Extraterritorial Human Trafficking Prosecutions: Eliminating Zones of Impunity Within the Limits of International Law and Due Process

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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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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"), which was subsequently reauthorized in 2003, 2005, 2008, and 2013. With each reauthorization, Congress enacted substantive amendments to the TVPA, such as adding civil remedies and strengthening criminal sanctions. With the 2008 reauthorization, Congress was particularly concerned with the impunity of traffickers. In a hearing in 2007, Congress considered the impunity of diplomats, defense contractors, and foreign traffickers. To address the last of these, Congress included a critical amendment ("Amendment") in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), which expanded extraterritorial jurisdiction for human trafficking committed outside the United States to foreign traffickers present in the United States.

However, the Amendment's broad expansion of extraterritorial jurisdiction has raised questions of prescriptive jurisdiction and due process under international and domestic law. 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. 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

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


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


*Id.*


*See 18 U.S.C. § 1596(a)(2) (2012).*

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

*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.\textsuperscript{16} The court also reasoned that the statute was a valid exercise of prescriptive jurisdiction under the protective principle\textsuperscript{17} of international law on the ground that human trafficking threatens the national security of the United States.\textsuperscript{18}

This Note argues that the \textit{Baston} 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 \textit{Baston} 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

\textsuperscript{16} \textit{Baston}, 818 F.3d at 668–69.
\textsuperscript{17} See infra Section II.C.
\textsuperscript{18} \textit{Baston}, 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

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.
22 Id. § 7102(9).
 Trafficking is primarily an economic crime. Annually, it accrues an estimated $150 billion in profits through the exploitation of over twenty million people worldwide. Sex trafficking is the most identified form of trafficking, due to a heightened focus on sexual exploitation. Nevertheless, labor trafficking has been found in most industries in the United States, including hospitality, construction, and agriculture.

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 . . . .” Traffickers use promises of good work and good pay, seduction, and other tactics to manipulate the vulnerabilities of victims. In the United States, risk factors for youth trafficking include homelessness, child welfare involvement, 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. . . . .”).


28 See id.


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.”).

supportive adults in a youth’s life. 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.

Women and children are identified predominately as victims of human trafficking, but the United States Department of State has acknowledged that male victims, especially male victims of sex trafficking, are often overlooked or misidentified. Men are more often identified as victims in situations of labor trafficking. Racial minorities also constitute the majority of identified human trafficking victims. 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. Seventy-four percent of sex trafficking victims were black, Hispanic, Asian, or “other.” The racial demographics of the crime refute antiquated conceptions, codified in early conventions, of human trafficking primarily affecting white populations.

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33 HOMELESSNESS, supra note 30, at 6.
39 Human Trafficking, supra note 38.
40 Id.
As for those who engage in the trafficking of victims, most traffickers are male, are “nationals of the same country as the victims,” and include family members and friends of the victims. Notably, trafficking that occurs at the hands of intimate partners shares features of domestic violence, rendering identification of victims an especially complex task.

Finally, although human trafficking is commonly described as “slavery,” not all forms of human trafficking are slavery. 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. Traditionally, slavery, which involves an exercise of the powers of the right of ownership, is more narrowly defined than trafficking, and has long been regulated independently from trafficking, as its own universally condemned crime. Trafficking, on the other hand, encompasses

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. . . .”).
50 GALLAGHER, supra note 48, at 179.
a range of forms of exploitation. As such, some forms of trafficking may resemble slavery yet still not meet the narrow legal definition of slavery.

**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. 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. In confirmed labor trafficking cases, the majority of victims were foreign-born and Hispanic, confirming a regional movement of victims. 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. In cases where victims were foreign-born, most were from Mexico.

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

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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.”).
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. The study further revealed that only 10% of traffickers operate within international sex crime networks. 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.

The local and regional nature of the crime 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. 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. The statute states:

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61 Id.


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.”

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. 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.”

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.” 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, 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.”

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

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.”).

67 With such “clear indication of extraterritoriality,” the statute overcomes the
strong judicial presumption against extraterritoriality, required under Kiobel v.
Bank LTD., 561 U.S. 247, 265 (2010)).
69 Id. at S10,937 (emphasis added).
70 Legal Options, supra note 10, at 26 (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, various witnesses testified that trafficking potentially could be considered a crime against humanity, a form of slavery, or a form of torture. Emphasizing the heinousness of the crime, one witness called for universal jurisdiction as a “forward-looking measure” to punish traffickers worldwide.

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.

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. 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.” As human trafficking “is ‘part of an economic “class of activities” that have a substantial effect


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.

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).

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.”).

Legal Options, supra note 10, at 26.

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

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 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 Baston 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 . . . .”).
93 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) cmts. e, 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).
97 Bradley, supra note 91, at 323.
However, the Baston court and Congress raised the protective principle and universality, respectively, as bases for extending jurisdiction for human trafficking crimes in foreign-cubed cases. 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.” The protective principle was primarily designed to address government obstruction and fraud, allowing grants of jurisdiction over a foreign citizen for such crimes as counterfeiting official documents, espionage, and violations of immigration or customs laws. However, the principle traditionally is not extended to a wide class of international health and safety threats, such as communicable diseases.

