

AN EXAMINATION OF LAW ENFORCEMENT RESPONSES TO HUMAN
TRAFFICKING IN THE UNITED STATES: A COMPLIANCE ASSESSMENT
OF U.S. OBLIGATIONS UNDER CUSTOMARY AND CONVENTIONAL
INTERNATIONAL LAW

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INTRODUCTION

Human trafficking (HT) is prohibited by state, federal, and international law (IL); the United States (U.S.) is obliged under customary and conventional IL to address the rights of HT victims. The International Criminal Court (ICC) can also prosecute individuals accused of serious international criminal transgressions. Established during the summer of 2002, the subject matter jurisdiction of the ICC includes four categories of offenses: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹ HT offenses can be prosecuted under the “crimes against humanity” rubric, which includes enslavement,² deportation or forcible transfers of population,³ imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of IL,⁴ torture,⁵ sexual slavery and forced prostitution.⁶

Domestically, there are three primary federal laws that criminalize HT and provide for the protection of HT victims. The Trafficking Victims Protection Act (TVPA)⁷ was enacted in October 2000, and two Reauthorization Acts (TVPRA) passed in 2003⁸ and 2005.⁹ These Acts

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¹ Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, *available at* <http://untreaty.un.org/cod/icc/statute/rome.htm> (last visited Jan. 24, 2009).

² *Id.* art. 7(1)(c).

³ *Id.* art. 7(1)(d).

⁴ *Id.* art. 7(1)(e).

⁵ *Id.* art. 7(1)(f).

⁶ *Id.* art. 7(1)(g).

⁷ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

⁸ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117

created preventative measures against HT, provided for the prosecution of HT offenders, offered assistance to trafficking victims already in the US, and required monitoring of other nations' HT activities.

The purpose of this study is to examine the extent to which law enforcement practices meet U.S. obligations to HT victims under customary and conventional IL. Part I of this essay first identifies the United States' obligations to HT victims under customary IL and the HT-related instruments under which the US is obligated; second, this essay describes the TVPA and 2003 and 2005 TVPRA; and third, this article provides a description of the ICC, with an emphasis on the prosecution of HT offenders. Part II provides empirical findings from a federally-funded HT-related research project that examined U.S. law enforcement responses to HT victims.¹⁰ Four specific research questions are addressed: How do law enforcement agencies in the US respond to HT cases? What are the challenges faced by law enforcement agencies when responding to HT cases? What are the implications of law enforcement responses for HT victims? What are the challenges faced by local law enforcement agencies in collaborating with federal law enforcement agencies and victim service providers? Part III concludes that the U.S. is complying with its obligations to HT victims under IL. Part IV makes recommendations for addressing the complex needs of HT victims.

I. U.S. OBLIGATIONS TO HUMAN TRAFFICKING VICTIMS UNDER INTERNATIONAL LAW

The terms "human trafficking" and "slavery" are interchangeable.¹¹ Human trafficking (HT) involves the movement of people via violence, fraud, deception, or coercion. Generally, this movement is for the purpose of forced labor, slavery-like practices, or sexual exploitation. Labor exploitation includes slavery, forced labor, and debt bondage, while sexual exploitation typically includes abuse within the commercial sex industry. A wide range of estimates exists on the scope of the modern-day HT problem. The International Labor Organization – the United Nations (U.N.) agency that addresses labor standards, employment, and issues of social protection – estimates that there are 12.3 million people in forced labor and sexual

Stat. 2875 (2003).

⁹ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005).

¹⁰ Grant No. 2006-NIJ-1163 funded by the National Institute of Justice to Caliber Associates, an ICF International Company, solicitation for proposals *available at* <http://www.ncjrs.gov/pdffiles1/nij/sl000736.pdf>.

¹¹ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2007, <http://www.state.gov/documents/organization/82902.pdf>.

servitude at any given time.¹²

Both the Hague Conventions of 1899¹³ and 1907¹⁴ incorporated protections from enslavement and forced labor into the international regulation of armed conflict. Developments in IL governing peacetime conduct paralleled the development of the law of war and gradually evolved to prevent governments from inflicting human degradations on their civilian populations during peacetime.¹⁵ This evolutionary process began in 1815 and continues to the present day. Slavery has thus become an international crime under both conventional and customary IL,¹⁶ along with violations of “general principles of law.”¹⁷

Although a number of societies have historically considered slavery morally repugnant, it has gradually evolved from a “moral” transgression into an international crime.¹⁸ In the 19th century, the first international slavery-related conventions attempted to abolish the slave trade, which, at that time, involved European countries exploiting native Africans.¹⁹ By the mid-19th century, most European states had abolished slavery.²⁰ The Emancipation Proclamation, announced by President Abraham Lincoln on September 22, 1862 and put into effect on January 1, 1863, freed slaves in U.S. territories that were not under the Union’s control. The Thirteenth Amendment permanently abolished slavery throughout the nation in December 1865.²¹

Approximately 80 international instruments address slavery, slave-related practices, and forced labor.²² These instruments can be subdivided into four categories: 1) specific international instruments which have arisen under the law of peace; 2) general human rights instruments which touch upon the issue of slavery and its associated practices under the law of peace;

¹² *Id.*

¹³ Laws and Customs of War on Land (Hague, II), July 29, 1899, 32 Stat. 1803, T.S. No. 403.

¹⁴ Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

¹⁵ M. Cherif Bassiouni & Ved Nanda, *Slavery and Slave Trade, Steps Toward Eradication*, 12 SANTA CLARA L. REV. 424 (1972).

¹⁶ *Supra* notes 1-6.

¹⁷ M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law”*, 11 MICH. J. INT’L L. 768 (1990).

¹⁸ Digital History, <http://www.digitalhistory.uh.edu> (last visited Jan. 24, 2009).

¹⁹ Bassiouni & Nanda, *supra* note 15.

²⁰ See e.g., RODNEY STARK, *FOR THE GLORY OF GOD: HOW MONOTHEISM LED TO REFORMATIONS, SCIENCE, WITCH-HUNTS AND THE END OF SLAVERY* (2004).

²¹ U.S. CONST. amend. XIII, § 1.

²² See United Nations Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-region, *International Conventions and Protocols*, http://www.no-trafficking.org/content/Laws_Agreement/conventions.htm (last visited Jan. 24, 2009).

3) other international instruments which reference slavery and slave-related practices under the law of peace; and 4) those international instruments which address slavery and its related practices under the law of armed conflicts. Below is a summary of U.S. obligations to HT victims under customary IL and the conventions and declarations to which the United States is a party.

A. *Customary IL*

Customary IL results from a 1) general and consistent practice of States and 2) a sense of legal obligation.²³ Custom is, “[S]omething more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction probably, or... ought to, fall on the transgressor.”²⁴

Under the Restatement, the best indications of customary IL are the judgments and opinions of international or national judicial and arbitral tribunals, the writings of scholars, and pronouncements by States articulating a rule of IL when such pronouncements are not seriously challenged by other states.²⁵

The prohibition against HT is a well-settled part of customary IL and thus binding on all countries, even if they are not signatories to a specific HT-related treaty. The U.N. High Commissioner for Refugees (UNHCR), for example, has taken the position that HT constitutes a form of persecution that merits refugee protection if the country of origin is unable or unwilling to offer protection against it.²⁶ Indeed, the UNCHR released detailed guidelines on how and when trafficked persons are deserving of asylum protections.²⁷

²³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987).

²⁴ J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 59 (6th ed. 1963).

²⁵ RESTATEMENT OF THE LAW, THIRD, *supra* note 23, §103.

²⁶ UNHCR, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 7, 2002), <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>.

²⁷ UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked* (Apr. 7, 2006), <http://www.unhcr.org/refworld/docid/443679fa4.html>.

