ACTA HUMANA • 2024/4. 93–108. • DOI: 10.32566/ah.2024.4.6

How Human Exploitation May Be Fought in Public Procurement-Affected Industries?

The Case for the Federal Acquisition Regulation and the False Claims Act

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Human exploitation is a global phenomenon despite being globally fought against. The exact number of people in modern enslavement remains unknown but the tendency is obvious. Counterintuitively, even Covid–19 policies seem to have contributed to the level of exploitation through supply shortages and increased demand for commodities and low-added-value goods. The article discusses the inevitable necessity that governments step up against all forms of human exploitation domestically so as in global supply chains. The article intends to stir up attention against the position that the U.S. Federal Acquisition Regulation, the UK Modern Slavery act, let alone the EU's Public Procurement Directive could not be improved significantly. The article scrutinises these legislative items through the lens of their efficacy. The article finds that all three regulatory regimes have their specific imperfections: the U.S. law does not pay significant attention to the notion of reparation, the UK law outsources the problem to the corporates, while the EU Directive does not even reflect on the triviality that supply chains are globally interlinked, let alone paying attention to the time dimension and legal limitations of criminal proceedings. Furthermore, all three regimes apply the notion of commercial-off-the-shelf (COTS) products the public procurement of which are not under the anti-TIP regulations despite the apparent realities.

Keywords: human rights, public procurement, human trafficking

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Introduction: The matter of cleaning public procurements from all forms of human exploitation

Using public procurements as means of social ends has been widely analysed. The seminal article of McCrudden[2] is to be mentioned, in which the author points out to the use of public procurements to pursue human rights, social inclusion such as non-discrimination and affirmative action for underprivileged groups. The author asks the intriguing question whether certain policies pursued may be in contradiction with each other or with the general aims of a sound public procurement regime such as efficacy.

Cleaning public procurements from human exploitation is imperative. The European Commission has announced that it would introduce policies to ban goods produced with forced labour from the EU market.[3] According to the Commission, 27.6 million people are in forced labour in many industries and on all continents. Contrary to this figure, according to the Global Slavery Index, currently there are 50 million people in modern day slavery.[4] It appears that there are certain ambiguities concerning the statistics. The difference can be traced back to the legal definitions of a series of partly overlapping notions such as modern slavery, forced labour, human exploitation, human trafficking, trading in persons, etc. According to Nolan and Bott, modern slavery is not defined by international law with appropriate precision and its clear definition remains to be determined, furthermore, they argue that modern slavery is rather an advocacy term instead of an exact legal term.[5] This view foreshadows the numerous ambiguities global supply chain and public procurement managers have to encounter in order to keep full compliance with anti-exploitation regulations.

Clarifying the notion of Trading in Persons (TIP) considered in this article

In the following, instead of narrow notions of forced labour, servitude, modern slavery and other specific forms of human exploitation, the broad terminology is used as it had been crystallised and promulgated by the State Department in its annual TIP Reports[6] that refer to the Trafficking Victims Protection Act (TVPA) of 2000 as follows:

- "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age;" or

2 McCrudden 2004.
3 See: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5415
4 Walk Free 2021.
5 Nolan–Bott 2018.
6 Department of State USA 2022.

- "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." [7]

Moreover, there is an important remark to the two culpable conducts highlighted by the TIP report: "a victim need not be physically transported from one location to another for the crime to fall within this definition."[8]

Public procurement regulations in relation to TIP need to be understood with regards to a wide range of various regulations which add up to a complex realm of norms not entirely without contradictions. It might add to the ambiguities that there are over 12 global and 300 bilateral treaties against various forms of TIP, including forced labour.[9] One could add the number of various domestic regulations which might be in the thousands. Indeed, domestic laws and regulations on banning all kinds and forms of TIP are present in all countries and all jurisdictions and have a considerable past from the 19th century onwards, including the 13th Amendment of the United States' Constitution of 1865. The most important international treaties affecting public procurements and TIP – apart from the United Nation's Universal Declaration of Human Rights are the following:

- The International Labor Organization's eight Fundamental Conventions on forced labour, child labour, discrimination and freedom of association, as well as the right to organise (No. 29, 87, 98, 100, 105, 111, 138 and 182)
- The United Nation Convention on the Rights of the Child, Article 32
- The United Nation Convention against Corruption
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children adopted by the UN General Assembly, 55/25 15 November 2000 (Palermo Protocol)

