

ROOM FOR IMPROVEMENT: PALERMO PROTOCOL AND THE
TRAFFICKING VICTIMS PROTECTION ACT

by
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With over 27 million individuals enslaved worldwide, human trafficking has increasingly commanded international attention, yet countless traffickers are simultaneously evading identification. The international community shaped our understanding of human trafficking with the enactment of the Palermo Protocol. The United States contributed to this framework by legislating the Trafficking Victims Protection Act. This Comment explores how effectively these two instruments frame our conceptualization of trafficking victims and balance the shared goals of preventing trafficking, protecting victims, and prosecuting traffickers. It further examines the role the United States plays in shaping international human trafficking standards through its annual release of the Trafficking In Persons (TIP) Report and President Obama's Executive Order Strengthening Protections Against Trafficking in Persons in Federal Contracts. This Comment draws attention to the downfalls of narrowly conceptualizing trafficking victims and prioritizing prosecution over victim protection, while looking optimistically forward at how the use of sanctions as an enforcement mechanism could be efficaciously undertaken through the Executive Order.

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I. INTRODUCTION

The widespread ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children is a success story.

Yury Fedetov

*(Executive Director of the United Nations Office on Drugs and Crime)*¹

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)² has been commended as a tool enabling the international community to combat human trafficking in the most recent “Global Report on Trafficking in Persons” released by the United Nations Office on Drugs and Crime (UNODC) in December of 2012.³ Dating back to the General Assembly meeting on the day the Palermo Protocol was adopted, Mr. Rydzkowski, the Polish delegate to the United Nations explained the Protocol’s virtue:

The new legal instrument is of a unique character because, for the first time, it delivers in a precise manner the definition of the phenomenon of transnational organized crime and defines instruments of an effective fight against uncivil society. [Its adoption] is a significant achievement and reflects the political will of the international community to combat the increased threat posed by organized crime.⁴

Mr. Vento, the Italian delegate to the United Nations, lauded the Palermo Protocol, stating that it “pays equal attention to the repression of illegal conduct and the protection of the victims, fills in many gaps in international law and provides an effective instrument for international cooperation.”⁵

The widespread enslavement of individuals through trafficking garnered the attention of the United Nations, and eventually the Palermo Protocol was adopted in 2000 and entered into force in 2003.⁶ The Palermo Protocol was designed to supplement the UN Convention Against Transnational Organized Crime, and was created through the

¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS, at 1, U.N. Sales No. E.13.IV.1 (2012) [hereinafter 2012 REPORT], available at http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf. The purpose of the 2012 Report was to identify human trafficking patterns and flows, and its information is based on officially detected cases of trafficking in persons. *Id.* at 9.

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

³ 2012 REPORT, *supra* note 1, at 1.

⁴ U.N. GAOR, 55th Sess., 62d plen. mtg. at 9, U.N. Doc. A/55/PV.62 (Nov. 15, 2000) (statement of Mr. Rydzkowski).

⁵ *Id.* at 6 (statement of Mr. Vento).

⁶ Palermo Protocol, *supra* note 2.

UNODC.⁷ The Protocol was designed to reflect the international community's political will to combat organized crime, rather than to combat human rights violations inherent within slavery.⁸ Its stated goal is to foster "effective action to prevent and combat trafficking in persons, especially women and children, [which] requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking."⁹ The Palermo Protocol was the first international instrument to recognize multiple facets of trafficking.¹⁰ While related international human rights treaties had acknowledged the problem of trafficking,¹¹ the Protocol was the first treaty to provide a broad definition of trafficking.¹² This inclusion of a

⁷ UNITED NATIONS OFFICE ON DRUGS AND CRIME, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, Annex I, art. I, (2004), *available at* <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCbook-e.pdf>. While the Palermo Protocol works in conjunction with the Convention's aim to address transnational crime more broadly, this paper will focus on the Palermo Protocol because it has a more specific aim of addressing trafficking in persons. Three protocols supplement the Convention, each targeting a specific area of organized crime, including the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. While the Convention has been referred to as the Palermo Convention (by virtue of its adoption in Palermo, Italy) for the purposes of this Comment the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children will be referred to as the "Palermo Protocol" or simply the "Protocol."

⁸ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 7, pmb1. "However, the impetus for developing a new international instrument arose out of the desire of governments to create a tool to combat the enormous growth of trans-national organized crime. Therefore, the drafters created a strong law enforcement tool with comparatively weak language on human rights protections and victim assistance." KRISTINA TOUZENIS, UNITED NATIONS EDUC., SCIENTIFIC AND CULTURAL ORG., *TRAFFICKING IN HUMAN BEINGS: HUMAN RIGHTS AND TRANS-NATIONAL CRIMINAL LAW, DEVELOPMENTS IN LAW AND PRACTICES* 67 (2010).

⁹ Palermo Protocol, *supra* note 2, pmb1.

¹⁰ Cindy Braspenning, *Human Trafficking in the Netherlands: The Protection of and Assistance to Victims in Light of Domestic and International Law and Policy*, 1 *INTERCULTURAL HUM. RTS. L. REV.* 329, 351 (2006).

¹¹ *See* Convention on the Rights of the Child art. 35, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall 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."). The protocols thereto address the sale of children, child prostitution, child pornography, and the involvement of children in armed conflict. *Id.* arts. 34, 38. *See also* Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 3, June 17, 1999, 2133 U.N.T.S. 161; Convention on the Elimination of All Forms of Discrimination Against Women art. 6, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 3, Sept. 7, 1956, 266 U.N.T.S. 3.

¹² Palermo Protocol, *supra* note 2, art. 3. Article 3(a) defines "[t]rafficking in persons" as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of

trafficking definition laid the foundation for international and domestic laws to be created to address the problem.¹³

With estimates on the conservative side, over 27 million people throughout the world are enslaved through trafficking.¹⁴ One of the problems inherent to human trafficking is how vastly underreported it is, because estimates are based on official cases reported and many human trafficking victims have fallen under the data-collection radar.¹⁵ Within the United States around 12% of the victims are children, and the number of child victims of trafficking has increased from 2008 to 2010.¹⁶ Conceptions of human trafficking commonly evoke images of third-world women exploited in sexual servitude, however the range of victims and circumstances of entrapment are much broader. Trafficking is most frequently conceptualized as divided between labor trafficking¹⁷ and sex trafficking, although this distinction does not capture the complexity of victims' situations, as many victims of labor trafficking are also subject to sexual abuse by their traffickers.¹⁸ Other forms of trafficking exist, including the trafficking of persons for organ removal, begging, involuntary marriage, and more.¹⁹

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." Article 3(c) broadens the definition's applicability, stating "the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a)." *Id.*

¹³ Carol S. Brusca, *Palermo Protocol: The First Ten Years After Adoption*, 2 GLOBAL SECURITY STUD., Summer 2011, at 8, 9, available at <http://globalsecuritystudies.com/Brusca%20Palermo%20Final%20One.pdf>.

¹⁴ KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 3 (2009). The International Labour Organization (ILO) reported that there were 20.9 million victims of forced labor, which also included trafficking victims. 2012 REPORT, *supra* note 1, at 68.

¹⁵ 2012 REPORT, *supra* note 1, at 9, 89.

¹⁶ *Id.* at 62.

¹⁷ There is a complex relationship between migrant smuggling and labor trafficking which this Comment will not explore. See generally *MIGRATION AND INTERNATIONAL LEGAL NORMS* (T. Alexander Aleinikoff & Vincent Chetail eds., 2003) (a collaborative effort among experts throughout the world regarding the international legal implications associated with migration and the associations it shares with human trafficking).

¹⁸ See, e.g., UNITED NATIONS OFFICE ON DRUGS AND CRIME, *United States v. Marie Pompee*, HUM. TRAFFICKING CASE L. DATABASE, UNODC No. USA078 (2009), http://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/usa/2009/united_states_v._marie_pompee.html?tmpl=old (where a nine-year old Haitian girl was a victim of labor trafficking and was repeatedly raped by the traffickers' son); Memorandum and Order at 13–14, *United States v. Kaufman*, No. 04-40141-01, 13–14, (D. Kan. Jan. 6, 2006), available at https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2004cr40141-339 (where mentally ill individuals were victims of labor trafficking and were also forced to perform sexually explicit acts).

¹⁹ 2012 REPORT, *supra* note 1, at 12.

While there are currently 154 nation-state parties to the Palermo Protocol,²⁰ many complications surrounding human trafficking are left unaddressed. Up until 2009, almost one third of the member states to the United Nations had not ratified the Palermo Protocol.²¹ While ratification has since increased, most troublesome is the lack of ratifications from East Asian countries. Specifically, Japan, South Korea, Sri Lanka and Thailand have signed but not ratified the Protocol.²² According to the 2012 Report, “Trafficking originating from East Asia also remains the most conspicuous globally. Based on the Report, East Asian victims were found in 64 countries in all regions, and were often detected in large numbers.”²³

International agreements can only go so far, and ultimately nation-state legislation plays an integral role in the battle against human trafficking.²⁴ The United States enacted the Trafficking Victims Protection Act (TVPA) in 2000, which criminalizes human trafficking within the United States and also presently includes a sanctions regime that holds other nation states accountable to U.S. domestic standards.²⁵ The Executive Director of the UNODC recently stated, “Overall, the international community has the tools to confront this crime [of human trafficking],”²⁶ and this Comment analyzes how effectively the Palermo Protocol and the TVPA create a framework to confront this crime by identifying trafficking victims and addressing their needs in a manner that lives up to the philosophy of a victim-centered approach.

First, this Comment will analyze the Palermo Protocol and TVPA’s conceptualization of human trafficking victims. Second, this Comment will explore how the Palermo Protocol and TVPA enforce and balance the obligations of protecting victims and prosecuting traffickers. Third, this Comment will investigate the United States’ role as global enforcer of human trafficking standards via economic sanctions on nations noncompliant with United States’ national standards and President

²⁰ MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 2009, at 1, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009).

²¹ *Id.* at 1–3.

²² *Id.* at 2–3.

²³ 2012 REPORT, *supra* note 1, at 1.

²⁴ “In most countries, the legislation currently covers most or all forms of trafficking and there are only nine countries without a specific offence of trafficking in persons in their domestic legislation. Member States continue to work towards meeting their obligations to criminalize trafficking in Persons under the Protocol.” *Id.* at 84.

²⁵ Trafficking Victims Protection Act, 22 U.S.C. § 7106 (2006) [hereinafter TVPA]. The Trafficking Victims Protection Act of 2000 is one of three sections within the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, § 101, 114 Stat. 1464, 1466 (2000) (codified as amended at 15 U.S.C. § 7101 (2005)).

²⁶ 2012 REPORT, *supra* note 1, at 1.

Barack Obama's Executive Order designed to "Strengthen[] Protections Against Trafficking in Persons in Federal Contracts."²⁷

II. THE PERFECT VICTIM PARADIGM

[W]hile without question there are many victims who may fit that model [of the third world female victim], they represent only a fraction of the millions of trafficking victims.

*Robert Uy*²⁸

The Palermo Protocol took on the bold task of framing the definition of human trafficking for the international community, and in doing so it framed the conception of what a human trafficking victim looks like. At the root of the identification problem exists a tension between ensuring that resources are properly allocated toward the victims most in need (often women) and pigeonholing the identification of "the victim" as fitting into this specific category. The latter is inevitably done at the expense of male victims and others who are consequently not readily identified as victims, and the Palermo Protocol perpetuates this restricted construction of identity.

By emphasizing the role of "women and children," the Protocol frames the issue of human trafficking at the expense of male victims. Prior to the drafting of the Palermo Protocol, the series of "white slave" treaties also predominantly addressed the protection of women victims. The Convention on the Suppression of White Slave Trade of May 18, 1904, which addressed "the procuration of women or girls both in a view to their debauchery in a foreign country," framed the trafficking problem as the sexual exploitation of women and girls.²⁹ Later, the International Convention for the Suppression of the Traffic in Women and Children³⁰ and the International Convention for the Suppression of the Traffic in Women of Full Age³¹ reinforced the stereotype of the trafficking victim as female. These early agreements were later consolidated into the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,³² which had a limited focus on

²⁷ Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012).

²⁸ Robert Uy, *Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the "Perfect Victim" Paradigm*, 26 BERKELEY J. GENDER L. & JUST. 204, 210 (2011).

²⁹ International Agreement for the Repression of the Trade in White Women art. 1, May 18, 1904, 35 Stat. 1979.