B. *The 1904 International Agreement for the Suppression of the White Slave Traffic*²⁸

The International Agreement for the Suppression of the White Slave Traffic was signed on May 18, 1904, and entered into force for the United States on June 6, 1908.²⁹ Articles 1, 2, and 3 require cooperation in the prosecution and punishment of the trafficking in white slaves.³⁰ Article 2 requires that signatory parties “have a watch kept, especially in railway stations, ports of embarkation, and en route, for persons in charge of women and girls destined for an immoral life.”³¹ Article 3 requires States “to have the declarations taken of women or girls of foreign nationality who are prostitutes, in order to establish their identity and civil status, and to discover who has caused them to leave their country.”³² The information obtained must be communicated to the authorities of the country of origin of the women or girls, so that they might be eventually repatriated.

C. *The 1926 Slavery Convention*³³

The 1926 Slavery Convention, the first international instrument to formally define slavery, was adopted on September 25, 1926, and entered into force for the United States on March 21, 1929.³⁴ Article 2 of the Slavery Convention requires that States pledge to prevent and suppress the slave trade and to bring about the complete abolition of slavery in all its forms.³⁵ Article 5 requires States “to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.”³⁶

²⁸ International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 1 L.N.T.S. 83, *reprinted in* 17 MARTENS NOUVEAU RECUEIL (ser. 2) 168.

²⁹ U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2007, July 27, 2007, <http://www.state.gov/documents/organization/89668.pdf>.

³⁰ International Agreement for the Suppression of the White Slave Traffic, *supra* note 28, arts. 1-3.

³¹ *Id.* art. 2.

³² *Id.* art. 3.

³³ International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, Sept. 25, 1926, 60 L.N.T.S. 253, *reprinted in* 21 AM. J. INT’L. L. 171 (Supp. 1927).

³⁴ U.S. DEP’T OF STATE, TREATIES IN FORCE, *supra* note 29.

³⁵ *Id.* art. 2.

³⁶ U.S. DEP’T OF STATE, TREATIES IN FORCE, *supra* note 29, art. 5.

D. *The 1948 Universal Declaration of Human Rights (UDHR)*³⁷

The UDHR was adopted by the U.N. on December 10, 1948. The UDHR is not a binding treaty and thus has no signatories. Instead, having been ratified through a proclamation by the General Assembly, it provides a normative basis for international human rights standards. Article 4 states that, “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”³⁸ The Declaration is based on the “inherent dignity” of all people and affirms the equal rights of all men and women, in addition to their right to freedom. The Declaration gives human rights precedence over the power of the State. While States are permitted to regulate rights, they are prohibited under the UDHR from violating them.

E. *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*³⁹

The Supplementary Convention on the Abolition of Slavery Convention was signed on September 7, 1956, and entered into force for the United States on December 6, 1967.⁴⁰ Signatories are required to “take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices....”⁴¹

F. *The Abolition of Forced Labor Convention (AFLC)*⁴²

The AFLC was adopted on June 25, 1957, and entered into force for the United States on September 25, 1992.⁴³ The Convention requires member states “to suppress and not to make use of any form of forced or compulsory labor as a means of political coercion or education”⁴⁴ Nor can they use it:

. . . as a punishment for holding or expressing views

³⁷ U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/3, U.N. Sales No. E.88.IV.1 (1988).

³⁸ *Id.* art. 4.

³⁹ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3, 7 C.T.S. 1963.

⁴⁰ U.S. DEP’T OF STATE, TREATIES IN FORCE, *supra* note 29.

⁴¹ *Id.* art. 1.

⁴² Abolition of Forced Labour Convention (No. 105), June 25, 1957, 320 U.N.T.S. 291.

⁴³ U.S. DEP’T OF STATE, TREATIES IN FORCE, *supra* note 29.

⁴⁴ Abolition of Forced Labour Convention (No. 105), *supra* note 42, art. 1(a).

ideologically opposed to the established system; as a method of using labor for purposes of economic development; as a means of labor discipline; as a punishment for having participated in strikes; or as a means of racial, social, national or religious discrimination.”⁴⁵ Article 2 requires signatories “to take effective measures to secure the immediate and complete abolition of forced or compulsory labour”⁴⁶

*G. International Covenant on Civil and Political Rights (ICCPR)*⁴⁷

The ICCPR was ratified on December 16, 1966, and entered into force for the United States on September 8, 1992. Article 8 of the ICCPR addresses HT and slavery. Specifically, Article 8 holds that, “[n]o one shall be held in slavery,” and that “slavery and the slave-trade in all their forms shall be prohibited.”⁴⁸ Article 8(2) holds that, “[n]o one shall be held in servitude,”⁴⁹ and Article 8(3) holds that, “[n]o one shall be required to perform forced or compulsory labor.”⁵⁰ Moreover, Article 2 of the ICCPR holds that States must ensure that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”⁵¹

*H. Worst Forms of Child Labor Convention (WFCLC)*⁵²

The WFCLC was adopted on June 17, 1999, and entered into force for the United States on December 2, 2000.⁵³ The WFCLC addresses the prohibition and immediate action for the elimination of the worst forms of child labor. The main objective of the Convention is to prohibit and eliminate illicit activities and other work hazardous and harmful to the health, safety, and morals of persons under the age of 18. These activities include child slavery and prostitution, the use of children in illicit activities

⁴⁵ *Id.* art. 1(a-e).

⁴⁶ *Id.* art. 2.

⁴⁷ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 49, 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976).

⁴⁸ *Id.* art. 8(1).

⁴⁹ *Id.* art. 8(2).

⁵⁰ *Id.* art. 8(3).

⁵¹ *Id.* art. 2(3)(a).

⁵² Worst Forms of Child Labour Convention (No. 182), adopted on June 17, 1999, by the General Conference of the International Labour Organization at its eighty-seventh session, www.ilo.org/ilolex/cgi-lex/convde.pl?C182 (last visited Jan. 24, 2009).

⁵³ U.S. DEP’T OF STATE, TREATIES IN FORCE, *supra* note 29.

(e.g., drug trafficking), and hazardous labor. In Article 1, signatory States pledge to take “immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour...”⁵⁴ States shall:

- 1) prevent the engagement of children in the worst forms of child labour; 2) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labor and for their rehabilitation and social integration; 3) ensure access to free basic education and vocational training for all children removed from the worst forms of child labor; 4) identify and reach out to children at special risk; and 5) take account of the special situation of girls.⁵⁵

*I. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (CRC)*⁵⁶

The Convention on the Rights of the Child (CRC) requires States to take steps to prevent the abduction, sale, or trafficking of children for any purpose.⁵⁷ It also calls upon States to protect children from all forms of sexual exploitation and abuse.⁵⁸ The United States and Somalia are the only two countries that have not ratified the Convention. However, the United States did sign the Optional Protocol to the CRC in December 2002; it entered into force for the United States on January 23, 2003.⁵⁹ Built on a variety of legal systems and cultural traditions, the CRC is a universally agreed-to set of non-negotiable standards and obligations. These basic standards set minimum entitlements and freedoms which are founded on respect for the dignity and worth of each individual, regardless of race, color, gender, language, religion, origins, wealth, or birth status.

In 1989, the global community decided that children needed a convention that afforded them special protections. To that end, they created the Optional Protocol of the CRC, which is the first legally binding international instrument to incorporate the full range of human rights – civil, cultural, economic, political, and social rights. Article 8 of the Optional

⁵⁴ Worst Forms of Child Labor Convention, *supra* note 52, art. 1.

⁵⁵ *Id.* art. 7(2).

⁵⁶ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), <http://www.un-documents.net/a54r263.htm> (last visited Jan. 24, 2009) [hereafter Optional Protocol].

⁵⁷ Convention on the Rights of the Child, G.A. Res. 44/25, Annex, art. 34, U.N. Doc. A/Res/44/25/Annex, *opened for signature* Nov. 20, 1989 (entered into force Sept. 2, 1990), <http://www1.umn.edu/humanrts/instree/k2crc.htm> (last visited Jan. 24, 2009).

⁵⁸ Worst Forms of Child Labor Convention, *supra* note 52, art. 35.

⁵⁹ U.S. DEP'T OF STATE, TREATIES IN FORCE, *supra* note 29.

