF ECONOMIC, CULTURAL AND SOCIAL VULNERABILITY

It is estimated that at least 700,000 persons are trafficked annually.⁹ The rise of globalization, the widening of the gap between developing and developed countries, the increase in poverty, unemployment, and lack of equal opportunity, are all factors that contribute to the trafficking infrastructure.¹⁰ Poverty creates a condition of economic vulnerability. Innocent women and children become an easy target for traffickers, who take advantage of women and children's economic vulnerability by offering illusory economic opportunities.

Many local practices create conditions of cultural vulnerability, such as early marriages, mail order brides, arranged marriages, temporary marriages, and other harmful institutions, which do not rely upon any valid legal foundation, but are widely recognized and accepted. Sex tourism is becoming a main source of income for many coun-

tries. Some sex tourists believe, mistakenly, that young children are less likely to be infected with HIV/AIDS and other sexually transmitted diseases and, as such, they provide safe sex partners.¹¹ Studies show that children are being trafficked from countries of the Americas for the purpose of adoption, especially from Honduras, Ecuador, El Salvador, Venezuela, and Guatemala.¹²

Instability, hostile occupation, armed conflict, and civil unrest create social vulnerability of an insecure population that becomes disintegrated, displaced and easily subjected to trafficking for illicit sexual purposes or forced labor. The collapse of the Soviet Union in particular led to an increase of trafficking activities. Women are trafficked from the former Soviet Union to countries of Western Europe, the Middle East and the United States. Children are being trafficked for military purposes, and recruited to engage in armed forces as young as 8 years old, and become subject to forced labor and sexual abuse.¹³

Victims of trafficking are falsely promised employment in foreign countries and lured into economic opportunities that do not exist. Once recruited, trafficking victims perform services in the underground economy and become commodities in the illegal market and are placed in conditions of debt bondage and servitude. Their travel documents are confiscated and in many cases they become illegal aliens and are denied freedom of movement. These criminal acts constitute a human rights violation.

TRAFFICKING IN PERSONS AS A HUMAN RIGHTS VIOLATION

Under the 1948 Universal Declaration of Human Rights "no one shall be held in slavery or servitude"¹⁴ and "slavery and slave trade shall be prohibited in all their forms."¹⁵ Trafficking in persons constitutes a form of modern day slavery where women and children are held in conditions of servitude with no means of escape or ability to return to their countries of origin. Thus, trafficking in persons also violates the international principle that "everyone has the right to freedom of movement and residence..."¹⁶ and "everyone has the right to leave any country..." and "to return to his country."¹⁷ Placing trafficking victims in unwanted employment, entailing long hours of work with little or no pay, in inhumane conditions clearly violates another principle of international human rights that "everyone has the right to work, to free choice of employment, to just and favorable conditions of work..."¹⁸ and "everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."¹⁹ Victims of trafficking are coerced into conditions of involuntary servitude. Forced or compulsory labor is prohibited by the conventions of the International Labour Organization.²⁰

UNITED STATES RESPONSE TO TRAFFICKING IN PERSONS

The TVPA was signed into law on 28 October 2000. It explicitly recognized trafficking in persons as a "grave violation of human rights" and "a matter of pressing international concern."²¹ The TVPA established an interagency task force to coordinate the implementation of the TVPA and evaluate the progress made in the United States and foreign countries in the area of trafficking. The Department of State established the Office to Monitor and Combat Trafficking in Persons to provide the necessary assistance to the task force. The TVPA requires the United States to monitor the status of trafficking in other countries, provides such countries with assistance to combat trafficking and imposes sanctions on those countries that are complicit in trafficking.

MONITORING THE STATUS OF SEVERE FORMS OF SEX TRAFFICKING AND TRAFFICKING FOR LABOR OR SERVICES

Forms of trafficking under the TVPA are limited to sex trafficking and labor trafficking. The TVPA broadly defines sex trafficking to mean "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." The TVPA defines a commercial sex act to mean "any sex act on account of which anything of value is given to or received by any person."²² While trafficking for the purpose of prostitution undoubtedly falls under this definition, it is not clear whether trafficking for other forms of sexual exploitation, such as mail order brides, pornography, or sex tourism, are included in this definition. One must note, however, that the TVPA makes examining the role of the international sex tourism industry in the trafficking of persons as one of the main activities of the Interagency Task Force to Monitor and Combat Trafficking.²³