³⁰ International Convention for the Suppression of the Traffic in Women and Children arts. 6–7, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415.

³¹ International Convention for the Suppression of the Traffic in Women of Full Age art. 1, Oct. 11, 1933, 150 L.N.T.S. 431.

³² Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others pmbl., *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271.

the trafficking of women for sex,³³ consequently failing to properly address the broader scope of the human trafficking problem.

This trend was continued throughout the earlier stages of the drafting process, as the Palermo Protocol was initially named the “Protocol to Prevent, Suppress and Punish Trafficking in Women and Children.”³⁴ This failure to mention the broader category of “persons” as victims provides insight into the drafters’ initial conceptualization of trafficking victims. During the following session of the Ad Hoc Committee entrusted with drafting the Palermo Protocol, “almost all countries expressed their preference that the Protocol address all persons rather than only women and children, although particular attention should be given to the protection of women and children.”³⁵

By taking this gendered³⁶ approach of especially protecting women and children, the Palermo Protocol perpetuates the iconized “perfect victim.”³⁷ The conceptualization of this “perfect victim” has influenced modern discourse on human trafficking. Expending resources to save exploited women and children is viewed as “uncontroversial.”³⁸ While these resources definitely do need to be expended because this is a serious problem that is only expanding, in doing so, it is important to

³³ *Id.* art. 17. Although Article 17 acknowledges that parties to the Convention must “adopt or maintain such measures . . . to check the traffic in persons of either sex for the purpose of prostitution,” the history of the treaty development indicates that this effort was predominately focused on female victims, and the consolidation of the previous treaties into this Convention perpetuates the focus on female victims and does little to redress the balance and acknowledgment of male victims’ existence. *Id.*

³⁴ Revised Draft Protocol to Prevent, Suppress, and Punish Trafficking in Women and Children, Supplementing the Convention Against Transnational Organized Crime, 2d Sess., Mar. 8–12, 1999, U.N. Doc. A/AC.254/4/Add.3/Rev.1 (Feb. 22, 1999).

³⁵ Revised Draft Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nation’s Convention Against Transnational Organized Crime, 4th Sess., June 28–July 9, 1999, n.2, U.N. Doc. A/AC.254/4/Add.3/Rev.2 (May 18, 1999). This was after the Commission on Crime Prevention and Criminal Justice recommended that the Economic and Social Council approve for adoption by the General Assembly the draft resolution for the Convention Against Transactional Organized Crime, and the Assembly decided that the protocol addressing trafficking should expand to all “persons, but especially women and children.” *Id.*

³⁶ The terms “gender” and “sex” are not synonymous. An individual’s sex is biologically determined, whereas gender refers to the social norms surrounding an individual’s biological sex. See *ENCYCLOPEDIA OF PUBLIC HEALTH* 1294 (Wilhelm Kirch ed., 2008). Although I am using the term “gender” to differentiate males from females, this is only to be consistent with the terminology used within the Palermo Protocol. It is worth noting that the Protocol does not include the requirement of taking into account the victim’s sex. See Palermo Protocol, *supra* note 2, art. 6(4).

³⁷ Uy, *supra* note 28, at 205–11 (discussing how the Religious Right and feminist paradigms have constructed the image of the “perfect victim” of trafficking in popular discourse as emphasizing the sex trafficking of women at the expense of labor trafficking and male victims).

³⁸ *Id.* at 218.

acknowledge all forms of trafficking and all victims that are being exploited.

The proportion of male to female trafficking victims varies by nation and across different types of trafficking.³⁹ While the majority of sex trafficking victims are female, males are sex trafficking victims as well, and also constitute a significant portion of labor trafficking victims.⁴⁰ On a global scale, 90% of the individuals trafficked in some countries are boys.⁴¹ Boys are trafficked in different circles than girls, and while the phenomenon of human trafficking itself is under-researched, this is even more so the case for boys.⁴² The 2009 UNODC Global Report on Trafficking in Persons stated:

The issue of trafficking in adult males is related to the issue of trafficking for labour exploitation, which appears to be the major form of exploitation of adult men (although not the only form). Many experts argue that trafficking in adult men and trafficking for forced labour are extremely underreported.⁴³

Despite this underreporting, the 2009 Report's study of 61 countries found that 21% of the victims identified were male.⁴⁴ In 2010 Samuel Vincent Jones reported that:

[M]ales account[ed] for nearly half of all missing persons in the United States, at least 16% of the male population in the United States is known to have been sexually abused, there are approximately 300,000 boy prostitutes in this country and in most large U.S. cities, the number of male and female child prostitutes is essentially equal.⁴⁵

Victims' ability to receive help and escape their traffickers is wholly dependent upon law enforcement officials identifying individuals as victims.⁴⁶ The field of human trafficking is specialized, and without comprehensive training law enforcement officials are frequently

³⁹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS, at 11 (2009) [hereinafter 2009 REPORT], available at https://www.unodc.org/documents/Global_Report_on_TIP.pdf.

⁴⁰ Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1154 (2010).

⁴¹ *Id.* at 1144 (citing Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 22 n.109 (1999) (stating that 90% of prostitutes in Sri Lanka are boys)). See generally 2009 REPORT, *supra* note 39 (for country-specific charts illustrating the prevalence of males and females as trafficking victims).

⁴² See 2009 REPORT, *supra* note 39, at 49 ("Trafficking in males—adult men and boys—is rarely represented in official national statistics.").

⁴³ *Id.* at 49 n.11.

⁴⁴ *Id.* at 48 fig.21.

⁴⁵ Jones, *supra* note 40, at 1150–51 (footnotes omitted).

⁴⁶ Certification of victims as such by law enforcement is necessary for internationally trafficked victims so that they may receive immigration assistance. Often times, coming into contact with law enforcement is one of the only outlets available for individuals to escape their traffickers. TVPA, 22 U.S.C § 7105(b)(1)(E).

unequipped to identify human trafficking victims.⁴⁷ This is emphatically the case with boys who are victims of trafficking, because public conception of the “iconic victim” does not include males.⁴⁸ The lack of awareness about males being trafficked makes it “increasingly attractive to criminal networks” that specialize in trafficking of boys.⁴⁹ Law enforcement officials are frequently the first to encounter trafficking victims, and the victim’s ability to escape is highly contingent upon law enforcement recognizing them as victims.⁵⁰ To this end, the Palermo Protocol requires:

State Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims [T]raining should also take into account the need to consider human rights and child- and gender-sensitive issues.⁵¹

Throughout the drafting process, gender was not successfully included within the Protocol until the seventh revision.⁵² By ratifying the Palermo Protocol, nation states are legally obligated to provide or strengthen law enforcement training on the problem of human trafficking.⁵³ The requirement that the training needs to incorporate gender-sensitive awareness is diluted to a mere recommendation. The degradation from nation states “shall” provide training to “should . . .

⁴⁷ Jones, *supra* note 40, at 1185.

⁴⁸ *Id.* at 1162.

⁴⁹ *Id.* at 1150.

⁵⁰ See Lynsay Gott, Comment, *Unrealistic Burdens: How the T Visa and Asylum Law Fail to Protect Many Victims of Trafficking*, 26 IMMIGR. & NAT'LITY L. REV. 705, 708–10 (2005).

⁵¹ Palermo Protocol, *supra* note 2, art. 10(2).

⁵² Gender was initially included in the fourth revision, but later rescinded by the fifth revision, not to reappear again until the seventh revision. Revised Draft Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nation’s Convention Against Transnational Organized Crime, 11th Sess., Oct. 2–27, 2000, art. 7, U.N. Doc. A/AC.254/4/Add.3/Rev.7 (July 19, 2000) (references “gender-sensitive issues”); Revised Draft Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention Against Transnational Organized Crime, 9th Sess., June 5–16, 2000, U.N. Doc. A/AC.254/4/Add.3/Rev.6 (Apr. 4, 2000) (no reference of gender); Revised Draft Protocol to Prevent, Suppress, and Punish Trafficking in Women and Children, Supplementing the Convention Against Transnational Organized Crime, 7th Sess., Jan. 17–28, 2000, art. 4(2)(d), n.51, U.N. Doc. A/AC.254/4/Add.3/Rev.5 (Jan. 1, 2000) (omits reference to gender); Revised Draft Protocol Against the Smuggling of Migrants by Land, Air, and Sea, Supplementing the United Nations Convention Against Transnational Organized Crime, 7th Sess. Jan. 17–18, 2000, art. 7(2), U.N. Doc. A/AC.254/4/Add.1/Rev.4 (Dec. 27, 1999) (references “age, gender and special needs”).

⁵³ Palermo Protocol, *supra* note 2, art. 10(2).

take into account the need to consider”⁵⁴ amounts to not much more than window-dressing. Nation states are essentially able to decide for themselves if addressing the gender of the victim is worth including in the training of their officials. Arguably, in countries where more males are trafficked than females this could be the case. However, the problem occurs in nations in which both males and females are trafficked, because the predominant focus is on women, at the expense of men who are trafficked.

The obligations of the nation state are reduced to “taking into account” the victim’s gender when implementing measures to provide for recovery.⁵⁵ This standard legally obligates states to consider gender along with other factors,⁵⁶ allowing other factors to outweigh gender in the ultimate calculation of how to implement recovery measures. Additionally, there is no indication that the inclusion of the word “gender” is meant to increase resources available to males. For example, ensuring that female victims are paired with female law enforcement officers or service providers could qualify as “taking into account” the victim’s gender, so as to avoid potential re-traumatization they could face if their trafficker was male and they were asked to disclose their experiences to another male.⁵⁷ While considering gender is essential to help victims recover, the example indicates that the use of “gender” within the Palermo Protocol does not necessarily seek to draw attention to the protection of males.

The UNODC published a report that served as a “toolkit” to help law enforcement and other officials understand the problem of trafficking and the identification of victims.⁵⁸ Under the identification of victims section, law enforcement officials are advised to consider the gender of the victim, stating, “Lack of power is a characteristic of all types of trafficked persons. It is exacerbated for women who hold weak social status in their country of origin and whose victimization may result in

⁵⁴ *Id.*

⁵⁵ Article 6 is entitled *Assistance to and Protection of Victims of Trafficking in Persons*, which discusses states’ obligation to ensure that its “domestic legal or administrative system contains measures that provide to victims of trafficking” information on relevant court proceedings and assistance with representation in court. It also provides that state parties shall “consider implementing” measures to provide for the “physical, psychological and social recovery of victims.” *Id.* art. 6(2)–(3).

⁵⁶ See JOHN P. GRANT & J. CRAIG BARKER, PARRY & GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 118 (3d ed. 2009) (providing that “account” and “consider” are interchangeable in the context of *considerata* included in preambles to international treaties).

⁵⁷ UNITED NATIONS OFFICE ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS, at 177, U.N. Sales No. E.08.V.14 (2008), available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf.

⁵⁸ *Id.* at ix.

shame or loss of honour.”⁵⁹ This description indicates that taking into account how women are affected by trafficking is a sufficient consideration of gender. While this is definitely necessary, it is not sufficient because if this is the sole consideration of gender applied in educating law enforcement officials about how to identify victims, males are disproportionately disadvantaged. In training law enforcement on the root causes of trafficking, the report acknowledges that “[i]n some States, social or cultural practices also contribute to trafficking. For example, the devaluation of women and girls in a society makes them disproportionately vulnerable to trafficking.”⁶⁰

From a sociological standpoint, the proper definition of gender refers to the social differences between men and women. For example, transgendered individuals are victims of human trafficking, and seeking proper care for them would be highly dependent upon their gender-sensitive issues being taken into account. Proposals were made to incorporate more of a focus on the gender of the victim, but were not ultimately adopted in the final version of the Palermo Protocol. Italy suggested that Article 4, addressing the protection of trafficked persons, should require that “State Parties shall to the extent possible under their domestic law: . . . [d]evelop methods of investigation, detection and gathering of evidence that minimize intrusion into the private life of the trafficked person and are free from gender bias.”⁶¹ Acknowledging the existence of gender bias and how that affects trafficking victims would have allowed one degree of separation from the “perfect victim” ideology, which continues to manifest itself in rehabilitative services men receive.⁶²

Under Section II of the Palermo Protocol, detailing the protections for victims of trafficking, Article 6 Section 4 states, “Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.”⁶³ This reference to gender was added near the end of the revision process.⁶⁴ Throughout the drafting process, gender was not successfully included within the Protocol until the seventh revision.⁶⁵

The inadequacy of the gendered approach to trafficking is evident in the unavailability of services to males who are trafficking victims. The

⁵⁹ *Id.* at 255.