Protocol requires States to adopt appropriate measures to protect the rights and interests of child victims

Specifically, they must: 1) recognize the vulnerability of child victims and adopt procedures to recognize their special needs, particularly as witnesses; 2) inform child victims of their rights, their roles and the scope, timing, and progress of the proceedings and of the disposition of their cases; 3) allow the views, needs, and concerns of child victims to be presented and considered in proceedings where their personal interests are affected in a manner consistent with the procedural rules of national law; 4) provide appropriate support services to child victims throughout the legal process; 5) protect the privacy and identity of child victims; 6) provide for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and 7) avoid unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.⁶⁰

*J. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁶¹

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires states to institute measures to suppress all forms of trafficking of women. It also calls upon them to prevent exploitative prostitution⁶² and to ensure healthy and safe working conditions for women.⁶³ The United States, although a signatory to the Convention, is one of the few countries in the world not to have ratified it. The Convention has received periodic consideration by the Senate Committee on Foreign Relations. Most recently, it was recommended by the Committee for full Senate ratification in July 2002, subject to a series of reservations and declarations. The Congressional session ended that year without any action taken by the Senate.

⁶⁰ Optional Protocol, *supra* note 56, art. 8.

⁶¹ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979), <http://untreaty.un.org/English/TreatyEvent2001/pdf/01e.pdf>.

⁶² *Id.* art. 6.

⁶³ *Id.* art. 11.

K. *Protocol to Suppress and Punish Trafficking in Persons*⁶⁴

In November 2000, the U.N. General Assembly adopted the Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children, to the Convention against Transnational Crime (the Trafficking Protocol). The protocol entered into force on December 25, 2003. The purposes of the Trafficking Protocol are: a) to prevent and combat trafficking in persons, paying particular attention to women and children; b) to protect and assist victims of trafficking, with full respect for their human rights; and c) to promote cooperation among State Parties in order to achieve those objectives.⁶⁵ The United States ratified the Protocol on December 3, 2005.⁶⁶ The Trafficking Protocol lays out the first internationally accepted definition of trafficking as:

... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁶⁷

Exploitation includes, “the prostitution of others or sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁶⁸

Furthermore, the Protocol clarifies that the consent of a person to trafficking is irrelevant if threats or use of force or other forms of coercion are used to achieve that consent. It also states that the recruitment, transportation, transfer, harboring, or receipt of a child under age 18 for exploitation is trafficking, even if it does not involve any of the means defined.⁶⁹ The Trafficking Protocol requires that countries facilitate the safe return of their trafficked nationals and residents.⁷⁰ It also requires the receiving country that is returning a trafficked person to do so with due regard for the safety of the trafficked person and the status of any relevant

⁶⁴ U.N. Office on Drugs & Crime [UNODC], *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, U.N. Doc. A/55/383 (Nov. 15, 2000), http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf [hereafter Trafficking Protocol].

⁶⁵ *Id.* art. 2.

⁶⁶ Trafficking Protocol, *supra* note 64.

⁶⁷ Trafficking Protocol, *supra* note 64, art. 3(a).

⁶⁸ *Id.*

⁶⁹ Trafficking Protocol, *supra* note 64, art. 3(c)-3(d).

⁷⁰ Trafficking Protocol, *supra* note 64, art. 8.

legal proceeding related to the trafficking.⁷¹ The protocol mandates that governments strengthen border controls to detect and prevent trafficking.⁷² This includes training immigration and other law enforcement officials to prevent trafficking, to prosecute traffickers, and to protect the rights of trafficked persons.⁷³

Human rights organizations and experts have criticized the Trafficking Protocol for its relatively weak language on the rights and assistance needs of trafficked persons.⁷⁴ For example, the protocol requires a state party to protect the confidentiality of trafficked persons *in appropriate cases and to the extent possible* under its domestic laws. It urges a state party *to consider* implementing programs to address the physical, psychological, and social recovery of victims, especially provision of appropriate housing, counseling, medical care, material assistance and employment, educational and training opportunities. It *encourages* States *to endeavor* to address the physical safety of victims and *to consider* adopting measures to permit victims to remain temporarily or permanently in their territories. Finally, it notes that return of trafficked persons *shall preferably be voluntary*. All of this language is non-mandatory, which reflects, in part, the fact that the Protocol was negotiated under the auspices of the U.N. Crime Commission, a body whose mandate is grounded in law enforcement rather than human rights.⁷⁵

L. *International Criminal Court*

The international legal community worked toward the creation of a permanent international criminal court (ICC) for most of the twentieth century.⁷⁶ The Hague Conventions of 1899⁷⁷ and 1907⁷⁸ were the first

⁷¹ *Id.*

⁷² Trafficking Protocol, *supra* note 64, art. 11.

⁷³ Trafficking Protocol, *supra* note 64, art. 10.

⁷⁴ See generally ANN D. JORDAN, THE ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL (International Human Rights Law Group, May 2002), <http://www.walnet.org/cs/papers/UN-TRAFFICK.PDF>.

⁷⁵ *Id.*

⁷⁶ M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 50-53 (1995); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 49-57 (1997); M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 152-58 (1992); M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27, 33-34 (1983); M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of the International Criminal Court*, 52 J. INT'L AFFAIRS 795, 795-96 (1999); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 2-11 (1991); Elizabeth Chadwick, *A Tale of Two Courts: The 'Creation' of a Jurisdiction?*, 9 J. CONFLICT & SEC. L. 71, 72 (2004); Benjamin B. Ferencz, *An International Criminal Code and Court:*

significant codifications of the laws of wars in an international treaty. The Conventions, however, failed to create a permanent criminal court with jurisdiction that would transcend national boundaries, primarily because sovereign nations were unwilling to be bound by the judgments of an international judicial authority. The United States, for example, persistently claimed that it “reserved the right to resolve any purely American issue.”⁷⁹

Between 1946 and 1996, the U.N. led the efforts to codify certain international crimes.⁸⁰ Immediately after the Second World War, the United States sponsored Resolution 95(I), which recognized the principles of IL contained in the Nuremberg Charter.⁸¹ In 1948, the General Assembly directed the International Law Commission (ILC) to formulate the principles of IL in a draft code of offenses, while a special rapporteur was assigned to formulate a Draft Statute for the Establishment of the International Criminal Court.⁸² While many nations supported the establishment of a permanent ICC, its creation was unattainable without the consensus of the world’s superpowers.

Various draft reports were produced between the 1950s and 1980s, but it was not until 1989 that the General Assembly was again faced with the question of an ICC when Trinidad and Tobago proposed such an entity to address international drug trafficking. The ILC persevered in developing the limited 1989 mandate related to illicit drug trafficking, which eventually evolved into the Draft Statute for an International Criminal Court.⁸³ It was this draft that served as the basis for the General Assembly’s decision to establish the Ad Hoc Committee on the Establishment of an International Criminal Court and then the Preparatory Committee for the Establishment of an International Criminal Court.⁸⁴

On July 17, 1998, the Rome Statute was adopted at the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International

Where They Stand and Where They’re Going, 30 COLUM. J. TRANSNAT’L L. 375, 382-90 (1992); William N. Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 FORDHAM INT’L L. J. 88, 92-98 (1992); Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT’L L. 1, 4-14 (1998); Vespasian Pella, *Towards an International Criminal Court*, 44 AM. J. INT’L L. 37, 41-42 (1950); Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263, 264 (1950).

⁷⁷ Laws and Customs of War on Land (Hague, II), *supra* note 13.

⁷⁸ Laws and Customs of War on Land, *supra* note 14.

⁷⁹ HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH CENTURY EXPERIENCE 14 (1999).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Criminal Court.⁸⁵ Of the 148 nations in attendance, 120 voted in favor of the court, seven against, with 21 abstentions.⁸⁶ Signing of the Rome Statute means a nation will consider ratification and will not work against the treaty. Ratification obligates a country to cooperate with the Court and accept its jurisdiction over crimes committed in its territory. As of July 18, 2008, 108 nations had ratified the treaty.⁸⁷

It is also important to note that the ICC does not operate on the basis of primary jurisdiction, but is subject to the principle of complementarity.⁸⁸ That is, the ICC is a subsidiary mechanism with respect to the prosecution of its crimes. Some states, although supporting the creation of the ICC, were reluctant to create an institution that could potentially impinge on their national sovereignty.⁸⁹ The principle of complementarity thus provides that the Court will exercise jurisdiction only when a state is unable or unwilling to handle the case in which the crimes within the Court's jurisdiction have been committed.

