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3. Human Trafficking

Recent, unprecedented efforts to combat human trafficking include U.S. legislative developments, anti-trafficking policy implementation, and innovations in international law. U.S. domestic law slightly predates the key international treaty on human trafficking. Nevertheless, domestic and international law are largely consistent. With regard to enforcement, the numbers of criminal and civil cases against human traffickers have surged in the United States. On a parallel track, the European Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia have issued several important human trafficking rulings. This section focuses on the U.S. government’s efforts to comply with the principal statute at issue, the 2000 Trafficking Victims Protection Act, and its subsequent reauthorizations.

a. Overview of Statutory Law

Congress passed the Victims of Trafficking and Violence Prevention Act in 2000. Pub. L. No. 106–386, 114 Stat. 1466 (2000) (codified as amended in Title 22, Chapter 78, and Title 18, Chapter 77, of the U.S. Code). Typically referred to as the TVPA,⁶² this statute:

- Enumerated new federal criminal prohibitions;
- Afforded victims access to refugee resettlement benefits and new immigration protections; and
- Established a governmental office to conduct international monitoring and reporting on human trafficking. Information about and reports by this unit, the State Department’s Office to Monitor and Combat Trafficking in Persons, may be found at <http://www.state.gov/j/tip/index.htm> (last visited Dec. 9, 2013).

Subsequent reauthorizations of the Trafficking Victims Protection Act, in 2003, 2005, 2008, and 2013:

- Extended the extraterritorial reach of the law;

⁶² Among practitioners in this field, the statute typically referred to as the TVPA. This *Benchbook* uses the full name rather than the acronym, however, in order to avoid confusion of this 2000 statute with an earlier statute to which practitioners in another field often give the self-same acronym; that is, the Torture Victim Protection Act of 1991, Pub.L. 102-256, H.R. 2092, 106 Stat. 73. Enacted on Mar. 12, 1992, and codified in the note following 28 U.S.C. § 1350 (2006), the Torture Victim Protection Act is described *supra* § III.E.2.

- Enumerated additional criminal prohibitions; and
- Added a civil remedy that permits victims to sue traffickers in federal court.

The reauthorized law is sometimes referred to as the TVPRA.

i. Developments Leading to Adoption of the Trafficking Victims Protection Act

Section 1 of the Thirteenth Amendment to the U.S. Constitution states:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 of the amendment authorizes Congress “to enforce this article by appropriate legislation.”

Initially, the Thirteenth Amendment’s prohibition on chattel slavery could only be implemented through criminal statutory provisions.⁶³ Those statutes did not adequately address the modern manifestations of human trafficking in the United States, as a Congressional finding set forth in the Trafficking Victims Protection Act pointed out. *See* 22 U.S.C. § 7101(b)(13) (2006). For example, in *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court narrowly interpreted 18 U.S.C. § 1584 to criminalize only servitude brought about through use or threatened use of physical or legal coercion. With passage of the Trafficking Victims Protection Act, Congress sought to broaden the definition to encompass other, more subtle forms of coercion and conduct “that can have the same purpose and effect.” 22 U.S.C. § 7101(b)(13).

ii. Relation between the Trafficking Victims Protection Act and International Legal Instruments

The Trafficking Victims Protection Act is largely consistent with multilateral treaties that proscribe human trafficking. Among these is an issue-specific treaty adopted in 2000 to supplement an omnibus treaty on transnational organized crime. This issue-specific 2000 Trafficking Protocol – formally titled the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁶⁴ – is discussed more fully *infra* § III.E.3.b.

⁶³ Courts are divided over whether the Thirteenth Amendment to the U.S. Constitution carries with it a private right of action. *Compare Manliguez v. Joseph*, 226 F. Supp. 2d 377, 383-85 (E.D.N.Y. 2002), with *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1357 (6th Cir. 1996).

⁶⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, Annex II, available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. This treaty, which entered into force on Dec. 25, 2003, has 159 states parties, among them the United States, which ratified the treaty on November 3, 2005. U.N. Treaty Collection, Status, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en, (last visited Dec. 16, 2013).