⁶⁰ *Id.* at 424.

⁶¹ Proposals and Contributions Received from Governments, 11th Sess., Oct. 2–27, 2000, art. 4, U.N. Doc. A/AC.254/5/Add.28 (Aug. 4, 2000).

⁶² See Uy, *supra* note 28, at 214–15.

⁶³ Palermo Protocol, *supra* note 2, art. 6(4).

⁶⁴ By the sixth revision there was still no mention of gender anywhere within the Protocol. See Revised Draft Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention Against Transnational Organized Crime, 9th Sess., *supra* note 52.

⁶⁵ See *supra* note 52.

Palermo Protocol highlights the following services as being particularly important: “(a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities.”⁶⁶

The Palermo Protocol specifies “housing” as one of the essential services trafficking victims need, however these resources are not generally available to males who are trafficked. While many task forces work to ensure that victims are placed in a shelter, these facilities are frequently unavailable for male victims of trafficking.⁶⁷ As a result, homeless shelters have been used as alternative housing for males, but this puts them at a greater risk of being re-trafficked and is not a sufficiently rehabilitative setting.⁶⁸

The psychological care needed by trafficking victims also differs among male and female victims. Due to the focus on females as trafficking victims, males who do report abuse often face “severe stigmatization, which increases the likelihood that they will suffer psychosocial problems.”⁶⁹ The normative conception of masculine identity, as greatly influenced by the media, “minimizes the public’s empathy regarding physiological and psychological harm to males, and perpetuates the existing ideological paradigms which argue that men, unlike women, have total control over their labor and relationships.”⁷⁰ In order for rehabilitative services to be effective, the care afforded to male and female trafficking victims needs to reflect this discrepancy and address their varying needs accordingly.

These problems indicate that gender has not been adequately “taken into account,” in a manner that protects and prevents the re-trafficking of male victims. Understandably, more nations are willing to ratify a treaty that includes legal standards with lower burdens of compliance. However, legally obligating nations to “take into account” the gender of the victim does not require proper identification of and protection of male victims. The weak compliance requirement in juxtaposition with the treaty’s overall emphasis on protecting women and children does little to equate the balance needed to address the needs of all victims.

Some have argued that “[t]rafficking should be regarded as a form of gender-based violence.”⁷¹ Judge Giammarinaro of the Italian Criminal Court stated that “the root causes of [human trafficking] are in

⁶⁶ Palermo Protocol, *supra* note 2, art. 6(3).

⁶⁷ Uy, *supra* note 28, at 214–15.

⁶⁸ *See id.* at 215.

⁶⁹ Jones, *supra* note 40, at 1151.

⁷⁰ *Id.* at 1175.

⁷¹ Maria Grazia Giammarinaro, *Trafficking in Women and Girls* 6 (Div. for the Advancement of Women, Papers by Experts No. EGM/TRAF/2002/EP.6, 2002), www.un.org/womenwatch/daw/egm/trafficking2002/documents.html.

patriarchal structures that worldwide keep so many women in a condition of subordination to men, lack of recognition of their human rights, lack of equal opportunities, unemployment and poverty.”⁷² While there is certainly merit to this argument, that women have been subordinated to men in many realms, it does not justify treating trafficking as a form of gender-based violence. The lack of recognition of human rights, lack of equal opportunities, unemployment and poverty are all root causes of trafficking, but are not limited to women in their application. Traffickers go after vulnerability, not gender.⁷³ Although, this is not to say that gender plays no role in vulnerability.⁷⁴ A report issued by the UN organization responsible with drafting the treaty stated:

Women are often discriminated against in terms of wages, access to labour markets and marketable vocational training. This increases their vulnerability to exploitation by traffickers. In addition, gender stereotypes perpetuate their over-representation in lower paid, less secure, traditionally female jobs and determine the distribution of responsibilities for paid and unpaid work.⁷⁵

The root causes of trafficking, such as greed, poverty, lack of education, and more, exist across gender boundaries. Trafficking victimizes both males and females, and treating it as gender-based violence is too narrow of an approach to effectively address the problem.⁷⁶ With the Palermo Protocol’s prioritization of law enforcement effectiveness over human rights, the provision of adequate protection for the broad range of victims was not a foremost goal of the drafters.⁷⁷ Given the prevalence of men who are trafficked and the underreporting phenomenon, the law enforcement foundation of the treaty should have put more emphasis on identifying males as victims of trafficking, human rights concerns aside. In disregarding a portion of the population that is victimized, law enforcement efforts can only go so far.

The TVPA mirrors the gendered victim model encapsulated within the Palermo Protocol. Nearing the end of the drafting process, in a hearing from the Committee on International Relations the stated purpose of the TVPA was to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children.”⁷⁸ The Congressional findings reported in the hearing repeatedly emphasized that the TVPA was premised on the need

⁷² *Id.*

⁷³ See BALES & SOODALTER, *supra* note 14, at 6.

⁷⁴ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 57, at 426.

⁷⁵ *Id.*

⁷⁶ Jones, *supra* note 40, at 1185 (“The lack of equal treatment for male victims ignores the fact that human vulnerability to oppression and lack of power is shared by all victims, regardless of gender, ethnicity, or the type of exploitation being endured.”).

⁷⁷ This is evidenced by the original decision to create the Protocol to protect women and children exclusively. See *supra* note 34 and accompanying text.

⁷⁸ H.R. REP. NO. 106-487, pt. 1, at 1 (1999).

to address the trafficking of women and children.⁷⁹ The Congressional findings did not include any mention of males being victims of trafficking.⁸⁰ Throughout the hearing there was no mention of gender whatsoever.⁸¹ The emphasis on women and children as victims at the expense of any discussion of male victims perpetuates the conception of the human trafficking victim as female.

In addition to a gendered approach, the identification problem is perpetuated across various types of trafficking, including the distinction between labor and sex trafficking victims. A narrow focus on “trafficking as being only ‘sex trafficking’ has had a detrimental effect on the anti-trafficking movement, as it has led to the misallocation of resources and funding and confusion as to the application of the law.”⁸² Despite this perception, in the United States from 2007 to 2010, the “share of victims trafficked for forced labour accounted for more than 70 per cent of the total number of victims.”⁸³ The original version of the TVPA was introduced by Representative Chris Smith and focused primarily on sex slavery.⁸⁴ As House Democrats studied the bill, they became concerned that the focus was too narrow, and Representative Sam Gejdenson introduced a competing bill that included provisions relating specifically to labor trafficking.⁸⁵ After intense negotiations, Senator Orrin Hatch, who served as head of the Judiciary Committee, refused to pass the bill until the “pro-labor” provisions were removed.⁸⁶ Consequently, the TVPA passed with provisions holding individuals accountable for “knowing, or having reason to know” about sex slavery occurring, but removed this

⁷⁹ *Id.* at 1–2. “Millions of people every year, primarily women or children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.” *Id.* at 2. “Many of these persons, of whom the overwhelming majority are women and children, are trafficked into the international sex trade It involves sexual exploitation of persons, predominantly women and girls.” *Id.* “Traffickers primarily target women and girls, who are disproportionately affected by poverty, lack of access to education, chronic unemployment, discrimination, and lack of viable economic opportunities in countries of origin. Traffickers lure women and girls into their networks Traffickers also buy girls from poor families and sell them into prostitution or into various types of forced or bonded labor.” *Id.* “Women and children trafficked into the sex industry are exposed to deadly diseases.” *Id.*

⁸⁰ *Id.* at 1–4.

⁸¹ *Id.*

⁸² Uy, *supra* note 28, at 218.

⁸³ 2012 REPORT, *supra* note 1, at 63.

⁸⁴ JOHN BOWE, NOBODIES: MODERN AMERICAN SLAVE LABOR AND THE DARK SIDE OF THE NEW GLOBAL ECONOMY 56 (2007).

⁸⁵ *Id.*

⁸⁶ *Id.* at 57. Hatch’s staff stated that he wanted the bill to pass, but was concerned that as it stood, the federal government would be able to prosecute people for crimes based on the standard that employers “had reason to know” that trafficking was occurring, and feared this standard was too broad and could be applied to overseas production. *Id.*

standard for labor trafficking.⁸⁷ The TVPA's focus on protecting sex trafficking victims was thought to be something that "everyone could get behind; people on the Christian right were really repulsed by the issue and wanted to nail it, and the feminist left [was] also very against it,"⁸⁸ while providing an equal level of protection to labor trafficking victims could potentially "open up new avenues of attack on corporate America."⁸⁹ The competing interests involved in labor trafficking undercut TVPA's protection of victims and perpetuated the conception of a model victim by focusing attention on and applying more broadly applicable standards to sex trafficking victims.

The TVPA has also contributed to the "perfect victim" conceptualization as an internationally trafficked victim at the expense of American born trafficking victims within the United States. The TVPA was drafted to protect internationally trafficked victims, despite the inordinate amount of American born trafficking victims within the United States.⁹⁰ As Bradley Myles of Polaris Project explains, "All federal funds created under the TVPA for direct services to trafficking victims have been used to assist noncitizen victims. Trafficking services grantees have been required to serve only noncitizen victims with their grants, leaving no federal funds for specialized services for U.S. citizen victims."⁹¹ This exemplifies the lack of protection afforded to victims when they fall outside the scope of the "perfect victim" construction.

More recently, the UN 2010 Global Plan of Action to Combat Trafficking in Persons has acknowledged the importance of identifying victims as a trafficking prevention measure.⁹² The Plan resolves to develop and strengthen processes for victim identification, "including appropriate and non-discriminatory measures that help to identify victims of trafficking in persons among vulnerable populations."⁹³ The efficacy of this vague commitment's enforcement is dependent upon the awareness that victims of human trafficking do not always fit within the "perfect victim" of the third world sexually exploited woman, and that trafficking also occurs within our own borders, victimizing our own male and female citizens for various motives. While there are power discrepancies in society regarding relative privilege among males and females, in restoring balance to the disempowered the international community should focus on identifying and empowering all victims.

⁸⁷ *Id.*

⁸⁸ *Id.* at 56 (quoting an unnamed congressional aide).

⁸⁹ *Id.* at 57 (quoting an unnamed source on Capitol Hill).

⁹⁰ See BALES & SOODALTER, *supra* note 14, at 102. With regard to sex trafficking, antitrafficking NGOs have estimated that "hundreds of thousands of American women and children are at risk [of being trafficked], compared to the federal government's estimate of up to 17,500 foreign victims of trafficking per year." *Id.*

⁹¹ *Id.* at 103.

⁹² G.A. Res. 64/293, ¶ 17, U.N. Doc A/RES/64/293 (Aug. 12, 2010).

⁹³ *Id.*

Meeting the needs of trafficked victims should not be a zero sum game.⁹⁴ The Palermo Protocol advocates for a comprehensive approach, and an effective move forward is dependent upon broadening the spectrum to include the root causes of vulnerabilities all human beings face.

III. IMBALANCED ENFORCEMENT OF OBLIGATIONS

[T]he TVPA transforms into hard obligation[s] victim protections that were merely aspirational in the Palermo Protocol.

*Janie Chuang*⁹⁵

When the Palermo Protocol was first presented to the General Assembly, it was praised for paying “equal attention to the repression of illegal conduct and the protection of the victims, fill[ing] in many gaps in international law and provid[ing] an effective instrument for international cooperation.”⁹⁶ The Protocol’s purpose was intended to balance prevention of trafficking, protection of the victims, and prosecution of the traffickers.⁹⁷ Although the Protocol itself does not mention prosecution in its statement of purpose, it is encapsulated within the Protocol’s commitment to “combat” trafficking.⁹⁸ The main goals throughout the drafting process were twofold. First, that the Protocol would define trafficking “to include all trafficking into forced labor, slavery and servitude, no matter whether it is within or across a country’s borders” and second, to “recognize[] the rights and meet[] the needs of trafficked persons.”⁹⁹

At the Palermo Protocol’s introduction, a delegate to the General Assembly speaking on behalf of the European Union acknowledged how critical the implementation phase would be, stating that “[h]aving arrived at satisfactory texts is one thing, but it is quite another to ensure their entry into force and implementation. In this respect, we shall still have several

⁹⁴ This applies across gender, across the type of trafficking, and across those who are internationally or domestically trafficked.

⁹⁵ Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 451 (2006).

⁹⁶ U.N. GAOR, *supra* note 4, at 6 (statement of Mr. Vento of Italy).

⁹⁷ See LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT’L L. REV. 227, 239 (2003).