M. Federal HT Legislation

Estimates indicate that as many as 17,500 victims are trafficked into the United States each year.⁹⁰ The Trafficking Victims Protection Act (TVPA)⁹¹ was enacted by the Federal Government in October 2000. Prior to its enactment, no comprehensive federal law existed to protect victims of HT or to prosecute their traffickers. Congress has since passed the TVPA Reauthorization Acts (TVPRA) of 2003⁹² and 2005,⁹³ slightly amending the TVPA and reallocating funding to achieve the goals of the original TVPA. The TVPA and subsequent Reauthorization Acts are models for other countries because they address prevention, prosecution, and protection measures.⁹⁴ The prevention program consists of grants for education, outreach,

⁸⁵ Rome Statute, *supra* note 1.

⁸⁶ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, www.un.org/icc/index.htm (last visited Jan. 24, 2009) [hereafter Conference of Plenipotentiaries].

⁸⁷ The International Criminal Court, www.icc-cpi.int/statesparties.html (last visited Jan. 24, 2009).

⁸⁸ Conference of Plenipotentiaries, *supra* note 86, art. 1.

⁸⁹ John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* (Roy S. Lee ed., 1999).

⁹⁰ U.S. DEP'T OF JUSTICE, *REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, FISCAL YEARS 2001-2005* (2006).

⁹¹ Trafficking Victims Protection Act of 2000, *supra* note 7.

⁹² Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 8.

⁹³ Trafficking Victims Protection Reauthorization Act of 2005, *supra* note 9.

⁹⁴ Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*,

public awareness initiatives, and economic alternative programs overseas.⁹⁵ In fiscal year 2005, U.S.-issued grants totaled \$95 million, funding 266 international anti-trafficking programs in 101 countries.⁹⁶

The TVPA and TVPRA are comprehensive and create a four-pronged attack on HT in the United States. First, they provide for preventative measures against HT across U.S. borders. Second, they provide for the prosecution of HT offenders. Third, they offer assistance and protection to trafficking victims already in the United States. Fourth, they provide for the monitoring of other nations' activities that contribute to HT.

Beginning with this final prong, the Acts demand that countries receiving economic and security assistance from the United States submit an annual report assessing their efforts to combat trafficking.⁹⁷ The Acts outline minimum standards for the elimination of trafficking in other nations,⁹⁸ offer assistance to foreign countries so that they can meet those standards,⁹⁹ and threaten action against foreign governments that fail to meet those standards.¹⁰⁰

As for preventing HT into the United States, the TVPA establishes an interagency task force charged with monitoring and combating trafficking.¹⁰¹ The task force is comprised of presidential appointees, cabinet members, and agency directors whose responsibilities include the evaluation of progress made in trafficking prevention, prosecution of traffickers, and protection of victims. Additionally, the task force conducts research regarding trafficking and reaches out to other nations to strengthen capacities to eliminate trafficking and its related consequences.¹⁰²

Indicative of a Congressional belief that ignorance and poverty are major factors contributing to the development of the HT industry, the TVPA calls for international initiatives to enhance economic opportunity for potential victims of trafficking as a method of deterring trafficking.¹⁰³ It also calls for the Executive Branch to establish and carry out programs to increase public awareness of the dangers of trafficking and the protections

16 BERKELEY WOMEN'S L.J. 29 (2001).

⁹⁵ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466, 1474 (2000).

⁹⁶ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2005 21 (2006).

⁹⁷ Trafficking Victims Protection Act of 2000, *supra* note 7, § 104b.

⁹⁸ *Id.* § 108.

⁹⁹ *Id.* § 107.

¹⁰⁰ *Id.* § 110.

¹⁰¹ *Id.* § 105.

¹⁰² *Id.* § 105d.

¹⁰³ Trafficking Victims Protection Act of 2000, *supra* note 7, § 106a.

available to trafficking victims.¹⁰⁴ One way to achieve awareness is the establishment of programs that support the production of television and radio programming informing vulnerable populations of the dangers of trafficking.¹⁰⁵ Congress added an “escape clause” to the TVPRA, which allows a federal body that has entered into a contract with a private entity to terminate that contract should it be discovered that the private entity (or any party for which it is responsible) has engaged in severe forms of HT, procured a commercial sex act during the period of time that the contract was in effect, or used forced labor in the performance of the contract.¹⁰⁶

The TVPA and TVPRA have strengthened the ability of federal agencies to prosecute and punish traffickers. The TVPA increased mandatory minimum sentences for “peonage,” “enticement into slavery,” and “sale into involuntary servitude” from 10 to 20 years in prison.¹⁰⁷ The TVPA also provided for the criminal sanction of a life sentence for trafficking cases in which kidnapping, sexual abuse, or killing (or any attempt thereof) occurs.¹⁰⁸ Because those three criminal provisions alone were insufficient to prosecute human traffickers effectively, Congress criminalized four additional offenses: “forced labor,” “trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,” “sex trafficking of children or by force, fraud, or coercion,” and “unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.”¹⁰⁹ Additionally, Congress established a right in the victim to mandatory restitution for any of the aforementioned offenses.¹¹⁰

Collectively, these preventative and prosecution measures are powerful indicators that the United States intends to eliminate the trafficking of humans across its borders. The TVPA and the TVPRA also protect and assist HT victims. Qualified victims are eligible for benefits and services under any federal or state program or activity funded or administered by the Secretary of Health and Human Services, the Secretary of Labor, the Board of Directors of the Legal Services Corporation, and the heads of various other federal agencies.¹¹¹ Additionally, there is a mandatory restitution provision,¹¹² and qualified victims may bring a civil suit against individuals

¹⁰⁴ *Id.* § 106b.

¹⁰⁵ Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 8, § 3d.

¹⁰⁶ *Id.* § 3(g).

¹⁰⁷ Trafficking Victims Protection Act of 2000, *supra* note 7, § 112(a)(1)(A).

¹⁰⁸ *Id.* 112(a)(1)(B).

¹⁰⁹ *Id.* §§ 1589-92.

¹¹⁰ *Id.* § 1593.

¹¹¹ *Id.* § 107.

¹¹² *Id.* § 1593.

who have violated their rights as prohibited by the HT laws.¹¹³

Several key aspects of the TVPA and the TVPRA strengthen efforts to prosecute human traffickers. For example, new criminal statutes were created and penalties for existing crimes were enhanced under the TVPA in an effort to streamline prosecutorial efforts and deter recidivism, respectively.¹¹⁴ The 2003 TVPRA sought to further enhance the prosecution of trafficking-related crimes by including HT under the federal Racketeering Influenced and Corrupt Organization statute.¹¹⁵ The TVPRA also encouraged the use of IL Enforcement Academies to train foreign law enforcement authorities, prosecutors, and members of the judiciary about HT.¹¹⁶

The TVPA and TVPRA, as well as other related federal laws, aim to support and instill a legal mandate that provides a victim-centered approach to HT investigations and prosecutions undertaken in the United States and overseas. For example, the U.S. Department of Justice (DOJ) led an initiative designed to create multi-disciplinary task forces in high trafficking areas to proactively investigate criminal organizations, rescue victims, and hold perpetrators accountable. In addition, the Department of State, in collaboration with the Department of Labor and the United States Agency for International Development, also implemented inter-agency anti-trafficking initiatives in more than 30 countries in an effort to assist in prevention, detection, and eradication of HT offenses.

N. *Protection of Victims in the TVPA*

A primary goal of the TVPA was to address the protection of victims of HT by affording them access to federal benefits, regardless of their potentially illegal or undocumented status. The TVPA allowed victims who participated in the investigation and prosecution of their traffickers to apply for T non-immigrant status (T-visa) and permanent residency. This would allow them to receive other benefits and services through grant programs.¹¹⁷ To be eligible for a T-visa, trafficking victims must meet certain criteria including: a) the victim is or has been a victim of a severe form of HT as defined in section 7102(8) of the TVPA; b) the victim is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, on account of such trafficking; c) the victim has

¹¹³ Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 8.