It would not be correct to characterize the Trafficking Victims Protection Act as a federal statute that “implements” the 2000 Trafficking Protocol, for two reasons:

- *Timing:* The Trafficking Victims Protection Act became law weeks before the Trafficking Protocol was finalized and opened for signature in 2000, and well before that protocol entered into force in 2003 or was ratified by the United States in 2005; and
- *Omission:* Although the Trafficking Victims Protection Act itself lists an extensive catalogue of treaties and conventions that condemn slavery and servitude, the 2000 Trafficking Protocol is not included.⁶⁵

Nonetheless, there is considerable consistency between the Trafficking Victims Protection Act and the 2000 Trafficking Protocol. The U.S. government has coined the term the “Three P’s” – prevention, protection, prosecution – to describe the scope both of the legislation and of the Trafficking Protocol.

Considerations related to adjudication of trafficking cases include:

- Treaty framework
- The United States’ ratification of the Trafficking Protocol
- Elements of the U.S. statutory scheme addressing human trafficking
- Common defenses

Each is discussed in turn below.

For an excellent overview of relevant international law, see Anne T. Gallagher, *The International Law of Human Trafficking* (2010).

⁶⁵ Among the findings set forth in the Trafficking Victims Protection Act is the following:

The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports, including the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labor Convention; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/167, 51/66, and 52/98; the Final Report of the World Congress against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); and the 1991 Moscow Document of the Organization for Security and Cooperation in Europe.

22 U.S.C. § 7101(b)(23). Three additional international conventions specifically address trafficking in persons: the Convention on the Elimination of All Forms of Discrimination against Women, art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13, entered into force Sept. 3, 1981; the Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3, entered into force Jul. 1, 2002; and the Convention on the Rights of the Child, art. 35, Nov. 20, 1989, 1577 U.N.T.S. 3, entered into force Sept. 2, 1990. Because the United States has not ratified any of these treaties, they are not addressed in this chapter.

b. The 2000 Trafficking Protocol

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁶⁶ is typically called the Trafficking Protocol. At times it is also designated “the Palermo Protocol,” in recognition of the fact that it is one of three protocols, or side treaties, supplementing the 2000 U.N. Convention against Transnational Organized Crime.⁶⁷ That comprehensive treaty is known as the Palermo Convention, for the reason that, along with the Trafficking Protocol and one other side treaty, it was opened for signature in December 2000 at a diplomatic conference in Palermo, Italy.⁶⁸ States must ratify the Convention against Transnational Organized Crime in order to ratify the Trafficking Protocol.

The U.N. Office of Drugs and Crime, which is based in Vienna, Austria, serves as the secretariat for the Conference of Parties to the Palermo Convention; the website for that agency is <http://www.unodc.org> (last visited Dec. 9, 2013).

⁶⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, Annex II, available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. This treaty, which entered into force on Dec. 25, 2003, has 158 states parties, among them the United States, which ratified on Nov. 3, 2005. U.N. Treaty Collection, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime*, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en (last visited Dec. 9, 2013).

⁶⁷ U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Vol. 1, U.N. Doc. A/55/49 (2001), available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. This treaty, which entered into force on Sept. 29, 2003, has 179 states parties, among them the United States, which ratified on Nov. 3, 2005. U.N. Treaty Collection, *United Nations Convention Against Transnational Organized Crime*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Dec. 9, 2013).

⁶⁸ See U.N. Office on Drugs and Organized Crime, *United Nations Conference and the Protocols Thereto*, <http://www.unodc.org/unodc/treaties/CTOC/index.html#Fulltext> (visited Dec. 9, 2013). As stated *id.*, the other protocol opened for signature at this time was the Protocol against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, 2241 U.N.T.S. 480. This treaty, which entered into force on Jan. 28, 2004, has 138 states parties, including the United States, which ratified on Nov. 5, 2005. U.N. Treaty Collection, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the U.N. Convention against Transnational Organized Crime*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en (last visited Dec. 9, 2013). The third side treaty is the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Nov. 15, 2000, 2326 U.N.T.S. 208. This treaty, which entered into force on July 3, 2005, has 105 states parties; the United States is not among them. U.N. Treaty Collection, *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en (last visited Dec. 9, 2013). Both protocols are available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

c. Trafficking Defined

Article 3(a) of the 2000 Trafficking Protocol defines trafficking as follows:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

One phrase in the passage above, “exploitation of the prostitution of others,” is purposefully left undefined in the Protocol. The official record of the negotiations, known as the *travaux préparatoires*, or preparatory works states:

The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws.⁶⁹

As the official notes clarify, states may criminalize prostitution, but this is not required. States parties to the Trafficking Protocol exercise complete discretion on this aspect of their domestic criminal law.