⁹⁸ Palermo Protocol, *supra* note 2, art. 2 (stating the purposes as “(a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives.”).

⁹⁹ THE ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL 2 (GLOBAL RIGHTS 2002), available at http://www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723.

important bridges to cross.”¹⁰⁰ Aside from encouraging nations to sign and ratify the treaty so that it may enter into force, the European Union encouraged:

[E]ffective implementation of the provisions . . . including in cases in which assistance is needed to bring [nation state] institutional and judicial systems up to standard [I]n order to obtain this objective, the Union encourage[d] Member States to contribute towards the widest possible implementation of these legal instruments.¹⁰¹

The drafters’ element of control in the implementation of the Protocol was their determination of how stringent the provisions within the Protocol would be. Understandably, the more stringent the provisions, the less willing nation states might be to ratify the document. However, the drafters made conscious decisions to determine which provisions would require the member states to enact certain measures versus which provisions would merely encourage nation states to undertake initiatives.

This discrepancy in the Protocol’s balance is clearest when examining the provisions associated with prosecuting traffickers against the provisions intended to protect victims and prevent trafficking. Article 5 of the Protocol establishes that “[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3,” which provides the definition of trafficking.¹⁰² In contrast, when addressing the protection of victims the Protocol includes qualifiers to states’ responsibilities. The Protocol’s establishment of victim protection includes, “Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking.”¹⁰³ Likewise, “Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims.”¹⁰⁴ Finally, “Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.”¹⁰⁵ The requirements that states “consider,” “take into account,” and “endeavor to provide” for victim protection are weak, and create an unbalanced approach to addressing human trafficking.

The Palermo Protocol requires states to criminalize human trafficking but does not contain any mandatory provision under which nation states are required to protect the victims or conduct prevention initiatives.¹⁰⁶ The Palermo Protocol requires that “[e]ach State Party shall adopt such

¹⁰⁰ U.N. GAOR, *supra* note 4, at 4 (statement of Mr. Doutriaux of France, speaking on behalf of the European Union) (translation from French).

¹⁰¹ *Id.* at 5.

¹⁰² Palermo Protocol, *supra* note 2, arts. 5(1), 3(a).

¹⁰³ *Id.* art. 6(3).

¹⁰⁴ *Id.* art. 6(4).

¹⁰⁵ *Id.* art. 6(5).

¹⁰⁶ *See id.* arts. 5–6.

legislative and other measures as may be necessary to establish as criminal offences the [trafficking of persons].”¹⁰⁷ This is the only mandatory statement without a qualifier in the Protocol.¹⁰⁸ In Article 6(1), discussing the “[a]ssistance to and protection of victims of trafficking in persons,” the Protocol requires that “[i]n appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.”¹⁰⁹ While the use of “inter alia” suggests that the Article is not limited to privacy associated solely with prosecution, its reference to the legal system is tied to prosecutorial concerns.

This focus on securing the legal rights of victims associated with their prosecution but not their protection is echoed in Article 6(2), which states:

Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; [and] (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders.¹¹⁰

While the Protocol later mentions measures to be taken that would facilitate victim protection, it makes no reference to changing the legal system to the extent that member states would ensure victims have the right to be protected.¹¹¹

As the mandate to prosecute has been carried out in national legislation, it is sometimes at odds with victim protection, and its mandatory nature ensures that it takes precedence. In this regard, the Protocol falls short of its second goal, to adequately meet the needs of trafficked persons. One instance where this is evident within the United States is with the *Brady* conflict.¹¹² In *Brady v. Maryland*, the Supreme Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”¹¹³ When victims apply for T visas, the information that they include is material to the trafficker’s guilt or punishment, and therefore potentially falls within the ambit of *Brady* disclosure.¹¹⁴ This presents a tension within the current system: whether or not the

¹⁰⁷ *Id.* art. 5(1).

¹⁰⁸ *See, e.g., id.* art. 6 (using qualifiers such as “[i]n appropriate cases,” “shall consider implementing,” “shall endeavor to provide,” and “to the extent possible under its domestic law”).

¹⁰⁹ *Id.* art. 6(1).

¹¹⁰ *Id.* art. 6(2).

¹¹¹ *See id.* § II.

¹¹² I am grateful to Meg Garvin for indicating this tension to me.

¹¹³ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹¹⁴ *See infra* note 162 and accompanying text for discussion of T visas.

prosecution needs to disclose the information included in the T visa application to the defense, or if disclosing that the victim applied for a T visa is sufficient disclosure to satisfy the *Brady* requirement. This tension between victim protection and procedural fairness required by prosecution illustrates one of the challenges associated with implementation of international standards within national systems.

While the Protocol pays lip service to human rights,¹¹⁵ a true commitment to the human rights approach is lacking. The law enforcement framework prioritizes prosecution over the protection of victims and prevention of trafficking. A human rights framework seeks to address the root causes of trafficking, which the remedial focus on prosecution does not accomplish.¹¹⁶ Arguably, prosecution and prevention are connected, and if legislation is in place to prosecute the traffickers then in turn it facilitates prevention. However, the number of traffickers worldwide is increasing,¹¹⁷ indicating that prosecution is not an effective means to prevent trafficking. Despite the overwhelming focus on prosecution, of the 132 countries the UNODC studied for the 2012 Report, 16% did not report a single trafficking conviction between 2007 and 2010.¹¹⁸ The lack of effectiveness is illustrated by the fact that fewer than half of the nations that are legally bound to the Palermo Protocol have convicted anyone of human trafficking charges.¹¹⁹ Charges that are filed against traffickers are frequently brought under laws designed to address non-trafficking offenses, undermining the comprehensive approach intended by the Palermo Protocol.¹²⁰ More recently, the “percentage of countries without an offence criminalizing [human trafficking] halved between 2008 and 2012.”¹²¹ Despite the focus on prosecution, low conviction rates remain and the conviction rates for

¹¹⁵ See Palermo Protocol, *supra* note 2, pmb. (declaring that a comprehensive international approach is needed to “protect the victims of such trafficking, including by protecting their internationally recognized human rights”); *id.* art. 2(b) (the statement of purpose includes to “protect and assist the victims of such trafficking, with full respect for their human rights.”).

¹¹⁶ A human rights approach infuses the frameworks of analysis and action. TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH* 35 (2006). A framework of analysis involves “exploring and identifying relevant human rights norms and principles in relation to trafficking of human being[s].” *Id.* The framework of action “simultaneously attempts to articulate legal obligations imposed upon States, such as obligations to prohibit trafficking, prosecute traffickers, protect victims, and address the causes and consequences of the practice.” *Id.*

¹¹⁷ 2012 REPORT, *supra* note 1, at 7.

¹¹⁸ *Id.*

¹¹⁹ Brusca, *supra* note 13, at 15.

¹²⁰ See, e.g., Marisa Nack, Note, *The Next Step: The Future of New York State’s Human Trafficking Law*, 18 J.L. & POL’Y 817, 843–44 (2010); see also UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 7, at 1.

¹²¹ 2012 REPORT, *supra* note 1, at 1.

trafficking are “at the same level as rare crimes such as homicides in Iceland or kidnappings in Norway.”¹²²

The Protocol succeeded in creating a definition of trafficking that was broad enough to address most international trafficking and some domestic trafficking, although the implementation of this definition in various nation states required a more narrow domestic definition of trafficking than what the Protocol offered.¹²³ The Protocol’s definition is unworkable when applied to nation state legislation because “[i]t has too many elements that would have to be proven by prosecutors, thus making prosecutions more difficult. Also, some of the language is ambiguous, which could also lead [to] legal challenges.”¹²⁴ While the Palermo Protocol’s broad definition draws a wide variety of trafficking within its ambit, national governments have the sovereign power to adopt their own definitions of trafficking to best meet the needs of their institutional and judicial systems. As the Protocol’s only references to national legal implementation occur in connection with prosecution, the domestic implementation of legislation regarding trafficking was consequently rooted in a criminal law framework. Specialists have analyzed how the differences in national definitions of human trafficking have created a limitation in human trafficking data, partially explaining why international data is frequently challenged to determine the accurate scope and severity of the problem.¹²⁵

While the Palermo Protocol does not include articles relating to enforcement, Article 32 of the Convention contains mechanisms for implementation and enforcement by establishing a Conference of the Parties to the Convention.¹²⁶ The Conference was to be held no less than one year following the Protocol’s entry into force, and was designed for the parties to agree upon mechanisms for achieving the objectives of the Convention.¹²⁷ Since the Palermo Protocol is lacking in any enforcement mechanism, the tangential benefits from the enforcement mechanism set out in the Convention are worth discussing because it addresses shared objectives between the Convention and the Protocol in the battle against human trafficking. These objectives include the facilitation of “training and technical assistance,” the “implementation of the Convention through economic development,” and prevention initiatives, including “encouraging the mobilization of voluntary contributions.”¹²⁸ Other

¹²² *Id.*

¹²³ *See id.* at 16; *see also* THE ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL, *supra* note 99, at 3.

¹²⁴ THE ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL, *supra* note 99, at 3.

¹²⁵ ALISON SISKIN & LIANA S. WYLER, CONG. RESEARCH SERV., RL 34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 8 (2012).

¹²⁶ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 7, Annex 1, art. 32(1).

¹²⁷ *Id.* art. 32(2), (3).

¹²⁸ *Id.* arts. 29, 30, 32(3)(a).

objectives include “facilitating the exchange of information among State Parties on patterns and trends in transnational organized crime and on successful practices for combating it,” cooperating with relevant organizations, periodically reviewing the Convention’s implementation, and making recommendations to improve the Convention and its implementation.¹²⁹ This specifically requires State Parties to provide the Conference with information on their programs, plans and practices, and legislative and administrative measures to implement the Convention.¹³⁰

The 2010 Global Plan of Action to Combat Trafficking in Persons discusses various initiatives designed to effectuate prevention of trafficking, protection of victims, and prosecution of traffickers, but does not explicitly discuss enforcement measures for nations that do not comply with the Protocol.¹³¹ The preamble of the Global Plan recognized the need to “[h]elp Member States to reinforce their political commitments and legal obligations to prevent and combat trafficking in persons[,]” but did not later extrapolate on how this “help” would take shape.¹³² The Global Plan stated that nation states should “[i]mplement all relevant legal instruments that criminalize trafficking in persons” and discussed enforcement measures against traffickers including the “more systematic use of freezing assets for the purpose of eventual confiscation,” but did not address enforcing nation states’ legal obligations and the consequences that would arise when these were not met.¹³³ Rather than discuss enforcement measures, the Global Plan stressed the “importance of strengthening collective action by Member States and other stakeholders, including regional and international organizations, non-governmental organizations, the private sector and the media.”¹³⁴

Tom Obokata argues that the Palermo Protocol’s weak provisions regarding nation state human rights obligations should not be considered a disadvantage because international human rights law and other international mechanisms can supplement the Protocol.¹³⁵ He explains that “for its part [the Palermo Protocol] can serve as a vehicle to promote international co-operation among different actors. Therefore, it should be an instrument recognised as a key for promoting and implementing a human rights framework, augmenting global action against the act.”¹³⁶ However, the Protocol ultimately addresses human trafficking from a law enforcement standpoint, and problematically “anchors” the problem in that realm. As Jonathan Todres states:

¹²⁹ *Id.* art. 32(3)(b)–(d).

¹³⁰ *Id.* art. 32(5).

¹³¹ See G.A. Res. 64/293, *supra* note 92, ¶¶ 12–49.

¹³² *Id.* pmb.

¹³³ *Id.* ¶¶ 43, 45.

¹³⁴ *Id.* pmb.

¹³⁵ OBOKATA, *supra* note 116, at 164–65.

¹³⁶ *Id.* at 165.

The Trafficking Protocol grew out of a criminal law framework rooted primarily in concern for combating transnational organized crime syndicates rather than an independent assessment of what is needed to prevent human trafficking. As a result, the international community not only developed a narrow response focused primarily on criminal law measures, but its anchoring of antitrafficking law in criminal law concepts subsequently served to marginalize other vital perspectives.¹³⁷

While the Protocol may be supplemented by international human rights instruments on an international level, this does not permeate the Protocol's effect on national implementation. "The Protocol, and the domestic legislation it has engendered, have moved the antitrafficking agenda firmly into the sphere of criminal law enforcement[.]"¹³⁸ and consequently the protection of victims has taken the back burner to law enforcement priorities. The Protocol's imbalance is mirrored by the United States' approach of addressing human trafficking.