The TVPA recognizes that trafficking in persons is not limited to the sex industry and that "this growing transnational crime also includes forced labor."²⁴ While the TVPA covers labor trafficking it does not confuse it with alien smuggling or merely exploitative labor or unfair labor practices. Unlike trafficking in persons, which is a crime against the individual, alien smuggling is a crime against the state and assumes complicity of the smuggled person. Therefore, the natural response to this crime is deportation. Trafficking for forced labor is also defined broadly to include holding a person in "a condition of servitude through nonviolent coercion."²⁵ The TVPA does not cover other forms of trafficking, especially trafficking for the purpose of illicit inter-country adoption, trafficking in human organs, or other practices similar to slavery. In that sense, the TVPA is narrower in scope than the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, supplementing the United Na-

tions Convention against Transnational Organized Crime (UN Protocol) which defines the purpose of trafficking to include "exploitation of prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs."²⁶ The TVPA is also narrower than the UN Protocol in its definition of the "means of trafficking." While the TVPA requires force, fraud, or coercion for the existence of "severe forms of trafficking," unless the trafficking is in children, the UN Protocol adopts a more expansive view of what it considers "illegal means." These means include "...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."²⁷ The TVPA requires reporting only on severe forms of trafficking, as defined narrowly by the TVPA.

THE MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING IN PERSONS

The TVPA requires the State Department to submit an annual Trafficking in Persons (TIP) Report to the appropriate Congressional committees. The TIP Report classifies countries into three categories based upon their compliance with the minimum standards for the elimination of trafficking in persons as stipulated in the TVPA. Tier 1 includes countries whose governments have fully complied with these standards. Tier 2 includes countries whose governments do not yet fully comply with these standards but are making significant efforts to bring themselves into compliance. Tier 3 includes countries whose governments do not fully comply with these standards and are not making significant efforts to bring themselves into compliance with these standards.

The TVPA enumerates four minimum standards. The first standard states that the government of a country should prohibit severe forms of trafficking in persons and punish such acts. Meeting this standard requires a country to have an anti-trafficking law, which makes trafficking an offense and provides for a punishment for such offense. While some countries explicitly provide for such prohibition, others do not have a specific penal code provision, criminalizing the act of trafficking itself. Many countries still prohibit trafficking as a part of the anti-prostitution law, which criminalizes such activities. Compliance with this standard requires a country to recognize all forms of trafficking as a criminal offense, whether for the purpose of prostitution or forced labor, since the TVPA defines severe forms of trafficking in persons to include sex trafficking and trafficking for labor or services. The second standard specifically applies to sex trafficking and requires governments to prescribe the appropriate sentences in cases of sex trafficking that involve the trafficking of a child or aggravated circumstances, such as rape, kidnapping, or death. These sentences should be comparable to

punishments for grave crimes such as forced sexual assault. The third standard requires a government to prescribe a punishment for any act of a severe form of trafficking in persons that is "sufficiently stringent" to deter others from committing the same crime and reflects the serious nature of this crime. The fourth standard inquires into whether a government makes "serious and sustained efforts" to eliminate trafficking.

In determining whether these efforts are "serious and sustained," the TVPA calls for the consideration of seven criteria. The first three address government efforts in the areas of prosecution, protection, and prevention. This comprehensive approach is necessary to address all aspects of the problem of trafficking in persons. Since trafficking is a transnational crime, which requires transnational policies the criteria include cooperation among governments, extradition of persons charged with acts of trafficking and monitoring of immigration and emigration. The criteria also evaluate whether the government investigates and prosecutes public officials who participate in or facilitate trafficking.

Furthermore, the TVPA, in determining whether a government is making significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking, requires the consideration of three important factors. First, the extent to which the country is a country of origin, transit, or destination for trafficking must be determined. Second, the extent to which the government itself has participated in, facilitated, condoned, or is complicit in acts of trafficking. Third, what measures are reasonable to be taken by the government to eliminate trafficking in light of its resources and capabilities?

ASSESSMENT OF GOVERNMENT EFFORTS IN THE AREAS OF PREVENTION, PROTECTION, AND PROSECUTION

The minimum standards adequately address the various aspects of the problem of trafficking. There is no doubt that combating trafficking requires effective prosecution of the traffickers, but the root causes of the problem must also be addressed. Preventive measures must be taken to decrease the supply of innocent women and children. In the meantime, the trafficked person must be treated as a victim and governments must establish the necessary protective programs to assist victims of trafficking.

