

Follow the leader: best practices to combat human trafficking in the United States*

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Abstract

Human trafficking is a high-profile issue in the United States (US). The country is regarded as a leader in combating trafficking in persons and its efforts are viewed as revolutionary. The crime of trafficking is tackled on a federal as well as state level in a multi-disciplinary manner and with a coordinated, integrated and sustained approach. Legislation such as the Victims of Trafficking, and Violence Protection Act of 2000 (TVPA) and its reauthorisations has contributed tremendously to fight sex- and labour trafficking. South Africa (SA) has enacted the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (TIP Act) on 29 July 2013. However, the legislation is as yet not fully implemented. Because of its slow response to introduce legislation to criminalise the conduct, South Africa has had the unique opportunity to learn from the errors of other countries that may have responded too hastily to the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol). Although the Act draws from international-best practices and is also modelled on the TVPA, it is still lacking in certain aspects when compared to the US's efforts in abolishing human trafficking. This article will elucidate the anti-trafficking legal framework of the US as exemplar for the newly-enacted SA TIP Act. In a brief comparison, the merits as well as the shortcomings in the TIP Act will also be highlighted.

BACKGROUND

The United States of America (US) has a long history of slavery which pre-dates 1776 when it was founded as a nation.¹ The southern states of the US

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¹ The early slaves were mainly white Europeans in contrast to the African slaves of the 1800s. See Jordan & Walsh *White cargo: the forgotten history of Britain's white slaves in America* (2007) 11–20. Deer in 'Relocation revisited: sex trafficking of native women

practised slavery until it was outlawed in 1865. Section 1 of the Thirteenth Amendment to the US Constitution proclaims that ‘neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction’. In the early twentieth century, slavery again became a concern in the country, however, this time, the focus was on white females enslaved by foreigners (especially Arabs and Asians) for sexual exploitation. In reaction to this crime, the White Slave Traffic Act (or Mann Act) was passed in 1910.² This Act first introduced the phrase ‘human trafficking for sexual enslavement’. Since the passage of the Mann Act, the country has been plagued by slavery in all possible forms.³ Consequently, the umbrella term ‘human trafficking’ has been broadened to include all types of coercive behaviour.

in the United States’ (2010) 36(2) *WMLR* 621 at 628–629 states that: ‘[t]rafficking in the US long predates the current legal regime in power; the tactics used by sex traffickers today were used against Native peoples from the first moment of contact. These tactics were pioneered by the Spanish and Portuguese, the French and the English, the Dutch and the Russians. Colonial legal systems historically protected (and rewarded) the exploiters of Native women and girls and therefore encouraged the institutionalization of sexual subjugation of Native women and girls.’

² The Mann Act was designed to regulate interstate and foreign commerce by prohibiting the transportation of women and girls across interstate-lines for immoral purposes. The vague wording of the Act gave rise to politically-motivated prosecutions of especially suspected communist sympathisers. *Eg*, Charlie Chaplin was charged in 1944 under the Mann Act for producing a baby out of wedlock (which was proved not to be his after paternity tests). Also the first African-American heavyweight champion, Jack Johnson, and the guitar player Chuck Berry were charged under the Mann Act for consorting with white women (their girlfriends). Johnson was sentenced to one year in prison. See Holman ‘The modern-day slave trade: how the United States should alter the victims of trafficking and the Violence Protection Act in order to combat international sex trafficking more effectively’ (2008) 44 *TILJ* 99 109. The Mann Act is currently still used to charge anyone who knowingly transports any person in interstate or foreign commerce for prostitution or any sexual activity. Because the Mann Act does not require proof of force, fraud, or coercion, it is sometimes utilised to prosecute problematic trafficking cases. *Eg*, in both *US v Daneman* 06 Cr 717 (AKH) 2008 US Dist (SDNY 30 May 2008) and *US v Pipkins* 378 F 3d 1281, 1295 (11th Cir 2004); 412 F 3d 1251 (11th Cir 2005); (ND Ga 31 Oct 2007), insufficient evidence regarding coercive methods used warranted employing the Mann Act to charge the defendants, which succeeded on both counts.

³ Coonan & Thompson ‘Ancient evil, modern face’ 2005 *Georgetown J Int Affairs* 43.

THE LEGAL FRAMEWORK TO COMBAT HUMAN TRAFFICKING IN THE UNITED STATES

Human trafficking is prohibited by the US Constitution.⁴ Reinforcing the Constitutional prohibition are criminal statutes such as the United States Code (USC) Title 18 – the criminal and penal code of the US federal government. Laws relating to slavery, migration, organised crime, prostitution and child sexual abuse were commonly used to prosecute traffickers. Amongst these laws are the Racketeer Influenced and Corrupt Organisations (RICO) Act;⁵ the Travel Act;⁶ the Conspiracy and Attempt Act;⁷ the Immigration and Nationality Act (INA);⁸ the Alien Smuggling Act;⁹ the

⁴ The 13th Amendment was promulgated in 1865 with the proscription of slavery. Further attempts to stamp out ‘any other kind of slavery, now or hereafter’ were issued in a series of opinions in the *Slaughter-House Cases* 83 US 36, 72 (1872). Also, in 1874 the ‘Padrone statute’ was adopted by Congress to combat the kidnapping of boys in Italy for use as ‘shoeblocks, street musicians, and beggars on the streets of American cities’. See Human Rights Caucus (HRC) *Hidden slaves – forced labour in the United States* (2004) 19. The Court in *US v Lewis* 644 F Supp 1391 CR No G85–133 (1986) 1400 emphasised the continued applicability of this statute: ‘The 13th Amendment and its enforcing statutes are designed to apply to a variety of circumstances and conditions. Neither is limited to the classic form of slavery. Both apply to contemporary as well as to historic forms of involuntary servitude. The amendment and statutes were intended not merely to end slavery but to maintain a system of completely free and voluntary labour throughout the United States. [I]n general, the defence against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the labourer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh over-lordship or unwholesome conditions of work [*Pollock v Williams* 322 US 4, 17–18, 64 S Ct 792, 799–800, 88 L Ed 1095 (1944)].’

⁵ The RICO Act 18 USC ss 1961–1968. The Act seeks to eliminate the infiltration of organised crime and racketeering into legitimate commercial organisations. Human trafficking resorts under this Act as it often comprise of organised criminals involved with foreign commerce.

⁶ The Travel Act 18 USC s 1952 prohibits travelling between states or using an interstate facility in aid of any crime.

⁷ The Conspiracy and Attempt Act 21 USC s 846 – here an agreement of two or more people to commit a crime or to accomplish a legal outcome through unlawful acts is punished. There is furthermore a specific statute called Conspiracy against Rights 18 USC (s 241) which deals with conspiracies to deprive a US citizen of rights justified by the Constitution.

⁸ The INA 18 USC s 274 concerns specifically the smuggling of aliens.

⁹ The Alien Smuggling Act 18 USC s 1324 defines several distinct offences related to aliens. Although crimes committed under this title were quite severe, sentences received were very lenient. *eg*, in *US v Crawford* 769 F2d 253 CR No 85–2105 (5th Cir 1985), the defendants were convicted on one count of conspiring to transport illegal aliens (18 USC s 371), nine counts of knowingly transporting illegal aliens (18 USC s 1324), and eleven counts of holding persons in involuntary servitude (18 USC s 1584). They were sentenced to only five years imprisonment and a fine of US\$1000 to the state. Adding to this Act, as s 1324(a)(3)(A), is the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), enacted on 30 Sept 1996 which makes it an offence for any

Mann Act (White Slave Traffic Act);¹⁰ the Anti-Peonage Act;¹¹ the Federal Kidnapping Act;¹² and the Protection of Children Against Sexual Exploitation Act.¹³ In 1994 the largest crime bill in the history of the US was enacted, namely the Violent Crime Control and Law Enforcement Act.¹⁴ Amongst others, this Act contains substantive criminal provisions regarding gang crimes, alien smuggling, sexually violent offenders and sexual acts with a juvenile. Although a number of the above statutes such as the Anti-

person to knowingly hire at least ten individuals with actual knowledge that these individuals are unauthorised aliens during any twelve-month period. Recent legislation passed includes the SAVE Act (HR 4088/S 2366/S 2368) amending both the INA s 274 (expanding its scope) and Title 18 of the US Code (further sentencing provisions).

¹⁰ See n 2 above.

¹¹ The Anti-Peonage Act 1867 currently exists as 18 USC s 1581 'Peonage; Obstructing Enforcement', which falls under USC Ch 77 'Peonage, Slavery, and Trafficking in Persons'. The Act declares the holding of any person to service or labour under the peonage-system as prohibited. It makes it a crime to use force, a threat of force or a threat of legal coercion to make a person to work against his will. Eg, in *US v Booker* 655 F 2d 562, 564 (4th Cir 1981), three defendants were found guilty of kidnapping two persons with false promises of work. The victims were then transported to a labour camp with the intent of holding them as slaves, where they worked under constant threat of physical harm and pervasive fear without any compensation. The court determined that the defendants violated 18 USC s 1583 'Enticement into Slavery' and its counterpart statutes, s 1582 'Vessels for Slave Trade' and s 1584 'Involuntary Servitude'. These statutes and the Thirteenth Amendment to the Constitution all sought to prevent the coerced labour or involuntary servitude of any person by another. 18 USC s 1584 makes it unlawful to hold a person in a condition of slavery against their will. In *US v Kozminski* 487 US 931 (1988), the Supreme Court found that s 1584 should be narrowly interpreted with the result that this section only criminalises servitude brought about through use or threatened use of physical or legal coercion, and excludes other conduct that can have the same purpose and effect. However, in *US v Lewis* 644 F Supp 1391 CR No G85-133 (1986), aggravated child abuse was even categorised under s 1584. In this case, a religious sect leader, William Lewis (aka My Lord Prophet), forced adolescent boys to endure various forms of physical punishment (including imprisonment, beating, burning, hanging or stoning). One victim died from repeated beatings. The climate of fear that pervaded in the camp established conditions of involuntary servitude, even though the nature of work done in the camp was 'non-commercial', and the children's parents were present. Sex trafficking of children is elaborated on in 18 USC s 1591.

¹² The Federal Kidnapping Act 18 USC s 1201 allows federal law enforcement intervention once state lines were crossed with the victim.

¹³ The Protection of Children against Sexual Exploitation Act (1977) was amended several times and is now codified as 18 USC ss 2251-2253. This Act criminalises any conduct where a minor is used to engage in sexually-explicit conduct, especially for the purpose of producing any visual depiction of the conduct.

¹⁴ HR 3355 Pub Law 103-322. Loopholes in certain provisions made it difficult to bring cases to trial, eg where the requirement of intent complicated the crime to travel with intent to engage in sexual acts with a juvenile. It is very noticeable that in the US, laws on prostitution and related activities (pimping, pandering, procuring, maintaining a brothel, etc) are all state-generated laws. There are no federal laws prohibiting prostitution and related activities. See Ontiveros, Wolfe, Lederer & Zarembka 'Women and children first? New strategies in anti-trafficking initiatives' (2005) 6/2 *Georgetown Journal of Gender & the Law* 193 at 199.

Peonage Act, the Federal Kidnapping Act and the Protection of Children against Sexual Exploitation Act may address some trafficking concerns; these laws are not directly applicable to human trafficking.¹⁵ They are less serious offences and consequently carry less severe sentences which do not reflect the serious harm done to victims. None of the existing federal laws were comprehensive enough to effectively protect victims of trafficking or to prosecute their traffickers.

The Victims of Trafficking and Violence Protection Act of 2000 (TVPA)

To address the inadequacy of existing legislation and law enforcement to deter trafficking, and to acknowledge the gravity of trafficking in human beings, the US adopted the Victims of Trafficking and Violence Protection

¹⁵ The enforcement of available legislation to combat trafficking has also not been very effective in the past. It seems that offences resembling trafficking violations were mainly prosecuted under 18 USC s 1584 – whether labour trafficking or sex-trafficking. Most of the cases before the enactment of the Victims of Trafficking and Violence Protection Act of 2000 (TVPA) concerned involuntary servitude in the form of forced labour, *eg US v Alzanki* 54 F 3d 994, 998–1000 (1st Cir 1995) (finding an employer guilty of committing involuntary servitude where he and his wife brought a Sri Lankan native to the US to clean their home for fifteen hours a day for US\$120); *US v John Lester Harris* CR No 81–11 (EDNC 1989) (kidnapping and forcing undocumented migrant farm labourers to work on a labour farm); *US v Esperanza Vargas* CR No 91-521-02-RMB (1991) (keeping a minor Mexican domestic servant as slave by means of threats and violence); *US v Flores* CR No 96–806 (1997) (kidnapping and forcing undocumented Mexican migrant farm labourers to work through threats and violence); *US v Supawan Veerapol* CR No 98–00334 (1999) (Thai workers were forced to work long hours performing childcare, house- and restaurant-work under extremely coercive and abusive conditions). The *El Monte*-case of Sept 1995 involved the trafficking of seventy-two Thai nationals working in slave-like conditions in a garment factory. While the operators were charged with involuntary servitude, criminal conspiracy, kidnapping, smuggling and harbouring individuals in violation of US immigration law, the workers were imprisoned in terms of INS' regulations. Before they could file a civil lawsuit against the operators, they first faced a legal struggle alleging false imprisonment by the US. After winning this first battle, they were issued with S-visas, which allowed them to stay in the country legally while pursuing their claims. See Chacón 'Misery and myopia: understanding the failures of US efforts to stop human trafficking' (2006) 74 *Fordham LR* 2977 2988. The only major sex-trafficking case decided before the present TVPA is *US v Joseph Morales* 916 F Supp 336 CR No 95–52 (1996). In this case, the defendant smuggled Thai women into the US. Although many were prostitutes in Thailand, the victims were coerced and threatened to perform commercial sex acts in a prostitution trafficking ring, and worked under slavery conditions.

Act of 2000 or Trafficking Victims Protection Act (TVPA).¹⁶ The TVPA defines ‘severe forms of trafficking in persons’¹⁷ as:

- (A) sex trafficking¹⁸ in which a commercial sex act¹⁹ is induced by force, fraud, or coercion,²⁰ or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harbouring, transportation, provision or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude,²¹ peonage, debt bondage,²² or slavery.