In contrast, pursuant to Article 5 of the Trafficking Protocol, states must criminalize all forms of human trafficking, including forced labor and forced prostitution, “when committed intentionally.”⁷⁰ Similarly, states must criminalize the trafficking of children, defined in Article 3(d) of the Trafficking Protocol as any persons under 18 years of age. Article 3(c) confirms that the “recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation” is trafficking, even if no force, fraud, or coercion is present.

d. Reservations Accompanying U.S. Ratification of the Trafficking Protocol

When it ratified the 2000 Trafficking Protocol on November 3, 2005, the United States attached a number of reservations and one understanding; these may be found at U.N. Treaty Collection, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women*

⁶⁹ The *travaux préparatoires* for the 2000 U.N. Convention Against Transnational Organized Crime and its Protocols are available at http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf (last visited Dec. 9, 2013), at page 347.

⁷⁰ Notably, the Trafficking Victims Protection Act does not criminalize organ trafficking. The National Organ Transplant Act of 1984 prohibits the buying and selling of organs in the United States. Pub. L. 98-507, 98 Stat. 2339 (codified as amended in scattered sections of 42 U.S.C.).

and Children, supplementing the United Nations Convention against Transnational Organized Crime, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en (last visited Dec. 9, 2013). Issues addressed included:

- Jurisdiction
- Federalism

Each is discussed in turn below.

i. Jurisdiction

With regard to jurisdiction, the first U.S. reservation to its ratification of the 2000 Trafficking Protocol provided in part:

The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law.

This reservation thus proceeded to state that the United States would “implement paragraph 1(b) of the” U.N. Convention against Transnational Organized Crime, described *supra* § III.E.3.b, “to the extent provided for under its federal law.”

ii. Federalism

A second reservation concerned the relationship of federal law and constituent states in the United States. It stated that

U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, such as the Thirteenth Amendment’s prohibition of “slavery” and “involuntary servitude,” serves as the principal legal regime within the United States for combating the conduct addressed in this Protocol

This reservation then stated that federal criminal law “does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or otherwise implicate another federal interest, such as the Thirteenth Amendment.” It concluded, however, that federalism concerns would not preclude the mutual legal assistance and international cooperation required by the Convention against Transnational Organized Crime and the Trafficking Protocol.

e. Elements of the Treaty Implemented by U.S. Law and Policy

The 2000 Trafficking Protocol is best analyzed under the “Three P’s” paradigm of prevention, protection, and prosecution. Protection of victims typically arises out of provisions of the Trafficking Victims Protection Act, and prosecution of traffickers most frequently occurs in

federal courtrooms. This is changing, however, given that all fifty states in the United States have adopted human trafficking statutes.

i. General Protection of Victims

Article 6 of the 2000 Trafficking Protocol addresses “assistance to and protection of victims of trafficking in persons.” The Protocol requires that states consider implementing measures to:

- Protect the privacy and identity of victims of trafficking;
- Provide victims with information about court and administrative proceedings, permitting victims to present their views in criminal proceedings;
- Provide measures “for the physical, psychological, and social recovery” of victims. This includes appropriate housing, counseling, and information on legal rights, medical and material assistance, and employment opportunities;
- Consider the special needs of children;
- “[P]rovide for the physical safety of victims of trafficking”; and
- Ensure that the domestic legal system permits trafficking victims to obtain compensation for damage suffered.

With regard to privacy measures, victims of trafficking are routinely referred to only by their initials or first names in written opinions in criminal cases. *See, e.g., United States v. Marcus*, 628 F.3d 36, 45 n.12 (2d Cir. 2010).⁷¹

With regard to victim presentations, U.S. law permits witnesses to make victim-impact statements in criminal cases. *See* 18 U.S.C. § 3771.

With regard to victims’ recovery, the Trafficking Victims Protection Act established funding for nongovernmental agencies, which provide many recovery-related services.