Does the TVPA require equal weight of these criteria in assessing government efforts to eliminate trafficking? It has been argued that prosecution should be considered the most important criterion of serious and sustained efforts to eliminate trafficking in persons,²⁸ since the very first indicator is "whether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking in persons that take place wholly or partly within the territory of the country."²⁹ The TVPA, however, does not indicate that it lists these criteria in any particular order. The seventh

and last criteria in determining such efforts, is “whether the government of the country vigorously investigates and prosecutes public officials who participate in or facilitate severe forms of trafficking in persons, and take all appropriate measures against officials who condone such trafficking.”³⁰

Official corruption threatens any efforts to combat trafficking and it must be confronted, otherwise any preventive measures or protective initiatives taken by the government would be severely and adversely affected.

If one follows this argument, it may be concluded that the TVPA considers combating public corruption as the least important indicator of government efforts in eliminating trafficking. Official corruption threatens any efforts to combat trafficking and it must be confronted, otherwise any preventive measures or protective initiatives taken by the government

would be severely and adversely affected. Abuse of public office for private gain circumvents the implementation of human rights, since misuse of government expenditures results in misallocation of resources, denying the population the right to education, employment, health and adequate living conditions.

Another problem with this argument is that it may implicitly indicate that prevention of the root causes of trafficking is less important, although as it has been pointed out that “prevention is the key”³¹ in combating trafficking in persons. In addition, while prosecution of the traffickers is an important tool in the fight against trafficking, many governments still treat trafficked persons as criminals who are not entitled to any rights. The mere fact that governments have changed their policies towards the protection of the trafficked person must be considered a “serious” step towards eliminate trafficking, even if such governments have not yet taken all the necessary measures to investigate and prosecute cases of trafficking, especially since the legislator never intended that governments would be required to fulfill all the criteria listed in the TVPA as an indication of its serious and sustained efforts.

Based upon its efforts in the prevention and protection areas, Vietnam was evaluated as a Tier 2 country in 2002, moving from Tier 3 status in 2001, although the government still has not aggressively pursued prosecution of traffickers.³² While this evaluation apparently satisfies the minimum standards as stipulated in section 108 of the TVPA, the TIP Report failed to take into consideration government complicity in assessing whether the country is making significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking. The TVPA mandates that the TIP Report consider “the extent of non-compliance with the minimum standards by the government and, particularly, the extent to which officials or employ-

ees of the government have participated in, facilitated, condoned, or are otherwise complicit in severe forms of trafficking.”³³ Evidence of government complicity, as determined by the judiciary, should have been more seriously considered by the TIP Report.³⁴

THE SCOPE OF THE PROBLEM AND THE EXTENT TO WHICH A COUNTRY IS A COUNTRY OF DESTINATION

Another factor, in addition to government complicity, which must be taken into consideration, is “the extent to which the country is a country of origin, transit, or destination for severe forms of trafficking.”³⁵ Some interpret this factor to include “the extent of trafficking victimizations.”³⁶ In fact the TIP Report seems to adopt this interpretation, as indicated in its explanatory introduction, although there is no evidence that it considers the scope of the problem or “the extent of trafficking” in any particular country when it evaluates the status of trafficking.

Whether a country is a country of origin, transit or destination is an element that mainly affects the nature of measures that must be taken to eliminate trafficking. Preventive measures must be weighed more heavily in countries of origin while protective measures must be the focus of any assessment in countries of destination. The only reference to the numbers of victims of trafficking was made by section 108(a), which applies the minimum standards “to the government of a country of origin, transit, or destination for a significant number of victims of severe forms of trafficking.” The State Department requires that a country of origin, transit, or destination for 100 or more victims be included in the TIP Report, and the TIP Report recognizes that “it is possible for a country to have a high number of trafficked victims and for its government to be making significant efforts.”³⁷

The TVPA does not require the TIP Report to provide a description of the scope of the problem. This is the function of the annual Country Reports on Human Rights Practices, which now must include “a description of the nature and extent of severe forms of trafficking in persons...in each foreign country.”³⁸ The TIP Report does not consider the extent to which a country is a destination for sex trafficking as having any bearing on whether a country is placed in Tier 1, Tier 2, or Tier 3. In sixteen of the eighteen Tier 1 countries mentioned in the 2002 TIP Report, the act of prostitution itself is not criminalized. Nonetheless, the TIP Report considers these countries to be making serious and sustained efforts to combat trafficking and fully comply with the minimum standards as stipulated by the TVPA. In many of these countries, such as Germany and the Netherlands, prostitution is legalized. Nevertheless, legalization of prostitution is not considered in rating these countries, which appear in Tier 1 of the

TIP Report.

