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## The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking

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# THE UNITED STATES AS GLOBAL SHERIFF: USING UNILATERAL SANCTIONS TO COMBAT HUMAN TRAFFICKING

*Janie Chuang\**

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Once an issue relegated to the margins of international human rights discourse, human trafficking has rapidly become a mainstream political concern, both internationally and domestically. Defined roughly as the recruitment or movement of persons by means of coercion or deception into exploitative labor or slavery-like practices, trafficking is an international crime and human rights violation. According to the International Labour Organization, approximately 2.5 million people are trafficked within and across borders at any point in time, generating an estimated \$32 billion in profits for organized crime.<sup>1</sup> As the global economy impels more and more people to migrate under circumstances rendering them vulnerable to traffickers, governments worldwide have hastened to pass laws and initiatives to combat the problem. In the midst of this rapidly changing legal environment, the United States has emerged as a dominant force, with the political and financial wherewithal to influence how other countries respond to the problem of human trafficking.

In 2000 the United Nations Member States finalized a new international law on trafficking—the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol or Protocol).<sup>2</sup> The Palermo Protocol reflects a fragile international consensus, born from hard-wrought compromise on complex and highly contested issues over legal definitions and frameworks for addressing this transnational problem. The drafting sessions quickly became a forum for heated debates over global anti-trafficking policy, including whether the international legal definition of trafficking should encompass “voluntary” prostitution, and how to balance states’ concerns over irregular migration and criminal activity against their obligations to protect trafficked persons’ human rights. Emblematic of the priority placed on fostering international cooperation to combat this growing

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1. Int’l Labour Office (Geneva), *Report of the Director General: A Global Alliance Against Forced Labour: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 46, 55, International Labour Conference, 93rd Sess., Report I(B) (2005) [hereinafter *ILO Global Report*]. The United States estimates that 600,000–800,000 persons are trafficked across international borders each year, 14,500–17,500 of whom are trafficked into the United States. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (2005) [hereinafter *2005 TIP REPORT*]. It is important to note, however, that due to the clandestine nature of trafficking, it is exceedingly difficult to arrive at an accurate number of people trafficked. The value of reported statistics is often undermined by differences in methodology for data collection. See, e.g., DEP’T OF JUSTICE, *ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 7, 9* (2004) [hereinafter *DOJ 2004 ASSESSMENT*] (attributing the difference between the current estimate of 14,500–17,000 people trafficked into the United States and the 45,000–50,000 estimate reported in 1997 to “improvements in data collection and methodology rather than trends in trafficking”).

2. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383 (Nov. 15, 2000) [hereinafter *Palermo Protocol*].

problem, states ultimately agreed to leave resolution of the more contested issues to individual state discretion.

Just weeks before the UN General Assembly adopted the Palermo Protocol, however, the United States promulgated its own comprehensive domestic anti-trafficking legislation—the Trafficking Victims Protection Act of 2000 (TVPA).<sup>3</sup> The TVPA is one of the most comprehensive pieces of domestic anti-trafficking legislation in the world. Identifying trafficking as “an evil requiring concerted and vigorous action by countries of origin, transit, or destination,”<sup>4</sup> the TVPA reaches beyond U.S. borders to affect anti-trafficking policy abroad. Specifically, it establishes a sanctions regime authorizing the President to withdraw U.S. (and certain multilateral) non-trade-related, non-humanitarian financial assistance from countries deemed not sufficiently compliant with the U.S. government’s “minimum standards for the elimination of trafficking.”<sup>5</sup>

In assuming such extraterritorial reach, the United States has proclaimed itself global sheriff on trafficking. This raises grave concerns both as a matter of international law and as a matter of global anti-trafficking strategy. A powerful but blunt weapon for influencing the behavior of other states, unilateral sanctions have long been criticized as inconsistent with international law and ineffective in practice. The TVPA sanctions regime invites more of the same criticism. By injecting U.S. norms into the international arena, the sanctions regime risks undermining the fragile international cooperation framework created by the Palermo Protocol. The sanctions threat arguably elevates U.S. norms over international norms by giving the former the teeth the latter so often lack. In doing so, the sanctions regime presents a ready opportunity for the United States to impose—by the threat of sanctions—its own anti-trafficking paradigm on other states.

In practice, the sanctions regime has inspired many governments to develop domestic laws and policies to combat trafficking. But whether these actions contribute positively to the global fight against trafficking should not be assumed. The “minimum standards” by which the United States evaluates country performance are poorly articulated and inconsistently applied. Moreover, the legal norms the United States encourages other governments to adopt employ selective (and sometimes misleading)

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3. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 § 2A, 114 Stat. 1464 (2000) [hereinafter TVPA], as supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 [hereinafter 2003 TVPRA], and the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) [hereinafter 2005 TVPRA] (codified at 22 U.S.C. § 7101).

4. TVPA, *supra* note 3, at § 101(b)(21).

5. *Id.* § 108(a).

references to the Palermo Protocol norms, inviting the oft-repeated criticism of U.S. unilateralism for exporting U.S. domestic standards under the guise of universally applicable international norms. With many controversial issues still being actively debated, and much yet to be understood about this complex problem, efforts to assess and guide global anti-trafficking practices through the single lens of U.S. experience risk misfire.

Still in its infancy, the TVPA sanctions regime's long-term implications remain to be seen. The results so far, however, provide a fruitful basis for critique with an eye toward achieving consistency with the international legal framework established under the Palermo Protocol. Such an assessment is both timely and necessary, especially given the United States' recent ratification of the Protocol.<sup>6</sup> This Article aims to develop and apply this analysis.

By situating the U.S. rise to dominance in historical and political context, this Article underscores the significance of U.S. unilateralism for international anti-trafficking law and policy. Part I provides an overview of the political history of the Palermo Protocol and the TVPA, focusing on policy debates that continue to plague international efforts to coordinate and implement domestic legal responses to human trafficking. Part II examines the resort to unilateralism, and critiques thereof, as a matter of international law, and sets out a critical framework for assessing the trafficking sanctions regime. In conducting this inquiry, this Article adopts, for sake of argument, Professor Sarah Cleveland's optimistic view that, when crafted in accordance with international norms, sanctions can affirmatively contribute to the international system by promoting domestic internalization of such norms.<sup>7</sup> Having established context and methodology, Part III applies this critique to the TVPA sanctions regime to identify the areas where it falls short of compliance with the evolving international legal framework on trafficking. The Article then draws on this analysis to conclude with a modest proposal for transforming the sanctions regime into a more effective tool to combat human trafficking.

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6. The United States became an official party to the Palermo Protocol on December 3, 2005. Press Release, U.S. Dep't of State, *See United States Becomes Party to Anti-Trafficking Protocol: Marks Slavery Abolition Day* (Dec. 1, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/57532.htm> (last visited Mar. 14, 2006). In its ratification, the United States reserved the right to limit application of certain provisions of the Crime Convention and Palermo Protocol to a manner consistent with already existing federal law. In view of its reservations, the United States declared that it would not enact new legislation to fulfill its obligations under the Protocol. 151 CONG. REC. S11334-11335 (daily ed. Oct. 7, 2005).

7. See Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 31 (2001).

## I. COMPETING RESPONSES TO THE PROBLEM OF HUMAN TRAFFICKING

Although international law has recognized the problem of human trafficking since the early 1900s,<sup>8</sup> for most of the twentieth century trafficking was considered a private-sphere issue primarily concerning women, and thus relegated to the margins of the international human rights system.<sup>9</sup> Beginning in the early 1990s, however, the rise of the women's rights movement drew attention to the problem of trafficking.<sup>10</sup> At the same time, the marked increase in labor migration and the role of transnational organized crime syndicates in the clandestine movement of people caught the attention of governments. Increasing poverty and inequality in many parts of the world forced more and more people, especially from the global South, to migrate abroad for survival.<sup>11</sup> "Fishing in the stream of migration," transnational criminal syndicates found an abundant supply of a new commodity to be traded for profit: human labor.<sup>12</sup> The result was increased trafficking of men, women, and children for sexual and non-sexual purposes, including exploitative factory labor,

8. For a discussion of the early anti-trafficking treaties, see Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution; Making it Live Up to its Potential*, 10 HARV. HUM. RTS. J. 213, 216–20 (1997). Professor Farrior describes how these early instruments were crafted in response to concerns that white European women were being lured abroad for prostitution, a phenomenon which came to be known as "white slave traffic."

9. Activity in this area mainly consisted of low-profile reports from the UN Working Group on Contemporary Forms of Slavery. ANNE GALLAGHER, HUMAN TRAFFICKING: INTERNATIONAL LAW AND INTERNATIONAL RESPONSIBILITY § 1.1.2 (forthcoming 2006).

10. Human Rights Watch reports on trafficking from Burma to Thailand, and from Nepal to India, highlighted the link between trafficking and gender-based human rights violations. See ASIA WATCH & THE WOMEN'S RIGHTS PROJECT OF HUMAN RIGHTS WATCH, A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND (1993); HUMAN RIGHTS WATCH/ASIA, RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIAN BROTHELS (1995). The work of the newly-appointed UN Special Rapporteur on Violence Against Women—Radhika Coomaraswamy—focused attention on the roots of the problem, demonstrating how the absence of viable economic opportunities, the inequitable distribution of wealth among and within countries, and the continued and increasing social and economic marginalization of women in many communities rendered women particularly vulnerable to traffickers' deceptive promises of better opportunities abroad. Special Rapporteur on Violence Against Women, its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, On Trafficking in Women, Women's Migration and Violence Against Women*, ¶ 4, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, U.N. ESCOR Comm'n on Hum. Rts., 56th Sess., Agenda Item 12(a), U.N. Doc. E/CN.4/2000/68 (2000) [hereinafter *Special Rapporteur 2000 Report*].

11. *Id.*

12. See MIKE KAYE, THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS' HUMAN RIGHTS (2003).

domestic work, agricultural labor, and other forced labor and slavery-like practices.<sup>13</sup>

The then-existing international law on trafficking—the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention)—addressed trafficking only for sexual purposes,<sup>14</sup> however, rather than its broader, modern manifestations. Moreover, governments worldwide were finding that their domestic legal frameworks were similarly ill-equipped to prosecute traffickers and to provide appropriate protections and remedies to trafficked persons. It thus was increasingly clear that a new international legal framework was necessary to coordinate a global response to this transnational problem.

#### A. *The International Response: A Fragile Consensus in Vienna*

The international community seized the opportunity to address trafficking as a matter of international criminal law through a trafficking-specific protocol to the UN Convention Against Transnational Organized Crime<sup>15</sup> (Crime Convention). Drafted by the UN Commission for Crime Prevention and Criminal Justice, the Crime Convention was the first international treaty to deal with transnational organized crime.<sup>16</sup> The United States introduced the first draft of the trafficking protocol in January 1999 and, less than two years later, the General Assembly adopted the Palermo Protocol.<sup>17</sup> Reflecting the international community's strong commitment to the issue, the Protocol garnered enough ratifications to enter into force on December 25, 2003.

The “Vienna process,” as the drafting sessions became known, quickly transformed into a battleground for highly contentious debates. These debates focused on two issues: whether the definition of trafficking should encompass “voluntary” prostitution, and whether trafficking should be approached primarily as a crime and border control issue or as

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13. See, e.g., *U.S. v. Paoletti-Lemus*, No. 97 Cr. 768 (NG) (E.D.N.Y. 1998); *U.S. v. Manasurangkun*, No. 95 Cr. 714(A) (C.D. Cal. 1995).

14. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

15. United Nations Convention Against Transnational Organized Crime, Annex I, art. 25–26, G.A. Res. 25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/25 (2001) [hereinafter *Crime Convention*]. The Convention is referred to as the “parent” agreement, as its principal provisions apply to the three protocols to the Convention—i.e., trafficking, migrant smuggling, and firearms. States must ratify the Convention before ratifying any of the Protocols. See Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 *HUM. RTS. Q.* 975, 979 (2001).

16. For an excellent discussion of the development of the Crime Convention and its smuggling and trafficking protocols, see Gallagher, *supra* note 15.

17. Palermo Protocol, *supra* note 2.

a matter of states' obligations under international law to safeguard trafficked persons' human rights.<sup>18</sup> These debates are worth spotlighting because they underscore the complexity and divisiveness of the issue of trafficking. Controversy over these issues continues to impede collaborative efforts among governments and anti-trafficking advocates to effectuate a coordinated legal response.

### 1. The Definition of Trafficking

Going into the Vienna process, it was obvious that crafting a new international legal definition of trafficking would pose numerous problems. "Trafficking" is an umbrella term encompassing multiple acts that together can be viewed as a process with different phases: (1) the recruitment or transport of persons; (2) through some form of fraud, force, or coercion; (3) for an exploitative end purpose. Because each phase may involve a variety of different acts—the exploitative purpose might be forced prostitution, agricultural work, or domestic work, among other outcomes—constructing a trafficking definition requires deliberate choices as to what types of actions should fall under its umbrella. Complicating these choices is the possibility that the component acts might themselves trigger other legal regimes—immigration and criminal law, for example.<sup>19</sup>

As complex as these issues are from a conceptual and legal perspective, they are exponentially more difficult to resolve from a policy standpoint. Regrettably, the trafficking field has become embroiled in broader debates over prostitution reform. On one side of the divide are the "abolitionists," who believe that all prostitution is inherently exploitative and degrading to women. Abolitionists recognize no distinction between "forced" and "voluntary" prostitution and believe that the failure of states to prohibit all prostitution violates women's right to sexual autonomy. On the other side are those who believe that women can choose sex work as a viable livelihood option because it is the absence of adequate protections for sex workers—not the sex industry itself—that opens the door to trafficking and other abuses. Under this

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18. See BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, *TRAFFICKING—A DEMAND LED PROBLEM?* 16–18 (2002).

19. For further discussion of the nuances of the definitional debate, see *id.* See also Gallagher, *supra* note 15, at 984–86; Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 74–78 (1998); Alison N. Stewart, *Report From the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective*, 20 WOMEN'S RTS. L. REP. 11 (1998).



view, state action to penalize adults choosing to engage in prostitution amounts to a denial of individual liberty.<sup>20</sup>

Not surprisingly, negotiations over the trafficking definition during the Vienna process were highly factionalized.<sup>21</sup> One group of states, adopting the abolitionist perspective, viewed any distinction between forced and voluntary prostitution as morally unacceptable. They opposed any definition of trafficking that would include a coercion requirement and argued that the definition should encompass all migration for sex work.<sup>22</sup> Another group of states, supported by the UN human rights agency,<sup>23</sup> took the position that including non-coerced migration for sex work would make the trafficking definition overbroad and divert scarce resources away from the real problem.<sup>24</sup>

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20. For an in-depth discussion of these debates, see GALLAGHER, *supra* note 9, at § 1.1.4; Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. J. INT'L. L.J. 473 (2003); ANDERSON & O'CONNELL DAVIDSON, *supra* note 18, at 16; Chuang, *supra* note 19, at 80–96.

21. For a detailed description of these negotiations, see Gallagher, *supra* note 15, at 984–88. See also Gabrielle Simm, *Negotiating the United Nations Trafficking Protocol: Feminist Debates*, 23 AUSTL. Y.B. INT'L. L. 135 (2004); Abramson, *supra* note 20, at 483–92.

22. See COALITION AGAINST TRAFFICKING IN WOMEN, GUIDE TO THE NEW U.N. TRAFFICKING PROTOCOL (2001) [hereinafter CATW GUIDE].

23. See U.N. Special Rapporteur on Violence Against Women, *Position Paper on the Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Submitted to The Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, U.N. Doc. A/AC.254/CRP.13 (May 20, 1999) [hereinafter *Coomaraswamy Position Paper*]; U.N. High Commissioner for Human Rights, *Informal Note by the U.N. High Commissioner for Human Rights, Mary Robinson, delivered to the Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, U.N. Doc. A/AC.254/16 (June 1, 1999) [hereinafter *OHCHR Statement*]. Significantly, opponents of the abolitionist position in Vienna were not necessarily “pro-prostitution.” There were pragmatic legal reasons for limiting the trafficking definition, irrespective of the merits of prostitution or sex work—e.g., maintaining the distinction between smuggling and trafficking. Many advocates who oppose the abolitionist position are conflicted over the prostitution issue—that is, reluctant to assume away a woman’s agency to choose prostitution as a livelihood option but also concerned that the exploitative conditions pervading the sex industry perpetuate violations of women’s human rights.

24. *OHCHR Statement*, *supra* note 23; INTERNATIONAL HUMAN RIGHTS LAW GROUP, THE ANNOTATED GUIDE TO THE COMPLETE U.N. TRAFFICKING PROTOCOL (Aug. 2002). The United States initially led the move to exclude non-coerced sex work from the trafficking definition, and despite intense domestic pressure, it ultimately held its position on the issue. As Anne Gallagher notes, the U.S. position in Vienna quickly drew fire on U.S. soil from abolitionist feminists, as well as conservative and religious groups, who used the prostitution issue against the Clinton administration in election year political battles. These groups targeted as “pro-prostitution” First Lady Hilary Clinton, the titular head of the President’s Inter-Agency Council on Women, which oversaw the Administration’s domestic and international anti-trafficking policy. See Gallagher, *supra* note 15, at 985 n.63, citing William J. Bennett & Charles W. Colson, *The Clintons Shrug at Sex Trafficking*, WALL ST. J., Jan. 10, 2000, at A26; Philip Shenon, *Feminist Coalition Protests US Stance on Sex Trafficking Treaty*, N.Y. TIMES, Jan. 12, 2000, at A5; Hanna Rosin & Steve Mufson, *Bitter Issues in Crime Treaty Debate: What is Prostitution?*, WASH. POST, Jan. 15, 2000, at A2.

After protracted debate, the states agreed on the following definition of trafficking in persons:

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

(b) the consent of a victim of trafficking to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth in subparagraph (a) have been used.<sup>25</sup>

Significantly, the fact that subparagraph (b) describes “consent” as “irrelevant” does not bring consensual migration within the definition of trafficking.<sup>26</sup> Rather, it serves to prevent traffickers from using victims’ “consent” as a defense to the crime.<sup>27</sup> Equally important, states intentionally left “exploitation of prostitution of others” and “other forms of sexual exploitation” undefined, opting for the legal treatment of prostitution to be addressed on a state-by-state basis:

The travaux préparatoires should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol, which is therefore *without prejudice to how States Parties address prostitution in their domestic laws*.<sup>28</sup>

By excluding consensual migration for prostitution from the trafficking definition, the states preserved the integrity of the distinction

25. Palermo Protocol, *supra* note 2, art. 3.

26. Note, however, that the abolitionist lobby has seized upon the language concerning the irrelevance of consent in subparagraph (b) as indicative of the Palermo Protocol’s adoption of an abolitionist position on prostitution. *See, e.g.*, CATW GUIDE, *supra* note 22, at 4. The negotiating history of the Palermo Protocol belies this claim. *See infra* note 28.