Finally, with regard to compensation, 18 U.S.C. § 1593 (2006) requires courts to award restitution to victims of trafficking. This statute specifically addresses the difficulty of calculating restitution for victims of trafficking, requiring that victims receive compensation for the full value of their losses.

⁷¹ A federal grand jury had indicted the defendant in *Marcus* for unlawful forced labor and sex trafficking between January 1999 and October 2001. His conviction was reversed on appeal, for the reason that the Trafficking Victims Protection Act took effect on Oct. 28, 2000. *United States v. Marcus*, 538 F.3d 97 (2d Cir. 2008). The Supreme Court reversed and remanded. 560 U.S. 258 (2010). The U.S. Court of Appeals for the Second Circuit upheld the forced labor conviction and remanded to the trial court for retrial on the sex trafficking conviction. 628 F.3d 36, 44 (2d Cir. 2010). At this juncture, prosecutors dropped the sex trafficking charge, and the defendant was sentenced to eight years in prison on the remaining charges. 517 Fed. Appx. 8 (2d Cir.), *cert. denied*, 134 S. Ct. 135 (2013).

Section 1593(b)(3) defines “full amount of the victim’s losses” as “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. § 201 et seq. (2012)).” This formulation permits a victim of sex trafficking to recover the amount earned by the trafficker for commercial sexual services. Restitution orders issued under other statutes, such as 18 U.S.C. § 3663 (2006), limit restitution in sex trafficking cases to back wages, which may be a less appropriate measure of loss. In 2012, the Treasury Department issued a notice on Restitution Payment under the Trafficking Victims Protection Act. I.R.S. Notice 2012-12, 2012-6 I.R.B. 365, *available at* <http://www.irs.gov/pub/irs-drop/n-12-12.pdf> (last visited Dec. 9, 2013).

Mandatory restitution payments awarded under 18 U.S.C. § 1593 are excluded from gross income for federal income tax purposes. Because of this tax treatment and the more accurate damages calculation in sex trafficking cases, restitution orders made to trafficking victims should be made under 18 U.S.C. § 1593 only.

ii. Immigration Measures

Article 7 of the 2000 Trafficking Protocol requires states to consider measures to “permit victims of trafficking in persons to remain” in the state’s territory, either temporarily or permanently. As in other instances, provisions of the federal statute, the Trafficking Victims Protection Act, correspond to this international obligation.

This Act initially established two forms of immigration relief for trafficking victims, by:

- Creating a new nonimmigrant category – T – for aliens who qualified as victims of a “severe form of trafficking in persons” set out in § 101(a)(15)(T) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1101(a)(15)(T). The Department of Homeland Security may award up to 5,000 of these T-visas annually. Recipients may eventually adjust their immigration status to legal permanent residency.
- Establishing “continued presence,” a temporary immigration status that permits potential witnesses to stay in the United States through the investigation and criminal prosecution stages. 22 U.S.C. § 7105(C)(3), 7105(E).

The 2008 reauthorization of the Trafficking Victims Protection Act, known as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, established another avenue for relief for victims of labor exploitation and trafficking in the United States. Pub. L. No. 110-457, 122 Stat. 5072 (codified in scattered sections of 6, 8, 18, 22, and 42 U.S.C. (Supp. II 2009)). Holders of special visas reserved for domestic workers and servants of diplomats and international organization employees – that is, holders of A-3 and G-5 visas – may remain in the United States to pursue civil claims against their employers. Section 203(c) of this 2008 reauthorization statute, codified at 8 U.S.C. § 1375c (2006), permits A-3/G-5 visa holders to request deferred action as they pursue their civil claims.