This approach clearly runs counter to the legislative intent of the TVPA. The TVPA "squarely rejects any effort to legitimize prostitution by treating it just like another kind of work."³⁹ While the TVPA defines severe forms of trafficking to mean trafficking of children, regardless of the means used, or trafficking of an adult by force, fraud or coercion, it rejects the distinction between forced prostitution and voluntary prostitution⁴⁰ and thus considers prostitution as exploitative in nature in all cases and "inherently a form of degradation."⁴¹ One must take into account that the United States has stringent anti-prostitution laws.

In addition, the provisions of the TVPA, as previously indicated, require that the assessment of governments' efforts to eliminate trafficking should not be limited to scrutiny of the governments of countries of origin for victims for severe forms of trafficking, but must "equally" include "close scrutiny" of the countries of destination for such victims.⁴² The TIP Report fails to conduct this scrutiny. The TIP Report does not recognize any link between the demand for prostitution and the proliferation or promotion of trafficking,⁴³ although studies show that the demand for prostitution in countries of destination causes a significant increase in sex trafficking.⁴⁴ In addition, there is ample evidence that a strong sex industry is conducive to commercial sexual exploitation of children.⁴⁵ Therefore, countries with legalized or tolerated prostitution should be considered countries that made "insufficient efforts to eliminate trafficking."⁴⁶

In a statement submitted to Congress, the author stated, "the prevention of prostitution should be considered as an important preventative measure, which contributes to the elimination of sex trafficking."⁴⁷ Any such measures should also include warnings about the harm of prostitution itself. This was the position of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which stated "prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human persons and endanger the welfare of the individual, the family and the community."⁴⁸ While the UN Protocol does not explicitly adopt this view, the Protocol provides that "states parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures...to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that lead to trafficking."⁴⁹

A third factor mandated by the TVPA requires the State Department, when classifying countries, to take into account "what measures are reasonable to bring the government into compliance with the minimum standards in light of the resources and capabilities of the government."⁵⁰ Consequently, any assessment of efforts made by a government must be judged with an eye on the "resources" and "capabilities" of such

government. For instance, the government's limited resources was a factor that influenced the TIP Report in placing India on Tier 2, based on available resources that the government was able to commit against trafficking in the areas of prevention and protection.⁵¹

IS A FOREIGN GOVERNMENT UNDER A DUTY TO PROVIDE INFORMATION ON THE STATUS OF TRAFFICKING IN PERSONS TO THE UNITED STATES?

Some argue that a government that does not meet the minimum standards should bear the burden of providing information about its efforts to comply with such standards. Failure to provide information or the withholding of such information would be a sufficient reason to place a country in Tier 3.⁵² It is hard to formulate a legal basis for the imposition of a duty to "report" or a duty to "inform" on the part of a government towards another in the absence of a bilateral agreement or foreign assistance. However, sharing of information among countries is an international obligation under the UN Protocol. The UN Protocol provides that law enforcement, immigration officials, and other relevant authorities of a country shall cooperate with other countries by exchanging information, especially regarding travel patterns of potential victims of trafficking or the perpetrators of the acts of trafficking, travel documents, and the means and methods used by organized criminal groups that are engaged in acts of trafficking.⁵³ The UN Protocol however, while providing for the duty to cooperate and exchange certain information in the context of trafficking, does not make such an obligation mandatory in nature. Countries may comply "as appropriate in accordance with their domestic law."⁵⁴

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INTERNATIONAL MONITORING LACKING ENFORCEMENT MECHANISM

Monitoring the status of trafficking in persons through a unilateral reporting process implicitly assumes that any international reporting mechanism is nonexistent, ineffective, or unenforceable. Various international conventions require member states to report to an international body. For example, the 1989 Convention on the Rights of the Child requires state parties to the convention to submit an initial report on the status of children's rights, and governmental measures adopted to give affect to such rights.⁵⁵ The Report is submitted to a committee which was established in 1991, two years from the date of ratification by a country, followed by periodic reports every five years. The committee reviews the reports, discusses the contents with government representatives and drafts observations and recommendations for action, including providing technical assistance in implementing these recommendations. The United Nations Convention against Transnational Organized Crime establishes a "conference of the

parties”⁵⁶ to promote and review the implementation of the convention. The convention requires each state party to provide the conference “with information on its programs, plans and practices ...”⁵⁷ to implement the convention. Since “any protocol to this convention shall be interpreted together with this convention ...”⁵⁸ one assumes that this implementation process equally applies to the UN Protocol, but international monitoring lacks any enforcement mechanism.