This definition classifies human trafficking into only two categories – sex trafficking and labour trafficking. The new definition allows the charge of human trafficking to be brought against anyone involved in any of the steps in the trafficking process – whether a recruiter, a harbourer, a transporter, a buyer, a seller, or any trafficking-related activity such as a brothel owner or manager. The reach of law enforcement is further extended to include accomplices who are involved in only one part of the process to be charged

¹⁶ TVPA (Pub Law 106–386 HR 3244). Adopted on 28 October 2000, enacted as 22 USC s 7101. This federal law is divided into three sections: Division A, the Trafficking Victims Protection Act (TVPA); Division B, the Violence Against Women Act of 2000 (VAWA); and Division C, Miscellaneous Provisions. See:

<http://www.state.gov/documents/organization/10492.pdf> (last accessed 10 January 2014). The bulk of the Act is actually based on older laws. Chacón n 15 above at 2980 comments that though ‘legislative revisions brought the crime of “trafficking” into the prosecutorial mainstream, [it] did nothing to address the ways in which the pre-existing legal regime upon which the TVPA is built actually facilitates trafficking’.

¹⁷ TVPA s 103(8).

¹⁸ TVPA s 103(9). Sex trafficking means the recruitment, harbouring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

¹⁹ TVPA s 103(3). Commercial sex act means any sex act on account of which anything of value is given or received by any person. The TVPA’s definition thus rejects the distinction between forced and voluntary prostitution or sex work.

²⁰ TVPA s 103(2). Coercion means (a) threats of serious harm to or physical restraint against any person; (b) any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (c) the abuse or threatened abuse of the legal process.

²¹ TVPA s 103(5). Involuntary servitude includes a condition of servitude induced by means of (a) any scheme, plan, or pattern intended to cause a person to believe that, if that person did not enter into or continue in such condition, that person or any other person would suffer serious harm or physical restraint; or (b) the abuse or a threatened abuse of the legal process.

²² TVPA s 103(4). Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

with trafficking. The TVPA adopts a restrictive outlook in its definition of the means of trafficking as it requires proof of the elements of force, fraud, or coercion for the existence of ‘severe forms of trafficking’.²³ For children, the elements of force, fraud, or coercion are not required. However, this is only applicable to children involved in sex-trafficking prosecutions.²⁴ The law also distinguishes human trafficking, where victims are coerced into entering the US, from human smuggling, where migrants enter the country without authorisation.²⁵ The purpose of the TVPA is to ‘combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims’.²⁶ To accomplish this purpose, the US follows the familiar three-pronged approach of prevention, prosecution, and protection.

Prevention

The TVPA has three main measures to help mitigate the factors that contribute to people becoming vulnerable to human-trafficking situations. These measures comprise administering economic alternatives,²⁷ increasing

²³ The TVPA does not only allow evidence of physical force but also of fraud and psychological coercion to sustain human trafficking charges. The TVPA does not provide for any ‘ordinary forms’ of trafficking.

²⁴ See TVPA s 112 ‘Strengthening Prosecution and Punishment of Traffickers’ 18 USC 1591. The TVPA ‘concurs with the general agreement in the international community that, in the case of minors, the trafficking term applies whether a child was taken forcibly or voluntarily, simply because children do not have volition and cannot consent to being smuggled’. See Goździak ‘On challenges, dilemmas, and opportunities in studying trafficked children’ (2008) 81/4 *Anthropological Quarterly* 903. All fifty states prohibit the prostitution of children under state and local laws that predate the enactment of the TVPA.

²⁵ Human trafficking is a crime against the individual while human smuggling constitutes a crime against the state, which different implications. See TVPA s 101(b)(17) & (19); 107(c)(1)(A). The SA Act does not have any such distinctions.

²⁶ TVPA s 102(a). Goździak n 24 above at 904 says: ‘It is interesting that women and children are lumped together in anti-trafficking legislation and the dominant trafficking paradigm when in all other instances, including labour laws, great care is taken to separate child from adult labour.’

²⁷ TVPA s 106(a)(1)–(5). TVPA s 101(b)(4) states that economic deprivation is one of the primary reasons for victims falling prey to human trafficking. It is argued that with the altering of poverty issues, subsequent decrease of victims and consequently also traffickers could result. Possible initiatives include micro-lending, giving the underprivileged job-training and counselling; providing programs that promote the possibility of women’s input on economic decision making as well as programs to keep children, especially young girls, in school. Others include the development of a curriculum that will warn outsiders of the dangers of human trafficking, and the giving of grants to NGO’s in order to advance the political, economic, social, and educational roles and capacities of women in their countries.

public awareness and information,²⁸ and consultation.²⁹ Most importantly, this Act aims to prevent trafficking by fostering international cooperation with foreign governments in their efforts to combat human trafficking. This is accomplished mainly by establishing an annual country report on human-rights practices.³⁰ Foreign countries receiving either economic³¹ or security assistance³² from the US are obliged to annually give reports on the nature and extent of severe forms of trafficking in persons in their country. To evaluate the progress the US and foreign countries have made in addressing the crime, an Interagency Task Force to Monitor and Combat Trafficking has been established.³³ Minimum standards for the elimination of trafficking are set. These are applicable to governments of countries of origin, transit or destination,³⁴ and provision is made for assistance to foreign countries to meet the minimum standards.³⁵ However, if governments do not comply with the minimum standards or are not making significant efforts to do so, certain actions are taken against them.³⁶ These actions consist mainly of withholding non-humanitarian or non-trade-related foreign assistance, or multiple, broad-based restrictions on assistance.³⁷

²⁸ TVPA s 106(b). This is mainly attained through educational programs.

²⁹ TVPA s 106(c). Consultation consists of the President consulting with NGO's regarding economic alternatives and awareness.

³⁰ TVPA s 104. The assessment of the countries' efforts details the facilitation of trafficking and steps taken to prohibit and punish such activities domestically, as well as international cooperation in trafficking investigations, extradition of traffickers and assistance to victims. The countries are ranked according to set minimum standards in a tier-system. Governments that fully comply with the standards are placed on Tier 1. Governments that are making significant efforts to bring themselves into compliance with the TVPA's standards, yet still do not fully comply with those minimum standards are placed on Tier 2. Governments that do not fully comply with the minimum standards and are not making significant efforts to do so are placed on Tier 3. The US was included for the first time as one of the ranked countries in the 10th annual report on 24 Jun 2010. See Ryf 'The first modern anti-slavery law: the Trafficking Victims Protection Act of 2000' (2002) 34 *Case Western Reserve JIL* 45 at 53.

³¹ TVPA s 104(a). To accommodate this purpose, s 116(f) of the Foreign Assistance Act (FAA) of 1961 (22 USC 2151(f)) was amended.

³² TVPA s 104(b). S 502B of the FAA (22 USC 2304) was amended.

³³ TVPA s 105(a)–(e). This Task Force creates political will at the highest levels. It is chaired by the Secretary of State, also includes the National Security Advisor, the Attorney-General, CIA Director, US AID Administrator, and the Secretaries of Health and Human Services, Labour, Defence, and Treasury. The force collects and organises data on human trafficking, facilitates and enhances cooperation amongst all partaking countries, consults with NGO's and other entities and researches the role of 'sex tourism' and the sexual exploitation of women and children internationally.

³⁴ TVPA s 108.

³⁵ TVPA s 109.

³⁶ TVPA s 110.

³⁷ TVPA s 110(d)(1), (2). Foreign assistance will be withheld for the subsequent fiscal year until such government complies with the minimum standards or makes significant efforts

Protection

As protection and assistance to trafficking victims were the primary goals of the TVPA, these measures are quite extensive.³⁸ Differentiation is made between protection granted to victims of human trafficking in foreign countries³⁹ and those in the US.⁴⁰ Trafficking victims of a severe form of trafficking in persons are eligible for US immigration relief and government benefits under Federal or State grant programs.⁴¹ To qualify as a ‘victim of a severe form of trafficking’, the victim must have been subjected to an act or practice described in section 103(8) of the TVPA⁴² and not yet attained eighteen years of age, or a subject of certification. Certification implies that the victims, after making a *bona fide* application for a visa,⁴³ have complied

to bring itself into compliance. Broad-based restrictions are imposed in response to continued human rights abuses. However, critics such as Chuang ‘The US as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking’ (2006) 14(27) *Michigan JIL* 437 439 views these measures as ‘[a] powerful but blunt weapon for influencing the behaviour of other states, unilateral sanctions have long been criticized as inconsistent with international law and ineffective in practice’.

³⁸ TVPA s 107. The TVPA authorised \$60 million in resources to address trafficking.

³⁹ TVPA s 107(a)(1), (2). Assistance consists mainly of anti-trafficking programs and initiatives and enhancing cooperative efforts between countries.

⁴⁰ TVPA s 107(b). ‘United States’ means the fifty states of the US, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the territories of the US. See TVPA s 103(12).

⁴¹ TVPA s 107(b)(1)(A), (B). These benefits include employment authorisation, housing, mental health services, and Supplemental Security Income. Victims are also eligible for compensation from state and federal crime-victims programs.

⁴² TVPA s 107(b)(1)(C)(i). S 103(8) sets out the definition of a victim of a severe form of trafficking in persons.

⁴³ The TVPA provides for two types of temporary immigration relief for victims: (1) continued presence, which allows for victims’ assistance as witnesses in an investigation or prosecution (2) Category T non-immigrant status or ‘T-visa’. This three-year visa is only available to victims of a severe form of trafficking who cooperate with law enforcement and participate in prosecutions (if they are at least fifteen years old), and would suffer extreme hardship if deported. The prescriptions for a T-visa are found in s 101(a)(15)(T) of the INA. According to the IIRIRA, a trafficking victim is likely to be inadmissible if she is HIV-positive (8 USC s 1182(a)(1)(A) i), or a prostitute (8 USC s 1182(a)(2)(D)), or has the potential to become a public charge (8 USC s 1182(a)(4)(A)). Although the TVPA amends the INA in that the Attorney-General (AG) may waive these health-related and public-charge grounds, admissibility still depends on the AG’s discretion. See Hartsough ‘Asylum for trafficked women: escape strategies beyond the T-Visa’ (2002) 13/1 *Hastings Women’s LJ* 77 at 99. Certification is done by the Office of Refugee Resettlement (ORR), through the joint efforts of the US Dept of Justice (DoJ) and Dept of Health and Human Services (HHS). Although generally referred to as a T-visa, it is technically not a visa because it is conferred to aliens present in the US by the Dept of Homeland Security (DHS) which does not have the authority to issue visas. Only the Dept of State (DoS) may issue visas through consular offices. As such, aliens present in the US receive T-status, while only aliens situated outside of the US can receive T-visas. For further information, see Siskin & Wyler *Trafficking in persons: US policy and*

with requests to participate in the investigation and prosecution of their traffickers and their continued presence in the US in order to ensure that the prosecution of traffickers is guaranteed.⁴⁴ Regardless of their potentially illegal or undocumented position, trafficking victims in US custody are granted status as crime victims,⁴⁵ not criminals (as illegal immigrants). They are guaranteed comprehensive victim services,⁴⁶ such as medical care, legal services, interpreting services, appropriate facilities for detention, and protection if their safety is in danger or they are at risk of recapture. They are also provided with education and vocational training, and employment placement. These benefits can also be extended to a victim's family if appropriate. If the victim is younger than twenty-one years of age, derivative T-visas are granted to the victim's spouse, minor children, and to the victim's parents.⁴⁷ If the victim is twenty-one years of age or older, these visas are awarded to the victim's spouse and children. No more than 5 000 visas or non-immigrant status may be awarded in any fiscal year. However, since the first visas were issued in 2002, the highest number of applicants received was 475 (in 2009), of which 313 were approved.⁴⁸

issues for Congress (2010) 24. T-visa holders may after three years apply for adjustment of status such as permanent residency or legal immigration status.

⁴⁴ TVPA s 107(b)(1)(E)(i)(I), (II). This is also known as the 'migrant model' approach, which requires that trafficking victims provide legal cooperation before being granted protection and assistance. See Jordan 'Human rights or wrongs? The struggle for a rights-based response to trafficking in human beings' in Masika (ed) *Gender, trafficking and slavery* (2002) 29–30.

⁴⁵ TVPA s 107(c)(1)(A). See also TVPA s 102(b)(17), (18), (19) stating that these victims must not be inappropriately incarcerated, fined, or otherwise penalised for unlawful acts committed as a direct result of being trafficked. However, when applying for T-status, trafficking victims have to be admissible to the US or obtain a waiver of inadmissibility, according to TVPA s 107(e)(3). This waiver is available for health related-, public charge-, or criminal grounds if the victim's trafficking included possible illegal activities. The waiver is especially important for those involved in sexual trafficking since prostitution is one of the grounds of inadmissibility specified in the INA s 212(a)(2)(D). Also see Siskin & Wyler n 43 above at 25.

⁴⁶ In order to maintain or improve on protection standards, officials undergo regular training in trafficking-victim identification and treating victims according to their specific needs. For child and adolescent victims, appropriate and victim-sensitive interviews are conducted by child forensic-interview specialists. The US government also funds an NGO-operated national hotline and referral service.

⁴⁷ TVPA s 107(e)(1)(C). The derivative visas are called T2-visas (for the spouses of T1-applicants); T3-visas (for T1-applicants' children) and T4-visas (for the parents of T1-applicants who are under twenty years of age).

⁴⁸ US DoS *Trafficking in Persons Report 2009* (2009) 57. The 313 certified victims came from 47 countries, which were primarily Thailand, Mexico, Philippines, Haiti, India, Guatemala, and the Dominican Republic. Interestingly, labour-trafficking victims formed the largest group of foreign adult victims (eighty-two per cent), and most of these were men (fifty-eight per cent) vs women (forty-two per cent). Only fifteen per cent were adult sex-trafficking victims (all women), and three per cent were both sex-trafficking and

Trafficking victims may also be eligible to apply for another form of immigration relief, known as U non-immigrant status or 'U-visa'.⁴⁹ Victims of certain criminal activities,⁵⁰ who have suffered substantial physical or mental abuse which can be verified, must also confirm by means of certification through law enforcement or immigration officials that they possess information about the criminal activity involved, and that they are cooperative in the investigation and prosecution of the criminal activity. If the victim is a child under the age of sixteen, the child's parent, guardian or friend may apply on behalf of the child. Under statute only 10 000 victims may receive the U-category per year.⁵¹ Similar to T-status holders, those in U-status may apply for legal permanent residency. However, U-status holders are only eligible for assistance through programs offered by the Department of Justice's Office for Victims of Crime. The number of trafficking victims who receive U-visa relief is unknown, as information regarding the type of crime suffered by the victims is not disaggregated.

