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EXTRATERRITORIAL HUMAN TRAFFICKING PROSECUTIONS: ELIMINATING ZONES OF IMPUNITY WITHIN THE LIMITS OF INTERNATIONAL LAW AND DUE PROCESS

CAROLINE A. FISH[†]

INTRODUCTION

The United States prides itself on “its moral leadership” on the issue of human trafficking.¹ In the past two decades, the United States has passed four significant pieces of federal anti-trafficking legislation² and released sixteen Trafficking In Persons (“TIP”) reports,³ which rank and sanction nations around the world on their efforts against human trafficking.⁴ Although the international community has not warmly welcomed all of these steps,⁵ the work of the United States has been credited with creating a model of an appropriate national legal response to trafficking.⁶

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¹ 154 CONG. REC. S10,936–37 (daily ed. Dec. 11, 2008) [hereinafter TVPRA] (statement of Sen. Durbin).

² *U.S. Laws on Trafficking in Persons*, U.S. DEP'T OF STATE, www.state.gov/j/tip/laws/index.htm (last visited Sept. 29, 2017).

³ *Trafficking in Persons Report*, U.S. DEP'T OF STATE, www.state.gov/j/tip/rls/tiprpt (last visited Sept. 29, 2017).

⁴ *U.S. Laws on Trafficking in Persons*, *supra* note 2.

⁵ Criticisms include the United States' disproportionate focus on criminal justice responses to trafficking, its anti-prostitution rhetoric, and its unilateral exercise of power and authority through the TIP ranking and sanctioning regime. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1663–64 (2010); Anne T. Gallagher & Janie Chuang, *The Use of Indicators To Measure Government Responses to Human Trafficking*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 317, 326–27 (Kevin E. Davis et al. eds., 2012) [hereinafter GOVERNANCE BY INDICATORS].

Congress' first major piece of legislation was the Trafficking Victims Protection Act of 2000 ("TVPA"),⁷ which was subsequently reauthorized in 2003, 2005, 2008, and 2013.⁸ With each reauthorization, Congress enacted substantive amendments to the TVPA, such as adding civil remedies and strengthening criminal sanctions.⁹ With the 2008 reauthorization, Congress was particularly concerned with the impunity of traffickers.¹⁰ In a hearing in 2007, Congress considered the impunity of diplomats, defense contractors, and foreign traffickers.¹¹ To address the last of these, Congress included a critical amendment ("Amendment") in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"),¹² which expanded extraterritorial jurisdiction for human trafficking committed outside the United States to foreign traffickers present in the United States.¹³

However, the Amendment's broad expansion of extraterritorial jurisdiction has raised questions of prescriptive jurisdiction and due process under international and domestic law.¹⁴ In 2016, in a case of first impression, the United States Court of Appeals for the Eleventh Circuit in *United States v. Baston* dealt with these questions and ultimately upheld the statute as permissible under international and domestic law.¹⁵ On the questions of domestic law, the court reasoned that the statute was within Congress' power under the foreign commerce clause and, applying a nexus analysis, reasoned that jurisdiction

⁶ GOVERNANCE BY INDICATORS, *supra* note 5, at 340–41.

⁷ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. §§ 7101–7114 (2012)).

⁸ U.S. Laws on Trafficking in Persons, *supra* note 2.

⁹ *Current Federal Laws*, POLARIS, www.polarisproject.org/current-federal-laws (last visited Sept. 29, 2017).

¹⁰ See *Legal Options To Stop Human Trafficking: Hearing Before the Subcomm. on Human Rights and the Law of the Comm. on the Judiciary*, 110th Cong. 3, 24–25 (2007) [hereinafter *Legal Options*] (statement of Sen. Richard J. Durbin, Chairman, S. Comm. on Human Rights and the Law).

¹¹ *Id.*

¹² Pub. L. No. 110-457, § 223(a), 122 Stat. 5044, 5071 (2012).

¹³ See 18 U.S.C. § 1596(a)(2) (2012).

¹⁴ See *United States v. Baston*, 818 F.3d 651, 669–70 (11th Cir. 2016).

¹⁵ *Id.* In other cases brought against foreign defendants for extraterritorial human trafficking crimes, the courts did not address the domestic and international law concerns, dismissing the TVPRA claims under the theory of retroactivity. These cases are outside the scope of this Note. See, e.g., *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013 (S.D. Tex. 2015).

did not offend due process because the defendant in the case had sufficient contacts with the United States.¹⁶ The court also reasoned that the statute was a valid exercise of prescriptive jurisdiction under the protective principle¹⁷ of international law on the ground that human trafficking threatens the national security of the United States.¹⁸

This Note argues that the *Boston* court was incorrect both in finding the Amendment consistent with the protective principle and in its analysis of the defendant's nexus with the United States. This Note asserts, instead, that (1) the Amendment is not valid under any traditional bases of prescriptive jurisdiction but is consistent with the United States' international obligations to "extradite or prosecute," and (2) the Amendment may be applied under the international anti-trafficking conventions to foreign defendants present in the United States, regardless of nexus, without violating due process.

Part I of this Note describes the complex nature of the crime of human trafficking. Part II analyzes the text and purpose of the Amendment, considers the opinion of the *Boston* court, and provides an overview of the international and domestic law concerns raised by the Amendment. Part III argues that the Amendment is not consistent with any recognized international law bases for prescriptive jurisdiction but illustrates how it is consistent with the United States' obligation to "extradite or prosecute" under international anti-trafficking conventions. Under the "extradite or prosecute" principle, however, the United States does not have an unlimited license to prosecute. The United States has a simultaneous obligation to cooperate with other countries through extradition and mutual legal assistance. Part IV provides that, in addition to extradition and mutual legal assistance, a policy of international capacity building is a tool to combat impunity and provide redress to victims in cases of extraterritorial human trafficking.

This Note concludes that the obligation to "extradite or prosecute" provided an avenue by which the United States could enact the broad extraterritorial Amendment it enacted outside

¹⁶ *Boston*, 818 F.3d at 668–69.

¹⁷ See *infra* Section II.C.

¹⁸ *Boston*, 818 F.3d at 670.

the traditional confines of prescriptive jurisdiction, but international cooperation remains paramount to the success of the international community in the fight against trafficking.

I. HUMAN TRAFFICKING: THE CRIME, VICTIMS, AND PERPETRATORS

Almost two decades have passed since the United States adopted the Trafficking Victims Protection Act and signed onto the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons ("Palermo Protocol"), which it later ratified in 2005.¹⁹ As a result, human trafficking has been at the forefront of the national agenda, prompting research, prosecutions, and heightened awareness. It is now well understood that trafficking is a vast economic crime of exploitation that occurs on a local, regional, and international level.²⁰

A. *Human Trafficking as an Economic Crime of Exploitation*

The crime of human trafficking consists of two main types: labor trafficking and sex trafficking. These crimes are defined in the TVPA as "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services" or "for the purpose of a commercial sex act."²¹ Human trafficking includes the use of "force, fraud, or coercion," except in cases of the sexual exploitation of children, where force, fraud, or coercion is not required.²² The crime does not require movement across jurisdictions: An individual can be trafficked without ever being transported to another place.²³

¹⁹ 22 U.S.C.A § 7102(9)–(10) (West 2014); *Ratification Status: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, U.N. DOC. A/55/383 (Nov. 15, 2000).

²⁰ See *infra* Sections I.A, I.B. This Note relies on international, national, and local data and reports as sources that illustrate the full picture of trafficking within the United States and globally.

²¹ 22 U.S.C. § 7102(9)(B), (10) (2012).

²² *Id.* § 7102(9).

²³ *What is Modern Slavery?*, U.S. DEPT OF STATE, www.state.gov/j/tip/what/index.htm (last visited Sept. 29, 2017) ("Human trafficking can include, but does not require, movement.").