In the following, it is briefly stated that neither of the corresponding UK, USA or EU norms are satisfactory to effectively fight against TIP in public procurement-related supply chains. U.S. False Claims Act however (introduced later on in this article in detail) lies outside of the narrowly interpreted laws on public procurement, still, FCA holds a considerable potential to serve as a pattern for further regulatory changes to the benefit of anti-TIP policies. Built on this hypothesis, the rest of the article is dedicated to examining the following research question:

How does the False Claims Act relate to other, specifically anti-TIP public procurement regulations and policies?

7 Department of State USA 2022: 5.
8 Department of State USA 2022: 5.
9 Cockayne 2015: 17.

Human trafficking in supply chains: Do regulatory regimes appear to be without bite?

The most relevant chunk of literature on human trafficking and other forms of modern-day slavery has already been collected and analysed fathoming the question if these phenomena are inherently embedded in global supply chains.[10] The findings of the author hint that short-term economic interests tend to collide with observing the principles of human rights which – as a logical response – has led to increased legislation. The cited empirical evidence in the referred article on the effectiveness of new pieces of legislation leave sceptical-leaning afterthoughts about the practical workability of self-cleaning of global supply chains, especially in areas like textile, food, agriculture and mining industries. In the current section public procurement-driven supply chains are taken into consideration in terms of cleaning supply chains from TIP as for the buyers in public procurements have a major advantage over private buyers: *they enjoy regulatory and market powers alike.*

In the European continental legal thinking, deduction is a decisive means of understanding. This is based on the belief that norms are never interpreted in themselves but as part of legal structures, understood in a way that higher-level norms define the major values and lower-level norms define the details. In the absence of an appropriate legal category for an event in the details, the higher-level norms need to be applied in an arbitrary fashion until legal practice crystallises a specific solution. European legislators tend not to leave new occurrences to be settled by the judiciary but rather by new, more specific (progressive) legislation. Similarly, the hierarchy of norms as a basic principle is paramount in the relation between national laws and the law of the European Union,[11] the latter enjoying higher hierarchical position in all policy areas included in the Treaties of the EU. The EU itself, however, is not the ultimate source of law regarding TIP for the EU acknowledges UN-based international law in this field. Having put this forward, the main characteristics of the exclusion ground regulations (Article 57 of 2014/24 Directive of the EU Parliament and the Council, hereinafter used as 'Directive') are the following.[12]

10 Gellén 2024.

11 Recently, the German Federal Constitutional Court has challenged this position in a landmark ruling: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html

12 Article 2 Section 1 of the TIP Directive of the EU No. 2011/36: "The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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." Directive 2011/36/EU of the European Parliament and of the Council.

Exclusion (debarment) grounds in relation to TIP in the Federal Acquisition Regulation (FAR)

FAR 52.222-50 contains detailed regulations on preventing certain forms of human exploitation within supply chains attached to public procurements. This approach is in line with the United Nation's Guiding Principles on Business and Human Rights 13 (b).[13] In addition, the Congress has recently passed S.3470 – End Human Trafficking in Government Contracts Act of 2022,[14] which strengthens the efforts on compliance by making human trafficking a ground for debarment.

FAR provides a brief catalogue of conducts that qualify for TIP, enhanced by a list of definitions. The legal text uses the formulation of the TIP Protocol of the UN[15] and that of the Modern Slavery Act of the UK[16] as well as the Article 4 of the European Convention on Human Rights. Prohibited conducts regarding TIP are described in the following:

Forced labour, slavery, servitude, prostitution, other forms of sexual exploitation and removal of organs (corresponding Article 3 of UN TIP Protocol[17]) conducted by "any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization" as agent (FAR 52.222-50), regarding commercially available goods excluding bulk cargo such as agricultural and petroleum goods. FAR apparently avoids the pitfalls of the Directive by effectively including partners and subcontractors and steps over the narrow circle of literally convicted criminals to focus on the purpose of this policy, namely: keeping TIP away from public procurements.