Prosecution

The TVPA contains numerous provisions regarding strengthening efforts to prosecute human traffickers.⁵² Not only are penalties for existing crimes increased under the TVPA, but additional and stricter criminal statutes are also created to apprehend and prosecute human traffickers, to deter

labour-trafficking victims. Of the foreign child victims, fifty-six per cent were labour-trafficking victims (fifty per cent boys and fifty per cent girls); thirty-eight per cent were victims of sex trafficking (sixteen per cent of these victims were boys); and six per cent were victims of both labour-and sex-trafficking. From 2002 to 2012, there were in total 2 968 applications for T-status. Of these applications, 1 862 were approved. During the same period, 1 891 applications were made for derivative T-status, of which 1 566 were approved. Of the adjudicated applications for T1 status, sixty-eight per cent were approved. In addition, of the adjudicated applications for derivative T-status, eighty-four per cent were approved. See also Siskin & Wyler, n 43 above at 27. Some critics want more T-visas to be awarded – see Ontiveros *et al* n 14 above at 106 at 198.

⁴⁹ This type of status or visa is created by The Violence against Women Act of 2000, found in Div B of the TVPA. See INA s 101(a)(15)(U).

⁵⁰ The criminal activity must have violated the laws of the US or occurred in the US. These activities may include any one or more of the following: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter, murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. See Siskin & Wyler n 43 above at 29.

⁵¹ INA s 214(o)(2). From Oct 2008 to Jun 2010, there were 18,126 applications for U-1 status and 10 712 (eighty-three per cent) were approved. See Siskin & Wyler n 43 above at 30.

⁵² Punishment and prosecution for trafficking-related offences are enhanced under the penal code for peonage and slavery.

recidivism and correspondingly decrease human-trafficking activities. The new or amended laws offer a variety of tools to increase the ability of federal prosecutors to charge, prosecute and convict traffickers and to streamline prosecutorial efforts.⁵³

The Federal Criminal Code (Chapter 77 of Title 18 USC) was amended in order to pursue traffickers more effectively and increase the penalties they can face. To begin with, the TVPA doubled the length of imprisonment for human-trafficking convictions. If convicted of human trafficking, a defendant can be sentenced up to twenty years in prison.⁵⁴ However, if death resulted from any act of human trafficking, or if the contravention included kidnapping and/or aggravated sexual abuse, the defendant can be imprisoned for any term of years up to life.⁵⁵ Moreover, 18 USC 1591 is amended to severely punish perpetrators who make use of children younger than fourteen for sex-trafficking purposes. These traffickers can receive any term of imprisonment up to life. If the child is older than fourteen but has not yet attained the age of eighteen, punishment consists of a fine or a prison term of up to twenty years, or both.⁵⁶

Because the existing three criminal provisions of ‘peonage,’ ‘enticement into slavery,’ and ‘sale into involuntary servitude’ were insufficient to effectively prosecute human traffickers, four additional criminal acts were added: ‘forced labour,’ ‘trafficking with respect to peonage, slavery, involuntary servitude, or forced labour,’ ‘sex trafficking of children by force, fraud, or coercion,’ and ‘unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labour’.⁵⁷

The definition of involuntary servitude as interpreted by the US Supreme Court in *United States v Kozminski*⁵⁸ was expanded to criminalise a broader range of actions constituting involuntary servitude. The court held in the *Kozminski*-case that violations of involuntary servitude must include threats or acts of physical or legal coercion. The TVPA further includes non-violent

⁵³ Tiefenbrun ‘The Domestic and International Impact of the US Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?’ (2005) 2 *Loyola Univ Chicago ILR* 1 at 38. See also Clawson, Dutch, Lopez & Tiapula *Prosecuting human trafficking cases: lessons learned and promising practices* (2008) 28.

⁵⁴ TVPA s 112(a)(1)(A).

⁵⁵ TVPA s 112(a)(1)(B).

⁵⁶ TVPA s 112(a)(2) s 1591 ‘Sex Trafficking of Children or by Force, Fraud or Coercion’.

⁵⁷ TVPA s 112(a)(2) ss 1589–1592.

⁵⁸ See *United States v Kozminski* n 11 above at 487.

coercion such as psychological coercion in the definition.⁵⁹ Traffickers' use of psychological coercion, trickery, and the seizure of documents are held to be sufficient proof that trafficking has occurred. Whereas, prior to the TVPA, the penalties for placing people in involuntary servitude were a maximum prison term of ten years, punishment was extended to twenty years (or a fine, or both). For those who unlawfully destroy, conceal, remove, confiscate, or possess another's official documents (*ie* passport), a maximum five-year penalty is provided for.⁶⁰ The TVPA also called for amending immigration statutes to punish traffickers who entrap victims by taking their passports and identification from them. There is also a five-year maximum penalty for the related offence of fraud in foreign labour contracting under 18 USC s 1351.

The statute also permits a court to require a defendant to pay restitution to a victim of human trafficking for the full amount of the victim's losses as determined by a court.⁶¹ Traffickers also face the possibility that trafficked victims may seek restitution from them by means of private civil lawsuits. Funds derived from the sale of assets seized from and forfeited by traffickers are made available for victims' assistance programs. This law further includes the possibility of severe economic sanctions for those persons convicted of operating trafficking enterprises within the US.

By strengthening and modifying trafficking legislation, the TVPA not only aims at correcting weak enforcement policies domestically, but also aims to influence other countries by legislative example and to harmonise trafficking legislation internationally.⁶² The domestic impact of the TVPA can be measured by examining the effect the statute had on advancing human-trafficking proceedings. The number of human-trafficking investigations since the enactment of the TVPA (between 2001 and 2004) has increased more than three times, more than twice as many defendants were prosecuted, and double the number of convictions were obtained.⁶³ The positive

⁵⁹ TVPA s 112(a)(2) s 1589 'Forced Labour'.

⁶⁰ TVPA s 112(a)(2) s 1592 'Unlawful Conduct with respect to Documents in furtherance of Trafficking, Peonage, Slavery, Involuntary Servitude, or Forced Labour'.

⁶¹ TVPA s 112(a)(2) s 1593 'Mandatory Restitution'.

⁶² Tiefenbrun 'The Saga of Susannah – A US Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000' 2002 *Utah LR* 107 115.

⁶³ Prosecutions from 2000 to 2003 were as follows: four prosecutions (2000), eight prosecutions (2001), seventeen prosecutions (2002), fifty-four prosecutions (2003). See Clawson *et al* n 53 above at 12. See also US DoS *Trafficking in Persons Report 2005*. From 2001 to 2003, the DoS charged, convicted, or secured sentences against ninety-two traffickers in twenty-one cases. Sixty-five of those charged, convicted, or sentenced were

international impact of the TVPA can only be assessed by examining the enactment and enforcement of new foreign anti-trafficking laws, and whether the result is an increase in investigations, prosecutions, and convictions abroad, and as well as the overall reduction in the international crime of human trafficking.

Shortcomings of the TVPA

It is generally agreed that the TVPA is a positive step towards the global reduction of human trafficking, yet it has shortcomings. The limitations of the TVPA are, however, neither new nor unique, but characteristic of most anti-trafficking initiatives worldwide.⁶⁴ Firstly, a few concerns exist regarding the structural aspects of the federal legislation. Some scholars argue that the qualification of ‘severe’ in the definition of ‘severe forms of human trafficking’ implies that a lesser kind of trafficking (*ie* that is not so severe) is permissible.⁶⁵ The TVPA does not criminalise ‘ordinary forms’ of trafficking. The Act also ‘contains narrow definitions of “victim” and

for sex-trafficking offences in fourteen separate cases. See US DoJ ‘Accomplishments in the fight to prevent trafficking in persons’ available at: http://www.usdoj.gov/opa/pr/2003/February/03_crt_110.htm (last accessed 10 January 2014). However, only three indictments in this period include charges under the new criminal statutes, *ie US v Kil Soo Lee* 159 F Supp 2d 1241 (2001) (250 Vietnamese and Chinese workers, mostly women, were held in involuntary servitude for two years in the US Territory of American Samoa); *US v Kennard* No 01-30346 2002 WL 1994523 (9th Cir 2002) (Russian girls were trafficked to Anchorage, Alaska, to dance nude) and *US v Gasanova* 332 F3d 297 (5th Cir 2003) (Uzbekistan women were forced to work in El Paso strip clubs and bars to pay back a \$300 000 debt and smuggling fee). Tiefenbrun ‘Updating the Domestic and International Impact of the US Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?’ (2007) 38 *CWRJIL* 249 260 adds that only one of the cases tried in 2001 and three of the cases tried in 2002 were under the TVPA, and those convicted received only up to ten to twelve years in prison. The penalties given for human-trafficking cases in the US are light in comparison to drug-trafficking. While the statutory maximum sentence for involuntary servitude is only ten years per count in the US, the statutory maximum for dealing in 10g of LSD or distributing a kilo of heroin is a life sentence. See Tiefenbrun ‘Sex sells but drugs don’t talk: trafficking of women sex workers’ (2002) 24 *Thomas Jefferson LR* 161 at 178.

⁶⁴ See Bruch ‘Models wanted: the search for an effective response to human trafficking’ (2004) 84(40) *Stanford JIL* 1 at 1.

⁶⁵ Chapkis ‘Trafficking, migration and the law – protecting innocents, punishing immigrants’ (2003) 17/6 *Gender and Society* 923 927 contends that the TVPA distinguishes between two categories of victim: ‘victims of trafficking’ and ‘victims of severe forms of trafficking’. The first type of victims are those whose presence in the US is due to ‘sex trafficking’, and includes anyone who has received assistance with migration for the purposes of prostitution (‘sex trafficking’ is defined in the TVPA without reference to force, coercion, or deception). However, only those involved in ‘severe forms of trafficking’ are covered in the TVPA.

“victimisation” that speak to sexually exploited, passive females’.⁶⁶ Several researchers suggest that this could be the reason why fewer than one thousand victims have been identified under this legislative statute.⁶⁷ With the two-tiered definition consisting only of sex- and labour trafficking, there are doubts as to whether sufficient efforts are made to address other forms of human trafficking such as child soldiering, forced marriages or illegal adoption. Furthermore, not all forms of commercial sexual exploitation (*ie* of children and adults) are included in the trafficking definition. There are also reservations about the effectiveness of the law and services to deal with the emerging issue of domestic minor sex trafficking (*ie* the prostitution of children in the US).⁶⁸

Another issue is the TVPA’s conception of ‘coercion’, ‘fraud’ and ‘force’ which refer only to the differential dynamics between traffickers and victims and more specifically to the conduct of the trafficker in luring the victim into a trafficking network.⁶⁹ Informed exclusively by criminal perceptions, these categories disregard any economic, political, and/or social factors that may have contributed to a victim’s actions – the fact that a person might him- or herself ‘decide to enter a trafficking circuit is implicitly ruled out because coercive or constraining economic conditions that might push a woman to

⁶⁶ Zimmerman ‘Situating the Ninety-Nine: A Critique of the Trafficking Victims Protection Act’ (2005) 7(3) *J of Religion & Abuse* 37. See also Godziak & Collett ‘Research on human trafficking in North America: a review of the literature’ in IOM *Data and research on human trafficking: a global survey* (2005) 107–109. More attention is given to sex-trafficked females than to male- or child victims in other forms of trafficking. Chapkis (n 65 above at 923) argues that the law ‘makes strategic use of anxieties over sexuality, gender, and immigration to further curtail migration ... through the use of misleading statistics creating a moral panic around “sexual slavery”, through the creation of a gendered distinction between “innocent victims” and “guilty migrants”’. The author suggests (at 935) that ‘[f]eminists should look critically at legislation such as the Trafficking Victims’ Protection Act, which relies heavily on narratives of female powerlessness and childlike sexual vulnerability’.

⁶⁷ Godziak & Collett n 66 above at 109–110; Zimmerman n 66 above at 49.

⁶⁸ Smith, Vardaman & Snow *Domestic Minor Sex Trafficking – America’s Prostituted Children* (2009) 74.

⁶⁹ Zimmerman n 66 above at 44. Giampolo ‘The Trafficking Victims Protection Reauthorization Act of 2005: the latest weapon in the fight against human trafficking’ (2007) 16/1 *TPCRLR* 195 217 criticises the fact that although non-physical threats or psychological pressure is implied in the definition of ‘coercion’, these elements are not explicitly enumerated. She concludes: ‘In sum, the United States’ definition of human trafficking is inconsistent with its declared purpose of protecting human trafficking victims. The definition should at least meet the minimum standard set by the Trafficking Protocol and above and beyond that, it should set an example to the international community by including an exhaustive list of additional means of exploitation. In addition, the definition should contain an all-inclusive phrase that incorporates “all other forms of exploitation that violate the rights of citizens as protected by the state”.’

enter a trafficking circuit are not considered legitimate forms of coercion or force under the statute'.⁷⁰ It is proposed that '[a] more complete and effective redress must include more complex conceptions of victimisation, coercion, and harm in order to adequately grasp the socio-political and economic dynamics that structure global human trafficking'.⁷¹ The Act does not require transportation or movement of the victim for trafficking to occur. The point is raised that if the requirement of movement from one locale to another is completely eliminated, any minor engaged in prostitution can be identified as a victim of human trafficking, regardless of citizenship or whether or not movement has taken place.⁷² There is also no approach to ensure that the legal definition of trafficking in persons as set out in the TVPA is uniformly interpreted and enforced.⁷³

Although the TVPA broadens the field of application through its definition, it is claimed that prosecutors should also be given the power to go after all those who profit from trafficking, not only just those directly involved in trafficking.⁷⁴ While punishment has doubled for certain crimes in the TVPA, critics detect low prosecution levels and relatively mild penalties.⁷⁵ The actual level of punishment for those who participate in trafficking crimes remains hardly unaltered – for example, perpetrators received an average of eleven years for each count of involuntary servitude.⁷⁶ In addition, the lack

⁷⁰ Zimmerman n 66 above at 44–45. This is also the reason why the full protections of the Act were restricted to 'severe victims of trafficking in persons' only. Chacón n 15 above at 3022 views this as 'a deliberate effort to deny immigration benefits to individuals who, while exposed to conduct that constitutes trafficking, gave consent at some point during the process of their transportation or employment'.

⁷¹ Zimmerman n 66 above at 37.