27. Gallagher, *supra* note 15, at 985.

28. Interpretative Notes for the Official Records (*travaux préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, ¶ 64, U.N. Doc. A/55/383/Add.1 [hereinafter UN Interpretive Notes] (emphasis added).

between migrant smuggling and trafficking.<sup>29</sup> That states were able to overcome their deep differences over the legal treatment of prostitution signified the high priority they placed on achieving consensus on a new international anti-trafficking legal framework.

## 2. Criminal Justice vs. Human Rights

Another policy debate during the Vienna process concerned the tension between states' desire to combat trafficking as a crime and border control issue and their obligation to uphold international human rights law. Throughout the late 1980s and 1990s, advocacy organizations worked to draw attention to trafficking as a human rights problem. Reports by Human Rights Watch and the UN Special Rapporteur on Violence Against Women showed that unequal access to education and employment opportunities, among other factors, fed the feminization of poverty and migration and increased women's vulnerability to traffickers.<sup>30</sup> These reports also demonstrated that the failure to protect trafficked persons' human rights led to further victimization of the trafficked and, in some circumstances, re-trafficking.

Notwithstanding efforts to frame trafficking as a human rights problem, it was concern over the crime and immigration elements of trafficking that ultimately motivated governments to develop a new international legal framework. Many in the human rights community were deeply disappointed that the first international legal instrument on trafficking in a half-century would be drafted by the UN Crime Commission rather than the UN Commission on Human Rights.<sup>31</sup> Advocates feared that employing a criminal justice framework would provide a politically convenient means for governments to justify restrictions on immigration under the guise of protecting trafficked persons.<sup>32</sup> In their view, restrictive migration policies would drive labor migration further underground and actually fuel trafficking.<sup>33</sup> Human rights advocates therefore faced the difficult task of injecting a human rights perspective into a crime

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29. Gallagher, *supra* note 15, at 986 (discussing states' agreement to sacrifice their own views on prostitution to achieve the greater goal of enforcing the distinction between trafficking and migrant smuggling).

30. See *Special Rapporteur 2000 Report*, *supra* note 10, at ¶¶ 54-60; COOMARASWAMY *Position Paper*, *supra* note 23; HUMAN RIGHTS WATCH/ASIA, *supra* note 10.

31. Some attributed the "hijacking" of the trafficking issue by the crime control perspective to the failure of human rights advocates to reach a consensus on a workable definition of trafficking. ANDERSON & O'CONNELL DAVIDSON, *supra* note 18, at 15.

32. See, e.g., Radhika Coomaraswamy, Special Rapporteur on Violence against Women, Keynote Speech at the NGO Consultation with UN/IGOs on Trafficking in Persons, Prostitution and the Global Sex Industry, Geneva, Switzerland (June 21, 1999).

33. See ANDERSON & O'CONNELL DAVIDSON, *supra* note 18, at 15 (citing International Labour Organization policy); KAYE, *supra* note 12, at 24.

control instrument drafted by crime and migration control officers and diplomats unused to human rights advocates in their arena.<sup>34</sup>

During the Vienna process, human rights advocates sought to convince states that human rights protections were integral to their ultimate crime and border control objectives.<sup>35</sup> It was easy to demonstrate that effective prevention and eradication of trafficking is inextricably linked to the protection of trafficked persons' human rights. Advocates and prosecutors alike recognized that successful prosecutions depend on trafficked persons' meaningful cooperation, which in turn requires assurances that their human rights will be protected. Otherwise, the risk of deportation and reprisals by traffickers combined with an inherent distrust of law enforcement officials (often complicit in the trafficking) would deter trafficked persons from reporting abuses and collaborating with prosecutorial efforts.

Human rights advocates also sought to target the root causes of trafficking through broader rights protections. They demonstrated how states' failure to protect women's human rights sustains trafficking in women—whether through the denial of economic rights equal to those available to men, or through inadequate redress for violations of women's human rights.<sup>36</sup> Advocates thus emphasized states' obligations under international human rights law to act with due diligence to prevent, investigate, punish, and protect against human rights violations, whether perpetrated by the state or by private actors.<sup>37</sup>

Ultimately, however, human rights protections received relatively little attention during the negotiations, largely due to the inordinate amount of time spent debating how trafficking should be defined. Although human rights advocates managed to convince states to include a savings clause requiring the Protocol to be interpreted consistently with states' obligations under international law (including international humanitarian, human rights, and refugee law),<sup>38</sup> they were unable to persuade states to include important trafficking-specific human rights protections. For instance, states refused to include a provision granting trafficked

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34. To its credit, recognizing the human rights implications of its work, the UN Crime Commission solicited the official participation of the UN human rights agency, and permitted interventions from non-governmental organizations. See *OHCHR Statement*, *supra* note 23; *Coomaraswamy Position Paper*, *supra* note 23.

35. GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN ET AL., HUMAN RIGHTS STANDARDS FOR TREATMENT OF TRAFFICKED PERSONS (1999), available at <http://www.globalrights.org/site/DocServer/IHRLG TraffickingStandards.pdf?docID=204> (last visited Mar. 14, 2006).

36. *Special Rapporteur 2000 Report*, *supra* note 10, ¶ 35; *OHCHR Statement*, *supra* note 23.

37. See *Special Rapporteur 2000 Report*, *supra* note 10, ¶¶ 51–53 (discussing due diligence standard under international law).

38. Palermo Protocol, *supra* note 2, art. 14.

persons protections against prosecution for status-related offenses such as illegal migration, undocumented work, and prostitution—likely due to concerns over the “unwarranted use of the ‘trafficking defense’ and a resulting weakening of states’ ability to control both prostitution and migration flows through the application of criminal sanctions.”<sup>39</sup> To the extent the Palermo Protocol obliges states parties to provide assistance and protection to trafficked persons, it is mostly couched in aspirational terms rather than as a matter of hard obligation. Thus, “in appropriate cases and to the extent possible under its domestic law,” states parties are to *consider* implementing measures providing for trafficked persons’ physical and psychological recovery and to *endeavor* to provide for their physical safety, among other goals.<sup>40</sup>

Notwithstanding the short shrift given to human rights, the Palermo Protocol drafters succeeded in establishing an international crime control cooperation framework to coordinate a transnational response to this complex, global problem. Together with the Crime Convention, the Palermo Protocol establishes concrete measures to improve communication and cooperation between national law enforcement authorities, engage in mutual legal assistance, facilitate extradition proceedings, and establish bilateral and multilateral joint investigative bodies and techniques.<sup>41</sup> Moreover, recognizing that developing states and economies in transition might not have the capacity to implement these measures, the Convention obliges states parties to cooperate in providing technical and material assistance to these states and establishes a UN funding mechanism to enhance these efforts.<sup>42</sup> Although the prosecutorial aspects of this framework remain a global priority, states parties’ commitment to eradicate trafficking has nonetheless created space for continuing dialogue over the role of strengthened human rights protections as a means to combat trafficking.

### B. *The United States’ Response: U.S. Norms with Global Reach*

The events that prompted the development of a new international law on trafficking had comparable effects in the United States. While high-profile articles in major U.S. media sources fostered greater mainstream awareness of trafficking,<sup>43</sup> social service providers witnessed firsthand the increasing numbers of trafficked persons. At the same time,

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39. Gallagher, *supra* note 15, at 991.

40. See Palermo Protocol, *supra* note 2, arts. 6–8.

41. Crime Convention, *supra* note 15, arts. 27, 28, 18, 16, 19.

42. Crime Convention, *supra* note 15, art. 30.

43. See, e.g., Michael Specter, *Contraband Women—A Special Report: Traffickers’ New Cargo: Naive Slavic Women*, N.Y. TIMES, Jan. 11, 1998, at A11 (discussing how the sale of women was becoming one of the fastest growing criminal enterprises).

U.S. prosecution of a series of high-level trafficking cases during the 1990s demonstrated that the United States was fast becoming, if it was not already, a major destination country for human trafficking.<sup>44</sup>

Eager to address the problem of trafficking, President Clinton issued a Presidential Directive in March 1998 outlining a comprehensive and integrated policy framework to guide the United States' anti-trafficking initiatives both at home and abroad.<sup>45</sup> The directive was organized around what is often referred to as "the three P's": (1) prevention; (2) protection and assistance for victims; and (3) prosecution of and enforcement against traffickers. To effectuate these goals internationally, the Clinton Administration positioned itself at the forefront of global efforts to combat trafficking. It established bilateral working relationships and anti-trafficking initiatives with numerous countries,<sup>46</sup> and spearheaded drafting of the Palermo Protocol. Meanwhile, the task of drafting U.S. domestic anti-trafficking legislation fell to the Republican-controlled Congress, which had a different view of the United States' role in global anti-trafficking efforts. While the Clinton Administration remained committed to developing an international cooperation framework in Vienna, back home Congress sought to induce international compliance with "U.S. minimum standards" by threat of unilateral sanctions. By giving U.S.-defined norms global reach, the sanctions regime created a ready means for the U.S. government to reinvent and unilaterally define a set of anti-trafficking standards with international purchase.

### 1. The U.S. Anti-Trafficking Legislation

After the Clinton Administration unveiled its new anti-trafficking policy, the U.S. Congress introduced and considered a series of anti-trafficking bills.<sup>47</sup> A bill introduced by Representative Christopher Smith

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44. Two cases, in particular—the "El Monte case" and the "Deaf Mexican case"—prompted members of Congress to propose comprehensive anti-trafficking legislation. See Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN'S L. J. 31, 38–39 (2002); *Trafficking of Women and Children: Hearing Before the S. Foreign Relations Comm. Subcomm. on Near Eastern and South Asian Affairs*, 106th Cong. 44–45 (2000) [hereinafter Yeomans testimony and Wellstone comments] (testimony of Bill Yeomans, Chief of Staff, Department of Justice Civil Rights Division and comments of Sen. Paul Wellstone and Sen. Sam Brownback).

45. Memorandum on Steps To Combat Violence Against Women and Trafficking in Women and Girls, PUB. PAPERS 358 (Mar. 11, 1998).

46. *International People Trafficking: Hearing Before the S. Foreign Relations Comm. Subcomm. on Near Eastern and South Asian Affairs*, 106th Cong. (2000) [hereinafter Loy testimony] (Statement of Frank E. Loy, Undersecretary of State for Global Affairs, describing bilateral anti-trafficking initiatives).

47. For a detailed description of the legislative history of U.S. anti-trafficking law, see Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 60–61 (2001).

(R-NJ) ultimately became the legislative centerpiece. On October 28, 2000, President Clinton signed into law the Smith-sponsored Trafficking Victims Protection Act of 2000.<sup>48</sup> Modeled on the Clinton Administration's "three P's" framework, the TVPA includes innovative measures aimed at prosecuting traffickers, preventing trafficking, and protecting trafficked persons.

a. The TVPA's general provisions

Perhaps not surprisingly, the debates that shaped the Vienna process also influenced the U.S. legislation. Like the Palermo Protocol, the TVPA's defined terms reflect a compromise on the prostitution reform issue. For instance, the TVPA includes a separate definition of "sex trafficking": "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."<sup>49</sup> This definition excludes the coercion requirement contained in the Protocol trafficking definition and thus would encompass consensual migrant prostitution. But while the TVPA includes "sex trafficking" as a defined term, it *limits*<sup>50</sup> the application of its operational terms to "severe forms of trafficking in persons"—i.e., trafficking involving force, fraud, or coercion in the inducement of a commercial sex act or other end purpose of the trafficking.<sup>51</sup>

The TVPA enhances the tools available to prosecute traffickers by explicitly criminalizing trafficking and certain trafficking-related acts,<sup>52</sup>

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48. TVPA, *supra* note 3.

49. *Id.* § 103(9).

50. Congressman Chris Smith, among others, has expressed a desire for more substantive application of the "sex trafficking" term. *See, e.g., Implementation of the Trafficking Victims Protection Act: Hearing Before the H. Comm. on Int'l Relations*, 107th Cong. 3–5 (2001) [hereinafter Smith statement] (statement of Representative Christopher H. Smith). The 2005 TVPRA, which President Bush recently signed into law on January 10, 2006, makes inroads in this direction. The 2005 TVPRA aims to reduce demand for commercial sex by requiring, for instance, the Attorney General to conduct "a biennial comprehensive research and statistical review and analysis of sex trafficking and unlawful commercial sex acts in the United States." 2005 TVPRA, *supra* note 3, § 201(a)(1)(a). The 2005 TVPRA also mandates that grant-making by the Department of Health and Human Services give priority to applicants with experience working with persons subjected to sexual abuse or commercial sexual exploitation and establishes grants for state and local law enforcement to investigate, prosecute, and educate persons who purchase commercial sex acts. 2005 TVPRA, *supra* note 3, § 202(b), 204(a)(1)(B).

51. TVPA, *supra* note 3, § 103(8) (emphasis added).

52. These include the crimes of forced labor and document seizure. *See* TVPA, *supra* note 3, § 112(a)(2). The crime of "forced labor" fills a gap in the criminal law by including psychological coercion as an element, thus enabling prosecution of traffickers where force or threat is less obvious. Previously, traffickers were prosecuted for the crime of "involuntary servitude," for which psychological coercion was insufficient to prove the crime. *See* 18 U.S.C. § 1584 (2000). Criminalizing document seizure enables prosecutors to target a com-

and by targeting its immense profitability.<sup>53</sup> In addition, the TVPA transforms into hard obligation victim protections that were merely aspirational in the Palermo Protocol. Recognizing that trafficked persons often cannot return to their home communities—due to social stigma or the risk of reprisals by their traffickers—the TVPA provides the possibility of temporary<sup>54</sup> or even permanent<sup>55</sup> residency status. Such status, however, is contingent upon cooperation with law enforcement in prosecution efforts.<sup>56</sup> The TVPA also makes trafficked persons and certain family members eligible for federal public assistance benefits<sup>57</sup> and affords trafficked persons a private right of action to sue their traffickers.<sup>58</sup> Recognizing that efforts to combat trafficking into the United States require strong prevention measures abroad, the TVPA establishes programs to strengthen other countries' domestic legal responses, efforts to provide economic alternatives to victims, and public awareness campaigns.<sup>59</sup> Measures also penalize complicity and involvement in trafficking by U.S. military personnel, government contractors, and subcontractors (and their dependents) working abroad.<sup>60</sup>

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mon tactic used by traffickers to strip trafficked persons' of their identity and to feed their fears of being detained or deported as undocumented migrants.

53. TVPA, *supra* note 3, § 112(a)(2) (requiring mandatory restitution and forfeiture of criminal proceeds).

54. *Id.* § 107(c)(3) (providing for a "continued presence" to remain in the United States for up to one year to assist in prosecution efforts); *id.* § 107(e) (making available a "T-visa" to remain in the United States for three years, with the possibility of adjusting to lawful permanent residence in certain cases).

55. To qualify, the T-visa holder must demonstrate that he/she has been (1) continually present in the United States for three years, and (2) a person of good moral character; and (3) has complied with reasonable requests to aid investigation and prosecution of the trafficker, or would suffer extreme hardship involving unusual or severe harm upon removal from the United States. TVPA, *supra* note 3, § 107(f).

56. Human rights advocates object to conditioning relief on the victim's cooperation in prosecution efforts. Law enforcement authorities could use the visa as leverage to encourage witness cooperation. This poses problems in terms of impeachment material and risks violating trafficked persons' human rights by exposing them to possible retraumatization and reprisals from the traffickers. ANTI-SLAVERY INT'L, HUMAN TRAFFIC, HUMAN RIGHTS: REDEFINING VICTIM PROTECTION 45 (2002).

57. TVPA, *supra* note 3, § 107(b)(1)(A), (B); 2003 TVPRA, *supra* note 3, § 4(a)(2).

58. 2003 TVPRA, *supra* note 3, § 4(4)(A).

59. See TVPA, *supra* note 3, § 107(a)(1), 106(c); 2003 TVPRA, *supra* note 3, § 3(a)-(e).

60. See 2003 TVPRA, *supra* note 3, § 3(g); 2005 TVPRA, *supra* note 3, § 103. Efforts to address trafficking by peacekeeping personnel were largely motivated by the case of Dyn-Corp International, a U.S. government contractor for police work in Bosnia-Herzegovina, a number of whose employees were involved in the purchasing of women. See H.R. REP. NO. 108-264(I), at 15 (2003) (analysis and discussion of § 3, subsection (b)); HUMAN RIGHTS WATCH, HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION 66 (2002). In 2004, the Department of Defense (DOD) adopted a "zero-tolerance" policy on human trafficking for all international deployments. See Memorandum from Paul Wolfowitz, Deputy Sec'y of Defense, Combating



### b. The TVPA's sanctions regime

The TVPA is perhaps best known for the global reach of its sanctions regime. The TVPA's congressional sponsors believed that efforts to prevent trafficking into the United States depended on *other* countries' efforts to stem trafficking across their borders. The sponsors therefore included a sanctions regime in order to "provid[e] . . . the incentive for [other] governments to cooperate"<sup>61</sup> with U.S. anti-trafficking efforts.<sup>62</sup> Under the sanctions regime, the U.S. government may deny non-humanitarian, non-trade-related foreign assistance to any government not making significant efforts to comply with U.S.-defined "minimum standards for eliminating trafficking" (U.S. minimum standards).<sup>63</sup> Sanctioned governments also face U.S. opposition to non-humanitarian, non-trade-related assistance from international financial institutions and multilateral development banks, such as the International Monetary Fund and the World Bank.<sup>64</sup>

Whether a country is subject to sanctions depends on the extent of its efforts to comply with the U.S. minimum standards. The U.S. State Department conducts assessments of any country with 100 or more trafficked persons per year and reports its findings in an annual report known as the Trafficking in Persons Report (TIP Report). The State Department bases its country assessments on data compiled from a wide range of sources, including U.S. embassies, foreign government officials, international organizations, nongovernmental organizations (NGOs), individuals, and published reports.<sup>65</sup> In applying the U.S. minimum standards, the State Department considers whether the countries are of origin, transit, or destination for trafficking; the extent to which government actors were involved or complicit in the trafficking; and what measures would be reasonable given a government's available resources and capabilities.<sup>66</sup>

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Trafficking in Persons (Jan. 30, 2004); Memorandum from Donald Rumsfeld, Combating Trafficking in Persons (Sept. 16, 2004). Regrettably, the DOD's rhetoric was not followed in practice. See *Implementation of DOD Policy with Regard to Trafficking in Humans: Statement Before the House Armed Serv. Comm. Comm'n on Security and Cooperation in Europe* (Sep. 21, 2004) (statements of Martina E. Vandenberg and Dr. Sarah E. Mendelson).