FAR's provisions of TIP are in line with the National Defense Authorization Act (NDAA) which also regulates termination of contract, suspension of payments until correction of conducts, and debarment.

FAR deserves appreciation compared to the Modern Slavery Act of the UK (resembled by Australia too) and to the European Directive on Public Procurements. The Directive is confined to idleness due to its tenacity to closed criminal proceedings which makes it virtually impracticable while the Modern Slavery Act puts all burden on the corporate policies and compliance managers while applying a rather high threshold (GBP 36 million per year) which deprives legal remedies from a large chunk of TIP victims. Reality is closing in rapidly on all of these regimes. The threat of reputational damage – which is the basic idea behind Modern Slavery Act – does not appear to affect corporate behaviour. As a conclusion I propose the decisive reform of all three.

13 For more information see United Nations 2011.
14 Public Law 117-116, see: www.congress.gov/bill/117th-congress/senate-bill/3470
15 General Assembly resolution 55/25 of 15 November 2000.
16 See: www.legislation.gov.uk/ukpga/2015/30/contents/enacted
17 See: www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons

Indeed, FAR 52.222-50 is an advanced legal means to tackle TIP from those supply chains that are depending on government buyers. Certainly, more could be achieved. As global figures on TIP appear to worsen at a concerning speed, government policies and institutions are under pressure to increase their efforts to counter and reverse the ongoing global tendency. FAR has its unrivalled advantage in the global fight against TIP by being a federal law of the US, being enforced by sound judicial proceedings, and extraterritorial jurisdiction in terms of contractors and subcontractors throughout the entire supply chain. FAR has its current shortcomings though and further development is inevitable in the following fields.

Publicly accessible data on any field experience on FAR 52.222-50 are scarce. Primary data are not available, secondary data cited in this article show as if the U.S. were immune to TIP challenges domestically. However, extraterritorial jurisdiction – based on the notion that contractors and subcontractors are legally recognised as beneficiaries of government funds – enables FAR to have a globally leading role in fighting against TIP in public procurements. Not because FAR were flawless or had no room for improvement but because the UK's and the EU's public procurement regimes respectively have much more significant shortcomings hampering the practicability of their policy aims.

The UK's Modern Slavery Act

The UK's Modern Slavery Act of 2015 contains specific regulations on British participation in global supply chains (Part 6, Art. 54). According to this piece of legislation, all corporations having higher than GBP 36 million annual turnover[18] are obliged to prepare a human trafficking statement. This is a general obligation regardless of whether the given company participates in public procurement proceedings. Article 54 excludes most public bodies, however, public services – especially social care – are affected by TIP in the UK.[19] In the case study presented by the authors, outsourced social care service providers extensively used migrant workers as caregivers in Nottinghamshire who were kept in unsuitable housing conditions and were forced to shop in the company store, furthermore, the workers were even physically threatened, and their wages were withheld while physical and sexual abuse were present. The astonishing findings are in connection with the GBP 36 million threshold and to the non-applicability of Modern Slavery Act to public bodies. It appears that the British legislators have not considered the possibility of such abusive practices in public services when penning the Modern Slavery Act.

18 See UK Home Office Corporate Report: www.gov.uk/government/publications/uk-government-modern-slavery-statement-progress-report/uk-government-modern-slavery-statement-progress-report-accessible-version

19 Emberson–Trautrims 2019.

Brief remarks on the OSCE Model Guidelines

The OSCE *Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains* – published in February, 2018 – provide a comprehensive overview of available public procurement policy solutions to all OSCE participant states and partners.[20]

The Model Guidelines' Law embraces the principle of due diligence in a way that contracting authorities shall award contracts only to bidders who provide for a satisfactory compliance plan consisting of the following elements *(awarding criteria):*

- recognition of risks
- details of due diligence to contain these risks
- define activities on suspected TIP
- remedies and managing grievances
- preventive public policies
- training and awareness programs
- recruitment plans: prohibiting recruitment fees
- transparency in wages
- housing plan if necessary
- procedures of preventing subcontractors of any tier to engage in TIP

Secondary analysis of existing empirical research

Quantitative analyses

Generally speaking, quantitative analysis regarding if public procurement has proven an effective policy tool with regards to TIP in the United States is not without difficulties due to the lack of available and accessible databases. The following quantitative empirical findings are presented in this paper.