⁷² Smith *et al* n 68 above at 5 and 7. The definition specifies that an element of force must still be present as well as a limitation on the victim's movement.

⁷³ Tiefenbrun 2002 n 63 above at 186.

⁷⁴ Miko *Trafficking in persons: the US and international response* (2006) 9.

⁷⁵ Clawson *et al* n 53 above at 7 and 24. It is also conspicuous that in cases involving labour trafficking (eg, *US v Tyson Foods Inc* 2002 US Dist LEXIS 26896 (ED Tenn May 22, 2002) (No 4:01–CR–61) and *Zavala v Wal-Mart Stores Inc* 2005 393 F Supp 2d 295 (DNJ 2005)) smuggling laws instead of trafficking legislation are made use of. Chacón n 15 above 3035 explains this situation as follows: 'There are two related explanations. First, the harsh sentences and political rhetoric surrounding the TVPA may actually operate to limit prosecutions under the Act, even in cases where the conduct in question seems to violate the letter of the TVPA. Because most people in the US are not conditioned to view the general exploitation of migrant labour as an evil on par with sex trafficking, prosecutors may be reluctant to attach the harsh penalties and high stigma of the TVPA to all but the most unpopular and politically powerless offenders. Second, noncitizens are easier targets for harsh sanctions such as those required by the TVPA than are US citizens or US corporations.'

⁷⁶ US DoJ Assessment of US Governments Activities to Combat Trafficking in Persons in Fiscal Year 2004 (2005) 16–17.

of an enforcement component in the TVPA is questioned, especially in terms of whether the Act has the power to truly enact and enforce its three-pronged strategy of prevention, prosecution, and protection. It is further pointed out that while the Act has the potential to do much good, there is no guarantee that its provisions will be enforced.⁷⁷

The TVPA's establishment of the Office to Monitor and Combat Trafficking and its annual trafficking report, which provides an assessment and implementation of anti-trafficking programmes, has been lauded as advancing the battle against trafficking internationally. However, the TVPA has been criticised for being culturally imperialistic by setting international (Western) standards and minimum thresholds for other countries, and by imposing US requirements and values on other cultures.⁷⁸ Although some argue that the US shows a lack of any perception of cultural differences, others emphasise that although '[c]ultural attitudes vary, cultural relativism cannot and should not excuse criminal activity that rises to the level of a universal crime like slavery'.⁷⁹ The usefulness of the annual report is also questioned as it provides no in-depth analysis of the nature of trafficking and offers little aside from fact sheets and commentary on conference proceedings.⁸⁰ Many complain that the trafficking reports list certain countries as

⁷⁷ The TVPA allocates funds for these purposes, establishes international and domestic programs, offers real economic and social incentives to victims who are willing to assist in the prosecution of traffickers, and creates economic disincentives to the perpetrators in the form of increased penalties for those convicted of sex trafficking. These goals and measures are laudable. But if they are not enforced or if they prove to be unenforceable, the TVPA will have little, if any, impact domestically and internationally on the deterrence of sex trafficking. See Tiefenbrun n 53 above at 3–4.

⁷⁸ Tiefenbrun n 62 above at 113. Desyllas 'A Critique of the Global Trafficking Discourse and US Policy' (2007) 34(4) *JSSW* 57 at 74 supports the view that people in the West are setting the agenda for the rest of the world, as evidenced in the TVPA's tier system for monitoring international progress to prevent trafficking. She argues that marginalised groups have the right to speak for themselves and the right to set their own agendas and their own experiences. Chuang n 37 above at 439 states that the US 'has proclaimed itself global sheriff on trafficking', which according to her, 'raises grave concerns both as a matter of international law and as a matter of global anti-trafficking strategy. By injecting US norms into the international arena, the sanctions regime risks undermining the fragile international cooperation framework created by the Trafficking Protocol [and allows the US to impose] its own anti-trafficking paradigm on other states.'

⁷⁹ Tiefenbrun n 53 above at 25.

⁸⁰ Godziak & Collett n 66 above at 111. The earlier reports (2001, 2002) failed to measure in a concrete manner precisely how many people were actually investigated, prosecuted and convicted for sex trafficking and forced prostitution in specific foreign countries. See Tiefenbrun n 53 above at 23. These reports also failed to state the degree to which government employees and law enforcement in foreign countries were complicit in the sex trafficking industry. Eg, some countries received a passing grade of Tier 2 but are some of the worst offending countries. In these countries a significant percentage of

Tier 2 while they do not meet minimum requirements, but are making efforts to do so. However, giving such countries a Tier 2 ranking sends a false message to the rest of the world that they are not engaging in the worst forms of human trafficking, when they are in fact doing so, but ‘making efforts’ to stop. In this manner, the ranking system works counter-productively against the citizens of such countries who are fighting against human trafficking, especially as no sanctions are applied to their countries.⁸¹ The trafficking reports also do not distinguish between smuggling of migrants and trafficking *per se*, which is a consistently difficult problem that skews statistics on trafficking generally.

The creation and implementation of the T-status or T-visa generated diverse responses. Opponents of the T-status contend that the status rewards criminal behaviour in that obtaining a visa could potentially influence a victim’s testimony (for example, encourage false testimonies). They assert that the potential for abuse of T-status is vast – immigrants who have committed unlawful, intentional crimes may claim that they were coerced into the illicit situation when arrested.⁸² Since immigrant benefits are scarce, some critics argue that more meritorious people such as those who have been waiting to enter the US and have followed the correct legal procedures deserve these benefits more.⁸³ Advocates for T-status are concerned that the Act provides protection almost exclusively to witnesses who assist with investigations and prosecutions, and that trafficked persons who have not yet decided to become witnesses are not protected.⁸⁴ Similarly, some voice concern about the burden of proof being placed on victims willing to assist, and the strict eligibility requirements (especially the extreme hardship threshold) to obtain a T-visa that the TVPA specifies.⁸⁵ This may also

brothel owners and agents are actually government employees, usually policemen. This may explain the disproportionate number between the vast number of victims and the low number of prosecutions in Tier two countries. See Tiefenbrun n 62 above at 129–132.

⁸¹ Tiefenbrun n 62 above at 136.

⁸² US Immigration and Customs Enforcement (ICE) agents are also concerned that some advocacy groups are able to ask ICE headquarters to have a person certified as a trafficking victim without any input from ICE agents, contending that some of these applications are not truly trafficking victims. See Siskin & Wyler n 43 above at 40.

⁸³ Cooper ‘A new approach to protection and law enforcement under the Victims of Trafficking and Violence Protection Act’ (2002) 51 *Emory LJ* 1041 at 1042–1044.

⁸⁴ See Hartsough n 43 above at 102. The author notes that the limitations of the T-visa may be counteracted by an alternative strategy of assisting trafficked persons via US asylum law. Even those who cooperate are not guaranteed to receive a T-visa. Those who do not cooperate face deportation – once deported, they face a ten-year ban on re-entering the US. See 8 USC s 1101.

⁸⁵ Clawson, Small, Go & Myles ‘Human trafficking in the United States: uncovering the needs of victims and the service providers who work with them’ (2004) 4 *IJ of*

account for the comparatively small number of T-visas issued relative to the estimates of trafficking into the US.⁸⁶

The TVPA has been further criticised for not granting victims sufficient financial restitution, as the Act does not specifically award actual and punitive damages, litigation expenses, etc to victims.⁸⁷ It has been suggested that victims of trafficking do not receive the protection and services infrastructure that exists for other crime victims in the US.⁸⁸ Furthermore, even though a federal victim protection framework is set out in the TVPA, there is no guarantee that such protections are uniformly applied at state and local levels.⁸⁹ Some argue that all trafficking victims are not treated equally

Comparative Criminology 68 at 69. Victims must demonstrate that they ‘suffer *extreme* hardship involving *unusual* and *severe* harm upon removal from the US’ (TVPA s 107 (F)(i), emphasis added). No definition is given in the TVPA of what exactly ‘extreme hardship’ entails. Chapkis n 65 above at 932, believes that the ‘T-visa, then, is designed not so much as a means to assist the victim as it is a device to assist prosecutors in closing down trafficking networks’. In requesting comments on the interim rule, the US DoJ acknowledges: ‘In view of the annual limit imposed by Congress for T-1 status, and the standard of extreme hardship involving unusual and severe harm, [DHS] acknowledges that the T-1 status will not be an appropriate response with respect to many cases involving aliens who are victims of severe forms of trafficking.’ See US DoJ ‘New classification for victims of severe forms of trafficking in persons; eligibility for ‘T’ nonimmigrant status’ (2002) 67/21 *Federal Register* 4784 at 4785.

⁸⁶ See US DoS *Trafficking in Persons Report 2010* (2010) 341. Although it is estimated that at least 14,500 persons are trafficked into the US each year, only 1862 T-status applications were approved between 2002 and 2010. The reason may be an overestimation of non-citizen trafficking victims in the US, however, a more logical explanation is that the US’s efforts to locate and identify victims are inadequate: ‘[v]ictim identification, given the amount of resources put into the effort, is considered to be low.’ See US DOS *Trafficking in Persons Report 2010* (2010) 338.

⁸⁷ Hyland ‘Protecting human victims of trafficking: an American framework’ (2001) 16 *Berkeley Women’s LJ* 29 at 50, 51, 58, 68. Hyland argues for further legislation, primarily to create a private right of action, to make sanctions discretionary, and to permit asset forfeiture in trafficking cases. Such provisions might provide an increased incentive to testify against traffickers and would contribute to victims’ early self-sufficiency. She encourages trafficking victims to seek punitive damages from their former traffickers, in addition to bringing civil suits. The writer argues at 51 that, ‘actual damages are grossly inadequate as a means of compensating victims for the traumatizing experiences’. The example of *US v Cadena* (Cr No 98–14015 23 Apr 1998) is given, where each victim received nominal compensation from US\$6 750 to US\$198 000, based on the government’s conservative estimate of 90 clients per woman per week to whom the owner charged US\$25 per sex act. One could, on the other hand, argue also that these provisions might inadvertently result in a larger number of illegitimate claims. See Godziak & Collett n 66 above at 118–119.

⁸⁸ Hyland n 87 above at 53.

⁸⁹ See US DoS *Trafficking in Persons Report 2010* n 86 above at 342: ‘Only nine of fifty states offered state public benefits to trafficking victims. Eighteen permitted victims to bring civil lawsuits in state court. Seven encouraged law enforcement to provide the required accompanying documentation for T-visa applications. Eighteen instituted

– there seems to be more focus on sex-trafficking victims than labour victims. Also, foreign nationals are being given greater access to public benefits and funding than US citizens and their relatives. More and better financial support for victims and TVPA initiatives seem to be a general problem.⁹⁰

Additionally, some question whether the TVPA effectively balances the human rights of trafficking victims with its law enforcement obligations. Most critics contend that the humanitarian aims of the Act have been under-emphasised in favour of prosecution.⁹¹ Others again feel that the TVPA treats trafficking as a human-rights issue, instead of fighting the problem by means of less restrictive immigration policies.⁹² The Act does little to strengthen the rights of most migrant workers, both in the sex industry and elsewhere. The law punishes trafficking victims for their immigration violations and prostitution activities more harshly than their captors, thus maintaining human trafficking as a low risk and high profit industry.⁹³

It is also argued that the TVPA does not adequately address economic and gender inequalities, and virtually disregards the increasing customer demand for the sex trade.⁹⁴ The legalised commercial sex industry (exotic dance clubs, pornography, sexually exploitative advertising, etc) is considered by many as a dominant factor in bolstering the demand for illegally trafficked sex workers in the US. US lawmakers should also focus on curbing the demand, and not only prosecuting the suppliers. In terms of economic

mandatory restitution.’

⁹⁰ While the TVPA proposes certain economic alternatives to combat human trafficking, appropriations of only US\$15 million over two years were authorised to fund all of these initiatives. In contrast, the federal government spends nearly US\$1 billion annually to patrol the US/Mexican border – see Chapkis n 65 above at 933.

⁹¹ Dalrymple ‘Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act’ (2005) 25(2) *Boston College Third World LJ* 451 472–473. Hartsough n 43 above at 102 concurs that the crime-fighting mechanism in the TVPA compromises the protection and assistance needs of trafficking victims. While not explicitly acknowledging the rights of humans to be free from punishment, mistreatment, cruel and inhuman treatment, and torture, the Act does name several international human rights treaties.

⁹² See Ryf n 30 above at 48; Godziak & Collett n 66 above at 118. Chacón n 15 above at 2977 laments the fact that: ‘The US has never developed an immigration strategy that effectively grapples with the global forces that drive migration.’

⁹³ See Ryf n 30 above at 48.

⁹⁴ Adelman ‘International sex trafficking: dismantling the demand’ (2004) 13/2 *Review of Law and Women’s Studies* 387 at 391, 396. Chacón n 15 above at 3017 remarks that ‘the fact that the Act exists, and that millions of dollars are spent to combat trafficking each year, diverts political pressure from the task of changing the legal regime to eliminate legal incentives for the exploitation of human beings’.

inequality, the greater part of human trafficking is the result of poor economic conditions, wherein many do not have the option to do anything else but to sell themselves to survive. Regarding gender inequality, in societies where gender discrimination and inequality have become ingrained in their customs and traditions, 'implementing programs to improve educational and economic opportunities is comparable to putting the cart before the horse'.⁹⁵ These issues could be addressed within the anti-trafficking laws in order to give women the opportunity to have a say in the acts of the trafficking industry. The general consent after the operationalisation of the TVPA was that further legislation was required to rectify some of the shortcomings identified.⁹⁶ This was accomplished by a series of reauthorisation acts passed on 7 March 2013.

Trafficking Victims Protection Reauthorisation Act of 2003 (TVPRA 2003)⁹⁷

The original TVPA of 2000 was reinforced in 2003 by the Trafficking Victims Protection Reauthorisation Act of 2003 (TVPRA). The reinforcement was done by re-authorising appropriations for the fiscal years 2004 and 2005. Substantial increases in funding for anti-trafficking programs were authorised for this period (over \$100 million for each fiscal year).⁹⁸ The renewed and enhanced policy allowed the US 'to fund public awareness campaigns for foreign countries and to provide funding for research on international and domestic trafficking'.⁹⁹ The research initiatives include, but are not limited to, the economic causes and consequences of trafficking in persons, the effectiveness of programs and initiatives to prevent trafficking and protect victims, as well as the interrelationship between trafficking in

⁹⁵ McClain 'An ounce of prevention: improving the preventative measures of the Trafficking Victims Protection Act' 2007 *Vanderbilt Journal of Transnational Law* 579 596.