Trafficking is primarily an economic crime. Annually, it accrues an estimated \$150 billion in profits through the exploitation of over twenty million people worldwide.²⁴ Sex trafficking is the most identified form of trafficking, due to a heightened focus on sexual exploitation.²⁵ Nevertheless, labor trafficking has been found in most industries in the United States, including hospitality, construction, and agriculture.²⁶

Both sex and labor trafficking are crimes of exploitation that disproportionately victimize those “affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities”²⁷ Traffickers use promises of good work and good pay,²⁸ seduction,²⁹ and other tactics³⁰ to manipulate the vulnerabilities of victims. In the United States, risk factors for youth trafficking include homelessness,³¹ child welfare involvement,³² and a lack of

²⁴ INT’L LABOUR OFFICE, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 7, 13 (2014). While these statistics are the best estimates of the scope of trafficking, the crime is difficult to measure with complete accuracy. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-825, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD (2006); *Combatting Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing Before the Comm. on the Judiciary*, 110th Cong. 40 (2007) [hereinafter *Combatting Modern Slavery*] (statement of Bradley W. Myles, National Program Director, Polaris Project) (“[W]e need more research . . . and more accurate counting mechanisms for all victims in the U.S. . . .”).

²⁵ Letter from Jean Bruggeman, Executive Director, Freedom Network USA, to Ambassador Susan Coppedge, U.S. Dep’t of State Office to Monitor and Combat Trafficking in Persons (Jan. 25, 2017), <https://freedomnetworkusa.org/app/uploads/2017/01/FNUSAInput2017TIPReport.pdf>.

²⁶ *Labor Trafficking Cases by Industry in the United States*, NAT’L HUMAN TRAFFICKING RES. CTR., (last visited Sept. 29, 2017), https://humantraffickinghotline.org/sites/default/files/Labor%20Trafficking%20Cases%20by%20Industry%20in%20the%20US%20Fact%20Sheet%20FINAL_1.pdf.

²⁷ 22 U.S.C. § 7101(b)(4) (2012).

²⁸ See *id.*

²⁹ See *Human Trafficking: Romeo Pimps*, GOV. NETH., www.government.nl/topics/human-trafficking/contents/romeo-pimps-loverboys (last visited Sept. 29, 2017).

³⁰ See COVENANT HOUSE, HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY THE YOUTH OF COVENANT HOUSE NEW YORK 6 (2013) (“[T]raffickers loiter in areas where homeless youth are known to gather and then tell them that the shelters are full and offer them a place to stay in lieu of sleeping on the streets.”) [hereinafter HOMELESSNESS]; *United States v. Pipkins*, 378 F.3d 1281, 1285 (11th Cir. 2004) (“To the pimps, an important component of the game was domination of their females through endless promises and mentally sapping wordplay, physical violence, and financial control.”).

³¹ See U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 388 (2016), <http://www.state.gov/documents/organization/25876.pdf>.

supportive adults in a youth's life.³³ In addition to these economic and social risk factors, political upheaval, armed conflict, and natural disaster can increase a population's risk for human trafficking.³⁴

Women and children are identified predominately as victims of human trafficking,³⁵ but the United States Department of State has acknowledged that male victims, especially male victims of sex trafficking, are often overlooked or misidentified.³⁶ Men are more often identified as victims in situations of labor trafficking.³⁷ Racial minorities also constitute the majority of identified human trafficking victims.³⁸ In 2011, in cases of human trafficking prosecuted by the United States Department of Justice, over ninety-five percent of labor trafficking victims identified as black, Hispanic, Asian, or "other"; white victims were less than two percent of victims.³⁹ Seventy-four percent of sex trafficking victims were black, Hispanic, Asian, or "other."⁴⁰ The racial demographics of the crime refute antiquated conceptions, codified in early conventions, of human trafficking primarily affecting white populations.⁴¹

³² See Elliott Gluck & Richa Mathur, *Child Sex Trafficking and the Child Welfare System*, STATE POLICY ADVOCACY & REFORM CTR. 2 (2014); U.S. DEPT OF STATE, *supra* note 31, at 388.

³³ HOMELESSNESS, *supra* note 30, at 6.

³⁴ See CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL 33200, TRAFFICKING IN PERSONS IN LATIN AMERICA AND THE CARIBBEAN (Oct. 2016).

³⁵ See U.N. Office on Drugs and Crime, *Factsheet on Human Trafficking*, www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf [hereinafter Factsheet] (last visited Sept. 29, 2017); see also 22 U.S.C. § 7101(a)-(b)(1) (2012).

³⁶ See *Male Trafficking Victims*, U.S. DEPT OF STATE: OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS (June 2013), <https://2009-2017.state.gov/documents/organization/211836.pdf>.

³⁷ See *Female/Male Breakdown of Trafficking Survivors Assisted by IOM*, INT'L ORG. FOR MIGRATION (July 25, 2016, 11:30 AM), www.iom.int/infographics/female-male-breakdown-trafficking-survivors-assisted-iom.

³⁸ See *Human Trafficking*, NATIONAL CRIME VICTIMS' RIGHTS WEEK RESOURCE GUIDE 24 (2013), www.victimsofcrime.org/docs/ncvrw2013/2013ncvrw_stats_humantrafficking.pdf; see also Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1467 (2015); U.S. DEPT OF STATE, *supra* note 31, at 388.

³⁹ *Human Trafficking*, *supra* note 38.

⁴⁰ *Id.*

⁴¹ See Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 2 U.S.T. 1999, 30 U.N.T.S. 23 (registration ex officio on May 4, 1949); White Slave Traffic Act, H.R. 12315, 61st Cong. (1910).

As for those who engage in the trafficking of victims, most traffickers are male,⁴² are “nationals of the same country as the victims,”⁴³ and include family members and friends of the victims.⁴⁴ Notably, trafficking that occurs at the hands of intimate partners shares features of domestic violence,⁴⁵ rendering identification of victims an especially complex task.⁴⁶

Finally, although human trafficking is commonly described as “slavery,”⁴⁷ not all forms of human trafficking are slavery.⁴⁸ In legal definitions of trafficking under both U.S. law and international conventions, slavery is but one purpose for which a person might be trafficked.⁴⁹ Traditionally, slavery, which involves an exercise of the powers of the right of ownership,⁵⁰ is more narrowly defined than trafficking,⁵¹ and has long been regulated independently from trafficking, as its own universally condemned crime.⁵² Trafficking, on the other hand, encompasses

⁴² See Factsheet, *supra* note 35; see also William Adams & Kevonne Small, *Effects of Federal Legislation on the Commercial Sexual Exploitation of Children*, U.S. DEPT OF JUSTICE: JUVENILE JUSTICE BULLETIN 3 (July 2010), www.ncjrs.gov/pdffiles1/ojdp/228631.pdf (“The majority of child sexual exploiters are men between the ages of 20 and 65.”).

⁴³ Factsheet, *supra* note 35.

⁴⁴ HOMELESSNESS, *supra* note 30, at 10 (“[T]raffickers fell into several main categories: parents and other immediate family, friends of family, boyfriends, employers, and others. . .”).

⁴⁵ See *Human Trafficking: Intersections with Domestic Violence*, NAT’L HUMAN TRAFFICKING RES. CTR. (Oct. 2011), www.traffickingresourcecenter.org/resources/human-trafficking-intersections-domestic-violence.

⁴⁶ See generally VERA INST. OF JUSTICE, SCREENING FOR HUMAN TRAFFICKING: GUIDELINES FOR ADMINISTERING THE TRAFFICKING VICTIM IDENTIFICATION TOOL, (June 2014), <http://archive.vera.org/sites/default/files/resources/downloads/human-trafficking-identification-tool-and-user-guidelines.pdf>; *Identify and Assist a Trafficking Victim*, U.S. DEPT OF STATE, www.state.gov/j/tip/id (last visited Sept. 29, 2017).

⁴⁷ See Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 611 (2014) (arguing that the rebranding of “trafficking” as “slavery” began as a U.S. effort to heighten moral condemnation and commitment to the cause).

⁴⁸ ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 179–82 (2010).

⁴⁹ See 22 U.S.C. § 7102(9) (2012); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

⁵⁰ GALLAGHER, *supra* note 48, at 179.