UNITED STATES WITHDRAWAL FROM INTERNATIONAL CONVENTIONS PROHIBITING TRAFFICKING IN PERSONS

Unfortunately the United States, while it has been active in promoting international human rights, is not a party to various international conventions including the Convention on the Rights of the Child, which explicitly mandates that member states “take all appropriate national, bilateral, and multilateral measures to prevent the abduction of, the sale of, or traffic in children for any purpose or in any form.”⁵⁹ The United States has also not ratified the Convention on the Elimination of all forms of Discrimination Against Women, which explicitly prohibits “exploitation of prostitution of others and other forms of traffic.”⁶⁰ Most recently the United States withdrew its signature to the Rome Statute of the International Criminal Court which recognizes trafficking as a crime against humanity, by defining enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and include the exercise of such power in the course of trafficking in persons, in particular women and children.”⁶¹ Foreign countries characterize such attitude as failure to conform to international standards, especially in the area of human rights. Such inaction is especially criticized since the United States is requiring foreign countries to make serious efforts to eliminate trafficking in persons and threatens to impose sanctions in the case of their noncompliance. The United States has signed the UN Protocol, but is yet to ratify it. Foreign countries are also uncomfortable with the United States reporting on the status of trafficking in persons in their countries, when there is no such reporting mechanism for the United States. While this is true, one must note that the TVPA requires the interagency task force to measure and evaluate the progress made by the “United States and other countries”⁶² in the area of trafficking.

THE NATURE AND LIMITATIONS OF TVPA SANCTIONS IMPOSED ON FOREIGN COUNTRIES

Under the TVPA the United States may withhold “non-humanitarian” and “non-trade” related assistance to a government until such government complies with the minimum standards or makes significant efforts to bring itself into compliance with such stan-

dards. Sanctions under the TVPA do not include narcotics related assistance, disaster relief assistance, anti-terrorism assistance, assistance for refugees, humanitarian and other development assistance in support of programs of non-governmental organizations.⁶³ The premise is that any economic assistance provided by the United States is voluntary in nature. Consequently, the withdrawal of such assistance should entirely depend on the discretion of the United States as a donor country.⁶⁴ The TVPA provides for withholding funding for participation of government officials in educational and cultural exchange programs.

In addition, the TVPA provides for financial sanctions including denying the offending government any loan or other utilization of funds provided by international monetary institutions, unless such funding would directly address basic human needs, is not administered by the government, and confers no benefit to the government itself. Financial sanctions as such are designed to deny a government access to specific financial resources, while avoiding or at least reducing any adverse humanitarian consequences.⁶⁵

It should be noted that Congress chose not to impose automatic or immediate sanctions. The TVPA provides for a grace period of three years. The purpose of this grace period is to allow foreign governments time to take the necessary measures required under the TVPA to eliminate trafficking, especially since many of these measures require a change in government policies and legislative reform.

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The sanctions under the TVPA are discretionary in nature.⁶⁶ The President may waive the imposition of sanctions. The waiver authority may be exercised by the President to avoid the adverse impact which sanctions may have on vulnerable populations, especially women and children. In addition, the President may decide that a government of a country is already subject to significant reduction in assistance because of other human rights violations and that additional measures may not be appropriate. The President is also authorized to not impose, suspend or terminate these sanctions to preserve the national interest of the United States. For instance, in 1997 a certification by the President allowed Mexico to avoid any economic sanctions, which were to be imposed on the government for its violation of the prohibition against drug trafficking, since the government cooperated with the United States to comply with international anti-narcotics goals.⁶⁷

In the event that the President decides that aid shall not be suspended from an offender country, the President must certify that such aid shall not "be received or used by any agency or official who has participated, facilitated, or condoned a severe form of trafficking in persons."⁶⁸ In addition to imposing sanctions on countries, the TVPA calls for taking the appropriate measures against significant traffickers in persons, whether foreign persons that play a significant role in trafficking, directly or indirectly in the

United States, or foreign persons that assist in or support activities of a significant foreign trafficker.⁶⁹ The TVPA also calls for the exclusion of any person who is believed to be an "aider, abettor, assistor, conspirator, or colluder with such trafficker in severe forms of trafficking in persons,"⁷⁰ and thus benefits from the illicit activities of trafficking in persons.