Section 205(a)(3)(A)(iii), codified at 22 U.S.C. § 7105, also requires that a victim's previously granted continued presence remain in effect for the duration of a civil action filed under 18 U.S.C. § 1595, even if continued presence otherwise would have been terminated.

iii. Prosecution of Traffickers: Criminal Prohibitions and Definitions

The Trafficking Victims Protection Act of 2000 and subsequent reauthorizations created a number of additional crimes and remedies, and it further recodified several preexisting crimes.⁷² These criminal statutes are generally referred to as the chapter 77 crimes, as they appear in chapter 77 of Title 18 of the U.S. Code. These include:

- 18 U.S.C. § 1581, Peonage.
- 18 U.S.C. § 1584, Sale into involuntary servitude.
- 18 U.S.C. § 1589, Forced labor.
- 18 U.S.C. § 1590, Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor.
- 18 U.S.C. § 1591, Sex trafficking of children or by force, fraud, or coercion.
- 18 U.S.C. § 1592, Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.
- 18 U.S.C. § 1593, Mandatory restitution.
- 18 U.S.C. § 1593A, Benefitting financially from peonage, slavery, and trafficking in Persons.
- 18 U.S.C. § 1594, General provisions, including those on attempt and forfeiture.
- 18 U.S.C. § 1595, Civil remedy, providing a private right of action.
- 18 U.S.C. § 1596, Additional jurisdiction in certain trafficking offenses, extraterritorial jurisdiction.

Other crimes, codified in chapters other than chapter 77, are often charged along with trafficking offenses. These include:

- 18 U.S.C. § 2423, Transportation of minors into prostitution.
- 18 U.S.C. § 1546, Fraud and misuse of visas, permits, and other documents.

⁷² Several of the chapter 77 crimes predated the Trafficking Victims Protection Act and remained essentially untouched or only slightly modified. These include sections 1981 and 1984, which were untouched, and section 1583, which only added an additional obstruction prohibition.

- 18 U.S.C. § 1351, Fraud in foreign labor contracting

The 2008 amendments to the Trafficking Victims Protection Act added a number of provisions to the existing criminal statutes prohibiting obstruction of justice.

The definition of “severe forms of trafficking” underpins these criminal statutes. The Trafficking Victims Protection Act defines the term “severe forms of trafficking in persons” as follows:

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

22 U.S.C. § 7102(9). It further defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” *Id.* § 7102(10).

iv. Monetary Remedies

Trafficking victims in the United States may obtain financial damages in criminal cases through mandatory restitution, as discussed *supra* § III.E.3.e.1. In addition, trafficking victims may bring federal or state civil cases seeking money damages. Most commonly, these civil cases include state law claims for tort damages, contract breach, labor law violations under state law or the federal Fair Labor Standards Act, and negligence. Cases brought during a federal criminal action are subject to a mandatory stay. 18 U.S.C. § 1595.

v. Civil Remedies and Restitution

In the civil context, in cases brought under 18 U.S.C. § 1595, courts have awarded a full range of damages. The U.S. Court of Appeals for the Ninth Circuit has held that punitive damages are available to plaintiffs filing federal civil actions for trafficking. *Ditullio v. Boehm*, 662 F.3d 1091, 1102 (9th Cir. 2011). Trial courts routinely award back wages, tort damages, and contract damages, as well as punitive damages. *See, e.g., Mazengo v. Mzengi*, 542 F. Supp. 2d 96 (D.D.C. 2008).

In the criminal context, 18 U.S.C. § 1593, described *supra* § III.E.3.e.iii, defines the scope of mandatory criminal restitution.

vi. Federal Civil Actions under Chapter 77

Section 1595 of Title 18 of the U.S. Code creates a federal right of action for victims of trafficking. Any crime that a federal prosecutor may charge under 77 of Title 18 of the U.S. Code, discussed *supra* § III.E.3.e.iii, may be included in a federal civil complaint brought under 18 U.S.C. § 1595 for conduct that occurred after the enactment date of December 19, 2003. The original civil remedy, created by the 2003 reauthorization, permitted suits only under 18 U.S.C. §§ 1589, 1590, or 1591. Section 221 of the William Wilberforce Trafficking Victims Reauthorization Act of 2008, codified at 18 U.S.C. §§ 1593(b), 1595, extended the civil remedy to all offenses listed in chapter 77. Pub. L. No. 110-457, 122 Stat. 5072 (2008).

vii. Extraterritorial Jurisdiction

Federal law, codified at 18 U.S.C. §§ 1596, 3271, provides extraterritorial jurisdiction for criminal and civil prosecutions of trafficking crimes listed in chapter 77 of Title 18 of the U.S. Code, discussed *supra* § III.E.3.e.iii.