1. The Attorney General's Annual Report to Congress in FY 2020 and 2019
2. Analysis of the spending of the Department of Defense in FY 2020, 2019 and 2018
3. The statistics of the Department of Justice on False Claims Act cases in 2015–2021

The inquiry into the Attorney General's Annual Reports to Congress appears necessary if one intends to extract reliable data on TIP in public procurements. The number of cases in relation to FAR 52.222-50 are lower than one would expect. The Attorney General's Annual Report to Congress on U.S. Government Activities to Combat

20 See the full text here: www.osce.org/files/f/documents/1/9/371771.pdf

Trafficking in Persons (FY 2020)[21] contains the annual statistics for public procurement-related cases investigated by the Department of Defense in two categories:

- CFR 52.222-50 Trafficking-related activities: 48 cases and 312 victims
- 48 CFR 52.222-50 Trafficking-Related Activities; 48 CFR 252.225-7040:[22] 8 cases and 683 victims

Regarding the internal composition of these cases, the Report states that a decisive chunk of cases were related to exploitative labour practices including misleading recruitment and violations under Defense Base Act and Longshore and Harbor Workers' Compensation Act of 1927.

Other extensive remarks of the Report in relation to FAR 52.222-50 are in connection with preventive trainings, workshops and information bulletins for employees and contractors, other hard data on the effectiveness of this regulation are not accessible. The report on fiscal year 2019[23] similarly lacks hard data on cases regarding the application of 52.222-50, however, the Report refers to the efforts of the Department of State in bringing about the OSCE Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains[24] which puts emphasis on due diligence on the bidders' side and risk assessment on the side of the contracting authorities.

Crouch, Morris and Peaslee carried out an analysis on the Department of Defence spendings in 2021.[25] Their method was based on filtering data according to the country of spending and the affected industry. The authors held that considerable risks can be identified according to geographical patterns and product categories, so they categorised the public procurement data according to the classification of the TIP Reports of the Department of State using Special Case, Tier 2 watchlist and Tier 3 categories.[26] The product categories taken into consideration were personal protective equipment, construction and food and food products.

The results of the spending analysis show that throughout the fiscal years 2018–2020, 11,141 contracts were awarded and 18,144 contract actions were taken by the Department of Defense (DoD) worth USD 13.1 billion which roughly accounted for one fifth of the total DoD foreign spending. In addition, the DoD spent USD 6.66 billion for personal protective equipment during the fiscal years of 2019 and 2020 which – according to the authors – signifies that a large chunk of DoD spendings were at risk of having been affected by TIP. It is important to note that items of personal protective equipment are commercial-off-the-shelf (COTS) goods and therefore do not fall under the prohibition of FAR 52.222-50 – similarly to the Italian tomato products

21 Department of Justice 2020.
22 Contractor Personnel Supporting US Armed Forces Deployed Outside the United States.
23 Department of Justice 2020.
24 Find the Model Guidelines here: www.osce.org/files/f/documents/1/9/371771.pdf
25 Crouch et al. 2021.
26 Crouch et al. 2021.

that were mentioned in the cited literature.[27] DoD spent a total of USD 6.66 billion for personal protective equipment (PPE) in FY2019 and FY2020. In this important product category, FAR 52.222 was not applicable despite obvious risks of TIP.

The efforts of the Department of Defense to eliminate TIP risks from its supply chains

The search engine of the website of the Inspector General of the Department of Defense does not offer statistics for FAR 52.222-50 cases.[28] However, the young researchers of the Naval Postgraduate School (NPS) have conducted an important empirical research as a part of the Acquisition Research Program Sponsored Report Series.[29]

The most important critical remarks of the authors of the NPS study are the following:

- lack of standardisation in DoD acquisition process (p. 2)
- high level of TIP in COTS (over-the-counter on off-the-shelf items, p. 2) – which in its effect contradicts the zero tolerance to TIP policy of the DoD
- federal procurement data system next generation DoD database has restricted access
- reference to FAR 52.222-50 was missing in DoD solicitations and contracts
- the proportion of COTS items in the DoD budget is too high to leave without compliance plans
- counter-TIP acquisition representatives and relevant training is needed periodically

In contrast to the refrained content of the official communications of the DoD, the daily press also appeared to be more interested in presenting statistical data to the public. For instance, NBC has reported recently that during the 2017–2021 period, the DoD found only one trafficking case that was referred to the Justice Department while debarring seven contracting and subcontracting companies. Administrative actions have been taken in 176 labour fraud cases with more rigorous oversight.[30]

The field of defence contracting is apparently scarce in documented legal cases of TIP[31] in the defence sector.