OPPOSITION TO SANCTIONS

Sanctions are designed to alter governments' behavior or policies⁷¹ so that a government complies with certain norms which the United States considers important.⁷² Sanctions however, have been criticized as violations of human rights themselves,⁷³ in that they have adverse affects on the economic, cultural and social rights of civilian populations. They inflict collateral damage on ordinary citizens,⁷⁴ and have negative effects since they mainly affect the poor and oppressed women and children needing protection.⁷⁵ Sanctions have been characterized as the equivalent of gambling in that "winning is rare and the costs are extraordinarily high."⁷⁶ They simply do not work⁷⁷ and are rarely enforced.⁷⁸

The Administration was opposed to taking action against countries that fail to meet the minimum standards under the TVPA.⁷⁹ There are five main reasons, which are advanced in support of such opposition. First, trafficking is primarily a private criminal activity, which will not be affected by sanctions imposed on governments.⁸⁰ Second, economic sanctions would hurt victims of trafficking by affecting economic opportunities that may be available to them.⁸¹ Since poverty is a root cause of the trafficking infrastructure that creates a vulnerable population for traffickers, imposing sanctions would exacerbate this vulnerability⁸² and consequently increase the likelihood of trafficking. Sanctions, therefore, are counterproductive. Third, sanctions would adversely affect non-governmental organizations that are working to combat trafficking and raise awareness of the seriousness of the problem and the need for government intervention. Governments would retaliate against NGOs who provide information to foreign governments on the scope of the problem of trafficking in persons in the country. Thus sanctions would be a pretext for punishing a key player in the fight against trafficking in persons. Fourth, out of fear of sanctions or threat of sanctions, governments would refuse to recognize the significance of the problem of trafficking instead of taking the necessary steps to combat the problem, defeating the very purpose of the TVPA, especially since countries are just beginning to acknowledge the problem and taking the appropriate steps to find solutions.⁸³ Failure to acknowledge trafficking as a problem would only "push trafficking further underground."⁸⁴ Fifth, foreign governments subject to sanctions would refuse to cooperate with the United States in the

prosecution of traffickers who succeeded in returning to their countries. International cooperation in the investigation and prosecution of traffickers is needed since trafficking is often an transnational crime.⁸⁵ Sanctions therefore would disrupt any collective effort to combat trafficking. However, Congress believed that foreign countries would not get serious about recognizing the significance of the problem of trafficking in persons, except when they are publicly identified as offending countries and threatened with sanctions.

Human rights cover the span of domestic political affairs of a country so any foreign government action in such affairs, in the absence of an explicit invitation, would be considered an intervention.⁸⁶ However, human rights are no longer a matter of domestic concern.⁸⁷ The United Nations Charter mandates member states to respect human rights and fundamental freedoms⁸⁸ and take the necessary action,⁸⁹ in cooperation with the United Nations, to achieve this purpose.⁹⁰ Nonetheless, foreign countries may view unilateral sanctions imposed by the United States, without multilateral authorizations, as an intervention in the domestic affairs of their countries, whose governments should have the absolute right to sovereignty.⁹¹

Congress explicitly acknowledges that "The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes." Congress also recognizes that "The United States must...urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims."⁹² Imposing sanctions on such countries would circumvent such cooperative efforts.

CONSTRUCTIVE ENGAGEMENT: PROVIDING ASSISTANCE TO FOREIGN COUNTRIES TO COMBAT TRAFFICKING

The TVPA, while calling for sanctions, also provides for assistance to foreign countries for programs, projects and activities designed to meet the minimum standards for the elimination of trafficking. The TVPA specifically refers to assisting foreign countries in drafting anti-trafficking laws which prohibit and punish acts of trafficking, the investigation and prosecution of traffickers, victim assistance and protection programs. In addition to the expansion of exchange programs and international visitor programs to include government officials as well as NGOs to promote the awareness of the problem of trafficking, the TVPA also calls for the U.S. to establish international initiatives to enhance economic opportunities for potential victims of trafficking, including lending program, training and business development, skills training, job counseling and women's economic participation programs, stay in school programs for children, and grants to

NGOs to advance the role of women, and development of educational curricula warning against the dangers of trafficking.