¹¹⁴ Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 2 LOY. U. CHI. INT'L L. REV. 193 (2005).

¹¹⁵ Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 8, § 5.

¹¹⁶ *Id.* § 112A.

¹¹⁷ *Id.* § 4.

complied with requests for help in the investigation or prosecution of traffickers or has not reached the age of 15; and d) the victim would suffer extreme hardship involving unusual or severe harm upon removal from the United States.

To implement the visions of the TVPA and the Immigration and Nationality Act (INA), the DOJ and the U.S. Department of Health and Human Services work together to certify trafficking victims through the Office of Refugee Resettlement. Certification is the process by which HT victims are eligible to remain in the United States for a period of time. This certification allows victims to receive benefits including employment authorization, housing, mental health services, medical care, and Supplemental Security Income (SSI). These benefits can also be extended to a victim's family when appropriate. The INA allows the Attorney General to grant derivative T-visas to the victim's spouse and children, as well as to the victim's parents if the victim is younger than 21 years of age.

Although the TVPA is widely regarded as a positive step toward addressing the global crime of HT, it is not without its critics. With regard to the international standards and minimum thresholds that it sets for other countries, the TVPA has been accused of being culturally imperialistic by imposing U.S. values on other countries and cultures.¹¹⁸ In addition, scholars have noted the lack of an enforcement component in the TVPA and question whether the Act has the power to truly enact and enforce its three-pronged strategy of prevention, prosecution, and protection. Critics point out that while the Act has the potential to do much good, there is no guarantee that its provisions will be enforced.

Similarly, some voice concern about burdens of proof being placed on victims and the strict eligibility requirements to obtain a T-visa.¹¹⁹ The TVPA has been criticized further for not providing adequate means of financial restitution for victims because it lacks mention of the awarding of actual and punitive damages, attorney's fees, and litigation expenses to victims.¹²⁰ Additionally, some question whether the TVPA can appropriately balance the human rights of trafficking victims with law enforcement obligations. The crime-fighting mechanism in the TVPA compromises the protection and assistance needs of trafficking victims.¹²¹

¹¹⁸ Susan W. Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107 (2002).

¹¹⁹ Heather J. Clawson, Kevonne Small, Ellen S. Go & Bradley W. Myles, *Human Trafficking in the United States: Uncovering the Needs of Victims and the Service Providers Who Work with Them*, 4 INT'L J. COMP. CRIMINOLOGY 68 (2004).

¹²⁰ Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L. J. 29 (2001).

¹²¹ Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*,

Many suggest that the protection and services infrastructure that exists for other crime victims in the United States has not yet been applied to victims of trafficking.¹²²

II. RESEARCH METHODS AND FINDINGS

The study design incorporated telephone surveys, key stakeholder interviews, and discussion forums with anti-trafficking task forces nationwide.¹²³

A. Telephone Surveys and Key Stakeholder Interviews

Nearly half of the respondents (48%) learned about HT through regular law enforcement activities, including roll call and on the job experience. An additional 27% learned about HT through various training events sponsored by the federal government and non-governmental organizations (NGOs). More than half (57%) considered themselves to be knowledgeable to very knowledgeable about HT issues. When asked about their familiarity with the TVPA, 44% indicated they were familiar to very familiar with the legislation.

Anti-trafficking task forces are one way law enforcement officials address the trafficking issue. Sixty-three percent of respondents indicated that they were working with a task force. Another way of enhancing law enforcement's capacity to combat HT is through legislation. A majority of respondents (59%) indicated their state had a HT law in effect. When asked whether HT was a priority for their agency, 58% reported that HT was a high or very high priority within their agency. Respondents were asked if there were any formal protocols in place for identifying and responding to HT cases. A total of 71% indicated that formal protocols were in place or were in the process of protocol development. When asked what the primary barriers were to identifying and responding to trafficking cases, respondents noted victim distrust, lack of training, lack of resources, and lack of interpreters. When asked about the special needs of trafficking victims and available services, 65% identified housing/shelter as the most needed service. Sixty-three percent of respondents indicated it was a challenge to communicate with trafficking victims.

Respondents noted that, in working with victims of trafficking, law enforcement should consider their immigrations status, language barriers, their lack of trust and fear of law enforcement, and the fact that victims of HT might not view themselves as victims. Heightened awareness of HT and

13 HASTINGS WOMEN'S L. J. 77 (2002).

¹²² JORDAN, *supra* note 74.

¹²³ See Appendix A for a complete description of project design and methods.

the growth of task forces were considered emerging law enforcement trends while quality training of local law enforcement on identifying and interviewing victims and conducting raids smartly were regarded as best practices. When asked what their primary training need was, respondents cited better quality training at all levels of law enforcement. Specific areas included basic information on HT, recognizing indicators, interviewing victims, and working collaboratively with other law enforcement and victim service providers.

B. Task Force Discussion Forums

Three nationwide task force discussion forums in California and Texas provided data designed to give information on the goals and objectives of the anti-trafficking task forces, characteristics of successful task forces, greatest challenges, greatest successes, and lessons learned. The goals and objectives of the task forces were similar and included: working collaboratively to identify victims and convict individuals engaged in severe forms of HT, providing for the safety of victims and meeting their needs through quality service provision, and increasing task force presence within the community. The success of task forces was based on each member having something different to offer; being able to work together by getting to know, understand, and trust each other; and creating awareness of HT within their own communities. Challenges included unique agency policies and procedures, the novelty of HT issues in most communities, and the issue of limited resources. Successes included building trust among task force members, having agencies talk openly about the issue, ongoing collaboration between local law enforcement and NGOs, and additional training that resulted from the task forces.

The data suggested several key recommendations. First, increased understanding from a law enforcement perspective was needed. Though HT has recently received public attention, some respondents reported that they still were not fully informed about the issue. By increasing awareness, law enforcement will continue to identify areas in which they need support, assistance, and information to better identify this crime and respond to its victims.

Second, an increased understanding of law enforcement's role in a HT case was needed. Law enforcement has a crucial role to play in any HT case. The data clearly suggested the need for more information on the roles of all law enforcement in the investigation of trafficking cases. Additionally, the role of law enforcement in helping victims of HT should be addressed. Respondents indicated that law enforcement could benefit greatly from a better understanding of the law enforcement endorsement process and how the endorsement may affect the lives of HT victims.

Third, respondents indicated that it is important to develop, refine, and share law enforcement specific protocols for identifying HT victims and response techniques. Respondents indicated that they were benefiting from HT protocols in their daily law enforcement work. Ensuring the availability of such protocols across the law enforcement community would likely enhance investigators' and line officers' ability to detect trafficking situations and improve their ability to work effectively with trafficking victims.

Fourth, it is important to increase collaboration among law enforcement (federal, state, and local), prosecutors, and victim service providers. Working collaboratively with other agencies was important to meet the needs of HT victims. Through formal memoranda of understanding, data and information sharing protocols, and sharing policies, practices, and procedures, agencies can begin to learn the boundaries of their work, the work of others, and areas where they overlap.

III. ASSESSMENT OF U.S. OBLIGATIONS TO HT VICTIMS UNDER CUSTOMARY AND CONVENTIONAL IL

A. Customary and Conventional IL

Based on customary and conventional IL, the United States has obligations to HT victims. Under the 1926 Slavery Convention,¹²⁴ the United States has a duty to "prevent" and "suppress" the slave trade and undertake "all necessary measures" to accomplish these goals.¹²⁵ Under the Supplementary Convention on the Abolition of Slavery,¹²⁶ the United States must take "all necessary measures" to abolish slavery. Under the AFLC,¹²⁷ the United States must "suppress" and "abolish" forced labor.¹²⁸ The ICCPR requires the United States to create an "effective remedy" for HT victims.¹²⁹ Under the WFCLC,¹³⁰ the United States must eliminate and prevent child labor and provide free basic education to all children removed from the child labor.¹³¹

Although the United States has not signed the CRC,¹³² its general

¹²⁴ U.S. DEP'T OF STATE, TREATIES IN FORCE, *supra* note 29.