⁵¹ See George Rutherglen, *The Constitution and Slavery Overseas*, 39 SEATTLE U. L. REV. 695, 714 (2016). Compare *Slavery*, BLACK’S LAW DICTIONARY (10th ed. 2014), with *Trafficking*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁵² See, e.g., U.S. CONST. amend. XIII; Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

a range of forms of exploitation.⁵³ As such, some forms of trafficking may resemble slavery yet still not meet the narrow legal definition of slavery.⁵⁴

B. Human Trafficking on a Local and Regional Level

Another feature of the crime of trafficking is that, while the crime is a global issue, most human trafficking occurs locally or regionally.⁵⁵ The Department of Justice, which tracks data through the Human Trafficking Reporting System, reported that in confirmed sex trafficking cases in the United States between 2008–2010, eighty-three percent involved American victims trafficked within the United States.⁵⁶ In confirmed labor trafficking cases, the majority of victims were foreign-born and Hispanic, confirming a regional movement of victims.⁵⁷ In 2015, the National Human Trafficking Resource Center reported that from human trafficking tips made in the United States, where the suspected victim's origin was disclosed, the victim was most often from the United States.⁵⁸ In cases where victims were foreign-born, most were from Mexico.⁵⁹

In a study of sex trafficking of children, research found that the majority of traffickers in the United States, Mexico, and Canada “operate strictly at the local level,” with 75% of traffickers operating only on a city-wide level and 15% operating

⁵³ See 22 U.S.C. § 7102(9) (2012); Palermo Protocol, *supra* note 49, at art. 3.

⁵⁴ GALLAGHER, *supra* note 48, at 179–81. The legal understanding of what constitutes slavery also may evolve to include other forms of exploitation, although it has not yet so evolved. *Id.*

⁵⁵ See Factsheet, *supra* note 35 (“[T]he flows [of trafficking victims] often remain intra-regional. Transregional trafficking, though still significant, is relatively less frequent.”).

⁵⁶ DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NJC 233732, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010 (2011).

⁵⁷ *Id.*

⁵⁸ *National Human Trafficking Resource Center Data Breakdown*, NAT'L HUMAN TRAFFICKING RES. CTR. (2016), www.traffickingresourcecenter.org/resources/2015-nhtrc-annual-report; see also CAL. DEP'T OF JUST., THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA 3 (2012) (“72% of human trafficking victims whose country of origin was identified by California’s task forces are American.”); S.F. DEP'T ON STATUS OF WOMEN, MAYOR'S TASK FORCE ON ANTI-HUMAN TRAFFICKING: HUMAN TRAFFICKING IN SAN FRANCISCO 7 (2016) (Of 499 trafficking victims reported in San Francisco, 255 were from the U.S., with the second largest group of victims from Mexico).

⁵⁹ NAT'L HUMAN TRAFFICKING RES. CTR., *supra* note 58.

on a national level.⁶⁰ The study further revealed that only 10% of traffickers operate within international sex crime networks.⁶¹ Local data also indicates such a trend; for example, in New York City, only 1% of child victims of sexual exploitation were from another country.⁶²

The local and regional nature of the crime⁶³ impacts how states regulate the behavior and how jurisdiction, extraterritorial or otherwise, is attached to that behavior.

II. EXTRATERRITORIAL JURISDICTION FOR HUMAN TRAFFICKING

Extraterritorial criminal jurisdiction is a widely debated topic.⁶⁴ This section narrows in on extraterritorial criminal jurisdiction in human trafficking cases by looking at (A) the text and purpose of the Amendment; (B) the 11th Circuit's analysis in *United States v. Baston*; (C) the international law limitations of prescriptive jurisdiction; (D) the "extradite or prosecute" principle under international conventions; and (E) the requirements of due process.

A. *The Text and Purpose of the Amendment*

The Amendment allows the prosecution of foreign defendants found in the United States in what are called "foreign-cubed" cases: cases where a foreign defendant committed an offense against a foreign victim in a foreign jurisdiction.⁶⁵ The statute states:

⁶⁰ RICHARD J. ESTES & NEIL ALAN WEINER, U. OF PA. SCH. SOC. WORK, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA, AND MEXICO 16 (2001).

⁶¹ *Id.*

⁶² FRANCES GRAGG ET AL., N.Y. ST. OFFICE OF CHILDREN & FAM. SERVS., NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN: FINAL REPORT 29 (2007), www.ocfs.state.ny.us/main/reports/csec-2007.pdf.

⁶³ For examples of local cases, see Press Release, New York State Office of Attorney General, A.G. Schneiderman Announces Bust Of Multi-County Sex Trafficking Ring in Central New York (Oct. 15, 2013), www.ag.ny.gov/press-release/ag-schneiderman-announces-bust-multi-county-sex-trafficking-ring-central-new-york; Lauren Lindstrom, *2 Sentenced for Forced-Labor Trafficking in Ohio*, THE BLADE (April 12, 2016, 7:25 AM), www.toledoblade.com/Courts/2016/04/12/2-sentenced-for-forced-labor-trafficking-in-Ohio.html.

⁶⁴ See Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 507–09 (2016); see also Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341, 389–90 (2014).

⁶⁵ CHARLES DOYLE, CONG. RESEARCH SERV., R40190, THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008

“[T]he courts of the United States have extra-territorial jurisdiction over any offense . . . [of peonage, enticement into slavery, sale into involuntary servitude, forced labor, labor trafficking, and trafficking of children] if . . . an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.”⁶⁶

In addition to the statutory text indicating the extraterritorial reach of the statute, Congress stated prior to the Amendment’s passage that the Amendment was intended to reach foreign nationals and extraterritorial conduct.⁶⁷ In proposing a first iteration of the Amendment, Senator Durbin, one of the co-sponsors of the bill, declared the purpose of the Amendment was to give “the U.S. Government [the ability] to go after human traffickers who are present in the United States, regardless of whether their heinous acts took place in this country or elsewhere.”⁶⁸

After the Amendment passed Congress, Senator Durbin stated that the Amendment “makes an important statement about this nation’s intolerance for human rights abuses *wherever they occur*.”⁶⁹ Concerned with the specter of “a notorious trafficker from a foreign country,” even one “who has never been alleged to have done anything in the United States” living in the United States,⁷⁰ Congress hoped the broad extraterritorial reach of the Amendment would deliver the message to the traffickers: “You cannot come to the United States and use us as a zone of impunity and as a safe haven for your ill-gotten gains.”⁷¹

In hearings, Congress considered that such extension of jurisdiction could be justified, and consistent with international law, under the principle of universal jurisdiction.⁷² In an attempt

(P.L. 110-457): CRIMINAL LAW PROVISIONS 12 (2009) (“The precise scope of Section 1596 may be open to question. It permits prosecution in the United States of an overseas violation . . . when the offender is later found or brought to the United States.”).

⁶⁶ 18 U.S.C. § 1596(a)(2) (2012).

⁶⁷ With such “clear indication of extraterritoriality,” the statute overcomes the strong judicial presumption against extraterritoriality, required under *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 118 (2013) (quoting *Morrison v. Nat’l Austl. Bank LTD.*, 561 U.S. 247, 265 (2010)).

⁶⁸ 154 CONG. REC. S10,389 (daily ed. Oct. 1, 2008) (statement of Sen. Durbin).

⁶⁹ *Id.* at S10,937 (emphasis added).

⁷⁰ *Legal Options*, *supra* note 10, at 26 (statement of Sen. Durbin).

⁷¹ 154 CONG. REC. S10,389 (daily ed. Oct. 1, 2008) (statement of Sen. Durbin).

⁷² *Legal Options*, *supra* note 10, at 25–26; *International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery: Hearing before the Comm. on*

to place human trafficking within the framework of those globally condemned crimes that enjoy universal jurisdiction,⁷³ various witnesses testified that trafficking potentially could be considered a crime against humanity, a form of slavery, or a form of torture.⁷⁴ Emphasizing the heinousness of the crime, one witness called for universal jurisdiction as a “forward-looking measure” to punish traffickers worldwide.⁷⁵

That aspirational goal of embracing universal jurisdiction for human trafficking and the threat that the United States could become a “safe haven” for foreign traffickers ultimately carried the Amendment to its passage.⁷⁶

B. The Eleventh Circuit’s Analysis in United States v. Baston

The United States Court of Appeals for the Eleventh Circuit was the first court to consider whether the Amendment was a permissible exercise of congressional power and concluded in *United States v. Baston* that, under the foreign commerce clause, it was.⁷⁷ Declining to “demarcate the outer bounds of the Foreign Commerce Clause,” the court stated that “the Foreign Commerce Clause includes at least the power to regulate . . . activities that have a ‘substantial effect’ on commerce between the United States and other countries.”⁷⁸ As human trafficking “is ‘part of an economic ‘class of activities’ that have a substantial effect

Foreign Affairs, 110th Cong. 44 (2007) [hereinafter *International Trafficking*] (statement of Rev. Msgr. Franklyn M. Casale).