The reporting process is designed to involve countries in constructive engagement with the United States and to encourage countries, through normal channels of diplomacy and direct dialogue, to comply with the minimum standards. In fact, upon issuance of the first TIP Report in 2001, at least 14 countries have increased their efforts to comply with these standards. Consequently, South Korea moved from Tier 3 to Tier 1. Romania, Israel, Albania, Gabon, Kazakhstan, Malaysia, Yugoslavia, and Pakistan moved from Tier 3 to Tier 2. France, the Czech Republic, Lithuania, Macedonia, and Poland moved from Tier 2 to Tier 1. A change in the status of severe forms of trafficking may be documented in an interim report in cases when governments come into, or out of compliance with the minimum standards for the elimination of trafficking, or begin or cease to make significant efforts to bring themselves into compliance since submission of the last annual report to the appropriate congressional committees.

CONCLUSION

174 Monitoring and combating trafficking in persons in foreign countries is not limited to reporting on the status of severe forms of trafficking in these countries. The United States Congress was not satisfied with merely making a statement of condemnation of human rights violation in the context of trafficking. Congress, in addition to the reporting process, decided to “name names” or engage in “shaming” by classifying countries into different categories, depending on their efforts to combat trafficking through the three tier model. It is also the policy of the United States, under the TVPA, to take actions against governments that do not comply with the minimum standards for the elimination of trafficking and are not making significant efforts to bring themselves into compliance with such standards. However, sanctions against governments must be carefully considered and applied in light of the numerous exceptions stipulated in the TVPA, especially when sanctions have adverse affects on the innocent population, including women and children. Sanctions should not be imposed when providing assistance instead of imposing sanctions will inducethe offending government to make the necessary efforts to comply with the minimum standards for the elimination of trafficking as required by the TVPA. The United States should continue its policy of constructive engagement, especially since trafficking in persons is a transnational crime, which requires bilateral and multilateral cooperation. 

NOTES

* To read the unabridged version of the article, please visit the *Journal's* web site at www.bjwa.org.

1. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.]. Section 102(a).

2. International Religious Freedom Act, Pub. L. No. 105-292, 112 Stat. 2787 (1998). See generally Peter G. Danchin, U.S. Unilateralism and the International Protection of Religious Freedom: The Multi-lateral Alternative. 41 Colum. J. Transnat'l L. 33 (2002).

3. Ibid. Section 2(b)(1).

4. Ibid. Section 102(b).

5. Tariff Act of 1930, [Pub.L. 71-362, 19 U.S.C. 1307]

6. Foreign Assistance Act of 1961, [Pub. L. No. 87-195, 22 U.S.C.]

7. Id. 22 U.S.C. 2151. The law also prohibits security assistance to any government that engages in such violation [Pub. L. No. 87-105, 22 U.S.C. 2304]

8. Id. Section 502 B

9. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.]. Section 102(b). For a general discussion of the TVPA see, Kelly E. Hyland, "Protecting Human Victims of Trafficking: An American Framework," 16 Berkeley Women's L.J. 29; Bo Cooper "A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act," 51 Emory L.J. 1041, 2002; Michael R. Candes, "The Victims of Trafficking and Violence Protection Act of 2000: Will it Become the Thirteenth Amendment of the Twenty-First Century?" 32 U. Miami Inter-Am. L. Rev. 571, Fall 2001; Susan Tiefenbrun, "The Saga of Susanna A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking in Violence Protection Act of 2000," Utah L.Rev. 107, 2002.

10. See generally, Andreas Schloenhardt, Organized Crime and the Business of Migrant Trafficking, 32 Crime, Law and Social Change, 203-2333 (1999)

11. Barri Flowers, "The Sex Trade Industry's Worldwide Exploitation of Children," 575 *The Annals of the American Academy of Political and Social Science* 147, 2001. See generally Elizabeth Bevilacqua, "Child Sex Tourism and Child Prostitution in Asia: What Can Be Done To Protect the Rights of Children Abroad Under International Law?" 5 *ILSA Journal of International and Comparative Law* 171, 1998; Eric Thomas Berkman, "Responses to the International Child Sex Tourism Trade," 19 *Boston College International and Comparative Law Review* 397, 1996

12. Juanita Darling, "Little Bundles of Cash; UNICEF and Some Adoption Agencies Charge that Babies Have Become a Commodity in Guatemala, as Mothers are Coerced and Lawyers Reap the Profits," *Los Angeles Times*, 17 January 2001.