⁹⁶ See Hyland n 87 above at 70. Desyllas n 78 above at 72 adds: 'The current US government prefers repressive strategies because they are simple and in accordance with other agendas, such as immigration control, ending organized crime, imposing ideologies onto other countries, and maintaining women's morality and sexuality'.

⁹⁷ TVPRA 2003, Pub Law 108-193, 117 Stat 2875 (2003) (codified as amended in scattered sections of USC), enacted 19 Dec 2003. This Act and subsequent reauthorisations of the TVPA are supplementary to the original TVPA of 2000. The Act must be renewed every two to three years so as to stay current with the latest developments in technology and evolution of the crime. After every Act's cycle, it expires and is replaced by a new reauthorisation which mainly deals with funding distribution, but may also amend or add provisions to the TVPA 2000. The last reauthorisation expired on 1 Oct 2011, and has not as yet been renewed. The TVPRA of 2011 was not enacted, while the TVPRA of 2013 was passed on 7 March 2013.

⁹⁸ Miko n 74 above at 13.

⁹⁹ Desyllas n 78 above at 70. See TVPRA 2003 s 6(f), (g).

persons and global health risks.¹⁰⁰ By supporting more research to be conducted on economic and gender disparities, this Act attempts to remedy some of the critique against the TVPA.

Generally, the TVPRA 2003 places greater responsibility on law enforcement authorities to investigate and prosecute human-trafficking cases. It also requires better coordination with victim service providers to accommodate the needs of trafficking victims.¹⁰¹ In order to enhance the prosecution of trafficking-related crimes further, human trafficking is included under the federal RICO statute.¹⁰² The TVPRA refines and expands on the TVPA's minimum standards for eliminating trafficking to be used in the Secretary of State's annual trafficking report.¹⁰³ Previous criticism regarding certain Tier 2 countries which do not comply with all requirements was remedied by the creation of a Tier 2 watch list.¹⁰⁴ Unlike the TVPA, the TVPRA requires the US State Department to consider not only investigations and prosecutions, but also convictions and sentences in determining whether a country is complying with the minimum standards for the elimination of trafficking or

¹⁰⁰ See TVPRA 2003 s 6(g)(1)(1)–(3). The TVPA s 112 is amended by inserting a new section on research on domestic and international trafficking in persons.

¹⁰¹ Clawson, Dutch & Cummings *Law enforcement response to human trafficking and implications for victims: current practices and lessons learned* (2006) 9.

¹⁰² TVPRA 2003 s 5(b). The crime of human trafficking is a predicate offence for RICO charges. Ch 77 of the USC 'Peonage, Slavery, and Trafficking' is amended to enhance US efforts to combat trafficking. However, the very low rate of conviction in many trafficking cases under the TVPRA suggests that the legislation is still inadequate. Overall, the conviction rates from 2001 to 2004 varied widely from fifty-seven per cent to eighty-one per cent. However, during years with high conviction rates, few cases were prosecuted. Eg, in 2003, the year with the highest conviction rate overall, there were only thirty-two defendants charged nationwide, resulting from just seven cases. Again in 2005, even though ninety-five defendants were charged under various statutes for human trafficking, only thirty-five were convicted, a rate of only thirty-seven per cent. See Brenner *Captive workforce: human trafficking in America and the effort to end it* (2006) 163.

¹⁰³ TVPRA 2003 s 6(a)(1)(A)–(G); Miko n 74 above at 13. Trafficking reports from 2003 to 2005 remedied the deficiency of an objective assessment of actual data *ie* actual people investigated, by providing the statistics, wherever available. Contributing factors to trafficking in certain countries such as corruption and police complicity were integrated into the 2003 report, and referred to in subsequent reports. The problem of 'demand' was not sufficiently discussed until the 2005 trafficking report. There is still a lack of accurate evaluation applied to some government initiatives, where ineffective and superficial anti-trafficking strategies are put forward. See Tiefenbrun n 62 above at 129, 133, 134, 137.

¹⁰⁴ TVPRA 2003 s 6(e). This 'special watch list' consist of countries that the Secretary of State determined should require special scrutiny during the following year.

whether a country is making significant efforts to bring itself into compliance with such standards.¹⁰⁵

The TVPRA remains committed to the protection and assistance of victims exploited through labour-and sex trafficking in the US, however, it recognises difficulties experienced by these victims in obtaining assistance, especially the T-visa.¹⁰⁶ A further improvement in criminal law and civil action is that under the TVPRA, victims are allowed to sue their traffickers in a federal district court.¹⁰⁷ The prevention strategies of the TVPRA focus on border interdiction, public information programs, and combating international sex tourism. The use of international media to educate and alert potential victims as propagated by the TVPRA further extends to inform individuals travelling to foreign destinations where sex tourism is significant about US laws against sex tourism.¹⁰⁸ The TVPRA contains an ‘escape

¹⁰⁵ Gallagher ‘A shadow report on human trafficking’ in Lao ‘The US approach vs international law (2007) 16/1 *Asian and Pacific Migration J* 1 at 5 is troubled by the fact that the US standard equates a high prosecution and conviction rate with a more effective criminal-justice response. Not only is it well known that trafficking cases are extremely difficult to investigate and prosecute, but the ‘success-by-numbers approach’ fails to recognise the fundamental difference between countries of origin and countries of destination. It is easier to prosecute traffickers in the country of exploitation. There is furthermore no explicit qualitative element for determining which type of prosecutions count towards the rating.

¹⁰⁶ TVPRA 2003 s 2(3): ‘On the other hand, victims of trafficking have faced unintended obstacles in the process of securing needed assistance, including admission to the United States under section 101(a)(15)(T)(i) of the Immigration and Nationality Act.’

¹⁰⁷ TVPRA 2003 s 4(a)(4). The Act does not add that a victim of trafficking shall also be entitled to file a civil action asking for punitive damages. However, in *Ditullio v Boehm* (10–36012 9th Cir 7 Nov 2011), the court held that the ‘TVPA permits recovery of punitive damages because it creates a cause of action that sounds in tort and punitive damages are available in tort actions under the common law’.

¹⁰⁸ TVPRA 2003 s 3(a)(2)(e) ‘Combating International Sex Tourism’. Information regarding illegal sex tourism was followed by more aggressive law enforcement. The US DoS *Trafficking in Persons Report 2005* (2005) 23 states that from the passage of the TVPRA in 2003 to June 2005, there were twenty indictments and over twelve convictions of child-sex tourists. Supporting the provisions in the TVPRA, the Protect Act (Prosecutorial Remedies and Tools Against the Exploitation of Children Today (Protect) Act of 2003, Pub Law 108–21, 117 Stat 650) makes it a crime for a US citizen (or any US permanent-residence holder) to travel abroad for the purpose of engaging in illicit sexual conduct with another person. This Act has extraterritorial reach which allows for the investigation, prosecution and conviction of offenders in the US, even if the illicit sex act was performed abroad and even if sex trafficking is legal in that country. If convicted, offenders may be fined or imprisoned for up to thirty years, or both. Together the Protect Act and the TVPRA increase penalties to twenty years in prison for engaging in child sex tourism. See Tiefenbrun 2007 n 63 above at 265. The Protect Act was held constitutional in that its extraterritorial application does not violate international law in *US v Clark* 315 F Supp 2d 1127 (WD Wash 2004); *US v Clark* 435 F 3d 1100 (9th Cir 2006) where a seventy-one-year-old US military veteran was arrested in Phnom Penh, Cambodia for

clause' relating to international affairs, which authorises a US federal body that has entered into a contract with a private contractor to terminate that contract should it be discovered that the private party has engaged in severe forms of human trafficking, procured commercial sexual services while the contract was in force, or used forced labour during the period of time that the contract was in effect.¹⁰⁹

Critics have been most vocal about the TVPRA's restriction of anti-trafficking funds to abolitionist groups that oppose prostitution.¹¹⁰ Any foreign organisation or NGO that advocates the legalisation or practice of prostitution are not funded, and grantees are asked to state their position on prostitution in writing.¹¹¹ By excluding those directly involved in the sex

sexually molesting underage boys and extradited to the US. See also *US v Frank* 486 F Supp 2d 1353 (2007) where s 2423(c) of the Act was challenged on the basis that it violated international law because it fails to recognise that the age of consent in Cambodia is fifteen. Frank was found guilty on five counts for travelling to Cambodia to engage in illicit sexual conduct with females under the age of eighteen. His appeal did not succeed. However, in *US v Jackson* 2007 WL 925730 (9th Cir 2007), the sex tourism indictment was dismissed for although the 'engaging in illicit sexual conduct' occurred after the enactment of the statute, the 'travel in foreign commerce' was complete in 2001 as Jackson had at that time travelled to Cambodia intending to resettle there permanently. The two statutory terms have to be interpreted as one substantive element.

¹⁰⁹ TVPRA 2003 s 3(b) 'Termination of Certain Grants, Contracts and Cooperative Agreements'. This section states that the grant will be terminated if 'if the grantee or any sub-grantee, or the contractor or any subcontractor (i) engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect, or (ii) uses forced labour in the performance of the grant, contract, or cooperative agreement'. See Clawson *et al* n 53 above at 12.

¹¹⁰ See Desyllas n 78 above at 70.

¹¹¹ Ditmore 'Trafficking in lives: how ideology shapes policy' in Kempadoo, Sanghera & Pattanaik (eds) *Trafficking and prostitution reconsidered: new perspectives on migration, sex work, and human rights* (2011) 107 at 114–117. The Bush Administration considered programs that utilise the term 'sex work' as 'inappropriate partners for USAID anti-trafficking grants or contracts' since they accept prostitution as employment choice. NGOs that forcibly removed women from prostitution in order to 'save' them have been among those given funding preferences. See Saunders & Soderlund 'Threat or opportunity? Sexuality, gender and the ebb and flow of trafficking as discourse' (2003) 22(3/4) *Canadian Woman Studies* 16. Human trafficking is for the first time linked to terrorism (after Sept-eleven attacks), as Keefer *Human trafficking and the impact on national security for the United States* (2006) 3 explains: 'The thread of trafficking runs through Al Qaeda's tapestry of terror. Since the start of the war in Afghanistan, reports have indicated that the Taliban engaged in open abduction of women and girls, taking them as war booty. There are numerous accounts of forced marriages, rapes, women and girls forced to act as concubines, and numerous killings. Many of those girls who were not used as concubines were sold as sexual slaves to wealthy Arabs through contacts arranged by the Al Qaeda terrorist network. Proceeds from these sales allegedly helped keep the cash-strapped Taliban afloat.' See also Shelley 'Human trafficking: transnational crime and links with terrorism' (testimony given before

industry who are most able to report and combat abuses, the success of well-established anti-trafficking programs may be hindered. This also demonstrates that the focus of the US policy is still primarily on sex trafficking, to the detriment of trafficking in other industries, such as sweatshops, agriculture and domestic labour.¹¹² Furthermore, funding is closely linked to religious ideologies allied with conservative views on prostitution.

Trafficking Victims Prevention Reauthorisation Act of 2005¹¹³

In 2005, the TVPA was again refined to authorise additional appropriations for the fiscal years of 2006 and 2007, and to close further loopholes in previous anti-trafficking legislation.¹¹⁴ This version of the TVPA focuses on enhancing specified US efforts to combat trafficking in persons, which include combating trafficking activities in post-conflict settings and humanitarian emergencies by international peacekeepers, armed forces and aid workers.¹¹⁵

The involvement of US citizens abroad in certain types of trafficking activities is inconsistent with US laws and policies, and undermines the credibility and mission of US government programs in post-conflict regions. For that reason, the law seeks to extend US extra-territorial jurisdiction over certain human trafficking offences, such as sex tourism.¹¹⁶ The TVPRA 2005

the US House Committee on International Relations, Subcommittee on International Terrorism, Non-proliferation, and Human Rights 25 June 2003).

¹¹² The reason for the emphasis on sex trafficking may be attributed to 'local law enforcement relying on its pre-existing vice units devoted to prostitution enforcement, whereas there were no comparable pre-existing structures for involuntary servitude in labour sectors'. See n 86 above at 340. Also, there are more sex-trafficking investigations conducted by state law enforcement than labour-trafficking investigations, and often the criminal statutes applied predate the passage of state anti-trafficking statutes.

¹¹³ Trafficking Victims Prevention Reauthorization Act of 2005 (TVPRA 2005) Pub Law 109-164, enacted 10 Jan 2006. Similar to the TVPRA, this Act amends the original TVPA of 2000.

¹¹⁴ See Miko n 74 above at 13-14. Previous laws are amended to strengthen anti-trafficking policies and programs.

¹¹⁵ TVPRA 2005 s 2(7)-(10). TVPA s 106 is amended by adding at the end of the section a new subsection under s 101 'Prevention of Trafficking in Conjunction with Post-Conflict and Humanitarian Emergency Assistance'.

¹¹⁶ TVPRA 2005 s 103. Part II of 18 USC is amended with the insertion of Ch 212A (s 3271 'Trafficking in Persons' offences committed by persons employed by or accompanying the Federal Government outside the US' & s 3272 'Definitions'). The need for extraterritorial jurisdiction was already identified in the *Trafficking in Persons Report 2004* where it was pointed out that the US had a leading role to play in fighting sex tourism by identifying and prosecuting their own nationals who travel abroad to engage in commercial sex with children – thus 'American paedophiles that exploit foreign children around the globe for commercial sex are no longer beyond the reach of US prosecution.' See US DoS *Trafficking in Persons Report 2004* 'Letter from Secretary

provides US prosecutors with additional transnational mechanisms to successfully apprehend, prosecute, and convict human traffickers. Criminal jurisdiction is granted over US government personnel as well as contractors accompanying US employees who are complicit in trafficking acts in foreign countries while working for the government. If the affected foreign government is already prosecuting the offender for the offence of trafficking in persons, the US may not commence another prosecution.