⁷³ Piracy, war crimes, slavery, genocide, torture, and crimes against humanity are generally accepted as crimes over which states may exercise universal jurisdiction. See *infra* Section II.C.

⁷⁴ *Legal Options*, *supra* note 10, at 24–26; *International Trafficking*, *supra* note 72, at 25, 42, 44, 63; *Combating Modern Slavery*, *supra* note 24, at 76; *Enhancing the Global Fight to End Human Trafficking: Briefing and Hearing before the Comm. on Int’l Relations*, 109th Cong. 5, 20 (2006).

⁷⁵ *International Trafficking*, *supra* note 72, at 44 (statement of Rev. Msgr. Franklyn M. Casale) (“Such an exercise of universal jurisdiction via federal statute could reach significant trafficking gang activity overseas, which has not yet had . . . an effect on U.S. soil or does not yet involve U.S. citizen perpetrators or victims.”).

⁷⁶ *Legal Options*, *supra* note 10, at 26.

⁷⁷ 818 F.3d 651, 668 (11th Cir. 2016), *cert. denied*, 2017 WL 866364 (Mar. 6, 2017).

⁷⁸ *Id.* (quoting *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005)).

on . . . commerce' between the United States and other countries," Congress acted within its power when enacting the Amendment.⁷⁹

Next, the court turned to the due process issue. Baston, a Jamaican national, trafficked women around the globe, traveling to as far-flung reaches as Russia, Australia, and Brazil to meet and recruit victims.⁸⁰ For his exploits, he used Florida as a home base, where he lived illegally.⁸¹ When trafficking victims abroad, he had them wire their money to his Florida bank account.⁸² Some victims he even trafficked in Florida.⁸³ Under this "legion" of contacts with the United States, the court found it "neither arbitrary nor fundamentally unfair to exercise extraterritorial jurisdiction over Baston."⁸⁴

In its due process analysis, the court further reasoned that exercising jurisdiction over the defendant was permissible because it was "consistent" with the protective principle of international law.⁸⁵ The court stated that trafficking threatens national security through communicable diseases and criminal enterprises that "destabilize other countries," "fund terrorist groups," and "smuggle drugs, weapons, and terrorists into the United States."⁸⁶ In this discussion of the protective principle, the court also stated that Congress did not offend international law because the international community condemns the crime.⁸⁷ Noting the many signatories to the the Palermo Protocol, the court reasoned that global condemnation of trafficking justified regulation of the crime.⁸⁸

⁷⁹ *Id.* (quoting *Raich*, 545 U.S. at 17). This analysis is consistent with other courts' analyses of Congress' broad foreign commerce power, for example, to regulate nationals who commit acts of sexual abuse in foreign countries. See 18 U.S.C.A. § 2423(c) (West 2014); *United States v. Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006); *United States v. Pendleton*, 658 F.3d 299, 308, 311 n.7 (3d Cir. 2011); *United States v. Bianchi*, 386 F. App'x 156, 161–62 (3d Cir. 2010). This Note will not address the foreign commerce clause question further.

⁸⁰ *Baston*, 818 F.3d at 657.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 658.

⁸⁴ *Id.* at 669.

⁸⁵ *Id.* at 670.

⁸⁶ *Id.* at 670–71.

⁸⁷ *Id.* at 670.

⁸⁸ *Id.*

However, the *Boston* court was incorrect in its analysis of nexus and in its application of the protective principle, as neither nexus nor the protective principle applies in this case.⁸⁹

C. *The International Law Considerations of Prescriptive Jurisdiction*

International law⁹⁰ traditionally places limitations on a legislature's ability to prescribe extraterritorial laws.⁹¹ These limits dictate that, to be valid, an extraterritorial statute must comport with at least one of five principles: (1) territoriality, (2) nationality, (3) passive personality, (4) protective, or (5) universality.⁹²

Under the territoriality principle, a nation may regulate conduct that takes place in its territory, as well as the status of people within its borders.⁹³ Under the nationality principle, a nation may regulate the conduct of its nationals, whether they are within or outside the country.⁹⁴ Under the passive personality principle, a nation may regulate conduct where the victim of the offense is a national.⁹⁵ None of these first three principles are implicated in the subsection of the Amendment at issue,⁹⁶ as "foreign-cubed" scenarios do not occur on United States territory, do not concern American defendants, and do not involve harm to United States nationals.⁹⁷

⁸⁹ See *infra* Sections II.C, II.E.

⁹⁰ See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . .").

⁹¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (AM. LAW INST. 1987); see also Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323–24.

⁹² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 cmts. a–k, 404 (AM. LAW INST. 1987); Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 330 (2012).

⁹³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) cmts. c, d (AM. LAW INST. 1987).

⁹⁴ *Id.* § 402(2); see, e.g., 18 U.S.C.A § 2423(c) (West 2014) (extraterritorial jurisdiction for illicit sexual conduct by U.S. nationals committed in foreign jurisdictions).

⁹⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (AM. LAW INST. 1987).

⁹⁶ See 18 U.S.C. § 1596(a)(2) (2012).

⁹⁷ Bradley, *supra* note 91, at 323.

However, the *Boston* court and Congress raised the protective principle and universality, respectively, as bases for extending jurisdiction for human trafficking crimes in foreign-cubed cases.⁹⁸ Under the protective principle, a country may enact a law that reaches foreign-cubed scenarios when the defendant's conduct violates national security or a "limited class of other state interests."⁹⁹ The protective principle was primarily designed to address government obstruction and fraud,¹⁰⁰ allowing grants of jurisdiction over a foreign citizen for such crimes as counterfeiting official documents, espionage, and violations of immigration or customs laws.¹⁰¹ However, the principle traditionally is not extended to a wide class of international health and safety threats, such as communicable diseases.¹⁰²

The universality principle allows a state to exercise jurisdiction over an individual who commits an offense "recognized by the community of nations as of universal concern," even where no other recognized basis for jurisdiction exists.¹⁰³ Universal jurisdiction is based on the premise that people who commit universally condemned crimes are *hostis humani generis*, "enemies of all mankind."¹⁰⁴ Their offenses are so heinous as to justify any nation's regulation of them without regard for other jurisdictional limits.¹⁰⁵ In prosecuting these crimes, nations act "as organ and agent of the international community."¹⁰⁶

⁹⁸ See *supra* Sections II.A, II.B.

⁹⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (AM. LAW INST. 1987); see, e.g., 18 U.S.C. § 1751 (2012) (extraterritorial jurisdiction for harm to the President); 18 U.S.C. § 1114 (2012) (extraterritorial jurisdiction for harm to officers and employees of the United States).

¹⁰⁰ Robert Staal, *International Conflict of Laws—The Protective Principle in Extraterritorial Criminal Jurisdiction*, 15 U. MIAMI L. REV. 428, 429–30 (1961); *United States v. Bowman*, 260 U.S. 94, 98 (1922) ("[T]he right of the government to defend itself against obstruction, or fraud wherever perpetrated . . .").

¹⁰¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. f (AM. LAW INST. 1987); see, e.g., *United States v. Pizzarusso*, 388 F.2d 8, 9–10 (2d Cir. 1968) (holding extraterritorial jurisdiction justified where defendant made false statements to a consular official in applying for a visa).

¹⁰² See Staal, *supra* note 100, at 429–30; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. f (AM. LAW INST. 1987).

¹⁰³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987).

¹⁰⁴ Bradley, *supra* note 91, at 324.

¹⁰⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987).

As universal jurisdiction is an expansive grant of power, it is not widely given: States agree only on a limited set of crimes that enjoy universal jurisdiction.¹⁰⁷ Generally, countries may exercise universal jurisdiction in cases of piracy, war crimes, slavery, genocide, torture, and crimes against humanity.¹⁰⁸

Universal offenses also must have “fairly precise definitions.”¹⁰⁹ A lack of definitional rigor and clarity can prevent the application of universal jurisdiction for even serious offenses, such as terrorism¹¹⁰ and human trafficking.¹¹¹

D. *The “Extradite or Prosecute” Principle of International Conventions*

However, beyond the principles of prescriptive jurisdiction, the international community agrees that countries should establish regulations and jurisdiction to enable them to “extradite or prosecute” in cases of human trafficking.¹¹² The extradite or prosecute principle provides that where a country has jurisdiction over an offender based on presence and refuses to extradite the defendant, often but not necessarily on the basis

¹⁰⁶ CrimA 336/61 Attorney-General of Israel v. Eichmann, 36 I.L.R. 277, 300 (1962) (Isr.).