f. Common Affirmative Defenses

A host of defenses has been advanced in trafficking cases. The most frequent, in both criminal and civil cases, pertain to: limitations periods; constitutional provisions; timing of conduct; the diplomatic status of the defendant; the asserted absence of force, fraud, or coercion; the asserted family status of the alleged victim; asserted cultural differences; the immigration status of the alleged victim; the defense of consent; an asserted belief that the alleged victim was an adult; the relationship of trafficking to slavery; and the status of the defendant in relation to subcontractors. Each of these defenses is treated below.

i. Limitations Period Defense

Defendants routinely challenge the statute of limitations for each count of the complaint or indictment. The statute of limitations for a civil trafficking case under 18 U.S.C. § 1595(c) is ten years. *Doe v. Siddig*, 810 F. Supp. 2d 127 (D.D.C. 2011).

ii. Constitutional Overbreadth Defense

Defendants have attacked the forced labor statute as overbroad, in violation of constitutional guarantees. By this claim, defendants argue that they did not threaten the alleged victim, but merely warned, honestly and innocently, that the authorities would deport that person. At least one U.S. court of appeal has rejected this defense. *United States v. Calimlim*, 538 F.3d 706, 710-13 (7th Cir. 2008), *cert. denied*, 555 U.S. 1102 (2009).

In sex trafficking cases, defendants have unsuccessfully challenged the term “sex act” as unconstitutionally vague. *E.g.*, *United States v. Martinez*, 621 F.3d 101 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1622 (2011).

iii. Timing of Conduct: Pre-Enactment Activity Defense

Under the pre-enactment activity claim, the defense challenges whether the conduct charged in the indictment predated the enactment of the relevant portion of the statute. *See United States v. Marcus*, 560 U.S. 258, 260 (2010) (criminal context); *Ditullio v. Boehm*, 662 F.3d 1091, 1102 (9th Cir. 2011) (civil context). Prosecutors generally counter that conduct that straddles the pre-enactment and post-enactment dates qualifies as a continuing violation. *Ditullio*, 662 F.3d at 1096.

iv. Status of the Accused: Diplomatic Immunity Defense

A defendant may raise diplomatic immunity, arguing that service must be quashed and the complaint dismissed. *See Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996). Only diplomats credentialed under the 1961 Vienna Convention on Diplomatic Relations⁷³ enjoy this total immunity. Consular officers and individuals working for international organizations have only functional immunity. *See Park v. Shin*, 313 F.3d 1138, 1143 (9th Cir. 2002).

Furthermore, even diplomats with full immunity may not enjoy residual immunity once they depart the United States or abandon their post. *Swarna v. Al-Awadi*, 622 F.3d 123, 137-38 (2d Cir. 2010) (analyzing residual immunity provided for under Article 39(2) of the 1961 Vienna Convention on Diplomatic Relations).

v. “No Force, Fraud, or Coercion” Defense

The “no force, fraud or coercion” defense arises when a defendant contends that the alleged victim was a happy and fulfilled worker, a claim advanced *inter alia* by submission of photographs of the alleged victim enjoying life at, for example, parties or Disneyland. *See, e.g., Doe v. Siddig*, 810 F. Supp. 2d 127 (D.D.C. 2011), a case in which defendants filed an answer with dozens of photographs not considered by the court. Defendants also have introduced as evidence letters sent to family members in the country of origin, describing satisfaction with life in the United States. *E.g., United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

vi. Status of Alleged Victim: Family Member Defense

Under the “family member” defense, a defendant submits that the alleged trafficking victim was a member of the family performing chores, rather than an employee forced to work. *See, e.g., Velez v. Sanchez*, 693 F.3d 308, 328 (2d Cir. 2012).