27 Howard–Forin 2019.
28 See: dodig.mil which leads to the following url when searching for FAR 52.222 and https://search.usa.gov/search?query=FAR%2052.222&affiliate=dodig&utf8=%26%23x2713%3B
29 Crouch et al. 2021.
30 Boigon et al. 2022.
31 See Crouch et al. 2021: 23–24.

In 2019 the Inspector General of the DoD published a report on DoD's efforts to combat TIP in Kuwait[32] and the follow-up in 2022. The Inspector General's scrutiny was initiated by a criminal investigation which had found that the given contractor violated FAR counter-TIP regulations in the following instances:

- irrationally high employment fees at interest
- wages below the legally mandatory minimum
- failing to pay monthly salary
- salaries were used to pay off employment fees which substantiated debt bondage
- constant overwork without compensation, no days off, no sick leave
- substandard housing

Apart from the results of the criminal investigation, including FAR-conform clauses in DoD contracts were recommended by the Inspector General with corresponding monitoring and surveillance mechanisms to strengthen the enforcement of zero-tolerance counter-TIP policies in defence procurements.

In June, 2019, a follow-up evaluation was published which admitted that 8 of the 22 recommendations were not fully implemented especially regarding the application of counter-TIP clauses and monitoring requirements. Therefore, enhanced contractor compliance monitoring, including past performance evaluation was agreed by the Commander of the U.S. Air Forces Central.

The fact that the Kuwait case could not be settled after the misconducts had been investigated raises the question how come such an issue could not be settled instantly.[33]

Enforcement means and the False Claims Act: Is it the silver bullet?

It appears from the literature presented so far that TIP as a global ethical and social problem (or rather: conglomerate of problems) is accelerating. An even grimmer picture appears in the light of the fact that 1 in every 150 were victims in 2022 – according to the findings of the World Economic Forum.[34] This in itself may call the policymakers' attention to amend existing policies including public procurement regulations. In fact, clean public procurement systems do have the potential to be the beacons of transparency and fairness for global supply chains.

The enforcement means under FAR 52.222-50 are the following:

- removing the employee who violated anti-TIP regulations
- the contractor may terminate a subcontract and can be called to do so
- suspending contract payments
- losing award fee

32 See: www.dodig.mil/reports.html/Article/1874544/evaluation-of-dod-efforts-to-combat-trafficking-in-persons-in-kuwait-dodig-2019/

33 McQue 2022.

34 Hall 2022.

- termination of the contract
- suspension or debarment

Additionally, to FAR, there is a web of anti-TIP laws affecting the practical enforceability of the available legal means. According to Grimmer these are overlapping and ineffective:[35]

- Trafficking Victims Protection Act (TVPA)
- Military Extraterritorial Jurisdiction Act (MEJA), regulating the operations of contractors on military missions abroad
- FAR 12.2703, prohibiting TIP during the performance of government contracts
- Trafficking Victims Protection Reauthorization Act (TVPRA)
- National Defense Authorization Act (NDAA) Sections 1701–1708: requirement of compliance plans, oversight of subcontractors by preventing, monitoring, detecting TIP and terminating subcontracts

Grimmer's[36] proposition on why these legal means remain ineffective are the following:

1. Rare prosecutions, a general inaction from federal prosecution
2. FAR does not remedy damages to the actual victims
3. FAR is too lax for terminated employees can be rehired

Policy means against modern slavery embrace preventive, monitoring and remediating tools, still, TIP is on the rise both in the number of victims affected and in the strength of economic forces capitalising on it despite all the efforts. One cannot help but think that means of anti-TIP policies are needed of further enhancement. Prosecuting TIP cases might be difficult to prove, time and resource consuming to investigate, thus not attractive to prosecutors. This remark is substantiated by the Final Report of the Commission of Wartime Contracting, which refers to 332 reported cases in Iraq and Afghanistan in which only 150 individuals and companies faced actual charges.[37]