¹⁰⁷ United States v. Yousef, 327 F.3d 56, 103–04 (2d Cir. 2003).

¹⁰⁸ See AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD 1 (2011); see, e.g., Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (“[T]he torturer has become like the pirate and slave trader before him *hostis humani generis* . . .”); 18 U.S.C. § 2340A(b) (2012) (universal jurisdiction for torture); 18 U.S.C. § 2441(a) (2012) (universal jurisdiction for war crimes).

¹⁰⁹ *Yousef*, 327 F.3d at 106.

¹¹⁰ See *id.*

¹¹¹ See GALLAGHER, *supra* note 48, at 214–17; *infra* Section III.A.

¹¹² See Explanatory Report to the Council of Europe Convention on Action Against Trafficking in Human Beings art. 31, para. 332, 2005, C.E.T.S. No. 197 [hereinafter Explanatory Report]; see also Council of Europe Convention on Action Against Trafficking in Human Beings art. 31, para. 3, May 16, 2005, C.E.T.S. No. 197 [hereinafter Council of Europe Convention]; South Asian Association for Regional Cooperation [SAARC], Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution art. VII, para. 4, Jan. 2, 2002, <http://www.lawcommission.gov.np/en/documents/2015/08/saarc-convention-on-preventing-and-combating-trafficking-in-women-and-children-for-prostitution.pdf> [hereinafter SAARC Convention]; G.A. Res. 55/25, annex, United Nations Convention Against Transnational Organized Crime art. 15, paras. 3–5, art. 16 (Nov. 15, 2000) [hereinafter UNTOC]; Ass’n of Southeast Asian Nations [ASEAN], ASEAN HANDBOOK ON INTERNATIONAL LEGAL COOPERATION IN TRAFFICKING IN PERSONS CASES 20–21, 109 (2010) [hereinafter ASEAN HANDBOOK].

of nationality, the country must prosecute that individual.¹¹³ The principle empowers countries in the fight against impunity for serious international crimes, enables them to pass jurisdictional statutes to prosecute foreign nationals based on presence alone, creates an obligation to cooperate in ending that impunity, and elevates extradition as one means of doing so.¹¹⁴

While “extradite or prosecute” is not a rule of customary international law,¹¹⁵ in situations of human trafficking, it has become widely accepted as a way to ensure traffickers do not escape prosecution.¹¹⁶ The United Nations Convention On Transnational Organized Crime (“UNTOC”)—the established legal framework for combating international human trafficking—in conjunction with the Palermo Protocol specifically mandates that countries “extradite or prosecute” in cases of human trafficking.¹¹⁷ The UNTOC prescribes that, to fulfill this obligation, countries “seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition” and enact jurisdictional statutes that would allow them to prosecute the crime.¹¹⁸

U.S. courts also recognize the “extradite or prosecute” principle and agree that jurisdiction is appropriate over foreign defendants in extraterritorial criminal cases where an international convention expressly states that member parties to the convention must extradite or prosecute the offender.¹¹⁹ The United States Court of Appeals for the Second Circuit in *United*

¹¹³ Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 145–46, 155 (2014).

¹¹⁴ *Id.* at 140–41.

¹¹⁵ *Id.* at 161.

¹¹⁶ See UNTOC, *supra* note 112, at art. 15, paras. 3–5, art. 16; Council of Europe Convention, *supra* note 112, at art. 31, para. 3; SAARC Convention, *supra* note 112, at art. VII, para. 4; ASEAN HANDBOOK, *supra* note 112, at 20–21, 109.

¹¹⁷ See UNTOC, *supra* note 112, at art. 15, paras. 3–4; Palermo Protocol, *supra* note 49, at art. 1.

¹¹⁸ UNTOC, *supra* note 112, at art. 15, para. 4, art. 16, para. 17.

¹¹⁹ *United States v. Yousef*, 327 F.3d 56, 95–96 (2d Cir. 2003) (discussing the “extradite or prosecute” principle under the Montreal Convention, which provides that members to the convention may extradite or prosecute terrorists for crimes on or against aircrafts); *United States v. Shi*, 525 F.3d 709, 723 n.5 (9th Cir. 2008) (discussing the “extradite or prosecute” principle under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation); *United States v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013) (applying the Ninth Circuit’s reasoning from *Shi* in its discussion of the International Convention Against the Taking of Hostages).

States v. Yousef noted that the “extradite or prosecute” principle “creates a basis for the assertion of jurisdiction that is moored in a process of formal lawmaking and that is binding only on the States that accede to it.”¹²⁰ The *Yousef* court clarified that jurisdiction under the “extradite or prosecute” principle is “not a species of universal jurisdiction, but a jurisdictional agreement among contracting States to extradite or prosecute offenders who commit the acts proscribed by the treaty”¹²¹

E. The Domestic Law Requirements of Due Process

The principles of international law discussed above are “useful as a rough guide” in determining whether application of an extraterritorial statute violates the due process clause of the Fifth Amendment.¹²² The existence of jurisdictional agreements, for instance, regarding the prosecution of widely condemned crimes can serve as “notice” to foreign defendants that their acts may be subject to prosecution where they are found.¹²³

The “ultimate question” of a due process analysis is whether the assertion of jurisdiction is arbitrary or fundamentally unfair.¹²⁴ The concept of “notice” provides that it is not arbitrary or fundamentally unfair to hold a defendant criminally liable where he could reasonably understand his conduct to be proscribed.¹²⁵ Although the United States Supreme Court has not addressed the issue, several circuits hold that a defendant

¹²⁰ *Yousef*, 327 F.3d at 95–96. (“[W]here an individual who has committed an offense proscribed by the treaty is present in a State party to the treaty, the State is obliged either to prosecute the offender (even if the offense was extraterritorial) or to extradite the offender for prosecution by another State party to the convention.”).

¹²¹ *Id.* at 96 (emphasis added); see also *Shi*, 525 F.3d at 723 n.5 (agreeing that an international convention does not create universal jurisdiction but, rather, provides for universal punishment of the offenses by the parties to the convention); *Ali*, 718 F.3d at 944.

¹²² *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995) (quoting *United States v. Davis*, 905 F.2d 245, 249 n.2 (9th Cir. 1990)).

¹²³ *Ali*, 718 F.3d at 944–45; see also Jennifer K. Elsea, *Substantive Due Process and U.S. Jurisdiction over Foreign Nationals*, 82 *FORDHAM L. REV.* 2077, 2094–96 (2014).

¹²⁴ *Ali*, 718 F.3d at 944 (quoting *United States v. Juda*, 46 F.3d 961, 967 (9th Cir. 1995)). In answering this question, courts prosecuting extraterritorial crimes have rejected drawing analogies to personal jurisdiction in civil cases. See *id.* (stating “the law of personal jurisdiction is simply inapposite” in a criminal case of hostage taking); *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002) (rejecting analogies to personal jurisdiction as “inapposite” in a case involving drug trafficking).

¹²⁵ See *Yousef*, 327 F.3d at 96; *Shi*, 525 F.3d at 723; *Ali*, 718 F.3d at 944.

could reasonably understand his conduct to be proscribed where there is an international convention for a “generally condemned” crime that states that the conduct will be prosecuted by “any state signatory.”¹²⁶ In such cases, the defendant’s country acceding to the international convention provides “global notice” to a defendant that his conduct is subject to the jurisdiction of any state party where he is found.¹²⁷ Thus, where the United States has enacted a jurisdictional statute over a foreign defendant for a widely condemned act under an international convention, application of that statute over a national of a party to the convention does not offend due process.¹²⁸

In cases of widely condemned crimes, this principle of “global notice” has further been extended to defendants who are nationals of countries that are not even parties to the relevant international convention.¹²⁹ While it is arguable that nexus could be required in cases that involve defendants who are nationals of countries that have not acceded to the international trafficking conventions, several circuits in the United States have not held this to be the rule.¹³⁰ Rather, the “generally condemned” status of crimes under certain international conventions, such as anti-trafficking conventions, may suffice to provide notice to the global community that these acts are proscribed and foreign defendants may be prosecuted by a state signatory of the relevant international convention.¹³¹

¹²⁶ *Ali*, 718 F.3d at 944; *see also* *United States v. Knowles*, 197 F. Supp. 3d 143, 163–64 (D.D.C 2016) (holding no violation of due process where the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances gave the defendants sufficient notice they could be subject to prosecution by the United States, a signatory of the treaty, for possession with intent to distribute controlled substances); *United States v. Murillo*, 826 F.3d 152, 157–58 (4th Cir. 2016) (holding no violation of due process where the Internationally Protected Persons Convention gave the defendant sufficient notice he could be subject to prosecution by the United States, a signatory of the treaty, for extraterritorial offences against protected persons).