61. See Wellstone comments, *supra* note 44.

62. The TVPA's primary sponsor, Representative Chris Smith, had successfully included a sanctions regime in the International Religious Freedom Act, 22 U.S.C. § 6445(a) (1998), upon which the TVPA sanctions regime was modeled. For a comprehensive critique of the IRFA sanctions regime, see generally Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: the Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33 (2002).

63. TVPA, *supra* note 3, §§ 110(d)(1), 108(a).

64. *Id.* § 110(d)(1)(B).

65. See 2005 TIP REPORT, *supra* note 1, at 29.

66. TVPA, *supra* note 3, § 110(b)(3).

The TIP Report then ranks countries according to whether they (1) fully comply with the minimum standards (Tier 1); (2) do not yet fully comply but are making significant efforts to do so (Tier 2); or (3) are not making significant efforts to comply (Tier 3).<sup>67</sup> In addition to the three tiers, there is also a “special watch list” of countries requiring special scrutiny during the following year.<sup>68</sup> This list includes countries that have moved up a tier, as well as any Tier 2 countries in which (1) the number of victims of severe forms of trafficking is increasing; (2) there is a failure to provide evidence of increasing efforts to combat trafficking from the previous year; or (3) where the determination that a country fell into Tier 2 was based on the country’s commitments to take additional steps over the year.<sup>69</sup>

The U.S. minimum standards by which countries are assessed are summarized as follows:

- (1) The government should prohibit and punish acts of severe forms of trafficking in persons.
- (2) For sex trafficking involving force, fraud, coercion, or in which the victim is a child, or of trafficking which involves rape, kidnapping or death, the government should prescribe punishment commensurate with that for grave crimes.
- (3) For the knowing commission of any act of a severe form of trafficking, the government should prescribe punishment that is stringent enough to deter and that reflects the heinous nature of the offense.
- (4) The government should make serious and sustained efforts to eliminate severe forms of trafficking in persons.<sup>70</sup>

Assessing criterion (4) involves analyzing a separate set of indicia that address various aspects of the “three P’s.”<sup>71</sup> Regarding a country’s prosecution efforts, factors include whether a government makes vigorous efforts (in cooperation with other governments) to investigate, prosecute, convict, and sentence traffickers and any public officials, military personnel, government contractors, and subcontractors engaged or

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67. *Id.* § 110(b)(1).

68. 2003 TVPRA, *supra* note 3, § 6(e).

69. *Id.* § 6(e)(3)(A). By February 1 of each year, the State Department is to provide an assessment of the progress that each country on the special watch list has made since the last annual report. *Id.* § 6(e)(3)(B).

70. *See* TVPA, *supra* note 3, § 108(a).

71. *Id.* § 108(b); 2003 TVPRA, *supra* note 3, § 6(d).

complicit in trafficking; and whether it extradites persons charged with trafficking on the same terms and to the same extent as persons charged with other serious crimes.<sup>72</sup> As for protection measures, indicia include whether the government protects victims from inappropriate incarceration, fine, or other punishment for trafficking-related offenses and protects their internationally recognized right to migrate.<sup>73</sup> With respect to prevention efforts, the criteria include whether the government undertakes public awareness campaigns, monitors immigration and emigration patterns, and takes measures to reduce the demand for commercial sex.<sup>74</sup> Finally, to ensure continuing commitment to efforts to combat trafficking, the TIP criteria look to whether a country engages in periodic self-assessments of its own anti-trafficking efforts and makes appreciable progress to combat trafficking each year.<sup>75</sup>

Countries that the State Department ranks Tier 3 may be subject to U.S. sanctions if they do not bring themselves into compliance within 90 days. During this grace period, the TIP Office works closely with Tier 3 governments to develop action plans to achieve compliance.<sup>76</sup> Countries that make a significant effort to comply will not be sanctioned.<sup>77</sup> The president may also waive sanctions if (1) continued financial assistance would promote the purposes of the TVPA or is otherwise in the U.S. national interest; or (2) a waiver is necessary to avoid significant adverse effects on vulnerable populations, including women and children.<sup>78</sup> The TVPA provides for the annual TIP Report to be issued beginning in 2001, but without sanctions attaching until the 2003 round in order to afford countries a grace period to bring themselves into compliance with the minimum standards.

## 2. The Role of the United States in the Global Fight Against Trafficking

The United States' role in global anti-trafficking efforts provoked substantial debate between the Clinton Administration and the TVPA's congressional sponsors. While these debates often focused on important strategic questions regarding the best use of U.S. resources and political capital, they also raised deeper and more difficult questions over how

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72. TVPA, *supra* note 3, § 108(b)(1),(2),(4),(5),(7).

73. *Id.* § 108(b)(2),(6).

74. *Id.* § 108(b)(3),(6); 2005 TVPRA, *supra* note 3, § 104(b).

75. 2003 TVPRA, *supra* note 3, § 6(d).

76. *Trafficking in Persons Report: Testimony Before the Subcomm. on Terrorism, Non-proliferation and Human Rights of the H. Int'l Rel. Comm.*, 108th Cong. 13-46 (2003) (testimony of John R. Miller, Dir. of the Office to Monitor and Combat Trafficking in Persons, U.S. Dep't State).

77. TVPA, *supra* note 3, § 110(a)(2).

78. *Id.* § 110(d).

best to characterize the “massive and complex global problem”<sup>79</sup> of trafficking and to devise appropriate strategies to address it.

Significantly, the inclusion of a sanctions regime flew in the face of the Clinton Administration’s newly revised sanctions policy, which limited the use of sanctions in recognition of the fact that the United States had been using sanctions with increasing frequency (especially during the 1990s) but with declining success.<sup>80</sup> The policy required that economic sanctions be employed only as a last resort—i.e., after aggressive pursuit of all other available diplomatic options—and that multilateral support for sanctions be pursued before resorting to unilateral measures.<sup>81</sup>

The Clinton Administration believed that using unilateral sanctions to combat trafficking would be ineffective and “profoundly counterproductive.”<sup>82</sup> A sanctions strategy would compromise U.S. efforts to seek international agreement on the Palermo Protocol<sup>83</sup> and undermine the collaborative ethic the Protocol was intended to foster in at least two critical respects. First, sanctions would negatively impact international cooperation by causing governments to downplay the seriousness of their trafficking problems in order to avoid the direct or political consequences of sanctions. As one Justice Department official explained, “as soon as we impose sanctions or . . . try to make an international pariah out of one of these [offender] countries, . . . cooperation tends to shut down.”<sup>84</sup> Second, the threat of sanctions would undermine intranational cooperation by causing governments and local populations to view as a threat the important work of local NGOs to raise the profile of trafficking.<sup>85</sup> Because countries’ efforts to address trafficking were still “in the early stages” and “fragile,” the Clinton Administration believed that instead of sanctioning noncompliance with U.S. norms, the United States

79. *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int’l Operations and Hum. Rts. of the H. Comm. on Int’l Rel.*, 106th Cong. 60-72 (1999) [hereinafter Koh testimony] (testimony of Harold Hongju Koh, Asst. Sec’y of State, Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State).

80. *U.S. Economic Sanctions: Good Intentions, Bad Execution: Hearing Before the H. Comm. on Int’l Relations*, 105th Cong. (1998) [hereinafter Schott testimony] (testimony of Jeffrey Schott).

81. *Sanctions and U.S. Policy Interests: Hearing Before the H. Int’l Relations Comm.*, 105th Cong. (1998) (testimony of Stuart E. Eizenstat, Under Secretary of State).

82. See Loy testimony, *supra* note 46 (referring to the Palermo Protocol as a “historic international instrument of cooperation to aid the fight against trafficking”).

83. *Id.*

84. See Yeomans testimony, *supra* note 44 (emphasizing the importance of forming close relationships with law enforcement agencies in the trafficked persons’ countries of origin).

85. Loy testimony, *supra* note 46.

ought to assist and encourage countries to expand their own anti-trafficking programs.<sup>86</sup>

Disputes over the sanctions regime also exposed deep differences within the U.S. government over how best to conceptualize the problem of trafficking. These differences mirrored the tensions in Vienna between the criminal justice and human rights approaches to trafficking and were echoed in arguments that then-Assistant Secretary of State for Democracy, Human Rights, and Labor (DHRL) Harold Koh made against the TVPA's proposed "new offices, new reporting, and new sanctions mechanisms."<sup>87</sup> Koh fought hard to keep the trafficking issue within the mandate of the human rights bureau, arguing that trafficking is a massive and complex transnational human rights issue, as opposed to a "'faceless' problem: [i.e.,] a criminal problem, an economic problem, an immigration problem."<sup>88</sup>

The U.S. government, Koh argued, should "do everything in [its] power to break the vicious cycle of human rights violations" that perpetuates trafficking.<sup>89</sup> Rather than create a new bureaucracy, the U.S. government should focus on consolidating and strengthening its existing human rights response mechanisms. The DHRL could use its global mandate, its already "well-established . . . and widely-respected" DOS Human Rights Reports (which were already reporting on trafficking), and the diplomatic tools already at its disposal—including essentially all of the sanctions contemplated in the legislation—to encourage other countries to step up the fight against trafficking.<sup>90</sup> Koh's view ultimately failed to carry the day, however, and the U.S. government promptly established its new offices, new reporting, and new sanctions to combat trafficking.

## II. A FRAMEWORK FOR ASSESSING UNILATERAL SANCTIONS AND INTERNATIONAL ANTI-TRAFFICKING NORM DEVELOPMENT

In addition to sitting uncomfortably with the international cooperation ethic that pervaded the Vienna process, the sanctions regime exposes U.S. anti-trafficking foreign policy to standard critiques of U.S. unilateralism for its damaging effects on international law and institutions. These include both moral and legal objections against the United States' promotion abroad of norms to which it refuses to legally bind itself and

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86. *Id.*

87. *See* Koh testimony, *supra* note 79.

88. *Id.*

89. *Id.*

90. *Id.*

its substitution of its own domestic standards in place of those to which the international community has agreed. The potential for damage to the international system is particularly significant in the trafficking context. Because the Palermo Protocol is at base an international cooperation treaty—and, moreover, a young instrument born from a fragile international consensus—opting out of a multilateral approach strikes at the very heart of this framework.

In order to understand the implications of the sanctions regime for the development and operation of the international anti-trafficking legal framework, this Part examines the standard critiques of U.S. unilateralism. But it does so with a constructive eye, to derive a set of guidelines by which the TVPA sanctions regime might be brought into compliance with the international system. This discussion accepts, for sake of argument, Professor Sarah Cleveland's theory that unilateral sanctions can function beyond their traditional role of punishing or altering state behavior and, when carefully crafted, affirmatively promote domestic internalization of international norms. Building upon Professor Cleveland's formula for effectuating this goal, the following discussion proposes a modified framework for assessing the TVPA sanctions regime with respect to its potential to contribute to the evolving international legal framework on trafficking.

### *A. The Standard Critiques of U.S. Unilateral Sanctions*

The use of unilateral economic sanctions has become a common foreign policy tool to alter state behavior, providing "a middle road response between diplomacy and military action."<sup>91</sup> By far the most active sanctions proponent in the world,<sup>92</sup> the United States has used unilateral sanctions to promote its foreign policy objectives, including combating nuclear proliferation, fighting trafficking in drugs and weapons, promoting democracy and human rights, and punishing territorial aggression.<sup>93</sup> U.S. unilateral sanctions have taken the form of statutes conditioning foreign assistance on a country's compliance with human

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91. Schott testimony, *supra* note 80.

92. Some have attributed the United States' frequent resort to unilateral sanctions to the contest between the executive branch and the legislative branch to control foreign policy. JOSEPH COLLINGS & GABRIELLE D. BOWDOIN, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *BEYOND UNILATERAL ECONOMIC SANCTIONS: BETTER ALTERNATIVE FOR U.S. FOREIGN POLICY* 10 (1999) [hereinafter *BEYOND UNILATERAL SANCTIONS*]. Congress imposes sanctions in response to presidential action or inaction; the president often imposes less intrusive sanctions to preempt Congress and gain greater flexibility of action. CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *ALTERING U.S. SANCTIONS POLICY: FINAL REPORT OF THE CSIS PROJECT ON UNILATERAL ECONOMIC SANCTIONS* 5–6 (1999) [hereinafter *ALTERING U.S. SANCTIONS POLICY*].

93. See Cleveland *supra* note 7.

rights and labor standards, targeting specific countries deemed to be rights abusers and, in the case of Cuba, punishing third parties that do business with the target state.<sup>94</sup>

Commentators criticize U.S. economic unilateralism as the hypocritical, “hegemonic actions of a ‘hyperpower,’”<sup>95</sup> especially when wielded in the name of promoting international human rights standards. Human rights advocates criticize U.S. unilateralism for employing what Peter Danchin terms a “new realist” approach to enforcing international norms—invoking international human rights norms to justify the use of sanctions against target states, but using entirely domestic norms and predominantly unilateral means to promote and protect those standards.<sup>96</sup> Insofar as the United States seeks to enforce international norms, critics argue, it does so selectively, subject to the changing priorities of U.S. domestic politics rather than a genuine respect for those norms.<sup>97</sup>

Resort to unilateral sanctions is also problematic because it undermines multilateral definition and enforcement of international human rights law.<sup>98</sup> As Danchin explains, persistent resort to unilateral sanctions instead of existing (though underdeveloped) multilateral enforcement mechanisms creates a self-perpetuating cycle that ultimately undermines progressive development of multilateral alternatives.<sup>99</sup> “A multilateral regime based on law cannot function effectively if one or more of its

94. Cleveland, *supra* note 7, at 4. For an in-depth survey of the impact of economic sanctions on target states, see GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* (1990) [hereinafter *ECONOMIC SANCTIONS RECONSIDERED*]. For an assessment of U.S. sanctions levied in the name of human rights, see KATARINA TOMASEVSKI, *RESPONDING TO HUMAN RIGHTS VIOLATIONS 1946–1999* (2000).

95. Cleveland, *supra* note 7, at 48–49, 74–75. “The United States sometimes walks a fine line between hypocrisy and straightforward imperialism where it seeks to enforce rights embodied in human rights instruments that it has not ratified itself or where it flexes its economic muscle to dictate policy to smaller developing nations.” Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 *FORDHAM INT’L L.J.* 577, 601 (1998). See also Danchin, *supra* note 62, at 106–15; Philip Alston, *Labor Rights Provisions in U.S. Trade Law: “Aggressive Unilateralism”?*, in *HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE* 71, 79 (Lance A. Compa & Stephen F. Diamond eds. 1996). But see Jack Goldsmith, *International Human Rights Law & The United States Double Standard*, in *GREEN BAG*, Summer 1998, at 365 (offering “a modest defense” of the United States’ resistance to applying international human rights law to itself).

96. Danchin, *supra* note 62, at 41.

97. *Id.* at 114 (citing Alston, *supra* note 95, at 79).

98. Cleveland, *supra* note 7, at 6; Danchin, *supra* note 62, at 73.

99. See Danchin, *supra* note 62, at 73. According to Danchin, “even an imperfect international legal process is preferable to unilateral action by a powerful state whose own ‘democratic process’ is more likely to result in a narrow and self-interested conception of the relevant international norms than a universal and broadly legitimate one.” *Id.* at 72.

members choose to act outside of or even alongside that regime while at the same time refusing to submit to those same rules.”<sup>100</sup>

Finally, critics argue that unilateral sanctions are, in practice, ineffective.<sup>101</sup> As the Center for Strategic and International Studies concluded in its study of U.S. unilateralism, “[n]early all unilateral sanctions fail nearly all of the time,” and their use by the United States has “generally worked against U.S. foreign policy objectives.”<sup>102</sup> When used to promote human rights and democratization objectives, U.S. sanctions have resulted in the populations of the target countries, rather than their governments, suffering the consequent economic pain.<sup>103</sup> Indeed, in some countries, sanctions have diminished or eliminated private sector engagement in political and economic change<sup>104</sup> as target governments use U.S. sanctions to good propaganda effect, successfully blaming the United States for what, in effect, were actually internal economic policy failures.

### B. A Framework for Assessing Unilateral Sanctions Under International Law

As ill-advised as sanctions may be as a matter of foreign policy, it is difficult to contend that resorting to unilateralism violates international law *per se*.<sup>105</sup> Critics assert that economic intervention in the affairs of

100. *Id.*

101. See Schott testimony, *supra* note 80 (noting that successful sanctions are “increasingly rare” as globalization has made it easier for target countries to tap international markets to find other suppliers of capital); BEYOND UNILATERAL ECONOMIC SANCTIONS, *supra* note 92. Gary Clyde Hufbauer, co-author of ECONOMIC SANCTIONS RECONSIDERED, *supra* note 94, recently argued that the evidence suggests that in about one-third of cases, economic sanctions were successful in achieving their stated policy objectives. Gary Clyde Hufbauer & Barbara Oegg, *Economic Sanctions: Public Goals and Private Compensation*, 4 CHI. J. INT’L L. 305, 307 (2003).

102. Sanctions will become even less effective as U.S. goods and services become more easily replaceable by those from other sources. BEYOND UNILATERAL SANCTIONS, *supra* note 92, at 1.

103. See U.N. Comm’n on Hum. Rts., Sub-Comm. on the Promotion and Prot. of Hum Rts., *Working Paper: The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, Working Paper for the Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/2000/33 (June 21, 2000) (prepared by Marc Bossuyt) (assessing the impact of sanctions on the civilian populations of Iraq, Cuba, and Burundi). This working paper was commissioned by the UN Sub-Commission on the Promotion and Protection of Human Rights in response to the many concerns UN human rights officials and human rights NGOs expressed over the impact of economic sanctions on the civilian populations of target countries.