A grant programme totalling US\$50 million is established for states and local law enforcement agencies to investigate and prosecute acts of severe forms of trafficking in persons and related offences.¹¹⁷ However, grants may only be made to law enforcement and prosecutorial task forces that work collaboratively with relevant social service providers and NGOs ‘with experience in the delivery of services to persons who are the subject of trafficking in persons’.¹¹⁸

Colin L Powell’. Attempt to commit sex tourism is also punished. In *US v Seljan* 497 F 3d 1035 (9th Cir 2007), an eighty-seven year- old retired businessman was arrested in Los Angeles airport on his way to the Philippines to have sex with two girls, ages eight and twelve. It was determined that he had travelled to the Philippines forty-three times between 1992 and 2003, and fifty-two photographs of him engaged in sex acts with Filipino children were discovered on him. He admitted that he had been ‘sexually educating’ children (aged between eight and thirteen) for about twenty years, and that he intended ‘sexually educating’ these children on this trip as well. Seljan was sentenced to twenty years in prison.

¹¹⁷ TVPRA 2005 s 204(a)(1)(A). Trafficking acts must involve US citizens, or foreigners admitted for permanent residence, and must occur, in whole or in part, within US territorial jurisdiction. Related offences is defined under TVPRA 2005 s 204(a)(2) as: ‘including violations of tax laws, transacting in illegally derived proceeds, money laundering, racketeering, and other violations of criminal laws committed in connection with an act of sex trafficking or a severe form of trafficking in persons’.

¹¹⁸ TVPRA 2005 s 204(b). This satisfies the requirement in the provision of a multidisciplinary approach. The TVPRA 2003 restrictive ‘anti-prostitution pledge’ (that international NGOs do not ‘promote, support or advocate’ the legalisation or practice of prostitution or else they will not receive governmental funding to support their anti-trafficking efforts), is now extended to domestic NGOs. This provision was challenged as unconstitutional by both *Alliance for Open Society International Inc and Open Society Institute v USAID* 430 F Supp 2d 222 (SDNY 2006) and *DKT International Inc v USAID* 435 F Supp 2d 5 (DDC 2006) . Both lawsuits charged that the provision violates their First Amendment right to free speech by forcing them to adopt the government’s point of view in order to receive funding, and that the terms are unconstitutionally vague, thereby permitting arbitrary enforcement. Finally, the stipulation undermines efforts to provide preventative health information and services to sex workers at risk of contracting and spreading HIV/AIDS, therefore the pledge presents a serious public health danger. The courts ruled in favour of the NGOs, however, these rulings do not extend to foreign organisations. See Chang & Kim ‘Reconceptualizing approaches to human trafficking: new directions and perspectives from the field(s)’ (2007) 3 *Stanford J of Civil Rights & Civil Liberties* 317 at 322–324.

The mandated annual reports proclaiming the rating of countries' anti-trafficking efforts were amended by the TVPRA 2005 by supplementing a fourth minimum standard in that governments have to make serious and sustained efforts to eliminate trafficking.¹¹⁹ The reports for this period show improvement and are more comprehensive than previous years.¹²⁰ Greater emphasis is also placed on labour trafficking,¹²¹ which the report for the first time suggests may be more prevalent than sex trafficking.¹²²

While the trafficking reports seem to be more victim-orientated, the TVPRA 2005 does not direct much new attention to the plight of victims.¹²³ The 2005 Act increases assistance to foreign trafficking victims in the US,¹²⁴ which includes access to legal counsel and better information on programs to aid victims.¹²⁵ The special needs of juvenile victims,¹²⁶ especially child labour,¹²⁷

¹¹⁹ The other minimum standards are that governments must prohibit and punish acts of trafficking; prescribe punishment commensurate with that for grave crimes such as forcible sexual assault; and prescribe punishment that is sufficiently stringent to deter, and that adequately reflects the offense's heinous nature. See Miko n 74 above at 14.

¹²⁰ However, there is criticism that the 'State's explanations for its ranking decisions are incomplete, and the report is not used consistently to develop government-wide anti-trafficking programs. [S]ome of the minimum standards are subjective, and the report does not comprehensively explain how they were applied, lessening the report's credibility and hampering its usefulness as a diplomatic tool. For example, country narratives for most countries in the top category (Tier 1) failed to clearly explain compliance with the second minimum standard, regarding prescribed penalties for sex trafficking crimes, established in the TVPA.' See US Government Accountability Office (GAO) *Human trafficking, better data, strategy, and reporting needed to enhance US anti-trafficking efforts abroad* (2006) 3 at 17.

¹²¹ Labour trafficking is also singled out in the TVPRA 2005 s 105.

¹²² Miko 73 above at 15.

¹²³ Desyllas in n 78 above at 75 demurs that the TVPRA 2005 allocates 'more funds to support a morally-driven policy that does not take into account the individuals it claims to serve'. Critics observe that while there has been a 210 per cent increase in certifications of foreign victims over the past five years, there has been no corresponding increase in funding for victim protection services. See US DoS *Trafficking in Persons Report 2010* n 86 above at 341.

¹²⁴ This is mainly done by means of a grant programme to develop, expand, and strengthen assistance programs 'for certain persons subjected to trafficking'. See TVPRA 2005 s 202.

¹²⁵ TVPRA 2005 s 102(a). The US Department of HHS, as of May 2006, had certified 1000 trafficking victims for special status and the DHS issued 112 T-visas to foreign survivors of trafficking. See Miko n 74 above at 15.

¹²⁶ TVPRA 2005 s 203. This renewed focus on granting benefits to child victims became necessary as the US had only granted trafficking victim's relief to eighty-two children, since the enactment of the TVPA. See Sensenbrenner *Committee on the Judiciary Report House Report No 109-317 Part 2* (2005) 26.

¹²⁷ TVPRA 2005 s 105.

as well as Americans trafficked within the US¹²⁸ are considered. However, while the TVPRA 2005 embodies extensive endeavours to provide more comprehensive protection and concern for the needs of these victims (foreign child victims in particular), the Act fails to amend the corresponding immigration laws.¹²⁹

¹²⁸ TVPRA 2005 Title II. An interesting case involving the national trafficking of US citizens is *US v Marcus* 487 F Supp 2d 289, 292–97 (ED NY 2007), where the Court determined that the term ‘commercial sex act’ as applied in the TVPA pertains not only to sex acts, but also to photographs of sex acts. In this case, the defendant and complainant engaged in a consensual relationship that involved bondage, dominance/discipline, submission/sadism, and masochism (‘BDSM’). After enticing the complainant to move to his home, she unwillingly became one of his sex slaves and was forced to maintain a BDSM website called ‘Slavespace’ for him. When Marcus was unhappy with her work on the website, he would severely punish her. One such punishment consisted of putting a safety pin through her labia and attaching a padlock to it, thereby closing her vagina. The incident was photographed, the pictures were posted on the website and she was forced to post a daily entry about it on the website. The defendant was convicted on charges of violating the forced labour and sex trafficking provisions of the TVPA. On appeal (*US v Marcus* 130 S Ct 2159, 2163 (2010)), the sex-trafficking conviction was set aside on the grounds that it violated the *ex post facto* clause. (The sex-trafficking incidents occurred before 28 Oct 2000 when the TVPA was enacted, though the most violent punishment episodes transpired post-enactment, when the complainant was forced to work on the website).

¹²⁹ Foreign child victims of trafficking (who are mostly unable to speak the language) are still entangled in statutory and regulatory administrative provisions. In many cases, alien child victims seek protection status in the Special Immigrant Juvenile (SIJ) provisions of the US Immigration Code 8 USCA s 1 101(a)(27)(J) as these provisions assure a more accessible remedy to these victims. However, the eligibility requirements under the SIJ as compared to the same under the Code of Federal Regulations (8 CFR 214.11 ‘Alien Victims of Severe Forms of Trafficking in Persons’) conflict. The foreign child victim is not required to assist with the prosecution of traffickers under the SIJ if he is under eighteen years of age (8 USCA s 1101 (a)(15)(T)(i)(III)(bb)) yet the CFR provisions indicate that he is not required to assist if he is less than fifteen years of age (8 CFR s 214.11 (d)(2)(vii)). Furthermore, under the CFR, child trafficking victims are still required to provide evidence of their age in the form of either an official copy of their birth certificate, passport or certified medical opinion, and evidence demonstrating that they face extreme hardship if removed from the US (8 CFR s 214.11(h)(3)). Compiling an application package for T-status also presents rigorous procedures. There are filing deadlines, fingerprinting procedures, application form, photographs and fingerprinting fees, personal interviews, demonstrating that the child is a victim of a severe form of trafficking and will suffer extreme hardship if he is removed from the US, and evidence that he has complied with any reasonable request for assistance in investigation and prosecution of traffickers (unless he is under fifteen years of age). For an alien child to practically implement these requirements satisfactorily is almost impossible without assistance from an informed adult. Green ‘Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap between US Immigration Laws and Human Trafficking Laws’ (2008) 12(2) *UC Davis J of Juvenile Law & Policy* 309 at 315 quite rightly asserts that ‘[i]n effect, the law constructs a roadblock rather than a resolution’. See also Green at 333–338.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008)¹³⁰

The TVPRA 2008 sanctioned increased funding for the fiscal years 2008 to 2011. In this Act, a fourth title is added *ie* the ‘Child Soldiers Prevention Act of 2008’. The responsibility to prevent human trafficking is directly extended in this Act to specified entities to ensure that US citizens do not use any item, product, or material produced or extracted with the use of labour from victims of severe forms of trafficking.¹³¹ The President is directed by the legislation to develop a system to evaluate the effectiveness of anti-trafficking assistance domestically as well as internationally.¹³² The TVPRA 2008 also removes the requirement that the minimum standards are applicable to the governments of countries where there are ‘a significant number of victims’ of severe forms of trafficking.¹³³ Additional actions against governments failing to meet minimum standards were appended – those countries that have been on the Tier 2 ‘Watch-List’ for two consecutive years may be downgraded to Tier 3 unless special conditions are adhered to.¹³⁴ The trafficking report should also be translated in the principal

¹³⁰ The TVPRA 2008 (Pub Law 110–457, 122 Stat 5044–5091 (2008)) (TVPRA 2008) was signed into law on 23 Dec 2008. This law was named in honour of William Wilberforce, an English member of parliament who was a social reformer and leading abolitionist.

¹³¹ TVPRA 2008 s 102(3). Partnerships will be entered into by the Office to Monitor and Combat Trafficking (the former Interagency Task Force) with foundations, universities, corporations, community-based organisations, and other NGOS to attain this goal.

¹³² See TVPRA 2008 s 105 which amends the TVPA by inserting s 107A. S 107A(c) directs the President to ‘establish a system to evaluate the effectiveness and efficiency of the assistance provided under anti-trafficking programs established under this Act on a program-by-program basis in order to maximise the long-term sustainable development impact of such assistance’. Despite all previous anti-trafficking efforts and programs, the US DoS’s Trafficking in Persons Report 2010 (n 85 above) indicates that 62 countries have not yet convicted a single human trafficker under trafficking laws in compliance with international standards and 104 countries continue to lack laws, policies or regulations to prevent victims’ deportation. See Siskin & Wyler n 43 above at 6, 10–11.

¹³³ TVPRA 2008 s 106(1) amends TVPA s 108(a). This amendment in the TVPA reporting requirements has led to an increase in rated countries. More countries (193) were rated in 2009 than before – twenty up from 2008 (173). The requirement of ‘a significant number of’ victims was taken by previous reports as at least 100 cases pa. See Wyler, Siskin & Seelke *Trafficking in persons: US policy and issues for Congress* (2009) 10, criticising that the ‘inconsistent application of the minimum standards and superficial country assessments has compromised their [TIP reports] credibility and effectiveness as a tool to influence government behaviour’. See Chuang n 37 above at 474. It is also difficult to determine which particular standards make a country qualify for Tier 1. According to Siskin & Wyler n 43 above at 36, many criticise that the Tier 2 and Tier 2 ‘Watch List’ have ‘become ‘catch-all’ categories that include countries which should really be placed on Tier 3’.

¹³⁴ TVPRA 2008 s 107(a). The President may waive the relegation if the specific country shows that it is making significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking; or its plan to eliminate trafficking,

languages of as many countries as possible and made available on the Internet.¹³⁵ An effective, integrated research mechanism in the form of a database for quantifying the number of victims of domestic and international trafficking in persons is established by this law.¹³⁶ Finally, a ‘Presidential Award for Extraordinary Efforts to Combat Trafficking in Persons’ is created which will be awarded annually to not more than five individuals or organisations.¹³⁷

Under the TVPRA 2008 Title II, positive amendments are made to the requirements for a T-visa. Foreigners, who are unable to comply with requests for assistance in their trafficking investigations and prosecution due to physical or psychological trauma, would now be eligible for T-visas.¹³⁸ Both T-visa and U-visa status may be extended beyond initial three years by the Department of Homeland Security (DHS) in certain circumstances.¹³⁹ Furthermore, the ‘extreme hardship’ requirement is tempered in that consideration is given to the ability of the foreigners’ countries to adequately address their needs in terms of security, mental and physical health requirements.¹⁴⁰ Continued presence requirements are extended to facilitate the parole of the victim’s relatives to the US.¹⁴¹ For those T-visa holders who want to adjust their status to permanent immigrant status (LPR-status), the

if implemented, would constitute making such significant efforts; and the country is devoting sufficient resources to implement the plan. Sanctions continue as determined by the TVPA: In 2010, President Obama resolved that 2 Tier 3 countries (Eritrea and North Korea) will be sanctioned for 2011 without exemption, and that four Tier 3 countries will be partially sanctioned (Burma, Cuba, Iran, and Zimbabwe). See Siskin & Wyler n 43 above at 15.

¹³⁵ TVPRA 2008 s 107(c).

¹³⁶ TVPRA 2008 s 108(a). This database is located within the Human Smuggling and Trafficking Centre to ‘(A) improve the coordination of the collection of data related to trafficking in persons by each agency of the US Government that collects such data; (B) promote uniformity of such data collection and standards and systems related to such collection; (C) undertake a meta-analysis of patterns of trafficking in persons, slavery, and slave-like conditions to develop and analyze global trends in human trafficking; (D) identify emerging issues in human trafficking and establishing integrated methods to combat them; and (E) identify research priorities to respond to global patterns and emerging issues.’

¹³⁷ TVPRA 2008 s 109.

¹³⁸ TVPRA 2008 s 201(a)(1)(D)(bb).

¹³⁹ TVPRA 2008 s 201(b) amending s 214(o)(7) of INA (8 USC 1184(o)(7)) for T-status. Relief may be granted to a T-status victim because of a delay in issuing the adjustment regulations, or there is a pending status application, or merely because of meriting exceptional circumstances. TVPRA 2008 s 201(c) amending s 214(p)(6) of INA (8 USC 1184(p)(6)) for U-visa (non-immigrant visa). This type of visa may be extended for similar reasons, except for that of exceptional circumstances.

