

House Foreign Affairs Committee Subcommittee on Global Health, Global Human Rights, and International Organizations

Written Hearing Testimony
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“Implementation of the Trafficking Victims Protection Act”
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Chairman Smith and Ranking Member Wild and Members of the Subcommittee,

It is an honor to testify before you today on the implementation of the Trafficking Victims Protection Act. My name is Martina Vandenberg and I am the president and founder of the Human Trafficking Legal Center, an organization that serves as a bridge between trafficking survivors and pro bono attorneys. Over the last decade, we have trained more than 5,000 pro bono attorneys to handle civil, criminal, and immigration cases for human trafficking survivors. We have placed more than 550 matters with pro bono counsel, providing legal representation for victims of trafficking who otherwise would have faced the justice system alone.

Today, we have an opportunity to reflect on the impact of the Trafficking Victims Protection Act (TVPA) over more than two decades. What have we achieved since 2000? An enormous amount. But there are still significant challenges that must be addressed.

Let’s begin with the successes.

First, the TVPA has proven to be a powerful tool to hold traffickers accountable. The TVPA criminalizes forced labor, as well as sex trafficking. The law includes explicit extraterritorial jurisdiction, 18 USC §1596, that covers human trafficking crimes committed abroad. The U.S. Government has used this extraterritorial jurisdiction successfully to prosecute perpetrators. Recently, the U.S. has increased the focus on forced labor at home and abroad, a welcome development. The *National Action Plan to Combat Human Trafficking*, issued in 2021, commits the United States to more robust enforcement to eradicate forced labor in global supply chains:

Prosecuting novel cases against companies that benefit financially from forced labor within their value chains holds significant potential to suppress global criminal conduct that poses a threat to its victims and to United States labor markets.¹

¹ *National Action Plan to Combat Human Trafficking* at 48, available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf>

Second, the TVPA provides a civil cause of action coextensive with the criminal provisions so that trafficking survivors can hold their traffickers, including those who benefit from their trafficking, accountable in the federal courts. That statute, 18 USC §1595, has allowed trafficking survivors to seek justice. The civil right of action has been particularly important for survivors of forced labor, who only rarely see their cases prosecuted. Since 2003, when an amendment to the TVPA made these cases possible, trafficking survivors have filed more than 650 civil cases in the federal courts. Through civil litigation, trafficking survivors have seen their day in court, recovering their stolen wages, their dignity, and their sense of hope. As one survivor said to me after winning her civil trafficking case, “This is what justice looks like.”

The extraterritorial jurisdiction provisions of the TVPA reauthorizations have allowed trafficking survivors to bring successful civil cases against perpetrators, even where the trafficking crossed international borders or the forced labor occurred abroad. In two important cases litigated in the Eastern District of Virginia, *Roe v. Howard* and *Doe v. Howard*, federal courts awarded significant civil damages to domestic workers trafficked by a U.S. diplomat and her Australian diplomat husband.² The defendants trafficked each of the women into forced labor in U.S. Embassy housing – one young woman in Yemen, and one young woman in Japan. Federal courts awarded damages to each of the women, finding that each one had been held in forced labor and sexual servitude. These cases – brought as civil cases under the TVPA – each invoked extraterritorial jurisdiction. On appeal, the 4th Circuit Court of Appeals upheld the jury verdict in *Roe v. Howard*.³ That decision reflected Congress’s intent: to provide trafficking victims with extraterritorial jurisdiction to hold U.S. citizens, permanent residents, and persons present in the United States accountable for these egregious crimes. As a pro bono lawyer who represented one of these victims, a young woman from Ethiopia, I thank you.

The success of Congressionally-mandated extraterritorial jurisdiction for civil trafficking cases is mirrored in other countries, where courts have held corporations accountable for forced labor. In Canada, for example, Eritrean workers successfully sued Nevsun, a mining company. They workers alleged that they had been held in forced labor in a zinc mine in Eritrea.⁴

Third, the TVPA’s Trafficking in Persons Report, which started in 2001 as a slender tome printed in Courier typeface, has evolved into a powerful foreign policy tool. Beyond the tier rankings, the TIP Report Country narratives include Congressionally-mandated reporting on corruption cases, incidents of trafficking by diplomats, and trafficking by peacekeepers. In addition, since the Obama Administration, the State Department has included a chapter on the United States. That chapter provides a critical assessment of our own nation’s performance in applying the minimum standards Congress enacted.