¹²⁵ *Id.* art. 2.

¹²⁶ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 39.

¹²⁷ Abolition of Forced Labor Convention, *supra* note 42.

¹²⁸ *Id.* arts. 1-2.

¹²⁹ International Covenant on Civil and Political Rights, *supra* note 47.

¹³⁰ *Id.* art. 1.

¹³¹ *Id.*

¹³² Optional Protocol, *supra* note 56.

acceptance within the international community creates an obligation under customary international law. The United States must thus “protect” children from sexual exploitation, adopt appropriate measures to provide support services to child victims, provide for the safety of child victims, and avoid unnecessary delay in the disposition of cases and the distribution of compensation to child victims.¹³³ Under the CEDAW,¹³⁴ which also imposes customary IL obligations on the United States, the United States must suppress all forms of trafficking in women. Finally, under the Trafficking Protocol,¹³⁵ the United States must prevent and combat HT, protect and assist HT victims, strengthen border controls to detect trafficking,¹³⁶ and prosecute traffickers.¹³⁷

Taken collectively, the obligations assured to HT victims under customary and conventional IL are very general and give the United States broad discretion with respect to *how* the duties and obligations are fulfilled. While not specifically articulated as such, the duties distinguish between current and future HT victims. For example, obligations to “suppress” HT involve working proactively to identify current offenders and, more importantly, to deter future acts. Obligations of “suppression” and “abolition” thus carry the dual motive of saving current victims and sparing potential future victims. Some obligations, however, are clearly intended for current victims only, such as “compensation” and “social support.”

The broad discretion allocated to the United States means that duties to HT victims can be fulfilled through a law enforcement approach and/or a human rights approach, as long as certain obligations are honored. The criminal justice and substance abuse prevention literature is clear that a law enforcement approach is important to the suppression of any type of criminal activity.¹³⁸ While the mere existence of laws prohibiting HT can influence the type and amount of HT activity, the effect size is magnified when the laws are actively enforced and when there are serious consequences for violations. As the actual and/or perceived likelihood of being detected and arrested for HT offenses increases, so should compliance.¹³⁹ When compliance to the laws prohibiting HT increases, the likelihood of fulfilling the obligations and duties to HT victims also increases.

¹³³ *Id.* art. 8.

¹³⁴ Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 61.

¹³⁵ Trafficking Protocol, *supra* note 64.

¹³⁶ *Id.* art. 11.

¹³⁷ *Id.* art. 10.

¹³⁸ See, e.g., Johanna D. Birckmayer, Harold D. Holder, George S. Yacoubian, Jr. & Karen B. Friend, *A General Causal Model to Guide Alcohol, Tobacco, and Illicit Drug Prevention: Assessing the Research Evidence*, 34 J. DRUG EDUC. 121 (2004).

¹³⁹ *Id.*

Findings from other federally funded HT studies¹⁴⁰ support the law enforcement approach to satisfying obligations to HT victims. Since its enactment in 2000, there have been approximately 230 TVPA cases prosecuted by the Federal Government.¹⁴¹ Of these, more than 85% have resulted in convictions.¹⁴² These findings overwhelmingly suggest that once HT prosecutions in the United States begin, guilty verdicts are virtually guaranteed. Formal TVPA charges against HT offenders, coupled with the prevalence of success these prosecutions have enjoyed, are strong evidence of consequential compliance with the duties owed to HT victims under international law.

B. Domestic Law

Under the TVPA¹⁴³ and 2003¹⁴⁴ and 2005¹⁴⁵ TVPRA, the United States is required to provide for the prosecution of HT offenders, offer protection to HT victims already in the United States, and monitor other nations' HT activities.¹⁴⁶ The TVPA establishes an interagency task force charged with combating trafficking¹⁴⁷ and provides for enhanced economic opportunities for potential HT victims.¹⁴⁸ The Executive Branch must also carry out programs to increase public awareness of HT trafficking and the protections available to HT victims.¹⁴⁹

Several key aspects of the TVPA and the TVPRA strengthen efforts to prosecute human traffickers. The 2003 TVPRA sought to further enhance the prosecution of trafficking-related crimes by including HT under the federal Racketeering Influenced and Corrupt Organization statute.¹⁵⁰ The TVPRA also encouraged the use of IL enforcement academies to train foreign law enforcement authorities, prosecutors, and members of the judiciary about HT.¹⁵¹ The TVPA increased mandatory minimum sentences

¹⁴⁰ Heather Clawson & George S. Yacoubian, Jr., *Human Trafficking in the United States: A Legal and Empirical Investigation of Cases Prosecuted Under the Trafficking Victims Protection Act*, presented at the annual meeting of the Academy of Criminal Justice Sciences, 2008.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Trafficking Victims Protection Act of 2000, *supra* note 7.

¹⁴⁴ Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 8.

¹⁴⁵ Trafficking Victims Protection Reauthorization Act of 2005, *supra* note 9.

¹⁴⁶ Trafficking Victims Protection Act of 2000, *supra* note 7, § 104b.

¹⁴⁷ *Id.* § 105.

¹⁴⁸ *Id.* § 106a.

¹⁴⁹ *Id.* § 106b.

¹⁵⁰ Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 8, § 5.

¹⁵¹ *Id.* § 112A.

for “peonage,” “enticement into slavery,” and “sale into involuntary servitude” from 10 to 20 years in prison.¹⁵² The TVPA also requires a life sentence for trafficking cases in which kidnapping, sexual abuse, or killing (or any attempt thereof) occurs.¹⁵³ Additionally, Congress criminalized “forced labor,” “trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,” “sex trafficking of children or by force, fraud, or coercion,” and “unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.”¹⁵⁴

Under the TVPA and TVPRA, there is a mandatory restitution provision,¹⁵⁵ and qualified victims may bring a civil suit against individuals who have violated their rights as prohibited by the HT laws.¹⁵⁶ The TVPA allows victims who participate in the investigation and prosecution of their traffickers to apply for T-visas and permanent residency and receive other benefits and services through grant programs.¹⁵⁷ Once certified, HT victims and their families receive benefits including employment authorization, housing, mental health services, SSI, and medical care.

Given these obligations and the empirical findings in the current study and other federally-funded HT studies, is the United States compliant with its duties to HT victims under customary and conventional international law? The findings support compliance, both in terms of effort and consequence.

First, the mere enactment of the TVPA and TVPRA indicate an attempt at compliance with the customary and conventional duties imposed on the United States to HT victims. The enactment of domestic HT legislation was the necessary first step in bringing the United States into compliance with its international duties. That the United States enacted domestic HT legislation demonstrates, at the very least, recognition of its duties under international law. Of course, the enactment of domestic legislation does not *assure* compliance of customary and conventional international law. Moreover, it creates additional obligations. The United States, having passed the TVPA and TVPRA, is now obligated to assure compliance under both its international legal obligations and domestic law.

Second, the provisions contained within the TVPA and the TVPRA of 2003 and 2005 indicate not only that the United States has *attempted* to comply with its obligations to HT victims under IL, but that it actually *has* complied with its obligations under IL. Both the law enforcement

¹⁵² Trafficking Victims Protection Act of 2000, *supra* note 7, § 112(a)(1)(A).

¹⁵³ *Id.* 112(a)(1)(B).

¹⁵⁴ *Id.* §§ 1589-92.

¹⁵⁵ *Id.* § 1593.

¹⁵⁶ Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 8.

¹⁵⁷ *Id.* § 4.

(interdiction) and social service provisions contained within the TVPA, and the tangible results that have resulted since the passage of the legislation, indicate that the United States has not only attempted to achieve compliance, but that tangible results have indeed been achieved.