Using False Claims Act[38] (FCA) to fight against TIP in public procurements profoundly changes the economies of anti-TIP policies by creating a substantive interest of treble compensation to the damages caused to the government – in addition to the fines (between the adjusted value of USD 5,000 and 10,000). The possibility of seeking economic advantage through litigation under the FCA drastically changes the normal incentive of a company manager who is responsible for harnessing TIP only upon having obtained knowledge of it, which naturally bends human interest towards turning a blind eye to suspicious developments. Still, FCA as legal means against TIP in public procurement appears not to meet its potentials which is counterintuitive to

35 Grimmer 2013.
36 Grimmer 2013.
37 Commission on Wartime Contracting in Iran and Afghanistan 2011: 92.
38 U.S. Code § 3729. False claims.

the substantial monetary rewards it offers to potential relators and so to their legal representatives.

The question remains open: Why FCA does not meet its potential as an effective legal means in fighting against TIP in public procurements? Grimmer hinted her proposition – having cited a legal professional – that it was not because of the shortcomings of the FCA that there were so few cases using FCA with the purpose to promote and defend TIP victim's interests in public procurement cases.[39] The reason why cases were so scarce was that there were not enough agents, protagonists, information sources and whistleblowers on the ground, and the prime contractors were categorically counter-interested in commencing any inquiries let alone investigations in such cases. At least this was the conclusion Grimmer and the Commission on Wartime Contracting had come to. It is to be added that it is always complicated and costly to conduct inter-jurisdictional operations and naturally, the country of origin of the third country nationals (TCNs) and the place where the actual exploitation takes place and the U.S. Government are at least three different jurisdictions that require smooth and trustworthy lines of communication which is obviously rare.

The FCA significantly widens the scope of (in European legal dogmatic language: the legal hypothesis of) the potential corporate misconducts as follows:

- Having a FAR-conform anti-TIP policy and not enforcing it. Such demeanour occurs when a whistleblower (relator) can substantiate the contractor (subcontractor) was engaged in TIP.
- The whistleblower (relator) can substantiate that TIP was knowingly tolerated (deliberately or negligently or in reckless disregard) by the contractor or subcontractor.
- The whistleblower (relator) can substantiate that the authorities of the given jurisdiction were not informed by the contractor or subcontractor.

If any of the enlisted circumstances is verified, the corresponding company policies and company reports as well as the invoices submitted to the contracting authority shall be considered as false claims under FCA. Such claims can be represented by the relator himself or he can permit the Federal Government to step in.

Recent, publicly available court cases of using FAR 222-50 against TIP are rather scarce but the following examples characterise the main line of legal problems that occur at the grassroots level.

United States ex. rel Larry Hawkins et al. v. Mantech International Corporation at District Court, District of Columbia. Plaintiffs claimed four violations of FCA and that TVPRA (Trafficking Victims Protection Reauthorization Act) was violated in their case by the defendant.

The court emphasised that the plaintiff was obliged to substantiate its claims to a level of plausibility that superseded probability. This might be an acceptable

39 Grimmer 2013: 140.

explanation to the observation made in this article that so few FCA-TIP cases are available. In TIP cases, the victims' privation of movement, communication or gathering information is a characteristic trait which constitutes the plaintiffs' factual qualities. It appears that in FCA cases these circumstances may hinder the victims' ability for legal remedy. In the cited case, the case did not survive dismissal at the District level. The Supreme Court held that both materiality and scienter criteria ought to have been fulfilled for a claim not to be dismissed under FCA. In the given case, the Supreme Court emphasised that non-compliance with TVPRA is by definition not a minor or insignificant element regarding the merits of a case. Plaintiffs alleged that "when defendants had confiscated their passports, had not obtained proper work visas for them" furthermore, "threatened to impose exorbitant fees if they had terminated their employment contracts early", therefore, plaintiffs claimed that the "defendants had obtained their labor by force in violation of the TVPA".[40]

United States of America Ex Rel. Elgasim Mohamed Fadlalla et al. plaintiff relators v. Dyncorp International LLC. et al. defendants.