² Rachel Weiner, *Former U.S. diplomat again found liable for sexually enslaving a housekeeper*, The Washington Post, July 31, 2017, available at https://www.washingtonpost.com/local/public-safety/former-us-diplomat-again-found-liable-for-repeatedly-raping-housekeeper/2017/07/31/977d31a8-7602-11e7-8839-ec48ec4cae25_story.html

³ *Roe v. Howard*, Opinion, Case No. 17-2338 (4th Circuit), Feb. 25, 2019.

⁴ *Nevsun settles with Eritrean plaintiffs in relation to landmark Supreme Court of Canada case*, The Canadian Lawyer, November 5, 2020, available at <https://www.canadianlawyermag.com/practice-areas/litigation/nevsun-settles-with-eritrean-plaintiffs-in-relation-to-landmark-supreme-court-of-canada-case/334916>

Fourth, the TVPA established the importance of survivor leadership. One need only look at the remarkable and powerful witnesses on this panel to recognize the fundamental role that experts with lived experience play in the formulation of U.S. policy. Congress paved the way for survivors to have a significant impact on the U.S. Government's anti-trafficking policy with the creation of the U.S. Advisory Council on Human Trafficking in 2015.⁵ That Council makes recommendations on federal anti-trafficking policies to the President's Interagency Task Force to Monitor and Combat Trafficking in Persons (PITF). And, after years of advocacy, this work is now compensated. Trafficking survivors should not be exploited as "volunteers." They should be paid as professionals for their policy analysis and expertise.

Two of my colleagues at the Human Trafficking Legal Center, Evelyn Chumbow and Fainess Lipenga, have served on the Advisory Council. Bella Hounakey, who is testifying on this panel today, currently serves on the Advisory Council. And Robert Lung previously served as the elected Chair of the Advisory Council. This approach – placing survivors at the center – is the only way to achieve significant progress in our efforts to combat human trafficking. Trafficking survivors know what is working, what is not working, and how it can be fixed. The U.S. Government has benefited immensely from listening to trafficking survivors – and implementing their recommendations. It is my hope that other countries will adopt this model.

Finally, the TVPA's success lies in the famous 3Ps: Prevention, Protection, and Prosecution. Over the last two decades, we have tended to focus myopically on the final P, Prosecution. But that is changing. We cannot prosecute our way out of forced labor. Indeed, according to the 2022 State Department Trafficking in Persons Report, there were just 1,379 prosecutions for forced labor in 2021 in the entire world. In fact, the total number of prosecutions globally for all forms of human trafficking in 2021 was just 10,572. Prosecution, although an important tool, cannot succeed without the additional Ps. At last, we are beginning to see more focus on the most neglected P, prevention.

What can be done to prevent human trafficking and forced labor? First and foremost, we must tackle the root causes of human trafficking: poverty, discrimination, structural inequality, flawed immigration policies, violations of freedom of association, and failure to enforce labor laws and fundamental workers' rights. If we are to prevent forced labor, we must end labor markets that force migrant workers to buy their jobs. Forced labor is a feature, not a bug, in global supply chains. Labor brokers and recruiters ensnare workers in debt, only to trap them in forced labor.

As Neha Misra of the Solidarity Center recently stated in testimony before the Ways and Means Committee, "[T]he global migration management architecture is purposely designed to promote cheap labor over migrant workers' rights."⁶ This must change.

⁵ The U.S. Advisory Council on Human Trafficking was created by the Justice for Victims of Trafficking Act (JVTA), *See* OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, available at <https://www.state.gov/u-s-advisory-council-on-human-trafficking/#:~:text=The%20United%20States%20Advisory%20Council,President's%20Interagency%20Task%20Force%20to%20trafficking/#:~:text=The%20United%20States%20Advisory%20Council,President's%20Interagency%20Task%20Force%20to>

⁶ Testimony of Neha Misra, Ways and Means Committee Hearing July 21, 2021, available at <https://www.solidaritycenter.org/wp-content/uploads/2021/07/Testimony-of-Neha-Misra-Solidarity-Center-Ways-and-Means-Trade-Subcommittee-Forced-Labor-Hearing-July-21-2021-2.pdf>

It is time to shift resources to invest in structural change and labor rights. If we hope to end forced labor, we must shift our focus from law enforcement to workers' rights, unionizing, and the freedom of association. Worker-driven social responsibility programs, such as the Coalition of Immokalee Workers' Fair Food Program, can prevent human trafficking. The U.S. Department of Labor's Bureau of International Labor Affairs has invested in workers' rights, most recently with a \$2.5 million grant to the Coalition of Immokalee Workers to expand their programs internationally.⁷ Another U.S. organization, the Centro de los Derechos del Migrante, Inc., or CDM, has created a web-based program for workers to report unscrupulous recruiters and employers. These mechanisms can prevent forced labor before it happens, allowing workers to warn others of potential hazards and criminal recruiters.

