Human Trafficking for Commercial Sexual Exploitation

Mainstream & Alternative International Legal Approaches relating to Constituent Elements, Liability of Legal Persons and International Co-operation in Criminal Matters

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ICL 2010 - ISISC – Siracuse, 25 May 2010
Structure

- gender-neutral criminal law approach
- incriminations (constituent elements)
  - in addition to core offence
    - trafficking
  - attention also given to related offences, such as
    - prostitution
    - child sexual abuse/exploitation & child pornography
- liability of legal persons for the above offences
  - importance
  - preventative potential of quality standards & self-regulation
- international cooperation in criminal matters (highlights)
- conclusions
Approach

- legal information (mainstreaming) & discussion (alternatives)
- human rights focused from a labour/social security and emancipatory perspective, including for children (Tom Obokata: mainly victim-centered)
- principal geographical levels of focus
  - UN
    - 2000 Trafficking Protocol to UN TOC Convention (Silke Albert)
    - 1950 Convention on THB and exploitation prostitution
    - 1989 CRC + 2000 2nd Optional Protocol
  - CoE
    - 2005 Warsaw Convention THB
    - 2007 Lanzarote Convention child sexual exploitation/abuse
  - EU
    - 2002 FD THB trafficking in human beings + draft directive
    - 2004 FD child sexual exploitation/abuse & porn + draft directive
Gender-neutral criminal law approach

- however: particular vulnerability women
  - feminization of poverty
  - gender discrimination
  - lack of educational/professional opportunities in home countries

- specific attention to (criminal) status of exploitation in prostitution
  - even then: gender-neutrality important
  - also: male/boys prostitution
  - increasing respect for women = false rationale for criminalization clients of prostitution
Trafficking (THB) vs smuggling

- Important that, even if phenomenologically often linked, substantive criminal law clearly distinguishes between:
  - Smuggling of persons/migrants
  - Trafficking in persons

- Distinction relatively recent acquis at int’l levels (*mainstream*)
  - UN level: since adoption 2000 Smuggling (SoM) and Trafficking (TiP) Protocols to UNTOC Convention
  - CoE: since 2005 Convention
  - EU: since mid-90ies

- Still: variety of (working) definitions trafficking and/or smuggling embedded in legal instruments or otherwise discussed at various international cooperation levels (UN, IOM, OSCE, ILO, CoE, EU)
THB: current mainstream definition (1)

- 1st element = MOVEMENT
- recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person
  - even where no organised criminal group is involved
  - even where no border is crossed
  - even where the victim has legally entered, has legal residence in or is a national of the state where the trafficking occurs
  - even where there is no profit motive
THB: current mainstream definition (2)

- 2nd (CORE !) element = MEANS
- where either, provided the person involved is not a child (i.e. a person below the age of 18), in which case the above conduct will constitute punishable trafficking even if none of the forthcoming means has been used
  - use is made of coercion, force or threat, including abduction
  - use is made of deceit or fraud
  - there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved
  - payments or benefits are given or received to achieve the consent of a person having control over another person
  - the consent of the person involved being irrelevant where any of these means has been used
THB: current mainstream definition (3)

- 3rd element = ENVISAGED EXPLOITATION
- for the purpose of (either)
  - the exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude
    - various perspectives and implementation differences
  - the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography
    - important int’l legal, policy and implementation differences
- no consensus as to whether also for the purpose of
  - organ transfer or removal (UN, COE and draft EU directive)
  - exploitation of begging (unless labour-related?) (draft EU directive)
  - exploitation of criminal activities (draft EU directive)
  - adoption (2nd Optional Protocol CRC)
Smuggling, carrier liability, false documents

- important in migration debate to realize that continued reinforcing of the ‘fortress idea’, e.g. by
  - criminalizing counterfeiting of documents
  - introducing carrier liability
  - promoting even the incrimination of persons facilitating illegal entry, stay or residence on the basis of mere humanitarian grounds
    - e.g. EU FD facilitation unauthorised entry, movement & residence
- creates a very profitable market for smugglers
- is actually feeding the vulnerability exploited by smugglers and traffickers
- urgent need for legal migration possibilities (EU)
Prostitution (1)

- 1933 International Convention for the Suppression of the Traffic in Women of Full Age
  - prostitution stigmatised as to be morally reprehensible + adult women exempted from the right to freely agree to their exploitation in prostitution

- 1950 UN Trafficking Convention (1)
  - reinforced this attitude towards exploitation of prostitution
  - irrefutable presumption that women in prostitution could not have given their consent to such a practice
    - fact that the UN Trafficking Protocol only targets the exploitation of another (adult) person's prostitution against her/his will, does not affect that position, as the Protocol does not supersede the 1950 Convention
Prostitution (2)