The United States signed the Palermo Protocol on December 13, 2000 and ratified it on November 3, 2005.¹³⁹ The drafters of the Palermo Protocol acknowledged that prior to its creation there was "no universal instrument that address[ed] all aspects of trafficking in persons . . . [and] in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected."¹⁴⁰ The Palermo Protocol was intended to fill this international void by facilitating a comprehensive approach to combatting human trafficking.¹⁴¹ While the TVPA was enacted one month before the Palermo Protocol became open for signature,¹⁴² they share the similar flaw of prioritizing prosecution over protecting victims and preventing trafficking. The Protocol's weak provisions relating to the protection of victims and prevention of trafficking required the United States to take no further steps to create a more balanced approach in addressing trafficking. The Protocol ultimately falls short of its intent to "sufficiently protect" victims, because it fails to require nation states to prioritize the welfare of the victim above the prosecution of the trafficker.

The drafting of the TVPA was partially instigated by the U.S. government's inadequate and belated handling of landmark cases that

¹³⁷ Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT'L L. 53, 55 (2011) (footnotes omitted).

¹³⁸ Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1617 (2010).

¹³⁹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Signatories to the CTOC Trafficking Protocol*, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>.

¹⁴⁰ Palermo Protocol, *supra* note 2, pmbl.

¹⁴¹ See UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 7.

¹⁴² The TVPA was enacted in October, and the Palermo Protocol became open for signature in November. Victims of Trafficking and Violence Protection Act, 114 Stat. at 1464; Palermo Protocol, *supra* note 2.

drew the United States' attention to the problem of labor trafficking.¹⁴³ In September of 1995, police conducted a raid in a garment factory in El Monte, California where they discovered "seventy-two Thai nationals working in slave-like conditions," who had been trafficked into the United States to work 18 hours per day, seven days a week for less than \$0.60 an hour, restrained by threats and violence.¹⁴⁴ Two years later the New York City Police Department discovered 62 deaf-mute Mexican immigrants who were trafficked into the United States and were forced to beg in the streets for 18 hours per day, seven days a week. When they failed to meet their \$600 per week quota they were subject to physical beatings, electrocution, mental abuse, and molestation.¹⁴⁵ Another case arose in 1996, when Miguel Flores' labor camps in Florida, Georgia, and South Carolina were discovered after the camps had been operating for years, where Flores had enslaved between 400 and 500 people.¹⁴⁶ This had first become apparent in 1992, when members of the NGO, Coalition of Immokalee Workers (CIW), were approached by six laborers who informed CIW that they had not been paid for their work at the camp and that their boss shot a worker.¹⁴⁷ The Department of Justice delayed taking action until 1996 when an indictment was brought in U.S. District Court against Miguel Flores, his partner Sebastian Gomez, and two of their recruiters, all of whom entered a guilty plea the next year.¹⁴⁸ The delay in prosecution indicated that "[t]he government simply wasn't prepared for modern slavery, and the result was hesitation, confusion, lack of interest, and constant misunderstandings on the government's part in pursuing it, as well as the inordinately long time it took to bring the traffickers to justice."¹⁴⁹ These cases, and others like them, magnified the "general concern that available criminal punishments would not be severe enough to fit the crime."¹⁵⁰ This realization was "instrumental in bringing about the Victims of Trafficking and Violence Protection Act in 2000, with its sets of definitions, charges, and penalties for dealing specifically with cases of sex and labor slavery in the United States."¹⁵¹

¹⁴³ BALES & SOODALTER, *supra* note 14, at 58; Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2987 (2006).

¹⁴⁴ Chacón, *supra* note 143, at 2987.

¹⁴⁵ *Id.* at 2987–88.

¹⁴⁶ BALES & SOODALTER, *supra* note 14, at 54–57.

¹⁴⁷ *Id.* at 55.

¹⁴⁸ *Id.* at 57–58. Defendants were charged with "six counts of holding others in involuntary servitude; six counts of collection of extensions of credit by extortionate means; six counts of transporting illegal aliens within the United States; concealing and harboring illegal aliens; transporting migrant farm workers in unsafe vehicles; and conspiracy to commit these crimes." *United States v. Flores*, No. 98-4178, 1999 WL 982041, at *1 (4th Cir. 1999) (affirming lower court convictions).

¹⁴⁹ BALES & SOODALTER, *supra* note 14, at 58.

¹⁵⁰ Chacón, *supra* note 143, at 2989.

¹⁵¹ BALES & SOODALTER, *supra* note 14, at 58.

The TVPA's statement of purpose is "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."¹⁵² Implementation of the TVPA mirrors the Palermo Protocol's imbalanced focus on prosecution over victim protection. Yet despite the focus on prosecution, fewer than 1% of traffickers within the U.S. have ever seen a courtroom.¹⁵³ This priority imbalance is most exemplified by the provision which allows for the "assets seized from convicted traffickers [to] go into law enforcement's budget, not into helping the slaves rebuild their lives."¹⁵⁴ At a Congressional hearing held a year after the drafting of the TVPA, Rep. Chris Smith who introduced the bill stated that its "essential principle" was to ensure that:

[C]riminals who knowingly operate enterprises that profit from sex acts involving persons who have been brought across international boundaries for such purposes by force, fraud or coercion, or who force human beings into slavery should receive punishment commensurate with the penalties for kidnapping and forcible rape. This would not only be a just punishment, but also . . . a powerful deterrent.¹⁵⁵

Rep. Smith then pointed out that the "logical corollary to this principle is that we need to treat victims of these terrible crimes as victims who desperately need our help and our protection."¹⁵⁶ Construing victim protection as supplemental to the prosecution of traffickers rather than as a principle in its own right indicates the TVPA's imbalance as mirrored in the Palermo Protocol. Despite the prioritization of prosecution evident in both legal instruments, the rhetorical focus of the anti-trafficking movement was still "on the three Ps: protection, prosecution, prevention."¹⁵⁷

The United States indicates its focus on prosecution through its enactment of the TVPA, and encourages this approach to be implemented on a state level as well. The Department of Justice created a Model State Anti-Trafficking law that specifically states, "[p]rovision of such services

¹⁵² TVPA, 22 U.S.C § 7101(a).

¹⁵³ Interview by M. Fogarty with Shawn Sullivan, MANNA Worldwide Member, *University Student Interview Regarding the Topic of Human Trafficking and How to Stop Human Trafficking*, MANNA FREEDOM (2011), <http://www.mannafreedom.com/blog-about-human-trafficking/> ("[U]nfortunately less than 1% of perpetrators are ever prosecuted What happens is the ones prosecuted are the people being victimized.").

¹⁵⁴ BALES & SOODALTER, *supra* note 14, at 264.

¹⁵⁵ *Implementation of the Trafficking Victims Protection Act, Hearing Before the H. Comm. on Int'l Relations*, 107th Cong. 7 (2001) [hereinafter *Hearing Before the H. Comm. on Int'l Relations*] (statement of Rep. Chris Smith). Representative Smith of New Jersey was described as "the father of this act." *Id.* at 6 (statement of Rep. Henry J. Hyde, Chairman, H. Comm. on Int'l Relations).

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.* at 12 (statement of Hon. Paula J. Dobriansky, Under Sec'y, Office of the Under Sec'y for Global Affairs, U.S. Dept. of State).

shall not be contingent on the trafficked person's immigration status or on the prosecution of the trafficking victim's trafficker."¹⁵⁸ However, the State Model Law requires:

Certification of Eligibility for Trafficked Persons [to occur w]ithin 96 hours of a state or local official having identified the presence of a trafficked person . . . [and then the official will] issue a letter of certification of eligibility or other relevant document entitling the trafficked person to have access to [State] Crime Victim Compensation funds and other state benefits and services.¹⁵⁹

Therefore, even if the state does not go through with prosecution, the victim's ability to receive benefits is contingent upon law enforcement recognizing them as victims. Even with victims that escape on their own, approaching law enforcement to receive certification is understandably intimidating. The Polaris Project has supplemented the provisions within the Department of Justice Model Law to bring more attention to meeting the needs of the victims.¹⁶⁰ Some programs have been created that create new points of entry for victims who are hesitant to approach law enforcement but still need to rebuild their lives.¹⁶¹ Organizations like Polaris are crucial to the development of legislation that meets the needs of the victims, especially since the current laws in place are not doing enough to secure the rights of the victims, aside from facilitating prosecution of traffickers.

In order to encourage victims to assist law enforcement, the Victims of Trafficking and Violence Protection Act created the nonimmigrant visa categories for internationally trafficked victims, the T visa and the U visa.¹⁶² The purposes of these visas was to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, [and] trafficking of aliens . . . while

¹⁵⁸ STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING, div. D, § (1)(a) (Global Rights 2005), *available at* www.globalrights.org/site/DocServer/StateModelLaw_9.05.pdf.

¹⁵⁹ *Id.* div. D, § 2(c).

¹⁶⁰ MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING 1 (2010), *available at* http://www.polarisproject.org/storage/documents/policy_documents/state_policy/Final_Comprehensive_ModelLaw__8_2010.pdf.

¹⁶¹ For example, Catholic Charities Immigration Legal Services (CCILS) provides immigration services to trafficking victims in Oregon. *Immigration Legal Services*, CATHOLIC CHARITIES, http://www.catholiccharitiesoregon.org/services_legal_services.asp.

¹⁶² Victims of Trafficking and Violence Protection Act, div. B, § 1513(a)(2)(B), 114 Stat. at 1534 ("Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens."); *see also* Immigration and Nationality Act § 101, 8 U.S.C. § 1184(p)(3) (2006) ("Duties of the Attorney General with respect to 'U' visa nonimmigrants."). The Victims of Trafficking and Violence Protection Act created the U visa through its reauthorization of the Violence Against Women Act. Victims of Trafficking and Violence Protection Act, p.mbl., 114 Stat. at 1464.

offering protection to victims.”¹⁶³ These visas were designed to serve prosecutorial interests by “encourag[ing] law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.”¹⁶⁴ The T visa is specifically designed for victims of trafficking, whereas the U visa is available for victims of certain crimes.¹⁶⁵ The Immigration and Nationality Act (INA) was amended to recognize victims falling into these two categories as nonimmigrants.¹⁶⁶

The requirements for eligibility under T visas and U visas are different, although both can be issued to trafficking victims. In creating the T visa, the INA states that an alien is eligible to apply for the T visa if four criteria are met. First, the Secretary of Homeland Security or the Attorney General determines he or she is or has “been a victim of a severe form of trafficking in persons, as defined in [the TVPA].”¹⁶⁷ Second, the individual must also be “physically present” in the United States “on account of such trafficking.”¹⁶⁸ Third, the statute requires victims (unless under the age of 18) to have “complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime.”¹⁶⁹ Last, eligibility requires a showing that the trafficking victim “would suffer extreme hardship involving unusual and severe harm upon removal.”¹⁷⁰ While there are broad waivers available to trafficking victims who may be inadmissible to the United States based on other immigration inadmissibility grounds, if the individual is a trafficker themselves they are ineligible for a T visa.¹⁷¹ Women frequently play a prominent role in human trafficking, and “[f]emale victims may evolve into traffickers as a way to escape future exploitation. Given the importance for traffickers to gain a victim’s trust,

¹⁶³ Victims of Trafficking and Violence Protection Act, div. B, § 1513(a)(2)(A), 114 Stat. at 1533.

¹⁶⁴ *Id.* at 1533–34.

¹⁶⁵ Certain crimes include “one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” 8 U.S.C. § 1101(a)(15)(U)(iii).

¹⁶⁶ *Id.* § 1101(a)(15)(T)–(U).

¹⁶⁷ *Id.* § 1101(a)(15)(T)(i)(I).

¹⁶⁸ *Id.* § 1101(a)(15)(T)(i)(II).

¹⁶⁹ *Id.* § 1101(a)(15)(T)(i)(III)(aa)–(bb). *But see* 8 C.F.R. § 214.11 (2012) (requiring the victim be under the age of 15 to qualify for an exception).

¹⁷⁰ 8 U.S.C. § 1101(a)(15)(T)(i)(IV).

¹⁷¹ 8 C.F.R. § 214.11(c) (“No alien, otherwise admissible, shall be eligible [for admission to the United States by using a T visa] if there is substantial reason to believe that the alien has committed an act of a severe form of trafficking in persons.”).

women, particularly when recruiting potential sex trafficking victims, may at times be more effective than men.”¹⁷² Although the individual is still a victim of trafficking, this could pose an obstacle to receiving T visas, as he or she may still be construed in the eyes of law enforcement as being a trafficker him or herself. Accordingly, this presents a situation where the U visa could be a more appropriate solution. The T visas, while they have more benefits, are also more politically infused and are therefore more difficult to obtain.