¹⁴⁰ TVPRA 2008 s 201(c).

¹⁴¹ TVPRA 2008 s 205.

prerequisite of a 'good moral character' may be waived by the Secretary of the DHS.¹⁴² A 'continuation of presence'¹⁴³ status is granted to prospective immigrants in order to sue perpetrators who committed any of the criminal acts defined in Chapter 77.¹⁴⁴ These acts include not only trafficking, but also various forms of slavery, peonage, and involuntary servitude. Additional provisions are further made to provide support to domestic workers as possible trafficking witnesses and informants.¹⁴⁵

The TVPRA 2008 authorised new measures to combat human trafficking by strengthening and enhancing trafficking-related criminal statutes to punish traffickers.¹⁴⁶ A new criminal offence related to human trafficking, namely

¹⁴² TVPRA 2008 s 201(d)(6).

¹⁴³ TVPRA 2008 s 203(c)(1)(A); s 205(a)(1).

¹⁴⁴ TVPRA 2008 s 221(1). The civil remedy provision (s 1595) is expanded to accommodate this action. Furthermore, a ten-year statute of limitation is included for the first time in the statute. Although a civil remedy has been provided for from 2003 to 2009, not a single suit filed under the TVPA in federal court by sex trafficking survivors has reached the merits. Kim 'The trafficked worker as private Attorney General: a model for enforcing the civil rights of undocumented workers' 2009 *University of Chicago Legal Forum* 247 310 alleges that up until 2009 approximately thirty civil suits have been brought under s 1595, however none of them alleged sex trafficking. To date, only one suit alleging sex trafficking has been filed. This is unusual as a civil action holds many advantages for the victims such as lower burden of proof, more control over the legal process and substantial civil awards.

¹⁴⁵ TVPRA 2008 s 202. Title II concerns 'Combating Trafficking in Persons in the US' and is sub-divided into four sub-titles: (A) 'Ensuring Availability of Possible Witnesses and Informants', (B) 'Assistance for Trafficking Victims', (C) 'Penalties Against Traffickers and Other Crimes', and (D) 'Activities of the US Government'.

¹⁴⁶ The new federal laws instigated the highest number of prosecutions and defendants charged since the TVPA's inception. Federal human-trafficking task forces opened 2515 suspected incidents of human trafficking for investigation between Jan 2008 and Jun 2010. These suspected incidents were classified as sex trafficking (eighty-two per cent), which includes more than 1200 incidents with allegations of adult sex trafficking, and more than 1000 incidents with allegations of prostitution or sexual exploitation of a child; labour trafficking (eleven per cent) and unknown trafficking type (seven per cent). See Banks & Kyckelhahn *Characteristics of suspected human trafficking incidents 2008–2010* (2011) 1. In 2009, the Human Trafficking Prosecution Unit (a specialised anti-trafficking unit of DoJ's Civil Rights Division) charged 114 individuals and obtained forty-seven convictions in forty-three human-trafficking prosecutions (twenty-one labour trafficking and twenty-two sex trafficking). The average prison sentence imposed for federal trafficking crimes in 2009 was thirteen years and prison terms imposed ranged from two months to forty-five years. See US DoS *Trafficking in Persons Report 2010* n 86 above at 339. However, Siskin & Wyler n 43 above at 11 comment that even though efforts to combat trafficking were enhanced in the TVPRA 2008, the number of prosecutions reported per year worldwide against trafficking offenders has declined on average 5.6 per cent per year since the first collection globally in 2003 (from 7 992 prosecutions in 2003 to 5 606 in 2009).

conspiring to traffic humans, is introduced.¹⁴⁷ The penalty for violating the conspiracy provision is commensurate to the penalty for the underlying substantive offence.¹⁴⁸ The Act creates the new offence of ‘obstructing or attempting to obstruct enforcement of anti-trafficking laws’, and imposes significant penalties on perpetrators.¹⁴⁹ A new crime prohibiting ‘fraud in foreign labour contracting’ is established which imposes criminal liability on those who, knowingly and with intent to defraud, recruit workers from outside the US for employment within the US by means of materially false or fraudulent representations.¹⁵⁰

Except for newly-introduced statutes, a number of important expansions to the criminal provisions are included in the Act. The TVPRA 2008 clarifies the application of the forced labour provision by adding the element of ‘force’ as a fourth prohibited means of violating the statute (in addition to serious harm; abuse of the legal process or law; and scheme, plan or pattern as means of inducement).¹⁵¹ As the only sex-trafficking statute containing a provision that imposed criminal liability on those who knowingly benefitted financially from participating in a venture that engaged in sex trafficking

¹⁴⁷ TVPRA 2008 s 222(c). Conspiracy to traffic in persons could previously only be charged under the general conspiracy statute for all federal crimes, which provides for a maximum of just five years imprisonment.

¹⁴⁸ TVPRA 2008 s 222(c)(2)(b)–(c). This section states that whoever conspires with another to violate the crimes of peonage, enticement into slavery, forced labour, trafficking with respect to the aforementioned crimes, and unlawful conduct with respect to documents in furtherance of these crimes, shall be punished in the same manner as a completed violation of the crimes. Unfortunately, there is no minimum mandatory penalty for conspiring to commit sex trafficking. The section continues by averring that whoever conspires with another to violate the crime of sex trafficking of children or by force, fraud, or coercion, shall be fined, or imprisoned for any term of years or for life, or both. These penalties are sufficiently stringent and proportionate to penalties prescribed under US law for other serious offences.

¹⁴⁹ TVPRA 2008 s 222(b). Perpetrators shall be fined, imprisoned for not more than twenty years, or both.

¹⁵⁰ TVPRA 2008 s 222(e). This provision will be codified at Ch 63 of 18 USC as s 1351. The statute provides for a fine, or a maximum term of five years’ imprisonment, or both.

¹⁵¹ TVPRA 2008 s 222(b) s 1589 (a)(1)–(4). The statute may be violated by one of, or by any combination of, these four prohibited means. Finally, in TVPRA 2008 s 222(b) s 1589 (c)(1)–(2) the terms ‘abuse or threatened abuse of law or legal process’ and ‘serious harm’ are expounded on. ‘Abuse or threatened abuse of law or legal process’ means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.’ ‘Serious harm’ is given as ‘any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm’.

acts, this prohibition necessitated expansion to other trafficking statutes as well. This is accomplished in the new legislation, which penalises anyone who knowingly benefits financially from any trafficking crimes.¹⁵² The new sentencing guidelines lower the standard of proof to ‘reckless disregard’¹⁵³ for anyone who financially benefits through participation in a trafficking venture. Prosecutors do not have to prove that defendants who come into contact with victims engaging in any trafficking conduct actually had knowledge that these persons were trafficked, mere *dolus eventualis* is sufficient. The *mens rea* requirement for sex trafficking is similarly broadened to include both actual knowledge that force, fraud, or coercion would be used to cause a person to engage in a commercial sex act, or reckless disregard of the fact that such means would be used.¹⁵⁴ The knowledge-of-age requirement in the sex trafficking of children is also eliminated in certain instances.¹⁵⁵

¹⁵² TVPRA 2008 s 222(d). Ch 77 of title 18 USC is amended by inserting s 1593A ‘Benefitting Financially from Peonage, Slavery, and Trafficking in Persons’.

¹⁵³ The US courts have explained ‘reckless disregard’ as meaning ‘deliberate indifference to fact which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the US illegally’. See *US v Perez* 443 F 3d 772, 781 (11th Cir 2006); *US v Garcia-Gonon* 443 F 3d 587, 590 (8th Cir 2006) where the concept was further described as ‘to be aware of, but to consciously or deliberately ignore facts and circumstances clearly indicating that the person being transported was an alien who had entered or remained in the US in violation of law’. See also *US v Guerra-Garcia* 336 F 3d 19, 25–26 (1st Cir 2003). This principle covers instances of the US concept of ‘wilful blindness’ as a basis for the knowledge element. ‘Wilful blindness’ describes situations where evidence shows that a defendant was presented with facts that the activity was likely criminal, but deliberately ignored the facts or intentionally failed to investigate; similar to a situation of ‘burying one’s head in the sand’. See *US v Whitehill* 532 F 3d 746, 751 590 (8th Cir 2008); *US v Mir* 525 F 3d 351, 358–359 590 (4th Cir 2008); *US v Flores* 454 F 3d 149, 159 (3th Cir 2006); *US v Heredia* 483 F 3d 913, 918 (9th Cir 2007).

¹⁵⁴ TVPRA 2008 s 222(b)(5)(A). As in the provision for ‘forced labour’, definitions of the terms ‘serious harm’ and ‘abuse of law or legal process’ are added on to. See TVPRA 2008 s 222(b)(5) (E)(iii)–(iv). There is no need to show proof of ‘force, fraud, or coercion’ for the sex trafficking of children. The burden of proof however remains for involuntary servitude of children.

¹⁵⁵ TVPRA 2008 s 222(b)(5)(D)(c). Critics of the TVPRA 2008 consider this provision inadequate since it does not sufficiently address the prosecution pillar of the Act. It is argued that this should be a strict liability provision that would eliminate the need to prove the defendant’s knowledge of age. This inclusion should be accompanied by an expansion of the definition of sex trafficking to include child prostitution. See Nguyen ‘The three ps of the Trafficking victims Protection Act: unaccompanied undocumented minors and the forgotten p in the William Wilberforce Trafficking Prevention Reauthorization Act’ 2010 *Washington & Lee J for Criminal Review & Social Justice* 187 215–216.

In combating child trafficking at the borders and ports of entry of the US, any unaccompanied minor who is a national or habitual resident of a country that is contiguous with the US will first be detained and then returned to the child's country of nationality, contingent on the Secretary of DHS's final decision.¹⁵⁶ It is contended that this action will protect these children from possible abuse and severe forms of trafficking.¹⁵⁷ The Act directs the Government to enter into agreements with neighbouring countries regarding the safe repatriation of their minor nationals.¹⁵⁸ Special screening procedures for children suspected of being trafficking victims are stipulated.¹⁵⁹ In addition, the law requires the Secretary of Health and Human Services (HHS) to provide legal counsel and appoint child advocates and custodians to child-trafficking victims and other vulnerable unaccompanied foreign

¹⁵⁶ TVPRA 2008 s 235(a)(2)(A)–(B). The decision is made on a case-by-case basis by considering stipulated procedures. It must be determined that there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality; that the child does not have a fear of being returned to the child's country, and the child can independently decide to withdraw the application for admission to the US. The number of unaccompanied minors in US custody has increased 225 per cent since 2003 when 5000 children were detained. See Hill 'The right to be heard: voicing the Due Process Right to Counsel for Unaccompanied Alien Children' (2011) 31/1 *Boston College Third World LJ* 41 at 45.

¹⁵⁷ These unaccompanied alien children are sometimes subjected to detention in the US of days, months or even years. Statistics reflect an average stay of between twelve and ninety-nine days for children in the various types of facilities, where conditions may be below minimum standards and children may be subjected to sexual, physical and emotional abuse. See Hill n 157 above at 41–43, 47–48. The TVPRA 2008 attempts to correct these deficiencies by codifying the standard of detention that a child 'be promptly placed in the least restrictive setting that is in the best interest of the child'. See TVPRA 2008 s 235(c)(2).

¹⁵⁸ TVPRA 2008 s 235(a)(2)(C). This has successfully been done. A programme established by provisions of the TVPRA and funded by the DoS – the Return, Reintegration, and Family Reunification Program for Victims of Trafficking – assisted two victims in returning to their home country and reunited 128 family members with trafficked persons in the US in 2009. Since commencing in 2005, the programme has assisted fifteen victims in returning to their country of origin and has reunified 378 family members from forty-one countries of origin.

¹⁵⁹ TVPRA 2008 s 235(a)(4). The procedures in note 157 above must be considered within forty-eight hours of the apprehension of such a child but before repatriation. In 2009 the Innocence Lost Initiative (a collaboration of federal and state law enforcement authorities and victim assistance providers) conducted a national operation to detect child trafficking victims – this resulted in to the identification of 306 children and led to the convictions of 151 traffickers in state and federal courts. See US DoS *Trafficking in Persons Report 2010* n 86 above at 339.

children, to the greatest extent practicable.¹⁶⁰ In this regard, the TVPRA 2008 has succeeded in its aims.

COMBATING HUMAN TRAFFICKING IN SA: THE PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS (TIP) ACT 2013

In order to bridge the gaps left by common-law and statutory provisions¹⁶¹ in combating the crime of human trafficking, SA enacted the TIP Act on 29 July 2013.¹⁶² This specific legislation on trafficking in persons gives domestic legal effect to SA's international obligations under the Trafficking Protocol.¹⁶³ It draws from international-best practices such as the TVPA, but

¹⁶⁰ TVPRA 2008 s 235(c)(4),(5),(6). After *Reno v Flores* 507 US 292, 315 (1993) (a class action challenging both the detention and federal release for immigrant children), the *Nationwide Settlement Regulating INS Treatment of Detained Minors: Flores v Ashcroft* (Centre for Human Rights & Constitutional Law) directed that these children must be treated with dignity, respect, and special concern for their vulnerability as minors in the least restrictive setting. The agreement appointed a list of custodians which includes: (1) a parent, legal guardian, or adult relative (sibling, aunt, uncle, or grandparent); (2) an adult individual designated by a parent or guardian; (3) a licensed care program; and (4) other adults or entities when there is no other likely alternative to long term detention and no reasonable possibility of family reunification. Although the TVPRA 2008 provides that advocates represent the interests of unaccompanied alien children, counsel has to be *pro bono* or paid, which may be difficult to secure. It is reported that less than ten per cent of lawyers in the US accept *pro bono* cases. See Hill n 157 above at 52. Courts have in the past interpreted an immigrant minor's right to counsel negatively. Eg, in *Perez-Funez v District Director INS*, 619 F Supp 656, 659–60 (CD Cal 1985) it was stated *in dicta* that there is no right to public counsel.