¹²⁷ *Ali*, 718 F.3d at 944 (rejecting “nexus” as an inviolable proxy for due process).

¹²⁸ *Id.*; *see also* *Perez-Oviedo*, 281 F.3d at 403.

¹²⁹ *See Ali*, 718 F.3d at 944–45; *Elsea*, *supra* note 123, at 2095–96.

¹³⁰ *See Ali*, 718 F.3d at 944–45; *Murillo*, 826 F.3d at 157–58; *Elsea*, *supra* note 123, at 2096.

¹³¹ *See Ali*, 718 F.3d at 944–45; *Murillo*, 826 F.3d at 157–58; *Elsea*, *supra* note 123, at 2096.

III. APPLYING THE AMENDMENT IN ACCORD WITH INTERNATIONAL LAW AND DUE PROCESS

The Amendment is not justified under the traditional bases of prescriptive jurisdiction, particularly the protective principle or universal jurisdiction. However, the emerging practice of “extradite or prosecute” provides an alternative avenue by which the Amendment can be justified under international law. Furthermore, due process is not offended where the defendant has sufficient global notice, under the Palermo Protocol and the UNTOC, that his conduct would subject him to the jurisdiction of the country where he is found.

A. *The Violation of the Jurisdictional Limits of International Law*

Congress’ expansive grant of extraterritorial jurisdiction for human trafficking through the Amendment violates the five international law limits on prescriptive jurisdiction.¹³²

Although the Eleventh Circuit in the *Baston* case applied the protective principle to justify the broad scope of the statute,¹³³ it did so incorrectly. Applying the protective principle to the crime of human trafficking was incorrect because, while communicable diseases and organized crime are grave threats, they are not threats to which the protective principle applies. The protective principle concerns threats directed against the security of the United States and a “limited class” of other threats, including counterfeiting U.S. currency or espionage.¹³⁴

To apply the protective principle in the context of human trafficking that occurs in foreign jurisdictions would be an uncharacteristic expansion of the protective principle. Under such an expansion, nations may extend jurisdiction for any number of crimes in other territories that fuel terrorism, disease, crime, and violence. While the threat of spreading violence, crime, and disease are real concerns, they are not those concerns that specifically implicate the protective principle and cannot be so used to justify Congress’ grant of extraterritorial jurisdiction under the Amendment.

¹³² See *supra* Section II.C.

¹³³ *United States v. Baston*, 818 F.3d 651, 670 (11th Cir. 2016).

¹³⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (AM. LAW INST. 1987); see also *supra* Part II.C.

Second, trafficking is not yet a crime where universal jurisdiction applies.¹³⁵ The two main reasons for this limitation are (1) the wide range of criminal behavior that the definition of “human trafficking” encompasses and (2) the international preference for extradition and cooperation in the prosecution of human trafficking crimes, in lieu of universal jurisdiction. This second point will be addressed in detail in subsection B concerning the correct application of the “extradite or prosecute” principle.

Human trafficking is a powerfully charged term that encompasses a range of criminal behavior and a multitude of circumstances. These situations range from the forced sexual enslavement of women and girls as part of a violent war¹³⁶ to the experience of young girls who have sex with fishermen for the family’s daily catch of fish.¹³⁷ Human trafficking describes, equally, families held in debt bondage at brick kilns¹³⁸ and a homeless teenager who returns repeatedly to a man who prostitutes her.¹³⁹ By its nature, human trafficking cannot be defined narrowly.¹⁴⁰ As a result of the crime’s definitional expanse,¹⁴¹ then, human trafficking does not fit neatly into any of the established categories of crime that have universal jurisdiction¹⁴² or into its own category of crime with universal jurisdiction.¹⁴³

¹³⁵ See GALLAGHER, *supra* note 48, at 214–17, 257–58; *supra* Section II.C.

¹³⁶ See Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 542 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), *aff’d*, IT-96-23 & IT-96-23/1-A, Judgement, ¶ 124 (June 12, 2002).

¹³⁷ See James Forole Jarso, *Implementing the Children’s Rights Agenda in Kenya: Taking Stock of the Progress, Hurdles and Prospects*, 27 AM. U. INT’L L. REV. 673, 708–09 (2012) (describing child trafficking practice of “fish-for-sex”).

¹³⁸ KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 152 (rev. ed. 2012).

¹³⁹ See Florrie Burke, *Innovations in the Fight Against Human Trafficking: Advocates’ Perspectives and Proposals*, 60 N.Y.L. SCH. L. REV. 615, 616–17 (2015/2016).

¹⁴⁰ See Harmen van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts*, 13 CHINESE J. INT’L L. 297, 314 (2014).

¹⁴¹ Chuang, *supra* note 47, at 609 (“[T]he anti-trafficking field is a strikingly ‘rigor-free zone’ when it comes to defining the concept’s legal parameters.”).

¹⁴² Piracy, war crimes, slavery, genocide, torture, and crimes against humanity. *Supra* Section II.C; see also Tom Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, 54 INT’L & COMP. L.Q. 445, 453 (2005) (“[N]ot all instances of trafficking amount to a crime against humanity.”).

B. Appropriately Applying the “Extradite or Prosecute” Principle

The Amendment was enacted to provide broad jurisdiction, consistent with the United States’ obligations to “extradite or prosecute” under the Palermo Protocol and the UNTOC. However, to be consistent with international anti-trafficking conventions, the Amendment cannot be applied unilaterally without consideration of the interests of other countries.

Countries are in agreement that effective prosecution of human trafficking requires mutual cooperation and assistance.¹⁴⁴ Congress, in passing the original TVPA, stated that the United States must work “to promote cooperation among countries linked together by international trafficking routes.”¹⁴⁵ The European Union, in its anti-trafficking convention, expressly requires consultation between nations in cases of human trafficking where more than one country has jurisdiction.¹⁴⁶ Emphasizing international “judicial cooperation in the criminal sphere,” Europe also sets forth standards for cooperation in the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.¹⁴⁷

Embracing a similar mandate, the South Asian Association for Regional Cooperation (“SAARC”) anti-trafficking convention calls for both extradition and the “widest measure” of

¹⁴³ See Miriam Cohen, *The Analogy Between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction*, 16 BUFF. HUM. RTS. L. REV. 201, 206–08 (2010) (arguing for universal jurisdiction for human trafficking “as a self-standing international criminal enterprise” when traffickers operate “in concert across nations”).

¹⁴⁴ 22 U.S.C.A. §§ 7101(b)(23)-(24), 7105(a)(2) (West 2014); Palermo Protocol, *supra* note 49, at arts. 9–10; Council of Europe Convention, *supra* note 112, at art. 1, para. 1(c), art. 40, para. 2; G.A. Res. 54/263, annex II, art. 6 (March 16, 2001); *Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children*, Part IV, O.A.U. DOC. EX.CL/313 (X) (Nov. 23, 2006) [hereinafter *Ouagadougou Action Plan*]; Org. of American States [OAS], *Fighting the Crime of Trafficking in Persons, Especially Women, Adolescents, and Children*, para. 4, AG/RES. 2019 (XXIV-O/04) (June 8, 2004); Int’l Labor Org. [ILO], *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, art. 8, No. 189 (June 17, 1999); European Union, *Framework Decision on Combating Trafficking in Human Beings*, paras. 2, 4, 7, 9, 2002/629/JHA (July 19, 2002); Ass’n of Southeast Asian Nations [ASEAN], PROGRESS REPORT ON CRIMINAL JUSTICE RESPONSES TO TRAFFICKING IN PERSONS 131–34 (July 2011).