The U visa is available to non-citizens meeting a number of criteria, including a showing that the Secretary of Homeland Security has determined that the individual has “suffered substantial physical or mental abuse as a result of having been a victim of [certain] criminal activity” which violated United States law or occurred in the United States.¹⁷³ The victim’s eligibility to receive a U visa also requires that he or she possesses information concerning the criminal activity and “has been helpful, is being helpful, or is likely to be helpful” to law enforcement officials, local prosecutors, or local authorities investigating or prosecuting the criminal activity.¹⁷⁴ In addition, victims must submit a “U Nonimmigrant Status Certification” signed by a certified official, stating that the applicant assisted with the criminal investigation.¹⁷⁵ U visas grant victims four years of non-immigrant status, and typically after three years they are able to apply for residence in the United States, as long as their original certifier shows that they have not refused to cooperate with law enforcement throughout the past three years.¹⁷⁶ Derivative protection is also available with U visas, which allows victims to apply for their parents and underage siblings to come to the United States.¹⁷⁷

By anchoring human trafficking in a criminal law framework, victims’ ability to receive protection is more or less contingent upon their cooperation with law enforcement. The funding available to victims is allocated through the Department of Justice, which “narrowly defines the type of victim on whom this funding may be used [as] one certified by law enforcement.”¹⁷⁸ Victims’ ability to access services are highly contingent upon their cooperation with law enforcement, as most non-governmental organizations rely on federal grants for their funding, and are then left

¹⁷² SISKIN & WYLER, *supra* note 125, at 6.

¹⁷³ 8 U.S.C. § 1101(a)(15)(U)(i)(I). For qualifying crimes, see *supra* note 165. Attempts and conspiracy to commit these acts also are considered “qualifying” for U visa purposes.

¹⁷⁴ *Id.* § 1101(a)(15)(U)(i)(II)–(III).

¹⁷⁵ 8 C.F.R. § 214.14(c)(2)(i) (2012).

¹⁷⁶ *See* 8 U.S.C. § 1101(a)(15)(V)(ii); 8 C.F.R. § 214.11(p)(1).

¹⁷⁷ 8 C.F.R. § 214.14(f). Although whoever perpetrated the crime cannot be eligible into the U.S. as a derivative. *Id.*

¹⁷⁸ Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 346 (2007).

unable to help victims who are not certified.¹⁷⁹ When victims are eligible to apply for either a T or U visa, the T visa is preferable because the individual then qualifies for social benefits.¹⁸⁰ Both T and U visas grant the victim work authorization.¹⁸¹ The visa status under a T or U visa is usually limited to four years unless the individual has sought to adjust his or her status to a legal permanent resident and the adjustment is pending.¹⁸²

However, even fewer victims receive benefits through the nonimmigrant visas because the visas are vastly underutilized. The number of visas available to victims is capped, with 5,000 T visas and 10,000 U visas available per year.¹⁸³ Despite the overwhelming number of victims trafficked in the United States, in 2009 there were only 222 applicants for the T visa, and 186 of these were approved.¹⁸⁴ Over the past seven years, there have not even been 5,000 *applicants* for the T visa.¹⁸⁵ This is thought partially to be due to the evidentiary burden associated with the T visa; if victims do not have certification from law enforcement it is much more difficult for them to acquire documents to prove that they meet the criteria necessary for eligibility.¹⁸⁶ While law enforcement certification is not mandatory, it vastly improves the likelihood that a victim will be eligible for a T visa.¹⁸⁷

The TVPA has been reauthorized throughout the years,¹⁸⁸ and the reauthorizations have gradually improved conditions for victims of trafficking. For example, the 2008 reauthorization eliminated the requirement that victims comply with law enforcement's reasonable request for cooperation in order to be eligible for a T visa, by stating that requests from law enforcement would be "unreasonable" if "a trafficking victim, due to psychological or physical trauma, is unable to cooperate with

¹⁷⁹ *Id.* at 346–47.

¹⁸⁰ The victim essentially becomes eligible for refugee benefits, including resettlement, food stamps, etc. *See, e.g.*, TVPA, 22 U.S.C. § 7105(b); U.S. DEP'T OF HEALTH & HUMAN SERV., SERVICES AVAILABLE TO VICTIMS OF HUMAN TRAFFICKING: A RESOURCE GUIDE FOR SOCIAL SERVICE PROVIDERS 16 (Sept. 18, 2012), *available at* http://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf.

¹⁸¹ Erin Bistricher, Note, "U" Stands for Underutilization: The U Visa's Vulnerability for Underuse in the Sex Trafficking Context, 18 CARDOZO J.L. & GENDER 449, 457, 464 (2012).

¹⁸² *See* 48 C.F.R. §§ 245.23(a), 245.24(b) (2012); Bistricher, *supra* note 181, at 457.

¹⁸³ Bistricher, *supra* note 181, at 458, 464.

¹⁸⁴ *Id.* at 458.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 459–60.

¹⁸⁷ *Id.*

¹⁸⁸ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended at 22 U.S.C. § 7101 (2008)); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (codified as amended at 22 U.S.C. § 7101 (2005)); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended at 22 U.S.C. § 7101 (2003)) [hereinafter TVPRA 2003].

a request for assistance.”¹⁸⁹ Other advancements have been made which serve both prosecutorial and victim protection interests, including the creation of a private right of action for victims to commence civil charges against their traffickers.¹⁹⁰ Although these advancements reduce obstacles to victim protection, “[t]hese changes do not, however, alter the fundamental balance of the law, which still prioritizes prosecution over victim protection.”¹⁹¹ At the time of this original writing, the TVPA had not been reauthorized since 2008, and expired at the end of 2011.¹⁹² On March 7, 2013, President Obama signed the Trafficking Victims Protection Reauthorization Act, empowering anti-trafficking programs for the next four years.¹⁹³

IV. GLOBAL LEADERSHIP

So as we recommit ourselves to end modern slavery, we should take a moment to reflect on how far we have come, here in our country and around the world, but how much farther we still have to go to find a way to free those 27 million victims and to ensure that there are no longer any victims in the future.

*Hillary Clinton
(U.S. Secretary of State)¹⁹⁴*

While the TVPA is by no means a flawless mechanism for handling the problem of human trafficking, its sanctions regime has the potential to encourage nation states throughout the world to enact their own domestic laws addressing human trafficking.¹⁹⁵ The sanctions regime was

¹⁸⁹ Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(15)(T)(iii) (Supp. II 2009).

¹⁹⁰ 18 U.S.C. § 1595 (2006).

¹⁹¹ Chacón, *supra* note 138, at 1625–26 (discussing how the “implementation of antitrafficking efforts by the Department of Homeland Security has been situated in the Immigration and Customs Enforcement (ICE) branch of the Department, rather than U.S. Citizenship and Immigration Services (USCIS), demonstrates that the capture and prosecution of traffickers is the mechanism by which DHS hopes to address the trafficking problem” *Id.* (footnote omitted)).

¹⁹² Haynes, *supra* note 179, at 340 (Congress’s failure to reauthorize the statute exemplifies one of the “primary problems thwarting Congress’ intent to protect victims and prosecute their traffickers[,]” which is that “lawmakers and law enforcement officials are ignoring or obscuring the root causes of trafficking, in favor of conflating trafficking with other issues of political interest.”).

¹⁹³ S. 1301, 112th Cong. (2011). On March 7, 2013 President Obama signed the Violence Against Women Reauthorization Act, which also reauthorized the Traffic Victims Protection Act. Valerie Jarrett, *No One Should Have to Live in Fear of Violence*, WHITE HOUSE BLOG (Mar. 7, 2013) <http://www.whitehouse.gov/blog/2013/03/07/no-one-should-have-live-fear-violence>; Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54.

¹⁹⁴ Hillary Clinton, Sec’y of State, Remarks: Release of the 2012 Trafficking in Persons Report, U.S. DEP’T OF STATE (June 19, 2012), *available at* <http://www.state.gov/secretary/rm/2012/06/193368.htm>.

¹⁹⁵ *See, e.g.*, TVPA, 22 U.S.C § 7107(d)(1).

built into the TVPA based on the United States' policy to refuse to provide non-humanitarian, nontrade-related foreign assistance to any government that "does not comply with minimum standards for the elimination of trafficking" and "is not making significant efforts to bring itself into compliance with such standards."¹⁹⁶ Based on the level of compliance with the "minimum standards," nations throughout the world are ranked on various "tiers," and nations on the third tier may face economic sanctions.¹⁹⁷ The Trafficking in Persons (TIP) Report, and the extraterritorial fiscal consequences that flow from its categorization, has been interpreted as providing the "teeth" that the Protocol lacks.¹⁹⁸

The "minimum standards" for eliminating trafficking that are taken into account when making a tier designation include:

The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.

For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.

For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.

The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.¹⁹⁹

While some argue that the use of unilateral sanctions is problematic because it "undermines multilateral definition and enforcement of international human rights law,"²⁰⁰ the Palermo Protocol has not framed the issue of human trafficking as one governed by human rights law. Rather, human trafficking is internationally addressed (for better or worse) within a law enforcement framework. What becomes problematic is the perpetuation of problems within the United States' framework applied on a global scale. Here, the minimum standards stress the need to address sex trafficking but do not specifically mention different forms of trafficking. By taking on a leadership role, the United States assumes additional responsibility to ensure that its own legislation is effective in addressing the broad scope of trafficking, before holding other nations accountable to its standards.

¹⁹⁶ TVPA, 22 U.S.C § 7107(c).

¹⁹⁷ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 37, 44 (2012), *available at* <http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm>.

¹⁹⁸ Chuang, *supra* note 95, at 439.

¹⁹⁹ TVPA, 22 U.S.C § 7106(a).

²⁰⁰ Chuang, *supra* note 95, at 458.

The Office to Monitor and Combat Trafficking in Persons (OMCTP) is responsible for making the determination of nations' levels of compliance with these minimum standards.²⁰¹ Pursuant to the TVPA, the OMCTP considers the following factors in making such a determination: “[w]hether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking,”²⁰² “protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking,” provides legal alternatives to removing victims to countries where they would face retribution, and ensures victims are not inappropriately incarcerated or penalized.²⁰³ Additionally, whether the government “cooperates with other governments in the investigation and prosecution of severe forms of trafficking,”²⁰⁴ including public officials who participate in or facilitate trafficking,²⁰⁵ is taken into account. The OMCTP further considers whether the government extradites people charged with acts of severe forms of trafficking on substantially the same terms as those charged with other serious crimes.²⁰⁶ The OMCTP also factors in whether the government “monitors immigration and emigration patterns for evidence of severe forms of trafficking in persons and whether law enforcement agencies of the country respond to any such evidence” in a way that is “consistent with the vigorous investigation and prosecution of acts of such trafficking, as well as with the protection of human rights of victims and the internationally recognized human right to leave any country, including one’s own, and to return to one’s own country.”²⁰⁷ Finally, the OMCTP looks to whether the government “has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, about the causes and consequences of severe forms of trafficking in persons.”²⁰⁸

Once these factors have been taken into account, the OMCTP publishes an annual Trafficking in Persons Report, rating each nation’s level of compliance with the standards, and economically sanctioning noncompliant nations accordingly.²⁰⁹ The Report places nations among four tiers.²¹⁰ Tier I indicates that the country’s government fully complies with the TVPA minimum standards.²¹¹ Acquiring a Tier I ranking does

²⁰¹ *About Us*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/about/index.htm>.

²⁰² TVPA, 22 U.S.C § 7106(b)(1).

²⁰³ *Id.* § 7106(b)(2).

²⁰⁴ *Id.* § 7106(b)(4).

²⁰⁵ *Id.* § 7106(b)(7).

²⁰⁶ *Id.* § 7106(b)(5).

²⁰⁷ *Id.* § 7106(b)(6).

²⁰⁸ *Id.* § 7106(b)(3).

²⁰⁹ *About Us*, *supra* note 201; U.S. DEP’T OF STATE (2012), *supra* note 197, at 37, 44.

²¹⁰ U.S. DEP’T OF STATE (2012), *supra* note 197, at 37.