1950 UN Trafficking Convention (2)
- ambiguous attitude towards exploitation of a person’s prostitution
  - reflecting a clear abolitionist (not: prohibitionist; opposed to: regulatory and decriminalisation) viewpoint
  - paradoxical situation that being a prostitute is not punishable (irresponsible for his/her actions, the question whether or not he/she has consented with being a prostitute, is irrelevant), whereas all aspects related to working as a prostitute, such as advertising or renting a room for providing sexual services, are (may be intended to protect the prostitutes against exploitation by third persons, the result however being exactly the opposite)
Prostitution (3)

› 1950 UN Trafficking Convention (3)
  › clearly maladjusted to changed attitude towards prostitution
    › must abolitionist tone make away for an approach in which the non-coercive and non-abusive employment and organisation of prostitution involving sufficiently mature or non-minors is internationally decriminalised?
    › states may have renounced or not ratified it
  › question (similar as for trafficking for the purpose of labour or sexual exploitation)
    › should a minor necessarily be considered to be under the age of consent to prostitute him/herself, where he/she has reached the legal age limit for having sexual intercourse, which usually is set below 18?
Labour and social security law perspective

- more control on illegal employment by social inspection
  - especially in prostitution and (adult) pornography sector
- changes in labour/social security legislation
  - with a view to clearer description of (sex) workers’ rights
- additional problem for victims employed and exploited in sex industry = UN 1950 Trafficking Convention
  - prostitution, though in itself not punishable, is not being recognised as a proper profession, and therefore only tolerated in practice, whereas guaranteeing a better social status for prostitutes (and, as a result, protection against exploitation) implies regulating/recognizing their profession
    - ECJ Jany November 2001: prostitution = economic activity
Child abuse/exploitation and pornography

- abuse/exploitation/prostitution
  - new in CoE and EU draft directive
    - ‘corruption’ of children by making them witness ‘sex’
    - soliciting through ICT means (proposal followed by material acts)
    - pornographic performances (including in front of webcam)
    - only labeled altogether as exploitation for THB definition at CoE level
- child pornography: production, distribution, dissemination, transmission, supplying, making available, acquisition and possession of and ICT access to child pornography, i.e.
  - material that visually depicts or represents either
    - a real child, a real person appearing to be a child or realistic images of a non-existent child involved or engaged in real or simulated sexually explicit conduct, including lascivious exhibition genitals/pubic area of a child
  - new: any depiction for primarily sexual purposes of the sexual organs of a child (3 categories) (CoE + EU draft directive)
Exclusions from criminal liability

- primarily for child pornography (chronological development)
  - CoE Cybercrime Convention 2001: excluded if not without right
  - EU 2004 FD: exclusion from criminal liability allowed where
    - real person appearing to be a child was in fact 18 years of age or older at the time of depiction
    - in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use
    - child pornography consisting of realistic images of a non-existing child produced and possessed by the producer solely for his or her private use, as far as no pornographic material involving a child or a real person appearing to be a child has been used for the purpose of its production, and provided there is no risk for the dissemination of the material
  - CoE Lanzarote Convention 2007: additional exclusion allowed where
    - consensual inter-adolescent behaviour (for sexual abuse)
    - 2nd indent EU 2004 FD
    - pseudo or virtual child pornography
  - EU draft directive: no exclusions any longer, but in case of consensual inter-adolescent behaviour (for sexual abuse and webcamsex)
Liability legal persons

- important to provide that legal persons can be held liable of (facilitating) trafficking (commercial carriers, travel agencies, or - for some countries - brothels)
  - UN Trafficking and Smuggling Protocols: criminal, civil or administrative liability
  - EU FD’s (and draft directives): criminal or non-criminal corporate liability for offences (infra)
  - national extension of extra-territorial jurisdiction for offences committed for benefit of a legal person established in a state’s territory, could be envisaged
- quality standards for labour offices, marriage bureaux, escort agencies, travel agencies, brothels, ... ?
  - examples (Antwerp window prostitution protocol; Aphrodite agency)
International cooperation in criminal matters

- related: no universal jurisdiction (good as is)
- UN Trafficking Protocol
  - UNTOC-related (organised criminal group + transnational) for international cooperation aspects
  - whereas often non-organised or transnational
- controlled delivery
  - only CoE prohibition for humans
- int’l witness protection & video conference hearing (after return)
  - usually not covered in multi-/bilateral conventions concluded with traditional countries of origin
Conclusions

› international mainstream policy without proper gap analysis and targeted ex post monitoring
› stronger focus on labour/social law potential
  > regulatory approach of prostitution sector?
  > through decriminalization or institutionlized non-prosecution of non-coercive/non-abusive or bona fide management or organisation of prostitution of and production of pornography involving adults (and minors above the age of sexual consent?)
› + stimulating natural and legal persons to observe certain quality standards (best practice promotion)
  > self-regulation or pps (+ control mechanism)
› retaining criminal law approach for coercive/abusive or mala fide players
  > including even against demand side actors knowingly using services that have no quality label (cfr CoE 2005 Warsaw Convention)
› more (child) emancipation in addition to mere protection
› highlights int’l cooperation in criminal matters
Questions and discussion