¹⁶¹ The use of prior criminal sanction to combat human trafficking in SA is divided into fragmented auxiliary laws (eg the Immigration Act 13 of 2002, the Prevention of Organised Crime Act 121 of 1998, etc); specific legislation against trafficking in persons (eg the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the Children's Act 38 of 2005), and constitutional provisions (eg human dignity (s 10), right to life (s 11), the right guaranteeing freedom and security of the person (s 12), amongst others). These legislations are difficult to use in practice to combat trafficking, and the penal provisions provided for these crimes are not serious enough.

¹⁶² The TIP Act, which consists of nine substantive law chapters (ch 10 deals with miscellaneous matters) is still as yet not fully implemented. The legislation was preceded by the draft Prevention and Combating of Trafficking in Persons Bill which was introduced into Parliament on 16 March 2010 as well as two discussion papers and a SA Law Reform Commission (SALRC) issue paper on human trafficking. See SALRC *Report on Trafficking in Persons* (2002); SALRC *Trafficking in Persons* (2004); SALRC *Trafficking in Persons* (2006).

¹⁶³ The SA Act specifically refers to the international obligations entered into when the state became a signatory to the Trafficking Protocol in the Preamble and in the Objects of the Act. See also Dept of Justice and Constitutional Development *Government Gazette* 29 Jan 2010 No 32906 General Notice 61 (2010) 3.

also illustrates the nuances of SA forms of human trafficking which manifest in certain cultural practices such as *ukuthwala*.¹⁶⁴

Similar to the TVPA, the Act replicates the Trafficking Protocol's definition of trafficking, yet in contradistinction to the US legislation, the SA definition¹⁶⁵ is extended to include acts of human trafficking such as the delivery, sale, exchange, and lease of persons, the adoption of a child facilitated or secured through legal or illegal means, or concluding a forced marriage with another person, within or across the borders of the Republic.¹⁶⁶ Whereas the TVPA has a more restrictive outlook in its definition of the means of trafficking,¹⁶⁷ the means of control over human trafficking victims in the SA definition are extended to include a threat of 'harm, kidnapping, and the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage'. The methods of manipulation in the SA definition centres mainly on the words 'coercion', 'abuse of power', 'deception' or 'abuse of vulnerability', almost

¹⁶⁴ The custom of *ukuthwala* (literary meaning 'to carry') originates from the Xhosa people. It is a culturally-legitimated mock abduction of a girl by a young man whereby the girl's family is forced to enter into negotiations for the conclusion of a customary marriage. See Mwambene & Sloth-Nielsen 'Benign accommodation? *Ukuthwala*, "forced marriage" and the South African Children's Act' (2011) 2/1 *Journal of Family Law and Practice* 5. According to Brown *Human Slavery's New Era in Sub-Saharan Africa* (2010) 4, early marriage '... often leads to limited education, abusive circumstances, and destitute poverty from divorce, separation or abandonment. Multiple marriages can leave the wives struggling to support the family unit and therefore vulnerable to trafficking for exploitative purposes'. This is fertile ground for human traffickers.

¹⁶⁵ TIP Act provides: '4. (1) Any person who *delivers*, recruits, transports, transfers, harbours, *sells, exchanges, leases* or receives another person *within or across the borders of the Republic* by means of- (a) *a threat of harm*; (b) *the threat or use of force or other forms of coercion*; (c) *the abuse of vulnerability*; (d) *fraud*; (e) *deception*; (f) *abduction*; (g) *kidnapping*; (h) *the abuse of power*; (i) *the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person*; or (j) *the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any person in close relationship to that person*, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons. (2) Any person who (a) *adopts a child, facilitated or secured through legal or illegal means*; or (b) *concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or any person in any form or manner*, is guilty of an offence' (own italics to indicate additions to original Trafficking Protocol definition). This provision criminalises human trafficking irrespective of the victim's age or the type of trafficking involved. Both the TIP and the TVPA also reflect the need for special safeguards and care for especially children in their definitions.

¹⁶⁶ The TVPA only distinguishes sex-and labour trafficking.

¹⁶⁷ See n 23 above.

identical to those of the TVPA.¹⁶⁸ The TIP Act provides an extensive list of different types of exploitation,¹⁶⁹ but remains open-ended as it is not limited to them. The Act lists many more exploitative situations than the TVPA but not that of forced prostitution¹⁷⁰ or ‘commercial sex’.¹⁷¹ This may, of course, be covered by the concept ‘sexual exploitation’.¹⁷² The TIP Act does not establish linkages between human trafficking and related crimes such as illegal migration which the TVPA does. By not pointing out the differences between the trafficking and the smuggling of persons, the legislation risks a faulty understanding of what the concepts mean. This may lead to cases of smuggling being identified as human trafficking incidents. However, it is submitted that it is clear from the definition of trafficking in terms of the Act that the means employed (for example, deception, abuse *etcetera*) as well as the intent to ‘exploit’ distinguish the trafficker from the smuggler or illegal migrant.

Prosecution

Similar to the TVPA, the TIP Act also creates the separate offences of debt bondage,¹⁷³ the possession, destruction, confiscation, concealment of or

¹⁶⁸ *Ibid.*

¹⁶⁹ According to the Act s 1 “‘exploitation” includes, but is not limited to (a) all forms of slavery or practices similar to slavery; (b) sexual exploitation; (c) servitude; (d) forced labour; (e) child labour as defined in s 1 of the Children’s Act; (f) the removal of body parts; or (g) the impregnation of a female person against her will for the purpose of selling her child when the child is born’. Not all elements listed here are found in the TVPA definition.

¹⁷⁰ The TIP Act does not directly refer to either voluntary or involuntary prostitution, and consequently also does not provide guidelines to distinguish between these two concepts. As prostitution is currently criminalised in SA, an issue of concern is the treatment of prostitutes who initially accept an offer of sex work which turns into an exploitative situation.

¹⁷¹ TVPA s 103(3). Commercial sex act means any sex act on account of which anything of value is given or received by any person. The TVPA’s definition thus rejects the distinction between forced and voluntary prostitution or sex work.

¹⁷² As defined in the TIP Act s 1. The TIP Act also does not specifically criminalise sex tourism.

¹⁷³ TIP Act s 5. Debt bondage is defined in s 1 as ‘the involuntary status or condition that arises from a pledge by a person of– (a) his or her personal services; or (b) the personal services of another person under his or her control, as security for a debt owed, or claimed to be owed, including any debt incurred or claimed to be incurred after the pledge is given, by that person if the–(i) debt owed or claimed to be owed, as reasonably assessed, is manifestly excessive; (ii) length and nature of those services are not respectively limited and defined; or (iii) value of those services as reasonably assessed is not applied towards the liquidation of the debt or purported debt.’ The penalty for debt bondage may be a fine or imprisonment for a period not exceeding fifteen years or both.

tampering with travel documents of victims of trafficking,¹⁷⁴ using the services of victims of trafficking,¹⁷⁵ and any type of facilitation of trafficking in persons.¹⁷⁶ Although the criminal statutes and penalties in relation to human-trafficking acts are relatively strict in the TVPA, the penalties envisioned in the TIP Act are even more stringent. These vary from a fine only or a maximum of five years' imprisonment for the least severe offences, to a maximum of life imprisonment or a fine in an amount not exceeding ZAR100 million, or both, for the most severe ones.¹⁷⁷ Following the model provided for in the TVPA, liability for the offence in the SA Act is also extended to include juristic persons and partnerships,¹⁷⁸ and any type of involvement in human trafficking by way of attempting to commit trafficking, inciting or directing others and conspiring to commit the crime is criminalised.¹⁷⁹ As many trafficking activities are organised online, an electronic communications service provider that fails to comply with certain duties in terms of the Act may be held liable to a fine or imprisonment for a period not exceeding five years.¹⁸⁰

Protection

The protection measures in the TIP Act¹⁸¹ are not as extensive as in the TVPA. Both pieces of legislation draw a distinction between protection granted to victims of human trafficking in foreign countries and that of

¹⁷⁴ TIP Act s 6. This offence is penalised with a fine or imprisonment of up to ten years or both. This section could be utilised to even penalise border employees or agents who confiscate travel and immigration documents from persons entering a country legally.

¹⁷⁵ TIP Act s 7.

¹⁷⁶ TIP Act s 8. The penalty for facilitation is a fine or imprisonment for a period not exceeding ten years or both (s 8(1)). An electronic communications service provider which fails to comply with the provisions is liable to a fine or imprisonment for a period not exceeding five years or both (s 8(3)).

¹⁷⁷ These sanctions are severe enough to punish offenders appropriately and deter potential perpetrators.

¹⁷⁸ TIP Act s 1 defines a 'person' as 'a natural person, a juristic person and a partnership, unless the context indicates otherwise'. See also TIP Act s 12(1)(f).

¹⁷⁹ TIP Act s 10(1). Much trafficking occurs with involvement of government officials such as police officers and immigration officials. Their participation as accomplices or organising or directing other persons to commit the offence is criminalised here.

¹⁸⁰ TIP Act ss 8(2)–(5); s 13(e). The duties required are the taking of all reasonable steps to prevent the use of its service for the hosting of information of trafficking, and if such an offender is detected, reporting the electronic communications identity number to the SA Police Service (SAPS), preserving any evidence for later prosecution and preventing access to that electronic communications (internet address) by the online customers of the service provider, or any person if they are stored on the system of the service provider.

¹⁸¹ Victim protection and identification are given priority in Ch 3 and 4 of the Act respectively.

citizens, as well as between adults and children. Both provide for protective measures for foreign-trafficked victims that include the granting of a recovery and reflection period¹⁸² and, under certain circumstances, the issuing of temporary residence permits and permanent residence permits (or visas) to foreign victims of trafficking.¹⁸³ Victims may also not be summarily deported or returned home to unsafe settings. However, only the TVPA provides support in the form of government benefits under Federal or State grant programs and more comprehensive victim services which may even be extended to a victim's family.¹⁸⁴ Both statutes require victims' assistance and testimony before any assistance may be implemented, and both also guarantee the protection of the privacy and identity of victims during prosecutions, as well as the prevention of their re-victimisation. According to the TIP Act, victims of trafficking are entitled to the payment of appropriate compensation from a convicted trafficker but only at the discretion of the court or at the request of the complainant or the prosecutor.¹⁸⁵ Similar to the TVPA's process of certification as a victim of trafficking, the Act requires that reported adult victims be referred to accredited organisations within twenty-four hours and assessed as to whether the person concerned is a verifiable victim of trafficking¹⁸⁶ whereupon a letter of recognition is issued. The TVPA contains limitations in the number of visas issued,¹⁸⁷ however, no such limitations are found in the TIP Act.

Prevention

Anti-trafficking preventative efforts in SA are primarily aimed at awareness campaigns, developing an integrated information system and guidelines on the identification of victims of trafficking and traffickers.¹⁸⁸ Programmes must be developed which focus on supplying the public, especially those at risk of trafficking, with information and educating them on trafficking practices as well as their legal rights in the country. Programs must also be created in order to discourage the demand for trafficked persons.¹⁸⁹ Unlike

¹⁸² TIP Act s 15(1).

¹⁸³ TIP Act s 16 & s 17.

¹⁸⁴ See n 46 above and for description of services; n 47.

¹⁸⁵ TIP Act s 29(1). To recover such funds from an organised criminal may prove to be a cumbersome task. The TVPA contains similar provisions. See n 61 above.

¹⁸⁶ TIP Act s 19(5)(b), 19(8), (10). According to ss 24(1) & s 27 of the TIP Act, an adult may only be referred to an accredited organisation if in possession of a valid letter of recognition.

¹⁸⁷ See notes 42 and 43 above .

¹⁸⁸ TIP Act s 41. The Director-General of Justice and Constitutional Development is charged with this task.

¹⁸⁹ TIP Act s 41(1)(d)(iii). This is especially important in a country with prevailing patriarchal attitudes towards women such as South Africa. In this regard, gender

the TVPA, the TIP Act does not make any mention of providing economic alternatives as a preventative measure.¹⁹⁰ This is a shortcoming, especially since poverty is a great enabling condition for trafficking in SA. Similar to the TVPA, the Act acknowledges that international cooperation is necessary to fight the global crime of trafficking.¹⁹¹ South Africa is in serious need of a national trafficking information management system (such as that found in the TVPA), and the TIP Act directs the National Commissioner of the SAPS to provide an annual report on all available information on trafficking in the region.¹⁹² Effective enforcement measures to prevent and combat trafficking should further include specialised police units or task forces (in addition to the local police force), such as those found in the TVPA to deal with trafficking cases. The TIP Act does not provide for the establishment of such specialised anti-trafficking units. This is a deficiency as these units could conduct trafficking investigations, protect victims from reprisals, and contribute towards the prevention of the crime.

CONCLUSION

As evidenced, the US federal government has taken a firm stance against human trafficking both within its borders and beyond. More than half of the states in the US currently criminalise human trafficking. The jurisdiction has established itself as an international leader in the struggle to abolish human trafficking. Anti-trafficking legislation has progressed through the years to include a more comprehensive victim-centred approach. Traffickers are successfully prosecuted under the TVPA and its reauthorisations, which show progress in eliminating initial obstacles contained in the original Act. Since the passage of the TVPA of 2000, the US government has invested hundreds of millions of dollars in various law enforcement and social programs aimed at combating the problem at home and abroad. In this regard, it is submitted that although the SA legal response to human trafficking is comprehensive and on the whole aligned with international

dimensions and gender-based violence are also not dealt with adequately in the Act as a counter-trafficking strategy.

¹⁹⁰ See n 27 above. The TIP Act does not elaborate on nor deal with the root causes of trafficking.

¹⁹¹ TIP Act s 37. This provision mainly provides for the President to enter into, amend or revoke agreements with foreign states pertaining to cooperation in human trafficking matters. However, unlike the TVPA, no stipulations are made as to the specific types of cooperation in human-trafficking matters, international exchange of information or other mutual legal assistance.

¹⁹² TIP Act s 44(2)(f), (3). No such report has been released as yet. The TVPA also provides a very comprehensive global anti-trafficking *Trafficking in Persons Report* on other countries' progress made in their combating of human trafficking. See n 30 above.

standards, the jurisdiction needs to achieve much more in combating the crime domestically. The recently-enacted legislation still requires practical application, where problems can be corrected by means of amendments to the Act, similar to the US's reauthorisations. However, the SA government has other obstacles to overcome, as it still has no human-trafficking database, or a centralised task force dealing solely with the combating of this crime, amongst others. For a comprehensive approach against human trafficking, these deficiencies should be addressed. Following the leader in combating trafficking domestically and internationally would be a good *terminus a quo* for South Africa.