²¹¹ *Id.* at 38.

not indicate that the country has eliminated the problem of human trafficking within its borders, but rather that the country has continued demonstrating progress toward combating human trafficking.²¹² Tier 2 indicates that the country's government does not fully comply with the minimum standards, but is making "significant efforts" to comply with the standards.²¹³ The "Tier 2 Watch List" applies to a country where the government does not fully comply with the minimum standards, but is making "significant efforts" to comply, and

the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing[,] . . . there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year[, or] . . . the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional steps over the next year.²¹⁴

Finally, Tier 3 applies to countries whose governments do not fully comply with the minimum standards and are not making "significant efforts" to comply.²¹⁵ Consequently, nations that fall under the third tier may be subject to economic sanctions whereby they would not receive non-humanitarian and nontrade-related aid from the United States.²¹⁶ In addition to withholding aid from the United States, "the U.S. President reserves the authority to direct the heads of international financial institutions such as the World Bank [and International Monetary Fund] to deny nonhumanitarian, non-trade-related and non-human rights-related assistance to Tier 3 countries."²¹⁷ Tier 3 countries also are forbidden from receiving funding for government employees' participation in education and cultural exchange programs.²¹⁸ The TVPA allows for a "waiver of sanctions if necessary to avoid significant adverse effects on vulnerable populations, including women and children."²¹⁹

In past years, some have argued that the discretion associated with sanctions has resulted in politically-infused lenience toward Tier 3 nations.²²⁰ Between 2003 and 2009, 45 countries were categorized as Tier

²¹² *Id.*

²¹³ *Id.* at 40.

²¹⁴ *Id.* (emphasis omitted).

²¹⁵ *Id.* at 43.

²¹⁶ See TVPA, 22 U.S.C § 7107(d)(1).

²¹⁷ Laura Herbert, *The Sexual Politics of U.S. Inter/National Security*, in FROM HUMAN TRAFFICKING TO HUMAN RIGHTS: REFRAMING CONTEMPORARY SLAVERY 86, 96 (Alison Brysk & Austin Choi-Fitzpatrick eds. 2012); see also U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 14 (2011), available at <http://www.state.gov/j/tip/rls/tiprpt/2011/index.htm>.

²¹⁸ U.S. DEP'T OF STATE (2011), *supra* note 217, at 14.

²¹⁹ *Id.*

²²⁰ See, e.g., *Trafficking of Women and Children in the Int'l Sex Trade: Hearing before the Subcomm. on Int'l Operations and Human Rights of the H.R. Comm. on Int'l Relations*, 106th

3 nations, and 12 were subject to sanctions.²²¹ Eight of these nations were already subject to U.S. sanctions, so the TVPA sanctions had little to no monetary effect.²²² Nineteen nations took sufficient steps following their designation as Tier 3 to avoid sanctions.²²³ The remaining 14 countries received U.S. waivers of sanctions on the basis of U.S. national interests.²²⁴ More recently in 2011, U.S. Chairman to the Subcommittee on Africa, Global Health and Human Rights, Rep. Chris Smith, expressed concern that President Obama determined 12 nations should remain for an additional year on the Tier 2 Watch List.²²⁵ Through its reauthorization of the TVPA in 2008, Congress added a requirement to the Tier ranking system that the President either downgrade or upgrade any country that has been on the Tier 2 Watch List for two consecutive years, and that if it has been on the Tier 2 Watch List for two consecutive years without improvement, it will automatically be downgraded to Tier 3.²²⁶ In practice, some countries, such as China and Russia, have been on the Tier 2 Watch List for seven or eight years, respectively.²²⁷ In the 2011 Report, Smith noted that of the 23 countries on Tier 3, only three countries received the full sanctions.²²⁸ Seven countries received partial sanctions and 13 countries faced no trafficking sanctions.²²⁹ Smith stated that:

[While s]ome may argue that being on Tier III is punishment enough, . . . Congress envisioned tangible repercussions for countries on Tier III. Those who work on the front lines of human

Cong. 1–2 (1999) (statement of Rep. Christopher Smith, Subcomm. Chairman); see also *U.S. Economic Sanctions: Good Intentions, Bad Execution: Hearing before the H.R. Comm. on Int'l. Relations*, 105th Cong. 147–50 (1998) (statement of Jeffrey J. Schott, Senior Fellow, Inst. for Int'l Econ.).

²²¹ Herbert, *supra* note 217, at 96–97.

²²² *Id.* at 97. These countries included Burma, Cuba, Eritrea, Iran, North Korea, Sudan, Syria, and Zimbabwe. *Id.*

²²³ *Id.*

²²⁴ *Id.* These countries included Algeria, Bahrain, Kuwait, Malaysia, Oman, Qatar, and Saudi Arabia because the government determined waivers were necessary to “effectively prosecute the Global War on Terror.” *Id.*

²²⁵ *The Trafficking in Persons Rep. 2011: Truth, Trends and Tier Rankings: Hearing Before Subcomm. on Afr., Global Health, & Human Rights of the H.R. Comm. on Foreign Affairs*, 112th Cong. 2–3 (2011) (statement of Rep. Christopher Smith, Chairman, Subcomm. on Afr., Global Health, and Human Rights) [hereinafter *Trafficking in Persons Rep.*].

²²⁶ See U.S. DEP’T OF STATE (2011), *supra* note 217, at 14 (However, the “Secretary of State, through delegation, can waive the automatic downgrade based on credible evidence that a waiver is justified because the government has a written plan that, if implemented, would constitute making significant efforts to comply with the TVPA’s minimum standards for the elimination of trafficking and is devoting sufficient resources to implement the plan.”).

²²⁷ *Trafficking in Persons Rep.*, *supra* note 225, at 2–3.

²²⁸ *Id.* at 3. These countries were Eritrea, Madagascar and North Korea. *Id.*

²²⁹ *Id.*

trafficking know all too well that a law is useless and diminished at the very least, unless faithfully implemented.²³⁰

The long-term effectiveness of unilateral sanctions as an enforcement mechanism has been debated, and Janie Chuang draws upon previous reports to concoct her framework for workability when unilateral sanctions are most effective.²³¹ Chuang argues that sanctions regimes have the potential to “contribute to international anti-trafficking norm development and internalization” if the following criteria are met:

- (1) the sanctions imposed should “promote rights that are mutually binding on both the United States and the target state;”
- (2) “the United States should look to international standards in applying its domestic sanction laws;”
- (3) “the documentation and condemnation of violations should be as evenhanded as possible;”
- (4) “the sanctions regime should be structured to permit and encourage broad participation of a variety of transnational actors” (including but not limited to nongovernmental organizations, private enterprises, and intergovernmental organizations).²³²

Chuang stresses that the effectiveness of unilateral sanctions ultimately turns on “whether the decision to issue sanctions is based on clearly defined and consistently applied principles, rather than political calculation.”²³³

The TIP Report has been criticized for deviating from the Palermo Protocol’s stance on prostitution in relation to sex trafficking, thus holding nations accountable to the United States’ own definition of trafficking, rather than the international standard for trafficking.²³⁴ In defining “exploitation” the United States includes “commercial sexual exploitation,” which was purposefully left out of the Palermo Protocol so that the trafficking definition could be applied more universally without hinging upon how state parties addressed prostitution domestically.²³⁵ Regardless of specific definitions, the TIP Report plugged a gap in enforcement that the Palermo Protocol was not cut out to fill. Lacking a monitoring body, the Palermo Protocol’s capability to ensure compliance was inherently limited. In recent years, the TIP Reports have sought to compensate for international error by focusing more on protection.²³⁶

²³⁰ *Id.*

²³¹ *See* Chuang, *supra* note 95, at 464.

²³² *Id.*

²³³ *Id.* at 483–84.

²³⁴ *Id.* at 468.

²³⁵ *Id.*

²³⁶ *See, e.g.*, Clinton, *supra* note 194 (“That’s why in this year’s report, we are especially focused on that third P, victim protection. And in these pages, you’ll find a lot of proven practices and innovative approaches to protecting victims. This is a useful and specific guide for governments looking to scale up their own efforts.”).

The TIP Reports have also rightfully included the United States within the ambit of countries analyzed regarding compliance with the TVPA.²³⁷

The United States' role as a global leader in the fight against human trafficking has continued and strengthened throughout the Obama administration, most recently manifested at the Clinton Global Initiative in September of 2012.²³⁸ In addition to rhetorical commitments to the fight against human trafficking at both the Clinton Global Initiative and before the General Assembly,²³⁹ President Obama also released an Executive Order Strengthening the Protections Against Trafficking of Persons in Federal Contracts.²⁴⁰ President Obama discussed the initiation of multiple programs that are designed to create a more comprehensive approach in addressing human trafficking issues.²⁴¹

The Executive Order is a measure that issues sanctions to employers who are engaging in trafficking in their supply chain.²⁴² Specifically, the Executive Order prohibits contractors and subcontractors from engaging in specific trafficking-related activities, applies new compliance measures for contracts requiring work performed abroad that exceeds \$500,000, calls for training to improve agencies' abilities to identify trafficking, and identifies industries that have a history of trafficking and calls for the adoption of safeguards in those areas.²⁴³

The Executive Order accomplishes these tasks by amending the Federal Acquisition Regulation (FAR), which is a set of regulations issued by federal agencies that governs the "acquisition process" of government contracting.²⁴⁴ While the amendments to the FAR do not directly affect private companies, the amendments affect the contractors and subcontractors the government chooses to engage with, which could include private actors.²⁴⁵ While the Executive Order regulates United States government actors, its sanctions have both domestic and international

²³⁷ See U.S. DEP'T OF STATE (2011), *supra* note 217, at 52.

²³⁸ See Barack Obama, President, Remarks at the Clinton Global Initiative Annual Meeting in New York City (Sept. 25, 2012), *available at* <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CPD&browsePath=2012%2F09&isCollapsed=false&leafLevelBrowse=false&isDocumentResults=true&ycord=185>.

²³⁹ *Id.*; Barack Obama, President, Remarks to the United Nations General Assembly in New York City (Sept. 25, 2012), *available at* <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CPD&browsePath=2012%2F09&isCollapsed=false&leafLevelBrowse=false&isDocumentResults=true&ycord=185>.

²⁴⁰ Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012).

²⁴¹ *Id.*

²⁴² *Id.* at 60029–30.

²⁴³ *Id.*

²⁴⁴ 48 C.F.R. § 1.101 (2011). The FAR is the primary document composing the Federal Acquisition Regulations System, which was "established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies." *Id.*

²⁴⁵ See *id.* § 1.102(c).

consequences, as it applies to contractors and subcontractors existing outside the United States.

The specific sanction at issue here is contract termination, which is held to the standard set forth by the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA).²⁴⁶ The Executive Order makes reference to “activities that would justify termination under section 106(g) of the TVPA”²⁴⁷ as the threshold for behavior warranting sanctions. Section 106(g) was added by the TVPRA of 2003, and addresses the “termination of certain grants, contracts, and cooperative agreements.”²⁴⁸ It establishes that:

The President shall ensure that any grant, contract, or cooperative agreement provided or entered into by a Federal department or agency under which funds . . . are to be provided to a private entity, in whole or in part, shall include a condition that authorizes the department or agency to terminate the grant, contract or cooperative agreement, without penalty, if the grantee or any subgrantee, or the contractor or any subcontractor (i) engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract or cooperative agreement is in effect, or (ii) uses forced labor in the performance of the grant, contract, or cooperative agreement.²⁴⁹

The Executive Order essentially enforces this section of the TVPRA by amending the FAR. Specifically, the Executive Order requires contracting officers to notify officials if they become aware of “activities that would justify termination under § 106(g)” or under “any other applicable law or regulation establishing restrictions on trafficking in persons,” and then requires the agency responsible to “consider whether suspension or debarment is necessary in order to protect the Government’s interest.”²⁵⁰ While the latter portion of the Executive Order introduces an element of discretion, the required notice of trafficking activity holds potential for progress by bringing the problem of trafficking to light.

Other sections of the Executive Order require that an awareness program is created to inform employees about the policy of ensuring that employees themselves do not engage in trafficking of persons or related activities, and establish actions to allow employees to report instances of trafficking related activity.²⁵¹ The reporting process is also anchored to the TVPRA § 106(g) language, and allows employees to report, without retaliation, actions that would justify termination under that provision, in

²⁴⁶ TVPRA 2003 § 3(g) (amending § 106 of the TVPA of 2000).

²⁴⁷ Executive Order at § 2(1)(C), § (2)(A)(ii), § (2)(B)(i).

²⁴⁸ TVPRA 2003 § 3(g) (amending § 106 of the TVPA of 2000).