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. Universal jurisdiction is based on the premise that people who commit universally condemned crimes are "hostis humani generis," "enemies of all mankind." Their offenses are so heinous as to justify any nation’s regulation of them without regard for other jurisdictional limits. In prosecuting these crimes, nations act "as organ and agent of the international community."
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. Generally, countries may exercise universal jurisdiction in cases of piracy, war crimes, slavery, genocide, torture, and crimes against humanity.

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

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. 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

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


109 Yousef, 327 F.3d at 106.

110 See id.

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

of nationality, the country must prosecute that individual. 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.

While “extradite or prosecute” is not a rule of customary international law, in situations of human trafficking, it has become widely accepted as a way to ensure traffickers do not escape prosecution. 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. 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.

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. The United States Court of Appeals for the Second Circuit in United

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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.”\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{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.\textsuperscript{123}

The “ultimate question” of a due process analysis is whether the assertion of jurisdiction is arbitrary or fundamentally unfair.\textsuperscript{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.\textsuperscript{125} Although the United States Supreme Court has not addressed the issue, several circuits hold that a defendant

\begin{itemize}
  \item \textsuperscript{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.”).
  \item \textsuperscript{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.
  \item \textsuperscript{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)).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{125} See Yousef, 327 F.3d at 96; Shi, 525 F.3d at 723; Ali, 718 F.3d at 944.
\end{itemize}
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.\(^\text{132}\)

Although the Eleventh Circuit in the Baston case applied the protective principle to justify the broad scope of the statute,\(^\text{133}\) 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.\(^\text{134}\)

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. 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 war to the experience of young girls who have sex with fishermen for the family’s daily catch of fish. Human trafficking describes, equally, families held in debt bondage at brick kilns and a homeless teenager who returns repeatedly to a man who prostitutes her. By its nature, human trafficking cannot be defined narrowly. As a result of the crime’s definitional expanse, then, human trafficking does not fit neatly into any of the established categories of crime that have universal jurisdiction or into its own category of crime with universal jurisdiction.

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

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144 22 U.S.C.A. §§ 7101(b)(23)-(24), 7105(a)(2) (West 2012); Palermo Protocol, supra note 49, at arts. 9–10; Council of Europe Convention, supra note 112, at art. 1, para. 1(e), 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).


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. 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. The African Union, in a joint action plan with the European Union, calls for its fifty-four member states to enhance "co-ordination and co-operation" on human trafficking, including establishment of joint investigation units and extradition laws. Arab nations, likewise, now focus on regional and international frameworks to prosecute and combat human trafficking. The Organization of American States ("OAS") emphasizes the necessity of "a multilateral response from governments." To encourage such efforts, the OAS created an Anti-TIP Coordinator position to oversee regional efforts against trafficking.

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, issued a powerful declaration in 2016 that rejected unilateral acts by

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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.
151 Ouagadougou Action Plan, supra note 144, at Parts III, IV.
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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{157} Id. at para. 7.


\textsuperscript{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. In addition, all of these countries have ratified the Palermo Protocol and the UNTOC.

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. The United States has over sixty mutual legal assistance treaties with other countries, 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.

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. In addition, cooperation in extraterritorial prosecution can be “win-win situations” for all governments involved. 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. Effectively cooperating with those countries on the prosecution of

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163 DOYLE, supra note 159, at 22.
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.” Even a global “war against trafficking” does not grant countries the untrammeled right to violate the rights of defendants. Ensuring the rights of defendants is necessary to preserve the integrity of the judicial process and ensure ongoing support for trafficking prosecutions.

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. 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. 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.

166 GALLAGHER, supra note 48, at 392; see also Gallagher & Holmes, supra note 162, at 327.
167 GALLAGHER, supra note 48, at 391.
168 Id. at 392.
169 See Ratification Status, supra note 19; see also 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.\textsuperscript{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.”\textsuperscript{174} Such challenges raise “the specter of convicting the innocent.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{178} These protections are arguably essential to ensuring due process in an extraterritorial criminal procedure.\textsuperscript{179}

Finally, the basic human rights of defendants and their rights to counsel and to a fair trial\textsuperscript{180} 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

\textsuperscript{174} \textit{Id.} at 628.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.} at 677–83.
\textsuperscript{177} \textit{Id.} at 626.
\textsuperscript{178} \textit{Id.} at 677.
\textsuperscript{179} \textit{Id.} at 682–83.
\textsuperscript{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 redress\textsuperscript{181} and that all nations face difficulties in prosecuting this crime.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{185} In addition to foreign aid programs, the United States, sends personnel and resources to other countries to aid in investigations and prosecutions.\textsuperscript{186} For example, the U.S. Office


\textsuperscript{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.”).

\textsuperscript{183} Combating Modern Slavery, supra note 24, at 25 (statement of Florrie Burke).


\textsuperscript{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.”

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. More nations than ever before recognize the importance of collective action in the fight against all barriers to prosecution, against misconceptions of the crime, and against the criminalization of trafficking victims.

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