⁷³ Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, available at http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf. This treaty, which entered into force on Apr. 24, 1964, has 189 states parties; among them is the United States, which ratified on Nov. 13, 1972. *See* U.N. Treaty Collection, *Vienna Convention on Diplomatic Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en (last visited Dec. 9, 2013). The Convention has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006). This treaty, which has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006), is discussed *supra* § II.B.

vii. Cultural Defense

The cultural defense is premised on the claim that the defendants' treatment of the alleged victim is appropriate and customary in the defendants' country of origin. *See, e.g., United States v. Afolabi*, Crim. No. 2:07-cr-00785-002 (D.N.J. 2007). The cultural defense in this case was discussed in Assoc. Press, *Lawyer Says N.J. Trafficking Case Involves Culture Norms Not Understood in America*, Dec. 8, 2010, available at http://www.nj.com/news/index.ssf/2010/12/nj_immigrants_lawyer_says_smug.html. The conviction and sentence were affirmed on appeal in an unpublished opinion. *United States v. Afolabi*, Case No. 10-3287 (3d Cir. 2011).

Defendants frequently engage expert witnesses to support this defense, which can be related to the family member defense just described. In an Eritrean context, for example, experts dubbed a domestic worker's position in the family as "fictive kinship." *Mesfun v. Hagos*, No. CV 03-02182 MMM (RNBx), 2005 WL 5956612 (C.D. Cal. Feb. 16, 2005).

viii. Immigration Status of Alleged Victim: Lack of Standing

In what is known as the "illegal alien" or *Hoffman Plastics* defense, defendants argue that the alleged victim has no standing to bring a civil action because the victim is in the United States illegally. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002). Most courts that have considered this decision have construed it narrowly, to apply only to certain claims for back wages brought under the National Labor Relations Act. *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 247 (2d Cir. 2006).

ix. Immigration Status of Alleged Victim: Immigration "Fraud"

Under the "immigration fraud" defense, defendants contend that the alleged victim made false accusations in order to obtain a T-visa or other immigration status to remain in the United States.

x. Defense of Consent

In raising a consent defense, a defendant may argue that although the plaintiffs or complaining witnesses had contracts promising them minimum wage and benefits, these workers voluntarily (and orally) agreed to accept a far lower wage. In the sex trafficking context, defendants often argue that the alleged victims voluntarily engaged in prostitution and did not suffer force, fraud, or coercion with any nexus to prostitution. *See, e.g., United States v. Paris*, No. 3:06-cr-64, 2007 U.S. Dist. LEXIS 78418, at 29-30 (D. Conn. Oct. 23, 2007). On appeal, on appeal, no arguments raised on this point were considered. *See United States v. Martinez*, 621 F.3d 101 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1622 (2011).

xi. Defense Based on Perceived Age of Alleged Victim

In a case concerning a severe form of trafficking involving a child under 18 years of age, the defense may argue that the defendant believed that the child was an adult; that is, a person

older than 18. *United States v. Daniels*, 653 F.3d 399, 409-10 (6th Cir. 2011) (upholding jury instructions stating that the government was “not required to prove knowledge of the minor’s age to sustain a conviction”), *cert. denied*, 132 S. Ct. 1069 (2012).

xii. “Not Slavery” Defense

In the Alien Tort Statute context, defendants argue that trafficking does not rise to the level of slavery, and therefore does not violate customary international law. *See, e.g., Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010).

Similarly, defendants in TVPRA cases, described *supra* § III.E.3.a, frequently point to the lack of physical violence, the absence of chains and other restraints, in an effort to compare the victims’ treatment favorably with that of slaves held in the United States during the early nineteenth century. In such a case, a federal appellate court declined “to construct a minimum level of threats or coercion required to support a conviction” for involuntary servitude, thus leaving the question for the finder of fact. *United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002), *cert. denied*, 538 U.S. 981 (2003).

xiii. Independent Contractor/Lack of Agency Defense

In several civil lawsuits against larger employers, in which subcontractors or recruiters were most directly responsible for the forced labor, the larger employers typically have claimed that the subcontractors or recruiters were independent contractors, and that they acted outside the scope of their agency to the larger employer.

xiv. Payment of Legal Wages Defense

Several civil cases have been brought on behalf of trafficking victims who were paid wages that were the equivalent of, or surpassed, the required minimum wage. In these cases, employers have attempted to conflate compliance with wage and hour laws with their defense against human trafficking allegations.

It is possible for a victim of human trafficking to be paid wages, but still to qualify as being trafficked. This is particularly true when traffickers illegally deduct enormous sums for food, housing, purported debts, and transportation. *See United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

xv. Conclusion

All of these defense are frequently rejected by the court of first instance, and so do not appear in appellate decisions.