13. See generally, Isabelle Talleyrand, "Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women," 27 *Syracuse Journal of International Law and Commerce* 151, 2000.

14. 1948 Universal Declaration of Human Rights, Article 4.

15. Ibid. Article 4.

16. Ibid. Article 13-1.

17. Ibid. Article 13-2.

18. Ibid. Article 23

19. Ibid. Article 24

20. International Labor Organization (ILO) Convention Number 29, Concerning the Abolition of Forced or Compulsory Labor; ILO Convention Number 105, Concerning the Abolition of Forced Labor; ILO Convention Number 182, Worst Forms of Child Labor

21. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.]. Section 102

22. Ibid. Section 103.

23. Ibid. Section 105.

24. Ibid. Section 102

25. Ibid. Section 102(b)

26. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3

27. Ibid.

28. Statement of Holly Burkhalter, Advocacy Director, Physicians for Human Rights, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002

29. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.]; Section 108 (b)(1).

30. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.]; Section 108 (b)(7).

31. Statement by The Honorable Janet Ballantyne, Acting Deputy Administrator, U.S. Agency for International Development, 2001 Implementation Hearing.

32. Statement of The Honorable Paula Dobriansky, 2002. Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002

33. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.].Section 110(b)(3)(B).

34. Statement by Nguyen Dint Thang, Executive Director, Boat People S.O.S. Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002

35. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.]; Section 110 (a)(3)(A).

36. See testimony of Gary Haugen, President, International Justice Mission, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002; and Hearing before the Committee on International Relations, House of Representatives, 107th Congress, First Session, November 29, 2001.

37. The 2002 Department of State Trafficking in Persons Report, Introduction, June 7, 2002.

38. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.]; Section 104

39. Statement of The Honorable Henry Hyde, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, First Session, November 29, 2001.

40. Congressman The Honorable Chris Smith, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, First Session, November 29, 2001.

41. Statement of The Honorable Henry Hyde, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, First Session, November 29, 2001.

42. Legislative History: The Conference Record.

43. Statement of Donna M. Hughes, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002.

44. Statement of Jessica Neuwirth, President, Equality Now, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002.

45. Statement of Michele Clark, co-director of the Protection Project, before "Congressional Human Rights Caucus" and "The Congressional Children's Caucus Member's Briefing". June 6, 2002.

46. Statement of The Honorable Linda Smith ,Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002

47. Statement of Mohamed Y. Mattar, co-director of the Protection Project,Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002

48. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, opened for signature Mar. 21, 1950, 96 U.N.T.S. 271, 282 (entered into force

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July 25, 1951) [1949 Convention].

49. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 9(5).

50. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.]; Section 110 (a)(3)(C).

51. Statement of The Honorable Paula Dobriansky, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002.

52. Testimony of Gary Haugen, President, International Justice Mission Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002 and testimony of Holly Burkhalter, Advocacy Director, Physicians for Human Rights, Hearing before the Committee on International Relations, House of Representatives, 107th Congress, Second Session, June 19, 2002.

53. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Article 10(3).

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55. 1989 United Nations Convention on the Rights of the Child, Article 32.

56. *Ibid.*

57. *Ibid.*

58. *Ibid.*: Article 37(4).

59. *Ibid.*: Article 35.

60. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 14 (entered into force Sept. 3, 1981) [1980 Convention]. Article 6.

61. Section 105(d).

62. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 16, 1998, U.N. Doc. No. A/CONF.183/9* (1998), Article 7. Crimes against humanity are defined under Article 7 of the Rome Statute to include "enslavement", "sexual slavery", "enforced prostitution," and "any other form of sexual violence of comparable gravity."

63. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.].Section 103(7)

64. See Mark A. Chinen, Presidential Certifications in U.S. Foreign Policy Legislation, 31 N.Y.U.J. Int'l L& Pol. 217 (1999).

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69. Trafficking Victims Protection Act of 2000. [Pub.L. No. 106-386, 102(b)(1), 114 Stat. 1464 (2000) codified in sections 8, 18, 22 U.S.C.].Section 111.

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