104. ALTERING U.S. SANCTIONS POLICY, *supra* note 92, at 29.

105. For an insightful discussion of the merits of unilateral sanctions practice as a matter of international law, see, e.g., Cleveland, *supra* note 7, at 49–56; Danchin, *supra* note 62, at 83 n. 145; Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT’L L. 1, 31–47 (1989); Tom Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT’L L. 405, 413 (1985).



foreign states violates public international law principles of nonintervention and territorial jurisdiction.<sup>106</sup> But the sheer frequency with which states have employed unilateral sanctions since World War II cuts against any argument that customary international norms disallow the practice.<sup>107</sup> Moreover, because economic assistance is voluntary and at the discretion of the donor state, its withdrawal can hardly be characterized as “forcible” interference under customary international law.<sup>108</sup> Nor could it be said that unilateral sanctions violate the UN Charter provisions recognizing states’ right to be free from foreign intervention in matters of purely domestic concern. The prohibition in Article 2(4) of the Charter on “the threat or use of force against territorial integrity or political independence of any state” is inapplicable, as it does not bar *economic* intervention or non-forcible intervention.<sup>109</sup> And while Article 2(7) prohibits intervention in matters that are “within the domestic jurisdiction of any state,” this proscription is limited to intervention by the United Nations.<sup>110</sup>

In fact, because human rights principles are of international concern, unilateral sanctions arguably do not violate domestic sovereignty principles when employed to promote those norms.<sup>111</sup> The international obligation to respect human rights is an obligation *erga omnes* (and sometimes *jus cogens*)<sup>112</sup> and therefore binding on all states, whether protected under international agreements or customary law.<sup>113</sup> As the International Court of Justice found in the *Barcelona Traction* case, all

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106. Cleveland, *supra* note 7, at 6. See, e.g., Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT’L L. 19 (2000).

107. Cleveland notes that in the ICJ case involving Nicaragua, the ICJ affirmed the “compatibility of economic coercion with international law.” See Cleveland, *supra* note 7, at 53 (citing Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 126 (June 27)).

108. Cleveland, *supra* note 7, at 53 (citing LASSA OPPENHEIM, INTERNATIONAL LAW § 129 (9th ed. 1992)); Damrosch, *supra* note 105, at 39–42; Farer, *supra* note 105, at 413.

109. See U.N. Charter art. 2(4) (forbidding the “threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations”).

110. See U.N. Charter art. 2(7) (providing that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”).

111. Cleveland, *supra* note 7, at 53–56.

112. *Erga omnes* norms are considered “obligations of a State toward the international community as a whole” and include the “basic rights of the human person.” *Jus cogens* norms are a small subset of these, comprised of peremptory customary international law norms from which states cannot derogate. See *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), discussed in Cleveland, *supra* note 7, at 24–25 [hereinafter *Barcelona Traction*]. While states may derogate from *erga omnes* norms during times of crisis or conflict, for example, states are obliged to abide by *jus cogens* norms (e.g., torture) at all times.

113. Danchin, *supra* note 62, at 83.

states have an interest in the protection of human rights.<sup>114</sup> Indeed, the UN Charter obligates member states “to take joint and separate action in cooperation” with the UN to achieve respect for human rights and fundamental freedoms.<sup>115</sup> Because the human rights field lacks compulsory enforcement mechanisms, the resort to unilateral sanctions in the breach of such norms is, in effect, a measure of “self-help” by states having a legal interest in violations of customary norms.<sup>116</sup>

Commentators such as Professor Cleveland believe unilateral sanctions can actually “have an importance beyond their classical role in seeking to punish and alter a foreign state’s behavior—that of assisting in the international definition, promulgation, recognition, and domestic internalization of human rights norms.”<sup>117</sup> Cleveland’s theory builds on Harold Koh’s “transnational legal process theory,”<sup>118</sup> which Koh offers in response to why “almost all nations observe almost all principles of international law almost all of the time.”<sup>119</sup> Koh argues that “norm internalization”—the process by which international norms are internalized into domestic legal structures—results from a vertical dynamic through which a variety of transnational actors (e.g., IGOs, NGOs, and private citizens) repeatedly interact with each other and produce an interpretation or enunciation of an applicable international norm.<sup>120</sup> Gradually this interpretation becomes internalized into states’ domestic values and processes.<sup>121</sup> Through this repeated interactive process, occasional compliance with norms transforms into habitual obedience, or a situation where states are motivated to obey international law out of a sense of internal acceptance of the norms, as opposed to a begrudging compliance when convenient.<sup>122</sup>

Drawing on Koh’s theory, Cleveland argues that imposing economic sanctions can contribute to domestic internalization of international norms by incorporating attention to human rights concerns into the

114. As the I.C.J. made clear in the *Barcelona Traction* case, some obligations constitute “obligations of a State toward the international community as a whole,” including respecting the “basic rights of the human person.” See *Barcelona Traction*, *supra* note 112, at 32.

115. U.N. Charter art. 56.

116. Danchin, *supra* note 62, at 84.

117. Cleveland, *supra* note 7, at 73.

118. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997); Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L. J.* 1397 (1998); Harold Hongju Koh, *Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (1998).

119. See Koh, *YALE L.J.*, *supra* note 118, at 2599 (quoting LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979)).

120. *Id.* at 2646.

121. See Koh, *IND. L.J.*, *supra* note 118, at 1409–15.

122. *Id.* at 1407.

political processes of the sanctioning state.<sup>123</sup> Specifically, the process of imposing, reviewing, and revoking sanctions provokes numerous government-to-government interactions in which international norms can be invoked and clarified, thereby promoting norm internalization.<sup>124</sup> According to Cleveland, unilateralism is not “inherently hegemonic”—when crafted in accordance with international law principles, unilateral measures “can complement, rather than compete with, the development of a multilateral system.”<sup>125</sup>

But a number of conditions must be met in order for the sanctions regime to achieve consistency with international law principles.<sup>126</sup> First, in order to ensure U.S. actions comport with international rules regarding economic interference and jurisdiction, sanctions should be imposed only to promote rights that are mutually binding on both the United States and the target state. Second, the United States should look to international standards in applying its domestic sanctions laws. Third, and finally, the documentation and condemnation of violations should be as even-handed as possible.<sup>127</sup> Cleveland’s guidelines, if met, would address critics’ concerns regarding U.S. hypocrisy in enforcing standards that are not also binding on the United States, substantive inconsistency with international standards, and selective enforcement.

Cleveland’s proposal is not without its critics. Peter Danchin argues that Cleveland’s model misunderstands Koh’s transnational legal process theory. According to Danchin, the two models are fundamentally at odds—the use of unilateral sanctions constitutes a typical example of the “power” or “realist” view of state compliance (i.e., that states comply with international law only when forced),<sup>128</sup> whereas Koh’s view is that true compliance with global norms is not so much the result of externally imposed sanctions as it is the result of internally felt norms.<sup>129</sup> Danchin also argues that Koh’s formula entails a broader range of actors at the transnational level—e.g., IGOs, NGOs, private individuals—than permitted in the “one-sided forum” unilateral sanctions typically create between the sanctioning and target states.<sup>130</sup>

Cleveland’s proposal addresses Danchin’s critique for the most part, however. With respect to the tension between external coercion and in-

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123. Cleveland, *supra* note 7, at 6 (citing Koh, YALE L.J., *supra* note 118, at 2646).

124. *Id.* at 87.

125. *Id.* at 69.

126. *Id.* at 85.

127. *Id.* at 85.

128. Danchin, *supra* note 62, at 122–23. For Koh’s description of the “power” or “realist” view of state compliance with international law, see Koh, IND. L.J., *supra* note 118, at 1407.

129. Koh, IND. L.J., *supra* note 118, at 1408, 1401.

130. Danchin, *supra* note 62, at 123.

ternalization, it bears emphasis that Koh's vision of transnational legal process theory is meant to complement, not replace, other theories of state compliance,<sup>131</sup> including the "power" or "realist" view. Koh's use of South Africa as the "best example" of this process hardly amounts to a rejection of the use of external sanctions. As Koh points out, after many years of extreme external pressure and coercive mechanisms—e.g., sanctions—South Africa gradually converted itself into a law-abiding country that through its constitutional processes has internalized new norms of international human rights law as domestic law.<sup>132</sup>

Nonetheless, Danchin's critique regarding the limited range of actors involved in the transnational legal process does suggest that a modification of Cleveland's framework is in order. As Koh explains, "[i]f transnational actors obey international law as a result of repeated interaction with other actors in the transnational legal process, a first step is to empower more actors to participate."<sup>133</sup> This requires "expanding the role of intergovernmental organizations, nongovernmental organizations, private business entities, and 'transnational moral entrepreneurs,'" who mobilize popular opinion and political support for the development of a global norm.<sup>134</sup> These actors develop "transnational issue networks" to discuss and generate political solutions among concerned individuals, government agencies, intergovernmental organizations, academics, and private foundations, which then draw the interest and commitment of "governmental norm sponsors" (e.g., Jimmy Carter), who in turn use their prominent positions to promote the norms.<sup>135</sup> These transnational actors seek fora (e.g., treaty regimes) competent to declare both general norms of international law (e.g., treaties) and specific interpretations of those norms in particular circumstances (e.g., interpretations of treaties).<sup>136</sup> National governments then internalize norm interpretations issued by the global interpretive community into their domestic structures (e.g., through institutional mandates of governmental legal

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131. As Koh explains, international law scholars have offered five strands of theories for why states obey international law: (1) the realist view that nations never truly obey international law but rather comply because someone else forces them; (2) the utilitarian, rationalistic view that nations obey international law only when it is in their self-interest to do so; (3) the Kantian "liberal" view that nations obey international law out of a sense of ethical or moral obligation based upon notions of justice; (4) the communitarian view that nations obey international law due to the values of the international community of which they are members; and (5) legal process explanations at the state-to-state (horizontal) level that attribute a nation's obedience to international law to the prodding of other nations with which it is engaged in a discursive process. See Koh, *IND. L.J.*, *supra* note 118, at 1407.

132. *Id.*

133. Koh, *YALE L.J.*, *supra* note 118, at 2656.

134. Danchin, *supra* note 62, quoting Koh, *YALE L.J.*, *supra* note 118, at 2656.

135. Koh, *IND. L.J.*, *supra* note 118, at 1409-10.

136. *Id.*

advisers) so that, over time, domestic decision-making structures become “enmeshed” with international norms.<sup>137</sup> For these interactions to take place, the sanctions regime must avoid creating a chilling effect on the participation of governments, nongovernmental organizations, and the local population to raise the profile of the trafficking problem within their countries.<sup>138</sup>

It therefore makes sense to expand Cleveland’s prescription to include a fourth criterion targeting broader participation of transnational actors in the sanctions process. Drawing on Cleveland’s proposal and Danchin’s critique, the following criteria are useful guidelines by which a sanctions regime might contribute to international anti-trafficking norm development and internalization: (1) sanctions should be imposed only to 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 sanctions laws (e.g., complying with definitions set forth in international instruments and acting consistently with the interpretations and recommendations of international bodies); (3) the documentation and condemnation of violations should be as evenhanded as possible; and finally, (4) 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.

While full compliance with these guidelines is perhaps unrealistic given modern geopolitical sensibilities, these criteria provide a useful set of objectives toward which sanctions regimes should be modified and improved. Applied to the TVPA sanctions regime, this framework highlights areas where that regime, at least as currently constructed, does or does not pass muster as a means of internalizing international norms against trafficking in persons.

### III. ASSESSING THE U.S. ANTI-TRAFFICKING SANCTIONS REGIME

Since the passage of the TVPA, the U.S. government has issued five TIP Reports and three rounds of sanctions against countries deemed non-compliant with the U.S. minimum standards for combating trafficking. Eager to avoid the threat of U.S. sanctions, an unprecedented number of governments worldwide have passed anti-trafficking legislation and developed domestic infrastructure to meet the U.S. minimum standards. In one sense, then, the sanctions regime has contributed to the international

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137. *Id.* at 1410-11.

138. *See supra* Part I.B.2.

framework by promoting recognition of states' obligation to address trafficking.<sup>139</sup> But whether the actions taken by a government result from a genuine commitment to eradicate trafficking or, instead, serve as expedient cover against the threat of U.S. economic sanctions is a critical distinction to bear in mind. As discussed above, the success of the TVPA sanctions regime should be measured qualitatively, with respect to its overall ability to bring governments closer to internalizing international anti-trafficking norms.

Viewed through the lens of the four assessment criteria discussed in Part II, the U.S. minimum standards and the process by which the United States articulates and promotes those standards abroad fall short of their capacity to promote internalization of international anti-trafficking norms. Instead, the TVPA sanctions regime has become a convenient vehicle for the United States to export its domestic views and priorities on issues that were highly contested in Vienna and for which the Palermo Protocol effectively brokered a ceasefire. In threatening to disturb this fragile consensus, the sanctions regime endangers prospects for much-needed international participation in the articulation, promulgation, recognition, and internalization of international anti-trafficking norms.

#### *A. Mutually Binding Norms?*

The first criterion to be considered in assessing the sanctions regime's legitimacy is whether the norms the United States seeks to enforce are mutually binding on the United States and its target states or, alternatively, binding on all states as a matter of customary international law. Basing the regime on mutually binding norms avoids conflict with international law norms regarding nonintervention and non-forcible countermeasures and preserves respect for state sovereignty. A foundation in mutually binding norms also helps stave off allegations of U.S. hypocrisy in forcing others to abide by norms to which the United States refuses to bind itself. While the hypocrisy charge typically has been of little consequence to the United States,<sup>140</sup> it has particular significance in the trafficking context, where international cooperation is essential to the success of both global and U.S. domestic anti-trafficking efforts.

The recent decision by the United States to ratify the Palermo Protocol is a welcome development in this regard. By signaling to the

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139. See Anne Gallagher, Review Essay, *Trafficking in Persons Report*, 23 HUM. RTS. Q. 1135, 1138 (2001).

140. See Goldsmith, *supra* note 95, at 372 (defending the United States' poor record of ratifying human rights treaties and arguing that the efficacy of human rights law probably depends less on moral authority of the enforcing state than the costs of non-compliance).

international community, through ratification, its willingness to be bound by a set of internationally-defined standards, the United States has improved its standing to police the domestic anti-trafficking efforts of other countries. These salutary effects, however, are offset by the United States' unwillingness to abide by the Palermo Protocol's compromise over the definition of trafficking.<sup>141</sup> For reasons explained below, this departure from the compromise definition risks undermining the overall legitimacy of the TVPA sanctions regime.

### B. *Inconsistency with International Norms*

The second criterion for assessing the TVPA sanctions regime concerns whether the United States looks to international standards in applying its domestic sanctions laws. Key factors to consider include whether the substance and application of the U.S. minimum standards comply with the definitions set forth in international instruments and the interpretations and recommendations of international bodies.<sup>142</sup> As Cleveland notes, “[s]tates are much more likely to voluntarily comply with international norms that they perceive to be fair, and reliable interpretation and application of international norms by transnational actors is critical to encouraging nations to recognize, internalize, and obey international law.”<sup>143</sup> Given the struggles over the trafficking definition, consistency with international norms is crucial to the successful operation of the international anti-trafficking legal framework. As the legislative guide to the Protocol makes clear, “[t]he main reason for defining the term ‘trafficking in persons’ in international law was to provide some degree of consensus-based standardization of concepts” to undergird “efficient international cooperation in investigating and prosecuting cases.”<sup>144</sup> An agreed definition would also standardize research and other activities, allowing for better comparison of national and regional data and a clearer global picture of the problem.<sup>145</sup>

By substituting its own trafficking definition for that of the Protocol and failing to apply more comprehensive human rights standards in its

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141. See *supra* Part I.A.1.

142. Cleveland, *supra* note 7, at 85.

143. *Id.*

144. U.N. Office on Drugs and Crime, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, found in Legislative Guides for the United Nations Convention Against Transnational Organized Crime and Protocols thereto*, ¶ 35, available at [http://www.unodc.org/unodc/en/organized\\_crime\\_convention\\_legislative\\_guides.html#\\_Full\\_Version\\_1](http://www.unodc.org/unodc/en/organized_crime_convention_legislative_guides.html#_Full_Version_1) (last visited Mar. 14, 2006).

145. See INT’L ORG. FOR MIGRATION, DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY 10–11 (2005) [hereinafter IOM Report] (noting the lack of agreement among researchers over how trafficking should be defined and studied).

country assessments, however, the U.S. sanctions regime currently diverges in critical respects from the evolving international anti-trafficking framework.

### 1. A “New Realist” Approach to the Trafficking Definition

In a move that invites Danchin’s “new realism” critique, the TVPA sanctions regime employs a trafficking definition that cites to the Protocol, but substantively modifies the internationally-agreed upon Protocol definition. Embracing an abolitionist viewpoint on prostitution reform,<sup>146</sup> this modified definition is fundamentally inconsistent with the Protocol drafters’ intent to preserve individual state discretion to decide the domestic legal treatment of prostitution.<sup>147</sup>

As discussed in Part I, in implementing the sanctions regime, the TIP Office works closely with foreign governments to bring their domestic anti-trafficking laws and policies into compliance with the U.S. minimum standards.<sup>148</sup> The TIP Office drafts a plan of action for the governments and then provides them with a document setting forth Legal Building Blocks to Combat Trafficking in Persons (Legal Building Blocks),<sup>149</sup> i.e., model provisions for states to consider incorporating into their own domestic anti-trafficking laws. The Legal Building Blocks employ a trafficking definition (TIP definition) that mirrors the Palermo Protocol definition *but for one critical difference*: how it defines the term “exploitation.”<sup>150</sup> The Legal Building Blocks cite the Palermo Protocol as if to suggest the TIP definition carries the imprimatur of the international community. But a comparison of the two trafficking definitions exposes

146. The influence of the abolitionists is clear from the statements of Representative Christopher Smith. During a hearing held in 2001 on the implementation of the TVPA, Representative Smith stated that the goal of the TVPA was “to combat slavery . . . especially sexual slavery” and that “[e]mpirically, the legislation rejects the principle that commercial sex should be regarded as a legitimate form of work.” Smith statement, *supra* note 50. Smith goes on to note that “[w]hile the overwhelming weight of the sanctions are levied against those who engage in severe forms of trafficking, the clear intent of this legislation was inclusive of sex trafficking in general.” *Id.* Citing his concern that “there’s neutrality at the [State] department” on the prostitution issue, Smith repeatedly asks for confirmation that it is, in fact, the policy of the State Department to oppose all forms of prostitution, including legalized prostitution. *Id.*; *see also supra* note 50.