²⁴⁹ *Id.* at § 106(g)(1) (amending § 106 of the TVPA of 2000).

²⁵⁰ Exec. Order No. 13627, 77 Fed. Reg. at 60030 (Sept. 25, 2012).

²⁵¹ *Id.* at 60031.

addition to violations of “any other applicable law or regulation establishing restrictions on trafficking in persons.”²⁵²

The Executive Order seeks not only to establish reporting procedures but also monitoring procedures. These are designed to “prevent subcontractors at any tier from engaging in trafficking . . . and to monitor, detect, and terminate any subcontractors or subcontractor employees that have engaged in such activities.”²⁵³ The Executive Order requires that by September of 2013 the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons shall “jointly establish a process for evaluating and identifying, for Federal contracts and subcontracts performed substantially within the United States, whether there are industries or sectors with a history (or where there is current evidence) of trafficking related or forced labor activities described” in § 106(g) and that “safeguards, guidance and compliance assistance” will be adopted in these areas.²⁵⁴

The Executive Order also establishes training of federal employees and the inclusion of internal controls and oversight procedures to “investigate, manage, and mitigate” trafficking violations in these contracts.²⁵⁵ The Order effectively seeks to bring situations of trafficking to light throughout the supply chain where the United States federal government is involved, and establishes procedures for safeguards to protect particularly vulnerable sectors. The safeguards implemented are designed to “increase stability, productivity, and certainty in Federal contracting”²⁵⁶ and hold the potential for long term efficiency in addition to protecting human dignity.

The potentially problematic distinction between trafficking-related activities and forced labor appears in the Executive Order. By mentioning forced labor in the discussion of policy, the Executive Order defines trafficking as “sex trafficking . . . or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”²⁵⁷ The repetition of “trafficking-related activities and forced labor” throughout the Executive Order is potentially problematic because it theoretically frames labor trafficking as separate from “human trafficking” which has been predominately thought of as sex trafficking. However, the inclusion of forced labor in addition to trafficking-related activities could constitute an attempt by President Obama to include a broader range of activity that might have difficulty meeting the Executive

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 60031–32.

²⁵⁵ *Id.* at 60032.

²⁵⁶ *Id.* at 60029.

²⁵⁷ *Id.*

Order's standard of "subjection to involuntary servitude, peonage, debt bondage, or slavery."²⁵⁸

This Executive Order became effective on September 25, 2012,²⁵⁹ and represents the most recent form of sanctions associated with human trafficking. While there are some inherent differences between the Executive Order and the TIP Reports—mainly that the TIP Reports involve direct funding to nation state governments, and the Executive Order represents funding toward contractors and subcontractors benefitting the economies both of the United States and other nation states—the unilateral sanctions analysis is compelling in both cases. The United States' termination of its contracts for human trafficking essentially forgoes funding into nations through economic channels outside of direct foreign aid. Creating awareness of trafficking existing both in the labor supply chain and by employees who are engaging in trafficking-related activity is essential to finding an effective way to curb trafficking.

While Chuang's four-pronged framework is designed to assess the efficacy of unilateral sanctions against nation state governments,²⁶⁰ the merits of the prongs are useful tools of analysis to determine the potential efficacy of the Executive Order. Contractors and subcontractors are not subjects of international law,²⁶¹ and consequently the commitments required of nation states are distinct from commitments required of employers. As the TIP Report serves as a diplomatic tool to monitor nation states' compliance with U.S. human trafficking legislation, the Executive Order serves as a self-check to eradicate human trafficking from federal contracts. The Executive Order has the consequence of holding contractors and subcontractors both within and outside of the United States accountable to the domestic standards set forth by the United States. The termination of contracts has the sanction effect of eliminating United States funding on the project that the contractor or subcontractor was originally hired to perform. The United States is the "largest single purchaser of goods and services in the world"²⁶² and appears to be harnessing its potential to influence actors within the economic market to make socially responsible decisions.

First, the Executive Order applies to subcontractors and contractors both within and outside of the United States, and in this respect holds a mutual obligation upon both companies within the United States and companies operating outside of the United States. The Executive Order varies from the TIP Reports in the sense that the crux of the obligation is on the United States federal government to ensure that the appropriate agencies act in compliance with the Executive Order to impose sanctions

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ See *supra* notes 233–34 and accompanying text.

²⁶¹ Only states are subjects of international law.

²⁶² Exec. Order No. 13627, 77 Fed. Reg. at 60029.

when trafficking problems become exposed. The Executive Order is structured in such a way that the sanctions (terminating of the contract) are imposed to “promote rights that are mutually binding,”²⁶³ on both the United States and foreign contractors and subcontractors.²⁶⁴

Second, the rights laid out in the Executive Order address international standards encapsulated within the Palermo Protocol. The Protocol requires that States Parties take actions to “adopt or strengthen legislative or other measures . . . including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons . . . that leads to trafficking.”²⁶⁵ By creating measures to help monitor that the United States government is not contributing to the demand for labor trafficking in the supply chain, the United States is moving toward its commitment to this section of the Palermo Protocol. While the effect that the Executive Order has on other nations is indirect, it presents a modified multilateral approach, because the consequences affect companies that contribute to the economies of other nation states.

Chuang’s third prong of effectiveness for unilateral sanctions is that “the documentation and condemnation of violations should be as even-handed as possible.”²⁶⁶ The extent of this effect has yet to be seen, as the consequences of the Executive Order are still in their infancy. The fourth and final prong states that “the sanctions regime should be structured to permit and encourage broad participation of a variety of transnational actors, including, among others, nongovernmental organizations, private enterprises, and intergovernmental organizations.”²⁶⁷ In regulating the United States’ federal agency response to human trafficking along the supply chain, the Executive Order indirectly engages private enterprises.

Applying Chuang’s framework to the Executive Order, it appears that these unilateral sanctions of contractors and subcontractors hold the potential to be effective in the fight against human trafficking. In combination with the TIP Reports, the United States is using its international clout to hold nations and employers within nations accountable to anti-human trafficking standards.

In addition to these instruments, President Obama has called for human trafficking training and guidance for federal prosecutors, law enforcement officials, immigration judges, and other professionals so that they may be “better equipped to detect trafficking wherever it exists, and to help ensure that victims are always treated as victims and not

²⁶³ Chuang, *supra* note 95, at 464.

²⁶⁴ *Id.* (listing “promot[ing] rights that are mutually binding on the United States and the target state”); *see* Exec. Order No. 13627, 77 Fed. Reg. at 60032 (Sept. 25, 2012).

²⁶⁵ Palermo Protocol, *supra* note 2, art. 9(5).

²⁶⁶ Chuang, *supra* note 95, at 462.

²⁶⁷ *Id.* at 464.

criminals.”²⁶⁸ The inclusion of these measures to help with the identification of victims is an important step toward securing and prioritizing their protection. President Obama has also called for increased resources for victims of human trafficking, and the development of the “first-ever federal strategic action plan” to strengthen services for victims.²⁶⁹ The Obama Administration has sought to “augment the work of business, non-profits, educational institutions and foundations to combat trafficking,”²⁷⁰ and this comprehensive approach is necessary to glean a more in-depth understanding of the problem and, from there, how it can be alleviated.

V. CONCLUSION

Before the adoption of the [Palermo] Protocol more than ten years ago, several countries did not have any legislation addressing trafficking in persons The situation has changed dramatically over the last ten years.

*2012 UNODC Report*²⁷¹

The international community has come a long way since the adoption of the Palermo Protocol and the TVPA in 2000. There is no doubt that these instruments have increased awareness surrounding the problem of human trafficking and have given the international community standards by which nations may more effectively address this crime. Although the Palermo Protocol is rooted in the criminal law framework and prioritizes prosecution above attention to victims’ human rights, it has resulted in the implementation of mechanisms that hold perpetrators accountable for their actions. The Palermo Protocol has

²⁶⁸ *Fact Sheet: the Obama Administration Announces Efforts to Combat Human Trafficking at Home and Abroad*, WHITE HOUSE (Sept. 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/fact-sheet-obama-administration-announces-efforts-combat-human-trafficki>.

²⁶⁹ *Id.*

²⁷⁰ *Id.* The creation of the Global Business Coalition Against Trafficking is a “business-to-business network that will mobilize its members to fight trafficking.” The U.S. Travel Association is compiling an anti-trafficking “toolkit” to create awareness within the travel and tourism industry. The Counter-Trafficking in Persons Campus Challenge will “raise awareness and inspire activism among college students” and “develop innovative technology approaches to combatting human trafficking.” The John Hopkins University Bloomberg School of Public Health is engaging in a “cross-disciplinary research partnership with the Goldman Sachs Foundation and the Advisory Council on Child Trafficking which [focuses] on the prevention of trafficking and treatment for survivors.” The Made in a Free World initiative “help[s] buyers and suppliers identify and eliminate supply chain vulnerabilities.” The President’s Advisory Council on Faith-Based and Neighborhood Partnerships will “identify opportunities to expand partnerships with faith and community-based groups.” The White House Office of Science and Technology Policy and Council on Women and Girls are joining advocates, law enforcement leaders, technology companies and researchers to increase and foster innovative information sharing techniques among law enforcement and victims. *Id.*

²⁷¹ 2012 REPORT, *supra* note 1, at 82.

encouraged global criminalization of trafficking, which sends a message to the international community that trafficking violates human rights and will not be tolerated. Our globalized world is increasingly focused on human rights, and bringing attention to the problem of trafficking and providing guidelines for addressing it increases the likelihood that victims' needs will be met.

Despite this movement forward, there is substantial room for improvement in both the Palermo Protocol and the TVPA. While both instruments address prosecution of traffickers and protection of victims, they are similarly constrained within the "perfect victim" model and consequently fail to accord human rights to a substantial number of victims that fall outside the scope of the model. The vindication of human rights depends upon being recognized as a victim, and the slanted perspective applied to victim identification has prevented a grave number of victims from escaping their traffickers, let alone attaining justice. The human rights protections that the Palermo Protocol and the TVPA do afford to victims are undercut by this restricted construction of victim identity, which not only hinders victims' ability to be protected but also misallocates resources. In cases where the victim is properly identified, his or her human rights remain more or less contingent upon their willingness to cooperate with law enforcement.

Due to the Palermo Protocol's lack of a proper enforcement mechanism, the TVPA has become a standard by which the United States holds other nations fiscally accountable for their actions. While the TVPA attempts to supplement the Palermo Protocol's lack of enforcement, the identification and imbalanced priorities present within the TVPA perpetuate the same problems existent within the Palermo Protocol. The United States envisions itself as a global leader in the fight against human trafficking,²⁷² and yet does not take on this leadership role in a way to resolve many of the identification and prioritization flaws within the Palermo Protocol, but rather fiscally enforces this flawed approach both nationally and on a global scale. While the TVPA may provide human trafficking standards with the "teeth" that the Protocol lacks, it is important that the standards the international community is being held to are those that encourage comprehensive solutions.

Ultimately, the Palermo Protocol and the TVPA do not live up to their alleged victim-centered approach. With new initiatives coming forward, the strengthening of measures to properly identify victims, and then prioritize their protection is essential. In terms of identifying victims, the focus on protecting one category of victims cannot be done at the expense of another. The imbalance and identification concerns

²⁷² Proclamation No. 8924, 78 Fed. Reg. 1123 (Jan. 7, 2013) (to be codified as 3 C.F.R. pt. 100-102) ("Our commitment to stopping human trafficking does not end at our borders. As a leader in the global movement to combat this scourge, the United States has renewed sanctions on governments that harbor the worst offenders.").

present within the Palermo Protocol cannot continue to be perpetuated on the international and national levels if progress is going to be made in eradicating human trafficking.

As the United States and the global community move forward in efforts to combat human trafficking it is important to acknowledge and address these deficiencies within the Palermo Protocol. The 2012 Report focused on analyzing current flows of trafficking,²⁷³ which is a positive step toward understanding the gravity of human trafficking and identity of victims. President Obama's speech and Executive Order drew attention to the problem of trafficking, particularly the coexistence of internationally trafficked victims and domestically trafficked victims within the United States.²⁷⁴ Continued collaboration among and within nation states is essential to closing the identification awareness gap and acknowledging various types of victims. Effective implementation must deviate from the prosecutorial framework within which the issue of trafficking is situated, hold nations accountable, and create a more multi-faceted and victim-centered approach that truly protects all victims, regardless of gender and birthplace.

²⁷³ 2012 REPORT, *supra* note 1, at 1.

²⁷⁴ See Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012); Obama, *supra* note 238.