The case is an example on the importance of the legal notion of "original source" which legal standing – if insufficiently substantiated – is ground of dismissal (public disclosure bar). The U.S. Supreme Court held in this case too that the notion of false claim should be interpreted broadly, signifying any claim that is related to financial loss to the Government (Contracting authority). Additionally, a claim shall be deemed false even if certain relevant circumstances are omitted from it, furthermore, there is no toleration for half-truths or bent truths. Relevance is based on the notion of materiality which refers to the content of the claim being specific enough to influence the decision of the Government or to the abstract possibility that the claim would have influenced the Government had the given part not been omitted from it. Plaintiffs' claim survived challenges on the base of FAR 52.222 (b) which in this case proved to be a powerful leverage of legal remedy. On this count, evidence that keeping the possession of the passports of the relators and bringing them into the place of work on tourist visas appeared to be similar to the other cited cases being a grave misconduct penalised by Section 1592 of the TVPRA and by FAR 52.222 – 50 alike:

> "(b) Policy. The United States Government has adopted a policy prohibiting trafficking in persons including the trafficking-related activities of this clause. Contractors, contractor employees, and their agents shall not […]
> (4) Destroy, conceal, confiscate, or otherwise deny access by an employee to the employee's identity or immigration documents, such as passports or drivers' licenses, regardless of issuing authority"

40 USA ex. rel. Larry Hawkins et. al. v. Mantech International Corporation. Count IV: Plaintiffs state a claim under the Trafficking Victims Protection Reauthorization Act., Signed: January 28, 2020.

The Court held that U.S. extraterritorial jurisdiction applies to any contractors working for the U.S. Government – which added an important further element to the practical applicability of FAR 52.222 in the global fight against TIP.

United States ex rel. RICKEY HOWARD, Plaintiff, v. CADDELL CONSTRUCTION COMPANY, INC. an Alabama Corporation; W.G. YATES & SONS CONSTRUCTION COMPANY a Mississippi Corporation; and JULIAN MARIE BRESLOW; and DAVID J. VALDINI & ASSOCIATES, P.A., a Florida Professional Association, Defendants. (published: March 30, 2021)

In this case the court occupied a more restrictive position compared to the previous cases in two pivotal points: materiality and scienter. In terms of materiality, the Court held that FAR is "not an all-purpose antifraud statute". "Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." In terms of scienter, the Court cited Harrison II. 352 F.3d at 918 that there is a possibility of "collective knowledge" to build up as a scienter under FCA.

As indicated by the cited cases, plaintiffs – in TIP cases they are in an undoubtedly disadvantaged situation – need further leverage in terms of financial, institutional and informational support. It is obvious that more Department of Justice (DoJ) and DoD personnel are needed on this field. The public financing of the additional staff might be enhanced using the analogy of forfeiture rules. Furthermore, cleaning supply chains from TIPs may contribute to economic growth – according to Executive Order No. 14017.

Conclusions

Regarding the research question of the article, the following findings can be formulated, based on the legal research put forth above.

How does the False Claims Act relate to other, specifically anti-TIP public procurement regulations and policies?

FCA holds tremendous potential by flipping the economic model of TIP conducts by benefiting the victims. It appears however, that FCA is not yet the silver bullet for FAR-TIP claims despite its obvious potentials. By the time being, potential plaintiffs are not in the practical position to enforce their rights for they are not likely to substantiate materiality and scienter requirements against a large organisation, furthermore, they are unlikely to have access to competent FCA lawyers. The unwillingness of whistleblowers may be in connection with their pure cost-benefit calculations which have to compare short-term gains discounted by a relatively high probability ratio with a certain long-term loss in terms of losing the given job and starting a new life.

Reparation rules need to be further developed. FAR is lacking means to provide full or partial reparation to TIP victims. This is a conceptual shortcoming of FAR which has to be amended.

Furthermore, COTS rules need to be revised because low added value industries such as agriculture, mining and clothing are gravely affected by global TIP, furthermore, COTS products represent a high proportion of public procurement expenditures. Still, the U.S. federal legal system (containing both FAR and FCA) appears to decisively outperform both the UK and the EU in fighting TIPs in public procurement-related supply chains, the latter two appearing outdated, unrealistic and negligent of human suffering caused by TIP.

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