147. *See* UN Interpretative Notes, *supra* note 28.

148. *See supra* Part I.B.1.b.

149. OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, LEGAL BUILDING BLOCKS TO COMBAT TRAFFICKING IN PERSONS (Feb. 2004), available at <http://www.state.gov/g/tip/rls/19087.htm> [hereinafter *Legal Building Blocks*] (last visited Mar. 14, 2006). An earlier iteration of this document was styled “Model Law to Combat Trafficking in Persons.” *See* OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, MODEL LAW TO COMBAT TRAFFICKING IN PERSONS (Mar. 12, 2003) (on file with author).

150. Compare *Legal Building Blocks*, *supra* note 149, at § 100, 102, with Palermo Protocol, *supra* note 2, art. 3, and UN Interpretative Notes, *supra* note 28.



a sleight of hand: whereas the Palermo Protocol defines the “exploitation” element of the trafficking definition to

include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs,<sup>151</sup>

the TIP definition, while explicitly citing to the Protocol definition, states that:

“Exploitation” shall mean<sup>3</sup>:

- (a) keeping a person in a state of slavery;
- (b) subjecting a person to practices similar to slavery;
- (c) compelling or causing a person to provide forced labor or services;
- (d) keeping a person in a state of servitude, including sexual servitude;
- (e) exploitation of the prostitution of another;
- (f) *engaging in any other form of commercial sexual exploitation, including but not limited to pimping, pandering, procuring, profiting from prostitution, maintaining a brothel, child pornography;*
- (g) illicit removal of human organs.<sup>152</sup>

All elements are the same but for the addition of subsection (f), defining “commercial sexual exploitation.” As discussed above in Part I, however, the Palermo Protocol drafters purposely left the terms “exploitation of the prostitution of others” and “other forms of sexual exploitation” undefined to ensure that the trafficking definition would be “without prejudice to how state parties address prostitution in their domestic laws.”<sup>153</sup>

While governments technically are not required to incorporate the Legal Building Blocks into their domestic legislation, the threat of sanctions nonetheless pressures governments to conform to U.S. preferences. By virtue of a December 2002 National Security Presidential Direc-

151. Palermo Protocol, *supra* note 2, art. 3.

152. Legal Building Blocks, *supra* note 149, § 102 (citing Palermo Protocol, *supra* note 2, art. 3) (emphasis added).

153. See also *supra* Part I.A.1. Note that the Legal Building Blocks also suggest inclusion of a provision criminalizing “Transporting a Person for the Purpose of Exploiting Such Person’s Prostitution.” Legal Building Blocks, *supra* note 149, § 202.

tive,<sup>154</sup> the U.S. government has now upped the ante by making the abolitionist position official U.S. policy and an explicit condition of its foreign grant-making programs.

As explained in the 2005 TIP Report<sup>155</sup> and a “Fact Sheet” on the TIP Office website, “[t]he indisputable connection between human trafficking and prostitution led the [Bush] Administration to take a strong stand against legalized and tolerated prostitution.”<sup>156</sup> Accordingly, “the U.S. government [has] concluded that no U.S. grant funds should be awarded to foreign non-governmental organizations that support legal state-regulated prostitution.”<sup>157</sup> Specifically, U.S. law now prohibits the use of U.S. funds for (1) programs that “promote, support, or advocate the legalization or practice of prostitution”;<sup>158</sup> and (2) any organization “that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution.”<sup>159</sup> The U.S. government recently extended this restriction to U.S.-based HIV/AIDS organizations that receive funding for work overseas, requiring them to sign an “anti-prostitution loyalty oath”

154. Trafficking in Persons, National Security Presidential Directive/NSPD-22 (Dec. 16, 2002), available at <http://www.whitehouse.gov/news/releases/2003/02/20030225.html> (last visited Mar. 14, 2006).

155. 2005 TIP REPORT, *supra* note 1, at 19.

156. See BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, FACT SHEET: THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004), available at <http://www.state.gov/r/pa/ei/r/rls/38790.htm> [hereinafter TIP FACT SHEET] (last visited Mar. 16, 2006). This document derives broad generalizations regarding the relationship between prostitution and trafficking, but the sources it cites fail to support the breadth of these statements. For example, the Fact Sheet states that “89 percent of women in prostitution want to escape,” but the source cited only purports to examine prostitution in nine countries. *Id.* at 1 (citing Melissa Farley *et al.*, *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, J. TRAUMA PRAC., Vol. 2, No. 3/4 at 33–74 (2003); PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS (Melissa Farley ed., 2003)). Similarly, the Fact Sheet claims that “where prostitution has been legalized or tolerated, there is an increase in the demand for sex slaves” but cites a book that has been criticized for “proving little . . . for all [its] anger and bluster.” *Id.* at 2 (citing VICTOR MALAREK, *THE NATASHAS: INSIDE THE NEW GLOBAL SEX TRADE* (2004)); see Mark Athitakis, *From Russia Without Love: Sex Slaves*, CHI. SUN-TIMES, Oct. 17, 2004, at 12 (reviewing the Malarek book and noting the need for “a careful, considered, and thorough piece of reporting, an expose with more rigor and less rant”).

157. TIP FACT SHEET, *supra* note 156, at 2.

158. 2003 TVPRA, *supra* note 3, § 7(7). The restriction does not apply to assistance provided to trafficked persons “while they are being trafficked or after they are out of the situation that resulted from such victims being trafficked.” H.R. REP. NO. 108-264(I), 108th Cong., 1st Sess. 2003, as reprinted in 2004 U.S.C.C.A.N. 2408, 2419, Section-by-Section Analysis and Discussion, § 7, ¶ (7).

159. 2003 TVPRA, *supra* note 3, § 7(7). The legislative history clarifies that organizations that have no policy on prostitution will not be forced to adopt one. See 149 CONG. REC. H10281-01, H10287 (2003) (exchange between Representatives Lantos and Smith). But this nuance is not readily apparent from the language of the legislation and, in practice, has been the source of much confusion and concern among foreign NGOs.

pledging their opposition to prostitution and sex trafficking.<sup>160</sup> Predictably, this policy has spawned two lawsuits challenging its constitutionality on First Amendment grounds.<sup>161</sup>

Though the sanctions regime does not explicitly require countries to adopt an abolitionist position, the combination of the funding restrictions and the Legal Building Blocks strongly signals to those in need of economic assistance that the path to gold lies on the abolitionist side of the road. Having provided \$82 million in anti-trafficking grants in 2004 alone,<sup>162</sup> the United States plays a critical role in global economic assistance. As repeatedly raised during the Vienna process, the ability of developing countries and countries with economies in transition to respond to trafficking depends on the availability of economic and technical assistance to enable them to fully implement many of the key provisions of the Crime Convention and Palermo Protocol.<sup>163</sup> The United States being the largest source of anti-trafficking grant funds in the world, these countries are placed in the unenviable position of either (1) not developing anti-trafficking programs due to the lack of funds and thus risking U.S. sanctions; or (2) avoiding sanctions by developing anti-trafficking programs with U.S. financial assistance and its accompanying abolitionist restrictions. In either case, the strong U.S. foreign policy stance on prostitution infuses the sanctions threat with intense pressure on target countries to abide by U.S. abolitionist preferences,<sup>164</sup> contrary to the discretion the Palermo Protocol explicitly afforded on this issue.

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160. United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711 (2003). U.S. HIV/AIDS groups have called the new policy "ideological blackmail," which violates their First Amendment free speech rights and hinders their work with prostitutes, a critical risk group. See Steve Sternberg, *White House Changes Tune on AIDS Groups Working Overseas*, USA TODAY, June 9, 2005.

161. See, e.g., *DKT Int'l, Inc. v. United States Agency for Int'l Dev.*, Civil Action No. 05-01604 (D.D.C. 2005) [hereinafter DKT litigation]; *Alliance for Open Soc'y, Inc. v. United States Agency for Int'l Dev.*, Civil Action No. 05-cv-8209 (S.D.N.Y. 2005) [hereinafter OSI litigation].

162. See 2005 TIP REPORT, *supra* note 1, at 1. As of March 2005, the Bush Administration had devoted more than \$295 million to combat trafficking in more than 120 countries. See *Combating Human Trafficking: Hearing Before the Committee on House International Relations Subcommittee on Africa, Global Human Rights, and International Operations*, Mar. 9, 2005 (statement of Chairman Christopher H. Smith).

163. See, Gallagher, *supra* note 15, at 980. So significant was this concern that the Crime Convention created a UN funding mechanism to provide the necessary financial assistance. See Crime Convention, *supra* note 15, art. 35.

164. Note that the prostitution reform debates continue to divide the U.S. anti-trafficking community. See Tara McKelvey, *Of Human Bondage*, THE AMERICAN PROSPECT ONLINE EDITION, Nov. 2, 2004 at <http://www.prospect.org/web/page.wv?section=root&name=ViewPrint&articleId=8763> (last visited Mar. 14, 2006); Cathy Young, *Was Story About Sexual Trafficking Exaggerated?*, BOSTON GLOBE, Feb. 9, 2004; Nina Shapiro, *The New Abolitionists*, SEATTLE WEEKLY, Aug. 25-31, 2004; Debbie Nathan, *Oversexed*, THE NATION, Aug. 29, 2005.

## 2. Insufficient Attention to Human Rights

In addition to the definitional bait and switch, the relative absence of human rights norms in the U.S. minimum standards contradicts the increasing incorporation of human rights principles into evolving international anti-trafficking norms and, indeed, the avowed goals behind the TVPA.

The TVPA's congressional sponsors used the rhetoric of human rights to describe the problem of trafficking and to demand a rights-protective solution.<sup>165</sup> Arguing in support of the sanctions regime, Senator Wellstone noted that "women are treated as criminals and not as victims of gross human rights abuse" and proclaimed that "we intend to change that."<sup>166</sup> But protection of the human rights of trafficked persons is not among the four minimum standards.<sup>167</sup> Of the 10 indicia used to determine the fourth minimum standard—i.e., whether a government "make[s] serious and sustained efforts to eliminate severe forms of trafficking in persons"—only one refers to the human rights of victims, and does so almost in passing.<sup>168</sup> The actual application of the minimum standards, as demonstrated in the TIP Report country assessments, reveals the low priority placed on human rights protections.<sup>169</sup>

While the focus on a criminal justice response might be viewed as consistent with the priorities set by the Palermo Protocol,<sup>170</sup> the relative absence of human rights protections is not. In addition to the Crime Convention requirement that states protect victims and witnesses from potential retaliation or intimidation,<sup>171</sup> the Palermo Protocol sets forth a framework for providing human rights protections to trafficked persons, including, among others, medical and psychological care, appropriate shelter, legal assistance, physical safety, temporary residence, and safe repatriation.<sup>172</sup> It also reaffirms the applicability of

165. See Wellstone comments, *supra* note 44; Smith statement, *supra* note 50. See also TVPA, *supra* note 3, § 102(b)(23) (finding that "trafficking . . . involves grave violations of human rights and is a matter of pressing international concern" and citing international human rights agreements to which the United States is a party).

166. Wellstone comments, *supra* note 44.

167. See *supra* Part I.B.1.b.

168. See TVPA, *supra* note 3, § 108(b)(6). This factor asks whether a country's law enforcement agencies respond to evidence of severe forms of trafficking in persons "consistent with 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."

169. See *infra* Part III.B.2.b.

170. See *supra* Part I.A.2.

171. Crime Convention, *supra* note 15, arts. 25–26.

172. Palermo Protocol, *supra* note 2, arts. 6–8; *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Addendum to the Report of the United Nations High*

broader international human rights law by virtue of the article 14 savings clause.<sup>173</sup>

Moreover, since the adoption of the Protocol, international anti-trafficking norm development has moved in the direction of greater recognition of the human rights dimension to the success of global anti-trafficking efforts. In response to the “clear need for practical, rights-based policy guidance on the trafficking issue,”<sup>174</sup> the Office of the UN High Commissioner for Human Rights (OHCHR) developed in 2002 its Recommended Principles and Guidelines on Human Rights and Human Trafficking (UN Principles and Guidelines).<sup>175</sup> Noting that efforts to combat trafficking had been “ad hoc, sporadic and largely ineffective,” marked by “a tendency to marginalize the human rights and gender dimensions of trafficking,”<sup>176</sup> the High Commissioner sought to remind states of their obligation under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers, and to assist and protect trafficked persons.<sup>177</sup> Cited

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*Commissioner for Human Rights*, ¶ 7–11, U.N. ESCOR, Substantive Sess. 2002, U.N. Doc. E/2002/68/Add.1 (2002) [hereinafter *U.N. Principles and Guidelines*].

173. Palermo Protocol, *supra* note 2, art. 14.

174. U.N. Econ. & Soc. Council (ECOSOC), *Report of the High Commissioner for Human Rights to the Economic and Social Council*, ¶ 62, UN Doc. E/2002/68 (July 1–26, 2002) [hereinafter *High Commissioner Report*].

175. The *U.N. Principles and Guidelines* include a number of provisions that human rights advocates unsuccessfully sought to include in the Palermo Protocol. They recommend that states refrain from penalizing trafficked persons for their illegal immigration status or involvement in unlawful activities that directly result from the trafficking; provide trafficked persons with legal assistance and access to physical and psychological care, irrespective of whether they cooperate in legal proceedings; and guarantee safe and, to the extent possible, voluntary return to their countries of origin and legal alternatives to repatriation if return would pose a serious risk to their or their families' safety. See *U.N. Principles and Guidelines*, *supra* note 172, principles 7, 8, 11. The Principles and Guidelines also emphasize that strategies to prevent trafficking must address demand as a root cause of trafficking, the factors that increase vulnerability to trafficking, and public sector involvement and complicity in trafficking. *Id.* principles 4–6.

176. *High Commissioner Report*, *supra* note 174, ¶ 61.

177. *U.N. Principles and Guidelines*, *supra* note 172, principles 1–3.

with increasing frequency by governments, IGOs, and NGOs,<sup>178</sup> the UN Principles and Guidelines have been gaining persuasive force.<sup>179</sup>

In addition to promoting consistency with the evolving international anti-trafficking norms, applying human rights has the potential to produce more effective results. Recalling Koh's objections to the sanctions regime, trafficking is not an isolated act of violence but rather part of a broader, vicious cycle of human rights abuses. Trafficking being rooted in poverty, discrimination, and violence against women, among other enduring socioeconomic rights violations, a sanctions strategy could miss the mark by failing to address the root causes of the problem.<sup>180</sup> Because trafficking is a "bottom-up" human rights problem perpetrated by nonstate actors and rooted in private greed and adverse economic and social conditions,<sup>181</sup> a strategy that penalizes government actors has limited effect and could exacerbate the root causes of the problem by making target countries poorer and the victims even more vulnerable to traffickers.<sup>182</sup> Incorporating substantive human rights standards into the application of the sanctions regime can counter these limitations by drawing attention to the underlying human rights violations that perpetuate trafficking.

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178. See, e.g., websites of United Nations Development Programme (UNDP), <http://www.undp.org>; United National Children's Fund (UNICEF), <http://www.unicef.org>; International Labour Organization (ILO), <http://www.ilo.org>; Organization for Security and Co-operation in Europe (OSCE), <http://www.osce.org>; Organization of American States, (OAS), <http://www.oas.org>; Asia Pacific Forum of National Human Rights Institutions, <http://www.asiapacificforum.net>; American Bar Association Central European and Eurasian Law Initiative (ABA-CEELI), <http://abanet.org/ceeli>; Anti-Slavery International, <http://www.antislavery.org>; International Human Rights Law Group, <http://www.hrlawgroup.org>, among others. See also Joan Fitzpatrick, *Trafficking as Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1166–67 (2003) (applying the U.N. Principles and Guidelines to U.S. anti-trafficking legislation).

179. State actors, including the United States, are increasingly experiencing how the failure to protect trafficked persons' human rights compromises efforts to prosecute traffickers. For example, noting the significant disparity between the numbers of people trafficked to the United States (14,500–17,500 each year) and the numbers of those who have reported the abuse to law enforcement (i.e., 757 as of November 2003), the U.S. Department of Justice has made concerted efforts to collaborate more effectively with NGOs and to consider more victim-centered approaches to prosecution. DOJ 2004 ASSESSMENT, *supra* note 1, at 5, 22, 26–27.

180. For an insightful discussion of states' failure to address the root causes of trafficking, despite their rhetorical commitment to "prevention" measures, see BARBARA LIMANOWSKA, *TRAFFICKING IN HUMAN BEINGS IN SOUTH EASTERN EUROPE* (2004).

181. See Koh testimony, *supra* note 79 (characterizing trafficking as one of the "most comprehensive challenges to human rights . . . for it involves the very denial of the humanity of its victims").

182. Loy testimony, *supra* note 46.

### C. Inconsistent Documentation and Condemnation

The third criterion for assessing the TVPA sanctions regime concerns whether the documentation and condemnation of countries' anti-trafficking practices are conducted in an evenhanded manner. As Cleveland explains, "[t]he United States cannot be selective in its condemnation of regimes that engage in fundamental rights violations without severely weakening the credibility of its unilateral enforcement efforts."<sup>183</sup>

Since the passage of the TVPA, the U.S. government has issued TIP Reports for years 2001 through 2005, and has levied sanctions against seven countries. The TIP Report describes itself as a "diplomatic tool for the U.S. government to use as an instrument for continued dialogue, encouragement for the actions of some governments, and as a guide to help focus resources on prosecution, protection, and prevention programs and policies."<sup>184</sup> The TIP Report documents the extent to which governments meet the U.S. minimum standards, based upon which the U.S. government later makes its sanctions determinations. The legitimacy of the sanctions regime therefore rests in large part on whether the TIP Reports provide a consistent and accurate measure of government performance and whether the sanctions determinations themselves reflect a consistent and reasoned condemnation of lax governments.

#### 1. The TIP Reports

As Anne Gallagher argues, "the effectiveness of the [TIP] report as a tool of persuasion will ultimately depend upon its actual and perceived credibility."<sup>185</sup> Credibility requires accuracy and consistency in the country assessments. Because the U.S. minimum standards are too abstract to provide concrete guidance, the TIP Report country narratives and assessments provide a practical measure by which governments can gauge and improve upon their anti-trafficking efforts. Because governments are just beginning to recognize and address trafficking in a systematic manner, the TIP Report country assessments have tremendous potential to shape the international anti-trafficking response.