¹⁴⁵ 22 U.S.C. § 7101(b)(24) (2012).

¹⁴⁶ Explanatory Report, *supra* note 112, at para. 333.

¹⁴⁷ *Id.* at paras. 335–36. UNTOC also requires the fullest possible mutual assistance between countries in cases where the defendant is not extradited. UNTOC, *supra* note 112, at art. 18(1).

international cooperation in human trafficking cases.¹⁴⁸ The Association of Southeast Asian Nations (“ASEAN”) encourages states to establish joint investigation units for human trafficking and enact laws allowing extradition and mutual legal assistance.¹⁴⁹ The African Union, in a joint action plan with the European Union, calls for its fifty-four member states¹⁵⁰ to enhance “co-ordination and co-operation” on human trafficking, including establishment of joint investigation units and extradition laws.¹⁵¹ Arab nations, likewise, now focus on regional and international frameworks to prosecute and combat human trafficking.¹⁵² The Organization of American States (“OAS”) emphasizes the necessity of “a multilateral response from governments.”¹⁵³ To encourage such efforts, the OAS created an Anti-TIP Coordinator position to oversee regional efforts against trafficking.¹⁵⁴

Beyond encouraging cooperation, some countries have expressly condemned unilateral action by nations in the fight against human trafficking. The Community of Latin American and Caribbean States (“CELAC”), which consists of thirty-three countries in Latin America and the Caribbean,¹⁵⁵ issued a powerful declaration in 2016 that rejected unilateral acts by

¹⁴⁸ SAARC Convention, *supra* note 112, at arts. VI, VII; *see also* South Asian Association for Regional Cooperation, [SAARC] SAARC Convention on Mutual Assistance in Criminal Matters, Aug. 3, 2008.

¹⁴⁹ ASEAN HANDBOOK, *supra* note 112, at 20–21.

¹⁵⁰ *Member State Profiles*, AFRICAN UNION, <https://www.au.int/web/en/member-states> (last visited Sept. 29, 2017).

¹⁵¹ *Ouagadougou Action Plan*, *supra* note 144, at Parts III, IV.

¹⁵² Dr. Mohamed Y. Mattar, Johns Hopkins University, *The Right of Victims of Trafficking to Remedies: An Arab Regional Approach at the United Nations Regional Consultation on the Right to an Effective Remedy for Trafficked Persons 1–2* (Jan. 9, 2012), www.ohchr.org/Documents/Issues/Trafficking/Consultation/ConsultationEffectiveRemedy/Fifth/5thConsultationsM.Mattar.pdf; U.N. Office on Drugs and Crime, *Regional/Subregional*, www.unodc.org/middleeastandnorthafrica/en/resources/regional-sub-regional.html (last visited Sept. 29, 2017); U.N. Office on Drugs and Crime, *Arab Initiative for Building National Capacities for Combating Human Trafficking*, www.unodc.org/unodc/en/human-trafficking/2010/arab-initiative.html (last visited Sept. 29, 2017).

¹⁵³ Org. of American States [OAS], *Fighting the Crime of Trafficking in Persons, Especially Women, Adolescents, and Children*, paras. 2, 4, AG/RES. 1948 (XXXIII-O/03) (June 10, 2003).

¹⁵⁴ *Anti-Trafficking in Persons Section: About Us*, ORG. OF AMERICAN STATES, http://www.oas.org/dsp/english/cpo_trata_quienes.asp (last visited Sept. 29, 2017).

¹⁵⁵ COMMUNITY OF LATIN AMERICAN AND CARIBBEAN STATES, www.celacinternational.org (last visited Sept. 29, 2017).

other countries in the fight against human trafficking, condemned any attempts to violate other countries' territorial integrity and national sovereignty, and stressed the importance of international cooperation.¹⁵⁶ Emphasizing "transparency, solidarity, complementarity and cooperation," the Quito Declaration asserts anew that effective strategies to combat human trafficking require mutual respect, coordination, and harmony of human trafficking laws,¹⁵⁷ a sentiment embraced near-universally.

Thus, while the obligation to "extradite or prosecute" is widely recognized, this obligation operates hand-in-hand with an obligation to cooperate in anti-trafficking efforts.¹⁵⁸

In foreign-cubed cases of trafficking, relying on extradition and mutual legal assistance policies enables the United States to cooperate with the foreign country that has proper jurisdiction over the defendant and avoids the unilateral exercise of jurisdiction over a defendant the United States otherwise has no firm basis for jurisdiction. Both the jurisdiction where the crime was committed and the jurisdiction where the defendant is a national have a strong basis and interest under international law for prosecuting the offense.

Extradition is possible where the United States has an extradition treaty with the appropriate jurisdiction, and the United States has extradition treaties with two-thirds of the world's nations.¹⁵⁹ Given the often-regional nature of trafficking, it is important to note that the United States has extradition treaties with its closest neighbors, Canada and Mexico, as well as

¹⁵⁶ Community of Latin American and Caribbean States [CELAC], *Political Declaration of Quito—Middle of the World*, at paras. 7, 10, 59 (Jan. 27, 2016).

¹⁵⁷ *Id.* at para. 7.

¹⁵⁸ Anne Gallagher, *A Shadow Report on Human Trafficking in Lao PDR: The U.S. Approach v. International Law*, 15 *ASIAN & PACIFIC MIGRATION J.* 525, 529 (2006).

¹⁵⁹ CHARLES DOYLE, CONG. RES. SERV., RS22497, *EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 29* (2012). Extradition was also proposed in early congressional hearings on the Amendment, as a viable alternative to extending jurisdiction in the first place. When asked if the United States should expand extraterritorial jurisdiction for human trafficking, Deputy Assistant Attorney General Becker responded, "Senator . . . we could, of course, extradite that individual to the foreign country." *Legal Options*, *supra* note 10, at 26–27.

with all the countries of South and Latin America.¹⁶⁰ In addition, all of these countries have ratified the Palermo Protocol and the UNTOC.¹⁶¹

However, cases may arise where the United States has no extradition treaty with a country. In those instances, impunity is not guaranteed. The United States may prosecute the crime pursuant to its “extradite or prosecute” obligations. In those cases, every attempt should still be made to work with the foreign jurisdictions concerned, if possible, through mutual legal assistance.¹⁶² The United States has over sixty mutual legal assistance treaties with other countries,¹⁶³ and although it can prolong the legal process, mutual legal assistance does not unconstitutionally lengthen trial and can be essential to building a successful case.¹⁶⁴

Extradition and mutual legal assistance serve the purpose of honoring the efforts of other countries to combat human trafficking, rather than frustrating them, and helps prevent individual rights concerns from arising in an extraterritorial prosecution.¹⁶⁵ In addition, cooperation in extraterritorial prosecution can be “win-win situations” for all governments involved.¹⁶⁶ Especially as the United States promulgates an extensive monitoring and sanctioning regime that rewards efforts to criminalize and prosecute human trafficking, countries have an interest and desire in prosecuting notorious traffickers.¹⁶⁷ Effectively cooperating with those countries on the prosecution of

¹⁶⁰ 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, 2016, www.state.gov/documents/organization/267489.pdf.

¹⁶¹ See *Ratification Status*, *supra* note 19; *Ratification Status: United Nations Convention Against Transnational Organized Crime*, U.N. DOC. A/55/383 (Nov. 15, 2000) [hereinafter *U.N. Convention Against Transnational Organized Crime*].

¹⁶² Anne Gallagher & Paul Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line*, 18 INT'L CRIM. JUST. REV. 318, 334 (2008).

¹⁶³ DOYLE, *supra* note 159, at 22.

¹⁶⁴ See Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1290 (2011).

¹⁶⁵ See Danielle Ireland-Piper, *Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*, 9 UTRECHT L. REV. 68, 79 (2013).

¹⁶⁶ Margaret K. Lewis, *When Foreign is Criminal*, 55 VA. J. INT'L L. 625, 636–37 (2015).

¹⁶⁷ Anne T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the U.S. Trafficking in Persons Reports*, 12 HUM. RTS. REV. 381, 383–84 (2011).

extraterritorial human trafficking cases, thus, also serves to boost the reputation of foreign countries in the fight against trafficking.