Third, the funding of federal grants to research HT is additional evidence that the United States is complying with its duties to HT victims under customary and conventional international law. The purpose of these grants is to entrust researchers with significant money to investigate HT and to come to conclusions regarding the current state of HT knowledge in the United States. The findings both inform the public about the current state of affairs and make recommendations for future legislative modifications. Since the data are collected from those persons who would most benefit from changes to the domestic law, the funding of HT research is a particularly salient method through which the U.S. government becomes educated on what is working and what still needs to be done.

Fourth, while a variety of methodological limitations with the current data preclude any definite conclusions regarding compliance with international obligations to HT victims, the empirical findings from the current study, amalgamated with findings from other studies, suggest that the United States is complying with its duties to HT victims under customary and conventional IL. As articulated previously, there have been, on average, nearly 30 TVPA prosecutions annually since the legislation was enacted. More than half of the key stakeholders interviewed in the current study considered themselves to be knowledgeable to very knowledgeable about HT issues. In the United States, anti-trafficking task forces do exist and a majority of law enforcement officials charged with combating HT offenses work with these task forces. In addition, a majority of persons surveyed in the current study indicated their state had a HT law in effect and that HT was a high or very high priority within their agency. Respondents in the current study were asked if there were any formal protocols in place for identifying and responding to HT cases. A strong majority indicated that formal protocols were in place or were in the process of protocol development.

Can more still be accomplished for HT victims? Absolutely. When asked what the primary barriers were to identifying and responding to trafficking cases, respondents noted victim distrust, lack of training, lack of resources, and a lack of interpreters. When asked about the special needs of trafficking victims and available services, 65% identified housing/shelter as the most needed service. Sixty-three percent of respondents indicated it was a challenge to communicate with trafficking victims. The existence of challenges and barriers, however, do not negate the progress that has been achieved to date, nor does their presence indicate a lack of compliance to obligations to HT victims under international law. Rather, they signal areas

where additional attention should be provided.

CONCLUSION

The primary goals of this manuscript were to summarize the existing international and domestic legislation to which the United States is obligated as it relates to HT victims, to provide a description of the ICC and a summary of its efforts to prosecute HT offenses to date, to provide preliminary findings from a federally-funded HT-related research project, and to assess whether the United States is complying with its obligations to HT victims under conventional and customary IL. The summary of the existing international HT-related legislation suggests that the global community is dedicated to combating human trafficking across the world. More than 80 international HT-related conventions have been authored to date. Those conventions and instruments to which the United States is obliged establish general guidelines for combating the HT problem and for addressing the complex needs of HT victims. While the HT legislation in the United States is relatively new, three pieces of legislation have been authored during the past eight years, a fact that overwhelmingly suggests that the U.S. government recognizes the importance of combating HT and its effects on victims.

Tangible results, however, as measured by attempted and successful prosecutions, are lagging within the international criminal justice system.¹⁵⁸ A review of situations submitted to the ICC indicates that none are related to human trafficking. Since the ICC Statute entered into force on July 1, 2002, four situations have been referred to the Prosecutor,¹⁵⁹ the elected officer whose responsibilities include investigating and prosecuting those crimes that fall within the jurisdiction of the Court.¹⁶⁰ Three State Parties (Uganda, the Democratic Republic of the Congo, and Central African Republic) have referred dire circumstances occurring in their territories, and the Security Council, acting under Chapter VII of the U.N. Charter, referred the situation

¹⁵⁸ A comparison to the international criminal justice system is appropriate, for two reasons. First, the prosecution of slavery offenses, as specifically articulated violations of international criminal law under the ICC Statute, should belong first within the international criminal justice system. Second, domestic law that currently prohibits slavery (e.g., the TVPA) was modeled after international conventional law. It seems reasonable, therefore, that the international criminal justice system, as the forerunner in the evolution of slavery as a prohibited practice, should be responsible for enforcing the very laws it has engineered and the very practices it has outlawed.

¹⁵⁹ The current Prosecutor of the ICC, who took office on June 16, 2003, is Mr. Luis Moreno-Ocampo.

¹⁶⁰ See International Criminal Court, Office of the Prosecutor, <http://www2.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> (last visited Jan. 24, 2009).

in Darfur, Sudan.¹⁶¹ The Prosecutor began investigations in three of these situations – Uganda, the Democratic Republic of the Congo, and Darfur. On July 8, 2005, the Court issued the first arrest warrants with regard to the condition in Uganda. The trials have not yet begun at the time of this articles publication.

The inability of the international criminal justice system to respond expeditiously to the HT phenomenon is not surprising. Previous research into the efficacy of international tribunals in general has indicated that they are often created and sustained at great financial expense, but with few tangible rewards.¹⁶² For example, the International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY) were established during the early 1990s to prosecute individuals accused of committing genocide and other crimes against humanity. By 2001, however, the ICTR and ICTY had indicted only 50 and 80 suspected genocidal perpetrators, respectively.¹⁶³ Expenditures for the ICTR between 1995 and 2001 had exceeded \$410 million, which computes to \$45.5 million per genocidal conviction, while total expenditures for the ICTY were approximately \$471 million, approximately \$22.5 million per conviction.¹⁶⁴

These data are unfortunate for those who desire to see HT victimizers brought to justice by the international criminal justice system. That said, it is not surprising that the ICC has not investigated HT cases. The crime of genocide, which by definition results in human casualties, has captured the attention of the ICC since its inception. To date, four situations (the Republic of Uganda on January 29, 2004, the Democratic Republic of the Congo on April 19, 2004, the Central African Republic on January 7, 2005, and Darfur, Sudan, on March 30, 2005) have been referred to the ICC's Office of the Prosecutor, all of which have involved the crime of genocide.¹⁶⁵ Human trafficking, while important and unquestionably a crime that falls under the ICC umbrella, does not necessarily yield casualties. Priorities ultimately dictate where efforts will be concentrated, and the crime of genocide is, at least for the time being, where the ICC is focusing its efforts. Only time will tell whether the ICC has the capabilities to adequately address even those transgressions.

¹⁶¹ See Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, to International Criminal Prosecutor, Press Release SG/SM/9797 AFR/1132, <http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm> (last visited Jan. 24, 2009).

¹⁶² George S. Yacoubian, Jr., *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia*, 165 *WORLD AFF.* 133 (2003).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See International Criminal Court, Situations and Cases, <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Jan. 24, 2009).

The unwillingness or inability of the international criminal justice system to prosecute HT offenses ultimately means that the prosecution of these offenses must be addressed by domestic legal systems. This essay focused exclusively on the United States and whether it is fulfilling its obligations under customary and conventional IL. The empirical study described herein provides insight into current understanding of the issue of HT by law enforcement authorities currently working on this issue. Additionally, the challenges and barriers to identifying and responding to victims, understanding victim needs and the ability to refer victims for services, and understanding training and resource demands from the perspective of law enforcement with experience in this area have been highlighted. While considerable education at all levels is still needed, the findings suggest that most respondents were knowledgeable about HT issues, were able to identify victims' needs, and were aware of their own limitations (e.g., ability to refer victims for services and understanding the roles of others in responding to HT cases). Additionally, this study provides important information that suggests that anti-trafficking task forces that involve federal, state, and local law enforcement, victim service providers, and key community leaders are a promising strategy for increasing awareness of HT, increasing the identification of cases, and ultimately, improving the safety of victims.

The current research findings indicate that the United States is compliant under customary and conventional IL with respect to HT victims. Moreover, findings from other TVPA studies support this conclusion and overwhelmingly suggest that once HT prosecutions in the United States begin efforts, which by definition require cooperation between a variety of criminal justice and social service entities, guilty verdicts are virtually guaranteed. The TVPA, however, is not perfect legislation. Research findings here and elsewhere¹⁶⁶ indicate that those persons directly involved with enforcing its provisions recognize a variety of modifications that should be made. Specifically articulated concerns included obtaining better social services for victims and witnesses, creating harsher penalties, and obtaining additional funding for domestic trafficking victims.¹⁶⁷

This final weakness – a lack of funding for domestic victims – is both curious and telling. The United States has, for decades, resisted the international legal machine. President Clinton, for example, reluctantly signed the ICC Statute on December 31, 2000,¹⁶⁸ but on May 6, 2002, the Bush Administration declared that it would no longer consider the United

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1.