While the TIP Reports have improved markedly with each year, inconsistent application of the minimum standards and superficial country assessments have compromised their credibility and effectiveness as a tool to influence government behavior. The absence of clear priorities among the numerous factors considered in the U.S. minimum standards yields scattershot analysis at times, wanting for meaningful evaluation of

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183. See Cleveland, *supra* note 7, at 85.

184. 2005 TIP REPORT, *supra* note 1, at 29.

185. Gallagher, *supra* note 139, at 1139.

the situation on the ground. The lack of evaluative information in the country assessments, moreover, risks casting the impression that the TIP Report rewards the United States' friends and punishes its enemies.

a. Limitations on data collection and assessment

Producing the yearly TIP Report assessing and ranking countries' efforts to combat trafficking is an ambitious endeavor. The TIP Office reporting staff—comprised of approximately 10 individuals—is responsible for collecting and analyzing data regarding the anti-trafficking laws and policies of 150 countries. Given the clandestine nature of trafficking, data is difficult to obtain and assess for reliability. Although the TIP Office staff travel to some of the countries assessed to collect data, the reports are based primarily on information received from U.S. embassy posts, international and nongovernmental organizations, and foreign embassies, which, in turn, rely on other sources, including academics, journalists, and victims, for their information.<sup>186</sup>

Because they rely heavily on second-hand data, the credibility of the TIP Report country assessments depends on the quality of the sources to which the TIP Office has access. Access to reliable information depends on the willingness of organizations on the ground to provide data, which itself turns on the perceived credibility of the TIP reporting mechanism. Regrettably, early disappointment in the tier rankings has caused a number of NGOs to opt out of contributing information to what they believe is a fundamentally flawed undertaking. In their view, it is not worth the risk of compromising what, in some cases, are already strained relationships with their governments by reporting poor conditions on the ground.<sup>187</sup> As some NGOs exist only at the indulgence of their host governments, compromising government relations can jeopardize an NGO's ability to assist victims.<sup>188</sup> Moreover, now that the TIP Office has aligned itself with the abolitionist side of the prostitution debates, its perceived or actual bias against non-abolitionist organizations has caused a number of NGOs to distrust and disengage from the TIP reporting mechanism.<sup>189</sup>

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186. 2005 TIP REPORT, *supra* note 1, at 29–30.

187. This statement is based on a series of interviews held during 2004–2005 between the author and the personnel of various nongovernmental and intergovernmental organizations with counter-trafficking projects in Southeast Asia and Central and Eastern Europe [hereinafter NGO/IGO Interviews]. These interviews were conducted with assurances from the author that the anonymity of the interviewees would be preserved, in light of the sensitivity of the issues discussed and the potential risk to these individuals and their respective organizations.

188. *See id.* The author was apprised of specific instances where NGOs were reprimanded by their host governments for informing the TIP Office of the inadequacy of their governments' efforts to combat trafficking on the ground.

189. A number of researchers and policy advocates have openly conveyed their skepticism of the U.S. State Department's claim that prostitution is a cause of trafficking. *See* Letter



Given the extensive grassroots networks these NGOs might otherwise bring to the table, this dynamic undercuts the TIP Office's efforts to gather data for the TIP Reports.

While the politics of information-sharing from and among NGOs is perhaps predictable given the divisiveness of the field, the apparent lack of coordination between the TIP Office and DHRL is surprising. As Koh has noted, DHRL produces country-by-country assessments of anti-trafficking activity in its yearly U.S. Department of State Country Reports on Human Rights Practices (DOS Human Rights Reports). A cursory comparison of the TIP Reports against the "trafficking in persons" sections of the DOS Human Rights Reports reveals the latter to contain more detailed and substantive—and sometimes contrary to their TIP Report counterparts<sup>190</sup>—assessment of government anti-trafficking efforts. In addition to justifying Koh's caution against the duplicative nature of the TIP Report, the qualitative difference between the two reports casts doubt on whether the TIP Office has the resources and expertise necessary to conduct a comprehensive analysis of such a complex problem.<sup>191</sup> Given the human rights implications of trafficking, the TIP Office at least should recognize and draw upon DHRL's expertise in assessing governments' efforts to protect trafficked persons.

#### b. Standards and Categories for Tier rankings

A significant limitation of the TIP Report is its apparent lack of conceptual clarity as to the standards used for assessing and comparing country performance. The dozen or so criteria to be considered under the minimum standards are unwieldy on their face. Moreover, though these standards substantively focus on the prosecution of traffickers, the TIP Report's coverage of all "three P's" (prosecution, protection, and prevention) creates the expectation of meaningful review of government action from a rights perspective as well. This is further encouraged by the TIP

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to Ambassador John Miller from Ann Jordan, *et al.* (Apr. 21, 2005), available at [http://www.humantrafficking.org/countries/eap/united\\_states/news/2005\\_05/tr\\_to\\_amb\\_john\\_miller.doc](http://www.humantrafficking.org/countries/eap/united_states/news/2005_05/tr_to_amb_john_miller.doc) (last visited Mar. 16, 2006).

190. See, e.g., *infra* discussion of Czech Republic and Venezuela in notes 212 and 218.

191. The problem of trafficking implicates a wide range of policy areas, including criminal justice, immigration, labor, human rights, public health, among others. Understanding trafficking in practical context requires a broad understanding of how these areas can interact and conflict with respect to the implementation of counter-trafficking interventions on the ground. Meaningful evaluation of the effectiveness of these interventions can also require more specialized expertise. For example, without training in immigration law or comparative legal analysis, an analyst might be less able to appreciate how a foreign country's domestic counter-trafficking laws might actually operate to deprive victims of meaningful rights protection. For instance, *de jure* or *de facto* failure to distinguish between smuggled persons and trafficked persons could result in the inadvertent deportation of trafficked persons, exposing them to reprisals from traffickers in their home countries or to possible re-trafficking.

Report's recent addition of the "three R's (rescue, removal, and rehabilitation) to its rhetorical platform.<sup>192</sup> But the actual country assessments fall short, and not just from the rights standpoint.<sup>193</sup> The country assessments—presented in one to three pages of TIP Report text per country—tend to consist of superficial checklist reporting on governments' anti-trafficking measures, lacking in meaningful evaluation of their effectiveness.

Given the many criteria considered in the country assessments, it is difficult to glean a clear and consistent measure by which countries are compared and ranked. One would expect the Tier 1 countries to have established relatively comprehensive anti-trafficking laws and policies. But it is nearly impossible to discern a consistent set of threshold standards for Tier 1 ranking. For instance, the rhetorical emphasis in the TIP Report on a "victim-centered approach" suggests that at the very least, victim protection ought to be a priority:

In assessing foreign government efforts, the TIP Report highlights the "three P's" of prosecution, protection, and prevention. *But a victim-centered approach to trafficking requires us equally to address the "three R's"—rescue, removal, and reintegration. We must heed the cries of the captured. Until all countries unite to confront this evil, our work will not be finished.*<sup>194</sup>

But these lofty proclamations stand in stark contrast to the TIP Reports' fundamental failure to condemn practices that compromise the human rights of trafficked persons. For example, that trafficked persons "were treated as illegal immigrants and expressed fear of testifying due to safety concerns" in the Czech Republic and were "jailed and/or detained for violating immigration or other laws [and] not provided adequate legal representation" in Morocco<sup>195</sup> hardly supports the Tier 1 ranking both countries received in the 2004 TIP Report. In a similar vein, the 2005 TIP Report notes, but fails to condemn, France's practice of "arresting, jailing, and fining of trafficking victims as a means of discouraging the operation of trafficking networks and to gain information

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192. U.S. DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT 5* (June 2004) [hereinafter 2004 TIP REPORT]; see also Laura J. Lederer, Senior Advisor on Trafficking, Office for Global Affairs, Remarks at NGO Briefing on U.S. Government International Response to Trafficking Before the Commission on the Status of Women (Mar. 8, 2005), available at <http://www.state.gov/g/tip/rls/rm/2005/46562.htm> (last visited Mar. 31, 2006).

193. See *Examining U.S. Efforts to Combat Human Trafficking and Slavery: Hearing Before Subcomm. on the Constitution, Civ. Rts., and Prop. Rts. of the S. Comm. on the Judiciary*, 108th Cong. 131-35 (2004) (statement of Wendy Patten, U.S. Advocacy Director of Human Rights Watch).

194. 2004 TIP REPORT, *supra* note 192, at 5 (emphasis added).

195. *Id.* at 134 (Czech Republic), 199 (Morocco).

to pursue cases against traffickers,” which “harms trafficking victims and allows for [their] deportation, regardless of possible threats [in their country of origin].”<sup>196</sup>

The TIP Reports’ persistence in assigning Tier 1 status to countries that fail to distinguish between smuggling and trafficking<sup>197</sup> is equally problematic. Unlike trafficked persons, smuggled migrants are assumed to be acting voluntarily and afforded less protection under international law.<sup>198</sup> The failure to distinguish between the two practices risks inflating the numbers of people trafficked and skewing the assessment of government response. More significantly, it risks denying certain trafficked persons (i.e., those wrongly labeled as “smuggled”) the victim status to which they are entitled under the Palermo Protocol. As the 2004 TIP Report narrative for Italy demonstrates, mistakenly treating trafficked persons as smuggled could lead authorities to deport them,<sup>199</sup> thus exposing them to possible reprisals by traffickers in their home country and/or the risk of re-trafficking.

Even from the perspective of prioritizing aggressive criminal justice response over victim protection, the TIP Reports still lack a meaningful threshold standard for Tier 1 status. Tier 1 countries apparently are *not* required to adopt comprehensive anti-trafficking legislation but instead can rely on “related” criminal ordinances.<sup>200</sup> For instance, the United

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196. 2005 TIP REPORT, *supra* note 1, at 106 (France).

197. See 2004 TIP REPORT, *supra* note 192, at 185 (United Kingdom) (noting that the government “instituted thoughtful prevention measures, but did not clearly distinguish between trafficking and smuggling”); *id.* at 165 (Portugal) (noting that “[a]s stated in recent years, the government should distinguish more clearly between trafficking and immigration crimes, in order to ensure trafficking victims’ rights are fully protected and trafficking crimes sufficiently enforced” (emphasis added)); *id.* at 148 (Italy) (noting that “Italian law enforcement officials enforced anti-trafficking laws, but their approach conflated trafficking and illegal immigration”). In the 2005 TIP REPORT, Italy, the United Kingdom, and Portugal persisted in their failure to distinguish between trafficking and smuggling or illegal immigration. See 2005 TIP REPORT, *supra* note 1, at 221 (United Kingdom), 130 (Italy), and 181 (Portugal). The fact that Portugal has consistently ranked Tier 1, despite repeated (and apparently unheeded) admonitions by the U.S. government over the need to distinguish between trafficking and smuggling certainly suggests either a low priority on the human rights of trafficked persons or a failure on the part of TIP Office staff to appreciate how the conflation of smuggling and trafficking risks harm to trafficked persons.

198. See Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, 12 FORCED MIGRATION REV. 25 (2002). Smuggling is defined as the illegal movement of persons across borders for profit. *Id.*

199. See 2004 TIP REPORT, *supra* note 192, at 148 (noting that “[a]ccording to NGOs tougher immigration laws prompted authorities to deport illegal immigrants without first determining whether they were trafficking victims”). While Italy appears to be one of the few countries that provide trafficked persons the option of permanent residency status, this remedy is of limited value where the victims have already been deported as illegal immigrants.

200. See, e.g., 2004 TIP REPORT, *supra* note 192, at 93 (Hong Kong) (no specific anti-trafficking laws); *id.* at 177 (Sweden) (anti-trafficking legislation does not cover trafficking for non-sexual purposes).

Kingdom, Sweden, and Germany ranked Tier 1 in 2004 despite the fact that none of these countries had enacted laws targeting trafficking for (non-sexual) labor exploitation.<sup>201</sup> Indeed, the existence of *draft* laws appears sufficient to merit a Tier 1 designation, contrary to the explicit representation that the TIP Report “does not give great weight to laws in draft form.”<sup>202</sup> Moreover, with respect to the actual operation of existing criminal laws, there is disturbingly little condemnation of the fact that the vast majority of convictions obtained in at least two Tier 1 countries carried suspended sentences.<sup>203</sup> Government failure to address official corruption appears similarly tolerated.<sup>204</sup>

The failure to require a basic level of compliance with U.S. minimum standards for Tier 1 ranking compromises the TIP Report’s ability to induce governments to aggressively combat trafficking. Lax application of minimal standards for Tier 1 risks giving governments credit where credit is not due, which only encourages a deleterious complacency from which governments can easily backslide into inaction.<sup>205</sup>

201. *Id.* at 143–44, 177–78, 185.

202. 2004 TIP REPORT, *supra* note 192, at 25. *But see infra* discussion of Ghana in note 205; 2005 TIP REPORT, *supra* note 1, at 162 (promoting Nepal to Tier 1, despite the draft form of the labor trafficking law and the fact that its anti-trafficking efforts were “hindered by political instability and security problems”).

203. *See, e.g.*, 2005 TIP REPORT, *supra* note 1, at 179, 111 (noting that only 36 out of the 152 traffickers convicted in Poland, and 51 out of the 145 traffickers convicted in Germany, received *non*-suspended criminal sentences).

204. For example, the 2005 country assessment for Italy states that there were reports of officials “accepting bribes and facilitating trafficking” but notes, “however, [that] the government took measures to mitigate this by rotating officers off patrols for controlling prostitution.” *Id.* at 130. The country assessment for Nepal notes only that Nepal “should take measures against some immigration officials, police, and judges suspected of trafficking-related graft and corruption.” *Id.* at 163. The TIP assessment should have condemned these responses (or lack thereof) as inadequate and called for active arrest and prosecution of officials complicit in the trafficking. *See* 2003 TVPRA, *supra* note 3, § 2(5) (discussing how corruption of foreign law enforcement continues to undermine government efforts to investigate, prosecute, and convict traffickers). *See also* Palermo Protocol, *supra* note 2, arts. 8, 9 (outlining measures that states are to take against corruption of public officials).

205. Indeed, whether certain countries that were ranked Tier 1, but were subsequently demoted, deserved the initial Tier 1 ranking was highly questionable from the start. The United Arab Emirates—which ranked Tier 3 in years 2001 and 2002, then jumped to Tier 1 in 2003, down to Tier 2 in 2004, and then to Tier 3 in 2005—is a case in point. The 2004 TIP REPORT belies the U.S. State Department’s earlier portrayal of trafficking victims as “not detained, jailed or deported” and “not prosecuted for violations of other laws, such as immigration or prostitution.” *Compare* 2004 TIP REPORT, *supra* note 192, at 204 (“[t]he U.A.E. police reportedly *continue* to arrest trafficking victims along with prostitutes and incarcerate them”), *with* DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 156 (2003) [hereinafter 2003 TIP REPORT]. Ghana’s Tier 1 ranking in 2004 was similarly suspect. *Compare* 2004 TIP REPORT, *supra* note 192, at 57 (noting that anti-trafficking legislation had been drafted and that the government should proactively seek its passage) *and* DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2004) [hereinafter 2004 DOS COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES] (Ghana)

In addition, the failure to clarify and uphold meaningful minimal standards for the Tier 1 category obfuscates the standards for the other tiers as well. Since its inception, the tiering system has drawn fire from human rights organizations for its broad Tier 2 “catch-all” category, comprised of countries with disparate trafficking records, including those more appropriately classified as Tier 3.<sup>206</sup> The 2004 TIP Report’s addition of a Tier 2 Watch List compounded these concerns by raising the specter of a “buffer” zone between Tier 2 and Tier 3. While it is reassuring that the 2005 TIP Report’s Tier 3 list included countries previously ranked Tier 2,<sup>207</sup> the bases for distinguishing between Tier 2, Tier 2 Watch List, and Tier 3 remain unclear. For instance, it is difficult to discern how Malaysia—which has no trafficking-specific laws or law enforcement training and detains trafficked persons—merits a consistently better ranking than most, if not all, of the Tier 2 Watch List countries.<sup>208</sup> Moreover, as opaque as the standards for tier placement are, it is even harder to discern the criteria for tier *movement*. Apparently based on some notion of continued progress from the previous year, the standard for tier movement for any given country is a moving target, not to mention an impracticable measure for country-to-country comparisons of yearly progress.

To be more effective as a tool of persuasion, the TIP Report must establish and apply clearer guidelines for evaluating country performance. At a minimum, Tier 1 should be reserved for countries that have adopted comprehensive anti-trafficking legislation and that proactively prevent the further victimization of trafficked persons, including by barring summary deportation and prosecution for trafficking-related offenses.

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(noting how the absence of an actual trafficking law undermined prosecution efforts, such that there were no convictions during the reporting year). Not too surprisingly, Ghana was demoted to Tier 2 in 2005 on grounds that “law enforcement efforts were disjointed and hampered by the lack of a comprehensive national trafficking law.” 2005 TIP REPORT, *supra* note 1, at 112 (Ghana).

206. See, e.g., Press Release, Human Rights Watch, U.S. State Dep’t Trafficking Report Undercut by Lack of Analysis (July 11, 2003); Press Release, Human Rights Watch, U.S. State Dep’t Trafficking Report Missing Key Data, Credits Uneven Efforts (June 6, 2002).

207. These include Cambodia, Kuwait, Saudi Arabia, Togo, and the United Arab Emirates. Compare 2005 TIP REPORT, *supra* note 1, at 42 with 2004 TIP REPORT, *supra* note 192, at 39.

208. Compare 2005 TIP REPORT, *supra* note 1, at 151 (Malaysia) (noting the absence of specific anti-trafficking laws, no training of front-line police and immigration officers, and the placement of trafficking victims who cooperate in prosecutions “in harsh conditions in immigrant detention centers to await deportation”), with 2005 TIP REPORT, *supra* note 1, at 122–24 (India) (noting the existence of comprehensive anti-trafficking laws, training of hundreds of state and police officials, and coordinated support services delivery system).

## c. Ideological and Political Bias

Perhaps most critical to the credibility and legitimacy of the TIP Report is whether the assessment of government anti-trafficking activities is conducted in an evenhanded manner. While there is no denying that the decision to *issue* sanctions is ultimately a political one, there is no reason why the documentation and analysis of the conditions by which a country might *qualify* for sanctions could not be conducted in as neutral a fashion as possible. The country assessments must be politically neutral, conducted independently of existing, broader geopolitical tensions that might otherwise cast a shadow of bias. They must also mirror the ideological neutrality of the Palermo Protocol, particularly with respect to treatment of prostitution and sex trafficking.