These are the successes, the TVPA wins over the last two decades. But significant challenges remain. I will focus on just two key issues: trafficking by diplomats and remedies for the trafficking of migrant workers into forced labor.

Domestic Workers Trafficked by Diplomats

Diplomats and international organization personnel are permitted to bring domestic workers to the United States on special visas, known as A-3/G-5 visas. Over the years, in the wake of horrifying cases of forced labor and abuse, Congress has added protections for A-3/G-5 domestic workers. Amendments to the TVPA require that A-3/G-5 workers have contracts and receive a pamphlet outlining their rights as workers in the United States.

Despite these protections, trafficking of domestic workers by diplomats for forced labor persists. To its credit, the Department of State now administers an in-person registration program to interview each A-3/G-5 domestic worker annually. The program initially launched in Washington, DC and New York. Secretary of State Anthony Blinken recently announced that the domestic worker in-person registration program would be expanded across the nation.

These official check-in interviews play an essential role in *preventing* human trafficking. The interviews have placed diplomats on notice that the State Department is watching. At the interview, each domestic worker must bring her passport, her contract, her bank statement, her ATM card, and proof that she is able to communicate with family and friends. In the face of this oversight, corrupt diplomats have developed criminal schemes to thwart protections for domestic workers. We have seen cases in which diplomats pay the domestic workers in official bank accounts, as required by State Department rules, only to demand that the domestic worker kick back the majority of the salary to the diplomat in cash each month. Diplomatic traffickers have seized A-3/G-5 domestic workers' passports, returning the documents only for the in-person registration meetings with the State Department Protocol Office. Diplomatic traffickers holding these workers in forced labor have instructed the domestic workers to lie to the State Department and affirm that their rights are not being violated.

⁷ *US Department of Labor Awards \$2.5 Million Grant to Fuel Fair Food Program's International Expansion*, February 15, 2023, available at <https://ciw-online.org/blog/2023/02/us-department-of-labor-awards-2-5-million-grant-to-fuel-fair-food-programs-international-expansion/>

Because A-3/G-5 domestic workers are locked in their employers' homes, the in-person registration interviews are the only opportunity to learn whether there is abuse in the home. Moreover, these interviews can provide the only opportunity for a domestic worker held in forced labor to escape.

European members of the Organization for Security and Cooperation in Europe (the OSCE) developed in-person registration programs for domestic workers employed by diplomats years ago. With the implementation of the in-person registration program, the United States has joined the ranks of other OSCE members – Switzerland, Austria, the Netherlands, and Belgium – that conduct annual oversight interviews to prevent the forced labor of domestic workers in diplomatic households. The State Department currently operates this program voluntarily. We have advocated to make this in-person registration program a statutory requirement. Section 107 of Senate Bill 920 would require the State Department to conduct these in-person registration interviews each year across the United States. We encourage Congress to adopt these provisions.

In-person registration can prevent abuse. But what about domestic workers on A-3/G-5 visas who have already suffered forced labor and human trafficking? Fortunately, the State Department Diplomatic Security Service does investigate these cases. And, in some instances, diplomats have faced federal criminal indictment in the United States. But in almost every case, the diplomats are permitted to leave, often returning to their sending state. In several cases, diplomats accused of human trafficking and forced labor in this country have enjoyed promotions – not prosecution – in their own country. Impunity is still the norm.

Again, thanks to Congressional action and the creation of the civil private right of action, these domestic workers can sue their traffickers in the federal courts. But these judgments can result in stalemate when diplomats refuse to pay.