States legally bound by that signature – in effect nullifying it.¹⁶⁹ Moreover, two pieces of legislation were enacted by Congress to specifically hinder the operations of the ICC. First, the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act prohibits the United States from providing financial assistance to the ICC.¹⁷⁰ Second, the American Servicemembers' Protection Act (ASPA) of 2002, contained within the Supplemental Defense Appropriations Act of 2002, prohibits American cooperation with the ICC,¹⁷¹ restricts military assistance to countries that have ratified the ICC Statute,¹⁷² and authorizes the President to use “all means necessary and appropriate” to free from captivity American personnel held by or on behalf of the ICC.¹⁷³ These pieces of legislation clearly demonstrate an assault on the ICC mission. However, within the past few years the United States has been faced with what has traditionally been a problem with a transnational element – human trafficking. By any objective standard, it has responded to the problem with efficiency and triumph.

Success in the criminal justice system, whether it be domestic or international, should be measured by the number of convictions of suspected HT perpetrators, the quantity of social services that can be provided to the victims, and reduction of the prevalence of human trafficking. The United States is moving in the right direction with respect to these goals. In contrast, the global community has the proper infrastructure in place, but needs to prioritize its efforts to realize any significant gains in tackling the international HT problem.

The findings from the current study strongly suggest that the United States is compliant with its duties and obligations under customary and conventional international law as it pertains to HT victims. Direct victim services, such as asylum protection, housing, medical services, and counseling are prevalent, but deficient. In contrast, indirect efforts, including the prosecution of HT offenders, are strong. Such prosecutions, while clearly law enforcement-focused and not victim-focused, ultimately accomplish the goal of removing victimizers from circulation and providing a deterrent effect to future offenders. What this may mean is that the United States has prioritized HT as a law enforcement issue and not a human rights

¹⁶⁹ See Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> (articulating that United States does not intend to become party to ICC Statute).

¹⁷⁰ Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Pub. L. No. 106-113, §§ 705-706 (1999).

¹⁷¹ Supplemental Defense Appropriations Act of 2002, Pub. L. No. 107-206, § 2004 (2002).

¹⁷² *Id.* § 2007.

¹⁷³ *Id.* § 2008.

issue. This does not, however, mean that the United States is not in compliance with its duties to HT victims. There are a variety of methods through which obligations to HT victims can be provided. Successful criminal prosecutions of HT offenders, which seem to be the primary mechanism through which the United States has achieved compliance, unquestionably provide a service to both current and future victims alike. More can certainly be accomplished, yet limitations with domestic HT policies do not indicate a lack of compliance. Rather, they signal areas of opportunity that will always exist when addressing a complex, transnational issue like human trafficking.

APPENDIX A – RESEARCH METHODS

The purpose of the current study was to examine the understanding of HT among law enforcement agencies currently working in the HT arena, provide an overview of how law enforcement agencies responding to HT, and highlight the implications of this response for trafficking victims. The study design incorporated telephone surveys, key stakeholder interviews, and discussion forums with anti-trafficking task forces nationwide. The study had four (4) overarching questions:

How do law enforcement agencies organize responses to HT cases?

What barriers and challenges do law enforcement agencies face in responding to HT cases?

What are the implications of law enforcement responses for trafficking victims?

What barriers and challenges do law enforcement face in coordinating with federal law enforcement agencies and victim service providers in responding to a trafficking case and meeting the needs of victims?

Telephone Surveys and Key Stakeholder Interviews

For the current study, law enforcement was defined as employees whose primary responsibility is to investigate, apprehend, or detain individuals suspected or convicted of criminal acts and who work with victims within a public law enforcement agency. These employees include line officers, investigators, agents, trainers, and victim-witness coordinators. They perform their duties at the federal, state, and local levels in frontline, managerial, or supervisory positions.

Victim-witness coordinators help promote victim well-being as victims cooperate with the criminal justice process (e.g., investigation, prosecution, and sentencing). Examples of their duties include notifying victims of important case events and proceedings and providing victims with information and referrals for victim services (e.g., victim compensation programs, rape crisis centers, or mental health counseling).

Federal agents typically conduct initial interviews, survey the crime scene (e.g., sweatshop), seize evidence (e.g., records and computers), make arrests, translate documents, and serve grand jury or trial subpoenas. In a trafficking case, federal agents investigate the spectrum of federal criminal civil rights violations, crimes against children, and organized crime. The Federal Bureau of Investigation's (FBI) Civil Rights Unit and field offices are responsible for the domestic enforcement of the TVPA. Other federal agencies critically involved include Immigration and Customs Enforcement (ICE), Diplomatic Security Section, the Internal Revenue Service, and investigators from the Department of Labor.

State and local investigators are police officers (including detectives, sergeants, and sheriffs) with specialized training and experience who usually work in an investigative branch or unit of a police department. For a HT case, they oversee and manage the case at the State or local level and collaborate with federal agents, prosecutors, and victim service providers.

Line officers are police officers whose primary responsibility is to provide routine patrol, conduct criminal and traffic investigations, and make arrests. In a HT context, the line officer may be the first responder who can identify the indicators of a HT situation, secure evidence for subsequent prosecution, and refer victims to social service providers.

Law enforcement management or supervisors oversee law enforcement activities and help define priorities for the agency. With respect to HT, managers and supervisors are responsible for ensuring that officers, investigators, and agents are trained on identification and response practices, and that HT is a priority for their department or agency. Information from state, local, and federal managers/supervisors was limited to the key stakeholder interviews.

The cities originally selected were San Diego, Los Angeles, San Francisco, Seattle, Dallas/Ft. Worth, Miami, Atlanta, and New York City. These locations were strategically chosen based on the following criteria: a) known trafficking activity in the communities; b) existing contacts within law enforcement and other agencies working in the area of trafficking; and c) established anti-trafficking taskforces and/or comprehensive initiatives aimed at combating trafficking. While these cities yielded respondents with HT experience as anticipated, the sample size fell short of the proposed 120 respondents. To increase our sample size, a decision was made to expand the number of targeted cities for the law enforcement telephone surveys to other key cities within the United States that met the same criteria described above. The telephone surveys were supplemented with interviews from law enforcement supervisors/managers, representatives from the FBI's HT Office, U.S. Attorney's Office, Trafficking in Persons Office, and the Department of Justice.

The first phase of data collection involved telephone surveys with law

enforcement. Different versions of the telephone survey were created for the key categories of law enforcement targeted for this study (state/local investigators, police officers, victim witness coordinators, federal agents). The surveys were reviewed and approved by an Institutional Review Board to protect the welfare of human subjects and ensure that physical, psychological, and social risks to study participants were minimized. Each completed telephone survey lasted an average of 60 minutes.

In total, 292 individuals were contacted. Of these, 82 were ineligible to participate because they reported having no familiarity or experience working on trafficking cases. There were a total of 121 completed surveys and 89 non-responses (11 refusals and 78 non-contacts). Thus, the valid sample size was 210, with an overall response rate of 58% (121/210). A modest compensation was offered to law enforcement officers who were allowed to accept compensation in order to increase participation.

Staff members who conducted the surveys were trained to ensure a clear understanding of the project, familiarity with the content of the protocol, and standardization in protocol administration. Weekly meetings were held to discuss problems or issues that occurred during the survey administration and to identify solutions that could be applied systematically by all staff. To supplement the law enforcement surveys, key interviews were conducted with supervisors/managers representing federal law enforcement and other key agencies involved in addressing HT. The interviews were intended to provide information regarding senior management's perspective on the issue of HT, identify barriers and challenges faced by law enforcement, and highlight emerging trends and best practices.

Task Force Discussion Forums

The final data collection phase of the study featured onsite discussion forums with task forces in San Diego, Los Angeles, and Austin. The primary purpose of the forums was to discuss what task forces do, how they are structured, and whether task forces are an effective way to combat HT. Additionally, the forums provided an opportunity to identify lessons learned and examine potential effective strategies for addressing HT.