A review of the TIP Reports confirms the repeated allegations from human rights organizations<sup>209</sup> of bias against reporting on sex trafficking as opposed to trafficking for non-sexual purposes—e.g., agricultural work and domestic service. The reporting on non-sexual trafficking tends to be thinner than warranted by current statistics, which estimate that such trafficking constitutes at least one-third of all trafficking cases.<sup>210</sup> Moreover, the TIP Reports tend to give greater credit or censure to government efforts to combat sex trafficking than those that target trafficking for non-sexual purposes.<sup>211</sup> For example, the 2005 TIP Report narratives for Tier 1 countries Germany and the Czech Republic do not even acknowledge that labor trafficking is a problem in these countries, despite published reports, including the 2005 DOS Human Rights Report, suggesting otherwise.<sup>212</sup> It bears noting that the 2005 TIP Report

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209. See, e.g., Press Release, Human Rights Watch, U.S. State Dep't Trafficking Report a "Mixed Bag" (July 12, 2001) ("the report concentrates too much on trafficking for 'sexual exploitation,' to the exclusion of trafficking into other forms of forced labor.").

210. See *ILO Global Report*, *supra* note 1, at 46.

211. See, e.g., 2004 TIP REPORT, *supra* note 192, at 108 (Taiwan), 143 (Germany), 133 (Czech Republic). A source, transit, and destination point for sex trafficking and forced labor trafficking, Taiwan is described as having "comprehensive laws that criminalize trafficking." But apart from mentioning a statute targeting the sex trafficking of children, the narrative only vaguely refers to "other statutes that criminalize other trafficking activities" and focuses the discussion on anti-sex-trafficking measures. *Id.* at 108. In similar vein, the narrative for Germany notes that, while specific sex trafficking legislation exists, forced labor trafficking is pursued under "crimes against personal freedoms"; the narrative offers no analysis of the effectiveness of efforts to penalize trafficking for non-sexual purposes. *Id.* at 143. Similarly, the Czech Republic has passed specific legislation to deal with sex trafficking, but relies on "human smuggling provisions" to address the problem of trafficking for forced labor. *Id.* at 133.

212. Compare 2005 TIP REPORT, *supra* note 1, at 111 (describing Germany as a transit and destination country for sex trafficking), with *ILO Global Report*, *supra* note 1, at 48, ¶¶ 228–29 (describing trafficking for domestic work, seasonal agriculture work, construction work, catering, the fun-fair trade, and meat-processing). Compare 2005 TIP REPORT, *supra* note 1, at 93 (describing Czech Republic as a source, transit, and destination country for sex

shows signs of improvement, placing four Middle Eastern countries in Tier 3 based on their failure to address labor trafficking.<sup>213</sup> But to shield itself against allegations of bias, the TIP Report must equally scrutinize such practices with respect to all countries—moving beyond the obvious prime offenders and examining those with primarily sex trafficking problems.<sup>214</sup>

Critics have also argued that the TIP Reports employ selective criticism of country practices, “going light” on U.S. allies and reserving their criticism for countries with which the United States has either a strained relationship or no strategic interests. The TIP Office’s standard rationale for this outcome is that it is, of course, more likely to achieve success in its efforts to work with friendly governments on their anti-trafficking policies than with hostile ones.<sup>215</sup> While there is a certain logic to this reasoning, the TIP Report country narratives lack sufficient information to justify the promotion of certain countries and the censure of others. For instance, the 2004 TIP Report promoted Indonesia—a key ally in the U.S. “war on terrorism”—from Tier 3 to Tier 2, despite little discernable improvement on the ground<sup>216</sup> and a persistent (and continuing, according to the 2005 TIP Report) failure to pass a comprehensive anti-

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trafficking), with DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2005) [hereinafter 2005 DOS COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES] (Czech Republic) (noting that “there were some cases of forced labor”).

213. In a move that drew concern from commentators over its possible impact on relations between the United States and the Middle East, the 2005 TIP Report placed United Arab Emirates, Qatar, Kuwait, and Saudi Arabia in Tier 3. See 2005 TIP REPORT, *supra* note 1, at 137, 181, 187, 218. See also Jim Krane, *Arab Nations Warned on Human Trafficking*, ASSOCIATED PRESS, June 5, 2005; Anne Gearan, *14 Nations Fail to Stop Human Trafficking*, ASSOCIATED PRESS, June 4, 2005; Glenn Kessler, *Saudis Rebuked on Forced Labor*, WASHINGTON POST, June 4, 2005, at A10; Joel Brinkley, *U.S. Faults 4 Allies Over Forced Labor*, N.Y. TIMES, June 4, 2005, at A5; David Stout, *U.S. Cites 4 Mideast Allies in Report on Trafficking in People*, N.Y. TIMES, June 3, 2005.

214. For example, though the 2005 TIP REPORT mentions that France, Poland, and Portugal have problems with labor trafficking, none of these narratives discuss measures taken to prevent labor trafficking. See 2005 TIP REPORT, *supra* note 1, at 106–07, 121–23. Moreover, the 2005 TIP REPORT promotes Nepal to Tier 1, despite the fact that a law addressing the rights of labor migrants is only in draft form. See 2005 TIP REPORT, *supra* note 1, at 163.

215. This view was expressed to the author in an interview conducted with former and current TIP Office staff members during the week of February 7, 2004 [hereinafter TIP Office Interview].

216. The Indonesian government reportedly “made strides to combat trafficking,” including increased public awareness campaigns, increased law enforcement efforts, data collection, and shelters for victims *abroad*. But though law enforcement efforts increased, corruption was a “serious impediment,” convictions carried light sentences, and translation of the national action plan to local enforcement “remains a problem” and “varies widely.” See 2004 TIP REPORT, *supra* note 192, at 94.

trafficking law.<sup>217</sup> Conversely, the demotion of Venezuela from Tier 2 to Tier 3 in the 2004 TIP Report and its continued Tier 3 placement in 2005 is similarly suspect given the reported absence of concrete data regarding the extent of the purported trafficking problem in Venezuela.<sup>218</sup> Indeed, a number of Washington-based think tanks with expertise in the region have been quick to attribute the Tier 3 ranking to the strained U.S.-Venezuela relations in the aftermath of a U.S.-backed failed coup attempt against President Hugo Chavez.<sup>219</sup>

These allegations of bias notwithstanding, the TIP Reports have improved over time. The fact that the 2005 TIP Report placed four Middle Eastern countries—with whom good relations are critical to U.S. interests in the region—on Tier 3 due to their failure to address labor trafficking is a welcome show of principle over political expedience. To strengthen their credibility, however, the TIP Reports should include neutral assessments of all countries—both friend and foe—supported by verifiable data.

## 2. Sanctions

As Professor Cleveland concluded in her study of U.S. unilateralism, differential treatment in the imposition of sanctions has done the most to undermine the normative legitimacy of U.S. unilateral actions.<sup>220</sup> The credibility of trafficking sanctions thus turns on whether the decision to issue sanctions is based on clearly defined and consistently applied

217. Compare 2004 TIP REPORT, *supra* note 192, at 94 (noting that “a draft bill is currently pending”), with 2005 TIP REPORT, *supra* note 1, at 126 (noting that “a draft bill is currently pending before Parliament”).

218. While the 2004 U.S. State Department Human Rights Country Report for Venezuela noted “no figures on trafficking were available from either government or NGO sources, making it difficult to gauge the extent of the [trafficking] problem,” the 2004 TIP Report offered only that “[d]ue to Venezuela’s current political situation, the government is not devoting serious attention or resources to trafficking in persons, which is a growing regional problem.” Compare 2004 DOS COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (Venezuela), *supra* note 205, with 2004 TIP REPORT, *supra* note 192, at 248. The 2004 TIP Report gives no evidence that Venezuela made less effort in 2004 than it did in 2003, when, according to the 2003 TIP Report, then-Tier-2-ranked Venezuela was deemed to have made “significant efforts to [combat trafficking], despite limited resources.” 2003 TIP REPORT, *supra* note 205, at 161.

219. See, e.g., Sarah Wagner, *Venezuela Accuses US of Politicizing Human Rights Work*, VENEZUELANALYSIS.COM, June 3, 2005, available at <http://www.venezuelanalysis.com/news.php?newsno=1644> (last visited Mar. 14, 2006); Jonah Gindin, *Venezuela Holds Hearing on Human Trafficking, Calls on US to Lift Sanctions*, VENEZUELANALYSIS.COM, May 27, 2005, <http://www.venezuelanalysis.com/news.php?newsno=1635> (last visited Mar. 14, 2006); Council on Hemispheric Affairs, *Washington’s Human Trafficking Charges Drag Down U.S.-Venezuela Relations*, VENEZUELANALYSIS.COM, Oct. 8, 2004, <http://www.venezuelanalysis.com/articles.php?artno=1290> (last visited Mar. 14, 2006) (quoting allegations of political bias from the directors of the Council of Hemispheric Affairs and the Center for Economic and Policy Research, and Global Rights).

220. See Cleveland, *supra* note 7, at 75.



principles, rather than political calculation. Of the 15 countries ranked Tier 3 in the 2003 TIP Report,<sup>221</sup> the United States ultimately sanctioned only Burma, Cuba, and North Korea.<sup>222</sup> Of the ten countries ranked Tier 3 in 2004, these three countries were again subject to sanctions, along with Equatorial Guinea, Sudan, and Venezuela.<sup>223</sup> In 2005, the United States ultimately sanctioned five of the fifteen Tier 3 countries—Cuba, Burma, North Korea, Venezuela, and Cambodia.<sup>224</sup> That the countries sanctioned include those already under sanctions from the United States or those with which the United States has little economically and strate-

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221. See 2003 TIP REPORT, *supra* note 205, at 21.

222. Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, No. 2003-35, Sept. 9, 2003, available at <http://www.state.gov/g/tip/rls/rpt/25017.htm> [hereinafter 2003 Presidential Determination] (last visited Mar. 14, 2006). The President waived sanctions otherwise applicable to Sudan and Liberia on grounds that certain multilateral assistance for these two countries would promote the purposes of the act or was otherwise in the national interest of the United States. *Id.* The countries that were sanctioned—Burma, North Korea, and Cuba—were already subject to bans on direct assistance prior to the 2003 trafficking sanctions. *Id.* The sanctions had no impact on the United States' provision of food aid to North Korea through the United Nations World Food Program, as such assistance was deemed purely humanitarian in nature. *Id.*

223. See 2004 TIP REPORT, *supra* note 192, at 39; Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, No. 2004-46, Sep. 10, 2004, available at <http://www.state.gov/g/tip/rls/prsr/36127.htm> [hereinafter 2004 Presidential Determination] (last visited Mar. 14, 2006). As with the 2003 sanctions, the 2004 trafficking sanctions continued the status quo with respect to Burma, Cuba, and North Korea, which were already banned from receiving U.S. direct foreign assistance. Sanctions were partially waived to provide limited assistance to Equatorial Guinea, Sudan, and Venezuela in order to strengthen the rule of law and democratic process in these countries. *Id.* The 2004 Presidential Determination predicted that sanctions would "not significantly impact U.S. assistance programs to Equatorial Guinea as these programs are minimal." *Id.* With respect to Sudan, because comprehensive sanctions were already in place under other U.S. programs, the 2004 trafficking sanctions "would likely not affect any current programs." *Id.* Sanctions against Sudan would, however, prevent Sudanese Government officials from participating in U.S.-government-funded educational and cultural programs in the future, while sanctions against Venezuela would preclude provision of assistance in the form of Foreign Military Sales. *Id.*

224. Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, No. 2005-37, Sept. 21, 2005, available at <http://www.state.gov/g/tip/rls/prsr/2005/53777.htm> [hereinafter 2005 Presidential Determination] (last visited Mar. 14, 2006). Sanctions were waived in the U.S. national interest with respect to Ecuador, Kuwait, and Saudi Arabia. *Id.* As with the previous two rounds of trafficking sanctions, the 2005 sanctions maintained the status quo with respect to Burma, Cuba, and North Korea, which were already banned from U.S. direct foreign assistance. *Id.* Sanctions were partially waived with respect to Cambodia and Venezuela. *Id.* With respect to Cambodia, the 2005 sanctions precluded \$500,000 in Foreign Military Financing assistance, but the partial waiver would continue to allow for \$600,000 in anti-trafficking in persons assistance, \$4.719 million to vulnerable populations, including women and children, and \$585,000 in aid to promote good governance and bolster democratic institutions. *Id.* The sanctions against Venezuela precluded provision of assistance in the form of Foreign Military Sales. *Id.*

gically at stake invites the familiar criticism of U.S. sanctions policy for “picking and choosing among human rights violators.”<sup>225</sup>

Unfortunately, the standard used to measure compliance—i.e., whether governments are making “significant efforts to comply” with U.S. minimum standards—renders the trafficking sanctions regime vulnerable to selective enforcement. Determining whether a government’s effort to comply is sufficiently “significant” is at base an entirely subjective standard, especially given the absence of any concrete baselines for the different tiers—e.g., a requirement that Tier 1 countries have a comprehensive anti-trafficking law.

Once on the Tier 3 list, a country has 90 days to take “significant steps” to work with the U.S. government to try to comply with U.S. minimum standards and thereby avoid sanctions. But a review of the rationales behind the decisions *not* to impose sanctions on certain Tier 3 countries demonstrates just how nebulous—and easily manipulated—this standard for compliance is. The “statements of explanation” behind these decisions tend to reference the introduction of anti-trafficking programs but they do not assess their substance or potential impact.<sup>226</sup> Acts of subsequent compliance mostly include commitments to future action or prosecution-related measures such as raids and arrests of traffickers, but they feature few meaningful initiatives vis-à-vis victim protection.<sup>227</sup>

The decision to promote Sudan from Tier 3 to Tier 2 in the 2005 sanctions determinations is a case in point. The U.S. government justified the promotion based on a plan to end sexual violence against women that Sudan’s rulers presented to Secretary of State Condoleezza Rice in July 2005. It was later revealed, however, that the plan had actually originated with Deputy Secretary Robert Zoellick, who had presented the plan to the Khartoum regime two weeks prior to Secretary Rice’s

225. See *supra* sources cited in note 95.

226. For example, the description of the “protection” measures undertaken by the Dominican Republic in 2003 notes only that special prosecutors are “being installed . . . to better protect and address child trafficking,” 2003 Presidential Determination, *supra* note 222, but it is far from clear *how* this would result in “better protect[ion].” Tellingly, the 2005 TIP Report, which ranks the Dominican Republic as Tier 2-Watch List, includes no discussion of how these “special prosecutors” contributed to counter-trafficking efforts on the ground. Instead, the 2005 TIP REPORT states that “[t]he Dominican Government’s efforts to protect victims of trafficking remained inadequate over the last year” and that “[p]otential trafficking cases are rarely fully prosecuted or brought to conclusion.” 2005 TIP REPORT, *supra* note 1, at 96.

227. See Press Release, The White House, Statement by the Press Secretary: Presidential Determination Regarding the Trafficking Victims Protection Act for 2003 (Sept. 10, 2003); Press Release, The White House, Statement by the Press Secretary Regarding Trafficking in Persons (Sept. 10, 2004); Press Release, The White House, Statement by the Press Secretary: Presidential Determination Regarding the Trafficking Victims Protection Act for 2005 (Sept. 21, 2005).

visit.<sup>228</sup> That such token commitments and action suffice to shield a Tier 3 country from sanctions renders it entirely predictable that the only countries ultimately sanctioned would be those out of favor with the U.S. government.

Admittedly, there is a certain logic to the view that governments with strained relations with the United States would be less likely to achieve compliance in the 90-day grace period because of the fewer opportunities to “work with” the U.S. government to develop their anti-trafficking policies. But even notwithstanding this rationale, the TVPA sanctions regime is vulnerable to the critique of selective enforcement. The controversy surrounding the decision to issue sanctions against Venezuela and Cuba illustrates an apparent or actual ulterior political motive. Regarding the trafficking situation in Venezuela, Human Rights Watch and several Washington D.C.-based foreign policy think tanks have denied that trafficking is any more of a problem in Venezuela than any other region.<sup>229</sup> Rather, multiple foreign policy think tanks, including critics of the Venezuelan government, have criticized the Venezuela sanctions as blatantly political, designed to cabin the influence and power of President Chavez.<sup>230</sup> That Venezuela was demoted to Tier 3 two months before a recall referendum on Chavez’s presidency and sanctioned shortly after President Chavez won by a “landslide” suggests, according to critics, that Venezuela’s Tier 3 placement was just another instance of the United States using its economic leverage to defeat Marxist regimes.<sup>231</sup>

Along similar lines, commentators criticized the U.S. government’s denunciation of Cuba for Castro’s alleged encouragement of sex tourism as reflective of the U.S. government’s ‘willing[ness] to cut huge corners in its Cuba policy.’<sup>232</sup> Shortly after Cuba was placed on Tier 3 in 2004,

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228. See 2005 Presidential Determination, *supra* note 224; Glenn Kessler, *White House Presses Effort to Ease Darfur Violence*, WASH. POST, Nov. 4, 2005 (Bus. Sec.); Editorial, *Winking at Genocide*, BOSTON GLOBE, Nov. 8, 2005, at A10.

229. Bart Jones, *U.S.-Venezuela Rift; Sanctions Stress Relations Further; Bush Accuses Nation of Failing to Combat Human Trafficking, but Chavez Officials Say Move is Political*, NEWSDAY (New York), Sept. 26, 2004, at A20; Editorial, *The New Cold War*, CHI. TRIB., Sept. 25, 2004, at C24 [hereinafter CHICAGO TRIBUNE editorial]; Michael Shifter, Editorial, *U.S. versus Venezuela*, THE SEATTLE POST-INTELLIGENCER, Sept. 21, 2004, at B7; Michael Shifter, Editorial, *Picking a Fight with Venezuela*, N.Y. TIMES, Sept. 20, 2004, at A25.

230. See Jones, *supra* note 229 (quoting the directors of Inter-American Dialogue).

231. Critics compare this to the U.S. government’s treatment of El Salvador. Leading up to El Salvador’s 2004 presidential elections, when Marxist former-insurgent FMLN was poised to win, the United States threatened to prohibit Salvadorans in the United States from sending home remittances, which accounted for 17.1% of the El Salvador’s gross domestic product. See Gindin, *supra* note 219.