Take the case of Malawi. In 2016, a federal court in Maryland ordered a diplomat from Malawi, Jane Kambalame, to pay \$1.1 million in damages for trafficking a domestic worker into forced labor in the United States. That domestic worker was Fainess Lipenga, who is now my colleague at the Human Trafficking Legal Center and a member of the U.S. Advisory Council on Human Trafficking. Kambalame returned to Malawi, where she was promoted to a post as Malawi's High Commissioner to Zimbabwe and Botswana. In accordance with a Congressional mandate, the Department of State suspended Malawi from all A-3 visa sponsorship privileges to bring domestic workers to the United States in 2019.⁸ But that suspension soon ended, without any resolution of the case. Seven years after the verdict, Kambalame has refused to resolve the case. And the Government of Malawi has taken no substantive steps to settle the matter. Other governments have resolved similar cases with *ex gratia* payments directly to the victims. That is precisely what should happen in this case.

Additional consequences are clearly necessary for diplomats – and their sending states – who choose to thwart federal court orders. Diplomats are state officials. Trafficking by diplomats is an egregious form of public corruption, a misuse of an official position for personal gain.

⁸ Kate Ryan, *In first, U.S. rebukes Malawian diplomats over trafficking case*, Reuters, June 20, 2019, available at <https://www.reuters.com/article/us-usa-malawi-trafficking/in-first-u-s-rebukes-malawian-diplomats-over-trafficking-case-idUSKCN1TM00Y>

Diplomats who engage in human trafficking – in violation of internationally-human rights norms, criminal law, and prohibitions on corruption – should face sanctions.

Remedies for Trafficking of Migrant Workers into Forced Labor

The COVID-19 pandemic revealed – and exacerbated – forced labor in global supply chains. In 2020, U.S. Customs and Border Protection issued multiple withhold release orders (WROs), barring rubber gloves tainted with forced labor from entering the U.S. market. And in 2021, the agency issued a finding of forced labor against Top Glove, one of the companies previously subject to a WRO.⁹ In the United Kingdom, advocates sued the National Health Service for purchasing the tainted rubber gloves rejected by U.S. Customs authorities – and won.

Blocking goods from entering the United States under Section 307 of the Tariff Act of 1930 is a powerful tool. The Human Trafficking Legal Center serves as the secretariat for a coalition of organizations, the Tariff Act Advisory Group (TAAG), which advocates for robust enforcement of these laws. TAAG members have joined an international coalition – uniting with non-governmental organizations across the globe – to fight for similar import bans in all major global economies. We call this initiative “no safe harbor for forced labor.”

As advocates, we celebrate robust enforcement of anti-forced labor prohibitions in global supply chains. Indeed, we demand robust enforcement – around the globe and at home.

The United States must not become a safe harbor for abuse of migrant workers. In recent months, the Human Trafficking Legal Center has observed an extremely troubling trend: professional workers brought to the United States with contracts that include steep financial penalties. The labor recruiters who write these contracts refer to the provisions euphemistically as “liquidated damages.” We call these provisions “abscondment clauses.”

The contract provisions preclude the worker from leaving the position for three years. If the individual does try to quit the job, the employer/recruiter files a breach of contract case against the worker, seeking to enforce the “liquidated damages” clause. These penalties, mischaracterized as breach fees, can range from \$30,000 to \$150,000. These unconscionable contracts effectively trap these workers in debt bondage, making it impossible for them to leave their jobs. The workers are handcuffed by debt, unable to flee. This is the new American kafala system.

We are blowing the whistle on this abuse today because these contracts have become ubiquitous. Nurses and teachers from the Philippines initially raised the alarm. But we are now seeing contracts with abscondment clauses across a range of industries.

These contracts have devastating consequences for migrant workers in the United States. In one particularly troubling case, ten nurses and their attorney faced *criminal* charges in New York after the nurses left their jobs. Years later, a state appellate court in New York held that criminal prosecution to force nurses to remain at their job violated the Thirteenth Amendment to the

⁹ *CBP Issues Forced Labor Finding on Top Glove Corporation Bhd.*, CBP, March 29, 2021, available at <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-forced-labor-finding-top-glove-corporation-bhd>

Constitution's prohibition on involuntary servitude. A second group of nurses in New York sued their employers and labor brokers under the TVPA for forced labor. The nurses won their case on summary judgment.¹⁰

Nursing shortages in the United States should not give rise to abusive conditions for foreign nurses. Contracts with abscondment fees, no matter the euphemism used to mask the abuse, must end.