C. Ensuring the Protection of the Rights of Defendants

While Congress sought to fight impunity in its enactment of the Amendment, the prosecution of traffickers should also never be “at the expense of the international rules governing the administration of justice.”¹⁶⁸ Even a global “war against trafficking” does not grant countries the untrammelled right to violate the rights of defendants.¹⁶⁹ Ensuring the rights of defendants is necessary to preserve the integrity of the judicial process and ensure ongoing support for trafficking prosecutions.¹⁷⁰

First, the United States may pursue extraterritorial human trafficking prosecutions consistent with due process pursuant to the general condemnation of trafficking under the Palermo Protocol and the UNTOC. Few countries are not parties to the UNTOC, as ninety-five percent of the world’s countries are parties, and 170 of these countries are also parties to the Palermo Protocol.¹⁷¹ For example, Jamaica, the home country of the defendant in *United States v. Baston*, is one such country that has acceded to both the Palermo Protocol and the UNTOC.¹⁷² As Jamaica has acceded to both these conventions, it would have been sufficient in that case to state that Baston had express notice under these conventions that his conduct was proscribed, rather than apply a nexus analysis. By committing a violent and universally condemned crime for which the international community recognizes an obligation to “extradite or prosecute,” Baston could reasonably anticipate that he could be subject to the jurisdiction of the United States, where he also lived.

¹⁶⁸ GALLAGHER, *supra* note 48, at 392; *see also* Gallagher & Holmes, *supra* note 162, at 327.

¹⁶⁹ GALLAGHER, *supra* note 48, at 391.

¹⁷⁰ *Id.* at 392.

¹⁷¹ *See Ratification Status, supra* note 19; *see also U.N. Convention Against Transnational Organized Crime, supra* note 161.

¹⁷² *United States v. Baston*, 818 F.3d 651, 669–70 (11th Cir. 2016); *see U.N. Convention Against Transnational Organized Crime, supra* note 161.

Second, once before a tribunal in the United States, foreign defendants should be guaranteed procedural safeguards as a matter of adjudicative integrity.¹⁷³ Extraterritorial criminal prosecutions raise challenges for defendants, including the fact that “evidence and witnesses are certain to be abroad, but the defendant cannot use the court’s power to . . . get them in front of the jury.”¹⁷⁴ Such challenges raise “the specter of convicting the innocent.”¹⁷⁵ To avoid this possibility, one compelling safeguard that should be adopted in federal criminal extraterritorial prosecutions is that of leveraging prosecutorial power on the behalf of the defendant.¹⁷⁶ Where “[t]reaties empower prosecutors to obtain evidence internationally,” in extraterritorial federal criminal prosecutions, these same treaties might be “press[ed] . . . into service for defendants, gathering evidence abroad on their behalf.”¹⁷⁷

The goal of this practice and safeguard would be to ensure that defendants are “given roughly the same access to evidence and witnesses as the defendant would have had if . . . the defendant had acted inside the United States and sought judicial assistance with respect to the evidence and witnesses.”¹⁷⁸ These protections are arguably essential to ensuring due process in an extraterritorial criminal procedure.¹⁷⁹

Finally, the basic human rights of defendants and their rights to counsel and to a fair trial¹⁸⁰ must also be ensured and protected in all extraterritorial human trafficking prosecutions.

IV. EFFECTIVE PROSECUTION OF TRAFFICKING ON A GLOBAL SCALE

Despite its ability to assert jurisdiction and prosecute human trafficking under the “extradite and prosecute” principle and domestic law, the United States should continue its executive policy of working to build the capacity of all nations to combat

¹⁷³ Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 677–83 (2016).

¹⁷⁴ *Id.* at 628.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 677–83.

¹⁷⁷ *Id.* at 626.

¹⁷⁸ *Id.* at 677.

¹⁷⁹ *Id.* at 682–83.

¹⁸⁰ U.S. CONST. amend. VI; Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, C.E.T.S. No. 5.

human trafficking. Such capacity building includes encouraging ratification of international conventions and helping nations draft effective human trafficking laws, in addition to seeking bilateral extradition and mutual legal assistance treaties with those countries. This policy recognizes that victims around the world need redress¹⁸¹ and that all nations face difficulties in prosecuting this crime.¹⁸² In the words of an expert testifying in congressional hearings for the Amendment, “this is not the time to turn away from foreign-born victims of trafficking and focus only on U.S. citizens . . . Both are equally important and deserving of our attention.”¹⁸³

The fact that the crime is primarily perpetrated by nationals of a country against other nationals of the same country highlights the need for policies to protect the most vulnerable within the borders of all countries. Capacity building shifts the focus from United States courts as destination courts to strengthening access to criminal justice systems worldwide. Doing so helps “wounded societies to strengthen their own national justice systems in order to ensure sustainable peace and the rule of law.”¹⁸⁴

This objective is not foreign to the United States, which has long worked to combat trafficking on a global scale and sends millions of dollars in funds around the world for this purpose.¹⁸⁵ In addition to foreign aid programs, the United States, sends personnel and resources to other countries to aid in investigations and prosecutions.¹⁸⁶ For example, the U.S. Office

¹⁸¹ ANNE T. GALLAGHER, UNITED NATIONS HUMAN RIGHTS, THE RIGHT TO AN EFFECTIVE REMEDY FOR VICTIMS OF TRAFFICKING IN PERSONS: A SURVEY OF INTERNATIONAL LAW AND POLICY 13–14 (2010), www.ohchr.org/Documents/Issues/Trafficking/Bratislava_Background_paper1.pdf.

¹⁸² Gallagher, *supra* note 158, at 535 (“[S]ecuring justice for victims is a huge task for even the most sophisticated and well-resourced national criminal justice system.”).

¹⁸³ *Combatting Modern Slavery*, *supra* note 24, at 25 (statement of Florrie Burke).

¹⁸⁴ Ivan Simonovic, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses*, 29 YALE J. INT’L L. 343, 361 (2004).

¹⁸⁵ The United States is the “largest source of anti-trafficking grant funds in the world.” Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 470 (2006) (noting the United States gave out “\$82 million in anti-trafficking grants in 2004 alone”); *see also* SEELKE, *supra* note 34, at 11 (stating that in 2012, the United States gave “more than \$11 million to support anti-TIP projects in Latin America”).

¹⁸⁶ Gallagher & Holmes, *supra* note 162, at 328; DOYLE, *supra* note 159, at 24.

of Overseas Prosecutorial Development, Assistance, and Training (“OPDAT”) provided officials in Mexico and Bahamas concrete training and support to “build [their] TIP investigative and prosecutorial capacity.”¹⁸⁷

Such capacity building is the key to the success of the global anti-trafficking regime and the United States is not alone in this effort. For example, Honduras, Paraguay, ten member countries of the ASEAN, and the European Union’s Judicial Cooperation Unit have all endorsed the practice of using prosecutorial delegates to liaise with other countries in cross-border prosecutions of human trafficking cases.¹⁸⁸ More nations than ever before recognize the importance of collective action in the fight against all barriers to prosecution,¹⁸⁹ against misconceptions of the crime,¹⁹⁰ and against the criminalization of trafficking victims.¹⁹¹

A policy of capacity building is essential to ending impunity and ensuring access to justice for all victims.

CONCLUSION

Although the Amendment is not justified under any traditional bases for prescriptive jurisdiction, under its international obligations to “extradite and prosecute,” the United States was justified in the Amendment’s enactment. However, in applying this Amendment, which provides broad jurisdiction for the prosecution of foreign defendants for extraterritorial human trafficking offenses, the United States must ensure that it exercises jurisdiction in accord with both its international obligations to cooperate with other countries and with domestic due process. Under the expansive regime of international anti-trafficking conventions and through extradition, mutual legal assistance, and international capacity building, the United States can fulfill the goals of the international anti-trafficking

¹⁸⁷ SEELKE, *supra* note 34, at 11.

¹⁸⁸ Gallagher & Holmes, *supra* note 162, at 328.

¹⁸⁹ See, e.g., Gallagher, *supra* note 158, at 535.

¹⁹⁰ See Dina Francesca Haynes, *Good Intentions are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77, 82 (2008).

¹⁹¹ See Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 477–78 (2012).

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conventions, ensure that prosecution does not offend due process, and guarantee that the United States never becomes a safe haven for human traffickers.