232. Maura Reynolds, *Bush Took Quote Out of Context, Researcher Says*, L.A. TIMES, July 20, 2004, at A15 (quoting a Cuba expert from the Council on Foreign Relations).

President George W. Bush quoted Fidel Castro as having claimed that “Cuba has the cleanest and most educated prostitutes in the world.” It was later uncovered, however, that not only had the State Department pulled the quote from a paper written by a college student and posted on the internet, but, according to the student, the president actually misconstrued his meaning.<sup>233</sup> In the view of a Cuba expert at the Council on Foreign Relations, President Bush’s remark on sex tourism in Cuba was a political maneuver to make up lost ground on Cuba policy and to regain Cuban-American votes in the 2004 U.S. presidential elections.<sup>234</sup> Rife with references to the lack of reliable data on the extent of trafficking in the country and of government efforts to combat the practice, the TIP Report assessments of Cuba are indeed too vague to provide credible support for sanctions.

The credibility and legitimacy of trafficking sanctions turns on the U.S. government’s ability to identify and apply clear and consistent criteria to justify its condemnations. Even apart from undermining U.S. global anti-trafficking efforts, bad trafficking sanctions policy can have serious implications for broader U.S. foreign policy and, most critically, the population of the target country. As policy analysts noted with respect to the Venezuelan sanctions, politically-motivated application of U.S. sanctions policy can not only fail to provoke the desired change, but it can affirmatively backfire by further radicalizing recalcitrant regimes and, moreover, fostering regional discontent with the United States.<sup>235</sup> Moreover, the devastating effect of sanctions on a target population can make a politically-motivated sanctions determination all the more unacceptable. While the trafficking sanctions determinations appear to consider their potential effects on vulnerable populations in the target countries,<sup>236</sup> it is unclear whether and to what extent such considerations factor into the decision to withdraw U.S. support for multilateral development projects. In the case of Venezuela, for example, a country with extremely limited resources, the 2004 sanctions not only foreclosed U.S. direct foreign assistance but also placed at risk up to \$1 billion in loans from international financial institutions, including financing for a \$750

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233. According to the college student who authored the paper, rather than boasting about sex tourism on the island, “Castro was merely trying to emphasize some of the successes of the revolution by saying ‘even our prostitutes are educated.’” *Id.*

234. *Id.*

235. See Shifter, *supra* note 229 (predicting that the Venezuelan sanctions would “probably prompt other Latin American governments to vote in favor of the [multilateral development] loans to Venezuela—if for no other reason than to get back at the United States”).

236. See, e.g., *supra* notes 222 (discussing the need to continue providing food aid to North Korea), 224 (noting the need to continue assistance to vulnerable populations in Cambodia).

million hydroelectric plant and projects aimed at clean drinking water, Amazon rain forest protection, judicial reform, and better education.<sup>237</sup>

#### D. Barriers to Broader Participation by Transnational Actors

The fourth criterion for assessing the TVPA sanctions regime asks whether and to what extent the regime fosters the transnational interactive process Koh believes so critical to international norm development. Is the TVPA sanctions regime destined to produce only the one-sided, sanctioning-state-to-target-state interaction Danchin envisions? To what extent does—or can—the TVPA sanctions regime facilitate a broader interaction of transnational actors?

Broad participation by a diverse range of actors is vital to the project of articulating, interpreting, and eventually internalizing international anti-trafficking norms. While the rapid proliferation of anti-trafficking laws and initiatives at the international, regional, and domestic levels in recent years suggests increased commitment to combat trafficking, it also masks substantial gaps in our understanding of this multifaceted global problem. As the International Organization for Migration (IOM) recently concluded in its survey of data and research on trafficking, there is a desperate need for trafficking research that moves beyond describing the problem and engages in critical analysis of how best to deal with it.<sup>238</sup> We have yet to understand, for instance, the long-term impact of trafficking on its victims and the extent to which they are able to integrate or reintegrate into their communities and fully recover from their ordeal.<sup>239</sup> The absence of independent and comprehensive analyses of the *real* impact and effectiveness of different types of interventions makes it extraordinarily difficult to meaningfully assess government efforts to combat trafficking, much less compile a list of “best practices.”<sup>240</sup>

Achieving the depth of understanding necessary to attain meaningful norm development requires input from a diversity of perspectives (e.g., criminal justice, migration, human rights, and public health). Trafficking is too complex a problem—and the potential spillover effect between legal regimes too great—to be analyzed through a single lens or political agenda. The Vienna process highlighted the need for continuing interaction between the criminal justice and human rights communities. The growing tension between abolitionist anti-trafficking organizations and public health providers is but one example of the need for different

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237. See sources cited *supra* note 229. It appears that the withdrawal of U.S. support did not ultimately block these projects. Interview with Michael Shifter, Vice President for Policy, Inter-American Dialogue (Feb. 13, 2006).

238. IOM REPORT, *supra* note 145, at 14.

239. *Id.* at 9.

240. *Id.*

communities to find avenues for interaction and cooperation to strengthen their respective agendas.<sup>241</sup>

In addition to fostering synergies between different policy agendas, the interactive process should involve a wide range of actors at the inter-governmental, governmental, and nongovernmental levels and the private sector. Often serving as the first point of contact with trafficked persons, nongovernmental organizations have valuable access to victim perspectives and a practical understanding of victim needs. Governmental actors are best positioned to compile and assess data regarding the incidence of and response to trafficking. Intergovernmental organizations can provide a comparative perspective and, moreover, strategic insight into how best to coordinate a multilateral response. Meanwhile, the private sector can provide much needed practical insight, for instance, into programs to address the root causes of trafficking, including micro-lending projects and employment opportunities in the formal sectors.

There is no question that the TVPA sanctions regime has provoked much-needed engagement of governments worldwide in global efforts to combat trafficking. The sanctions regime likely has provoked a number of governments—which otherwise might not have acted on what they perceive as a “women’s issue,” thus less worthy of attention—to develop anti-trafficking legislation and initiatives.<sup>242</sup> As Ambassador John Miller, director of the TIP Office has explained, “[i]n the end, it is not the imposition of sanctions that we seek but the recognition by governments that they must address the problem of trafficking in persons seriously.”<sup>243</sup> The 90-day “grace period” after the release of the TIP Report presents a “period of heightened attention” during which the TIP Office can utilize the threat of sanctions “to galvanize real action that will translate into lives saved and victims rescued.”<sup>244</sup>

It appears, and accounts from TIP Office staff confirm, that most of the Tier 3 countries do, in fact, work very hard to implement the national plans of action developed by the TIP Office.<sup>245</sup> But while the TVPA sanctions regime indeed has provoked a significant amount of activity, the critical question is whether that activity is meaningful for international efforts to develop, articulate, and internalize international anti-trafficking norms. In the course of these exchanges between the TIP Office and

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241. *Id.* at 14.

242. TIP Office Interview, *supra* note 215.

243. *Trafficking in Persons Report: Hearing Before the H. Int’l Relations Comm. Subcomm. on Terrorism, Nonproliferation, and Human Rights*, 108th Cong. (2003) (testimony of John R. Miller, Dir. of the Office to Monitor and Combat Trafficking in Persons, U.S. Dep’t of State).

244. *Id.*

245. See 2003 Presidential Determination, *supra* note 222.

target governments, does the United States assume it has a monopoly on knowledge in the trafficking field, or does it permit, even invite, an equal exchange of ideas? Without access to the dialogue between the TIP Office and target governments, it is difficult to assess to what extent, if any, the exchange of information extends beyond the “one-sided” exchange Danchin criticizes.<sup>246</sup> It seems clear, however, that given the inherently uneven playing field the threat of sanctions creates, fostering a two-way exchange of ideas would require active encouragement by the U.S. government.

Anecdotal evidence suggests that the specter of TIP sanctions causes some governments (of developing countries, in particular) to develop their anti-trafficking programs based entirely on what they perceive to be the expectations of the TIP Office.<sup>247</sup> Focused on fulfilling these externally-imposed standards, these governments fail to conduct their own, context-specific assessment of the needs on the ground, and overlook or ignore the recommendations of local NGOs. The pressure to conform to U.S. expectations thus has tremendous potential to chill government participation in anti-trafficking norm development within their own countries, not to mention at the global level.

The TVPA sanctions regime has also had a chilling effect on NGO participation in the TIP reporting process itself. While the TIP Office actively encourages NGOs to contribute data to the TIP Report, there have been reports of retaliation against cooperating NGOs by their host governments in response to poor rankings in the TIP Report.<sup>248</sup> Conversely, some NGOs in effect have “opted out” of the TIP reporting process in reaction to what they believe to be insufficient condemnation of government inaction.<sup>249</sup> The TIP Office cannot afford to alienate its partners on the ground if it is to provide meaningful assistance to trafficked persons. These partners include U.S. embassy officials, who not only manage the complex and often fragile relationships between the United States and the host governments,<sup>250</sup> but potentially have access to the local NGO community.

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246. See Danchin, *supra* note 62, at 123.

247. See NGO/IGO Interviews, *supra* note 187. The circumstances surrounding the promotion of Sudan to Tier 2 during the 2005 sanctions round, discussed above, is a prime example of this dynamic. See *supra* note 228.

248. See *supra* discussion accompanying notes 187–189.

249. *Id.*

250. Based on information derived from interviews conducted by the author with officials of the U.S. Department of Justice and U.S. Department of State in February and March of 2004. These officials noted that the TIP reporting mechanism had provoked a backlash from U.S. embassy officials, who complained that the TIP Reports were straining their diplomatic relationships with their host countries. Being far removed from the situation on the ground in these countries, the Washington D.C.-based TIP Office was perhaps not fully appreciative of the fragile relationships between the embassies and the host governments.

While some of these consequences are perhaps beyond the control of the U.S. government, it is entirely predictable that certain U.S. government actions would chill NGO participation in the interactive process. The requirement that NGOs take an “anti-prostitution pledge” or else be disqualified from U.S. financial assistance<sup>251</sup> will continue to alienate service providers whose contribution to anti-trafficking norm development is vital. These include a number of NGOs with some of the most extensive experience working with trafficked persons.<sup>252</sup> Not only do NGOs have valuable access to victim populations, but they have rare firsthand exposure and insight into the long-term impact of trafficking on survivors that is crucial<sup>253</sup> to informed anti-trafficking norm development.<sup>254</sup> In a similar vein, the recent decision to apply the “anti-prostitution pledge” to NGOs that provide HIV/AIDS services abroad<sup>255</sup>—including U.S.-based NGOs<sup>256</sup>—will severely limit much-needed participation from the (historically underrepresented) public health community in anti-trafficking norm development.<sup>257</sup>

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251. USAID ACQUISITION AND ASSISTANCE POLICY DIRECTIVE, IMPLEMENTATION OF THE UNITED STATES LEADERSHIP AGAINST HIV/AIDS, TUBERCULOSIS AND MALARIA ACT OF 2003—ELIGIBILITY LIMITATION ON THE USE OF FUNDS AND OPPOSITION TO PROSTITUTION AND SEX TRAFFICKING, AAPD 05-04 (June 9, 2005) [hereinafter USAID AAPD 05-04].

252. Such restrictions would preclude funding for such organizations as the Bangkok-based Global Alliance Against Trafficking in Women (GAATW), which has been at the forefront of service provision and anti-trafficking advocacy since the mid-1990's. In addition to working on trafficking issues, GAATW works in solidarity with sex workers' struggle for social, political, and legal rights. See Global Alliance Against Trafficking in Women, <http://www.gaatw.net/> (last visited Mar. 14, 2006). These restrictions would also deny funding to organizations like Salamon Apitavy and the Ildikok Memorial Civil Rights Institute, whose contributions to efforts to combat trafficking were lauded by the UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy. See *Special Rapporteur 2000 Report*, *supra* note 10, at 103.

253. IOM REPORT, *supra* note 145.

254. It is important to note that organizations that refuse to sign the pledge do not necessarily support prostitution but rather believe a non-judgmental approach ensures greater access to an already stigmatized population. See Memorandum from Burt Neuborne & Rebekah Diller on the Constitutionality of Anti-Prostitution Pledge in the AIDS Act 2 (June 13, 2005) [hereinafter Neuborne & Diller]; Memorandum of Law of AIDS Action and Twenty-One Other Organizations' as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction, *in* OSI litigation, *supra* note 161.

255. USAID AAPD 05-04, *supra* note 251. This could affect organizations like the Sonagachi project, a highly successful program named after the red light district of Calcutta, India, designed to prevent the spread of HIV by organizing sex workers and conducting peer-based outreach. See Neuborne & Diller, *supra* note 254, at 3. See also Holly Burkhalter, *The Politics of AIDS: Engaging Conservative Activists*, FOREIGN AFF., Jan./Feb. 2004, at 3.

256. The constitutionality of applying the USAID anti-prostitution loyalty oath to U.S.-based NGOs is highly suspect. See Neuborne & Diller, *supra* note 254, at 7 (concluding that the First Amendment bars Congress from requiring organizations to adopt an anti-prostitution policy stance); OSI litigation, *supra* note 161; DKT litigation, *supra* note 161.

257. The declarations submitted by multiple public health advocates in support of DKT International in its lawsuit against USAID, see *supra* note 161, underscore the detrimental



Exclusion of certain actors from the interactive process can also have the domino effect of provoking otherwise unaffected actors to “opt out” of engagement with U.S. anti-trafficking initiatives. Regrettably, the intensely divisive politics of the trafficking field foster line-drawing in the sand, forcing organizations to pick sides in the interminable and ultimately counterproductive prostitution reform debates. That the U.S. government has taken such a strong position on these issues and, more critically, has sought to export its perspective abroad, privileges certain actors’ views over others. In a field as new and complex as trafficking, and in such need for input from *all* sectors of civil society, this dynamic severely undermines the transnational interactive process.

#### IV. A MODEST PROPOSAL FOR IMPROVING THE U.S. ANTI-TRAFFICKING SANCTIONS REGIME

Inasmuch as the discussion in Part III illustrates the flaws of the TVPA sanctions regime, it also provides useful guidance as to how the regime might be strengthened to promote the articulation, promulgation, and internalization of international anti-trafficking norms. Because the TVPA sanctions regime is, by all accounts, here to stay, there is little value in lamenting the regime’s existence and much to be said for seeking reform. While chances are admittedly slim that the sanctions regime could be rid of all flaws, there are at least a few modest steps the United States could take to significantly improve the sanctions regime’s contribution to global efforts to combat trafficking.

It is imperative that the United States implement the TVPA sanctions regime in a manner that is consistent with the Palermo Protocol norms, particularly given the United States’ recent ratification of this instrument. At a minimum, this requires acknowledging, when working with foreign governments, the deference the Palermo Protocol affords to individual states with respect to the legal treatment of prostitution. U.S. attempts to infuse the Protocol trafficking definition with additional, U.S.-defined elements are inappropriate as a matter of international law. Such maverick behavior fosters the impression that the norms the U.S. seeks to apply abroad reflect the changing priorities of U.S. domestic politics rather than a genuine respect for universally applicable norms. Accurate and consistent interpretation of international norms is critical to state

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effects of this policy on HIV/AIDS prevention programs worldwide. For instance, Dr. Carol Jenkins, a public health consultant, notes that “[t]he chill effect has been extensive,” including warnings by USAID officers to public health workers to alter, cut, or hide their sex worker interventions and “the de-funding or the threat of de-funding sex worker projects.” See Declaration of Dr. Carol Jenkins, *in* DKT litigation, *supra* note 161, ¶ 13.

compliance with their terms. Moreover, adopting the Protocol's agnostic position on this controversial issue helps avoid alienating countries with strongly-held positions on the issue and instead promotes the ethic of international cooperation the Protocol drafters sought to foster. As discussed above, such cooperation in turn encourages broader participation by transnational actors in ongoing international anti-trafficking norm articulation, promulgation, and internalization—a process by which the international community might bridge the knowledge gaps in our understanding of this complex crime and human rights violation.

Additional modifications should be made to improve the operation of the sanctions regime. Clearer articulation and more consistent application of the U.S. minimum standards would significantly increase the TIP Reports' effectiveness as a tool of persuasion. The TIP Reports are an important vehicle for providing governments and the broader public practical insight into which measures do or do not meet U.S. minimum standards. As such, it is imperative that the country narratives provide more detailed descriptions and qualitative information regarding a country's anti-trafficking practices so as to allow for meaningful evaluation of their effectiveness. Although the factors to be weighed in assessing country performance are perhaps too many and too fluid to permit firm guidelines for each tier, the Tier 1 category, as the highest level of performance, should reflect a set of clearly-defined threshold standards. At a minimum, Tier 1 countries should distinguish between smuggling and trafficking, and refrain from penalizing trafficked persons through arrest, incarceration, or summary deportation. The highest-ranked countries at least should exhibit conceptual clarity as to what trafficking *is*—i.e., a crime and human rights violation whose victims should be protected, not penalized. Conversely, for those countries falling on the other end of the spectrum, deemed sanctionable by the U.S. government, TIP Reports should describe the bases for condemnation clearly and in detail so as to avoid allegations of bias.

## V. CONCLUSION

The measures discussed above are but a few suggestions for improving the TVPA sanctions regime's capacity to contribute positively to global anti-trafficking efforts. The regime has already had tremendous influence on domestic anti-trafficking efforts worldwide, but at the risk of undermining the new international cooperation framework established under the Palermo Protocol. A controversial and powerful weapon in the arsenal of international tools to combat trafficking, there is little margin for error.

Given the transnational nature of the problem of human trafficking, any strategy at the global level to combat this crime and human rights violation must operate in a manner that encourages multilateral participation in the articulation and acceptance of international anti-trafficking norms. The tensions present in the Vienna process continue to render global anti-trafficking policymaking highly contested terrain. The international cooperative ethic that fueled consensus in Vienna must be preserved if the international community is to avoid backsliding into counterproductive debate and inaction.

We are still at the bottom of the learning curve with respect to what we know and understand about this complex, transnational problem. The clandestine nature of the activity defies standard methods of data collection and analysis, and with most states only just beginning to recognize trafficking as an issue of national concern, regional variations in practice and appropriate responses thereto have yet to be fully appreciated. The increased attention and resources now being given to this issue carry the prospect of closing the knowledge gap. But doing so requires multilateral cooperation and participation in efforts to articulate, promulgate, recognize, and internalize international anti-trafficking norms. With 2.5 million people already affected, and the numbers on the rise, there is too much at stake to lose the progress the international community achieved in creating the framework for a coordinated global response to this problem.