Conclusion and Recommendations:

The U.S. National Action Plan states,

Globally and in the United States, forced labor and associated harmful employment practices hide the true cost of labor and subvert the legitimate job market, such as displacing American workers, driving down wages, and corrupting the domestic and global economy. These practices create an uneven playing field for responsible businesses that invest in measures to prevent forced labor in their product supply chains.¹¹

We must eradicate forced labor in global supply chains, using every available tool at our disposal. Congress has provided a panoply of mechanisms, including the Uyghur Forced Labor Prevention Act (UFLPA), Section 307 of the Tariff Act, extraterritorial criminal prosecution and civil litigation under Chapter 77 of Title 18, and Global Magnitsky sanctions for human trafficking and forced labor. But even with all of these tools at our disposal, we have made little headway against forced labor over the last two decades.

What can be done? The Human Trafficking Legal Center makes the following recommendations for the next decade of TVPA implementation:

- Fund programs to increase corporate accountability: Forced labor must be a C-suite issue, with attention from the highest levels of corporate leadership. In the 1970s, bribery was ubiquitous, just as forced labor in global supply chains is today. Enforcement of the Foreign Corrupt Practices Act against corporate actors fundamentally changed the understanding of risk. Potential liability under the FCPA sparked corporate due diligence. And that shift propelled the creation of a compliance industry to prevent bribery in corporate America. As Undersecretary of the Department of Homeland Security Robert Silvers recently told the *Wall Street Journal*, “Forced labor belongs in the same breath as FCPA. When it comes to corporate compliance programs, [the] boards of directors need to be focused on this, CEOs need to be focused on this [and], compliance teams certainly need to be laser focused on this.”¹² Corporations should face criminal prosecution, administrative fines, and debarment from government contracting if they are found to

¹⁰ *Paguirigan v. Prompt Nursing, et al.*, 17-cv-1302 (EDNY), Opinion and Order, Dkt. 95 (Sept. 24, 2019).

¹¹ National Action Plan to Combat Human Trafficking at 15.

¹² Richard Vanderfort, Forced Labor a ‘Top-Tier’ Compliance Issue, Says U.S. Official, *The Wall Street Journal*, Sept. 22, 2022, available at <https://www.wsj.com/articles/forced-labor-a-top-tier-compliance-issue-says-u-s-official-11664271003>

have held workers in forced labor in the United States or in their global supply chains abroad.

- Hold diplomats – and their sending states – accountable for trafficking A-3/G-5 domestic workers: Diplomats who ignore federal court judgments and thwart justice in trafficking cases are an affront to the rule of law. Corrupt diplomats who traffic domestic workers must be held accountable. The sending states should take responsibility for the criminal acts of diplomats posted abroad by payment of *ex gratia* payments. Where the sending states fail to do so, the U.S. government should apply sanctions. Jane Kambalame and Malawi should be the first to face sanctions in a diplomatic trafficking case. In addition, Malawi should again be officially suspended from the A-3/G-5 program and the ability to bring domestic workers to the United States. Visa applications for suspended countries should be reviewed carefully to ensure that the countries are not skirting the restrictions by bringing domestic workers into the United States on A-2 visas.
- Mandate in-person registration interviews with domestic workers on A-3/G-5 visas to prevent trafficking by diplomats.
- Prohibit the use of contracts with penalty “abscondment fees” for nurses and other migrant workers in the United States: State Department consular officers should review contracts submitted with visa applications to screen for penalties and breach fees. Visa applications accompanied by such contracts should be denied and the recruitment agencies/labor brokers investigated for criminal activity. In addition, Congress should order a Government Accountability Office investigation into “breach fees” and the trafficking of foreign nurses into forced labor in the United States.
- Increase appropriations to focus on the forgotten “P”, Prevention: The single-minded pursuit of criminal prosecution to end forced labor – and sex trafficking – has failed. It is time for a more holistic implementation of the TVPA that includes all three Ps. That means increasing funding for the Department of Labor’s Bureau of International Labor Affairs. State Department TIP Office funding should similarly shift to focus on workers’ rights, freedom of expression, and prevention.
- Work with allies to promote adoption of import bans on goods tainted with forced labor: Import bans – such as Section 307 of the Tariff Act or the Uyghur Forced Labor Prevention Act – are powerful tools to combat forced labor. But it is not enough for one country, the United States, to enforce these bans. Goods rejected from U.S. ports under these authorities can simply be transshipped to another economy without restrictions. There should be no safe harbor for forced labor. U.S. trade agreements should include an import ban provision, as does the U.S.-Mexico-Canada Agreement, USMCA.

Again, thank you for this opportunity to testify.