
Trafficking in Children

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Background (1)

- › *Ph.D. in Law – teaching assignments Ghent University*
 - › *(European and international) criminal law (and policy)*
 - › *(international) rights of the child*
 - › *prostitution policy*
- › *IRCP*
 - › *established 1992*
 - › *multidisciplinarity – criminal law “ultima ratio”*
 - › *primary research/consultancy areas*
 - › *international and European criminal law*
 - › *drugs*
 - › *organized crime and corruption*
 - › *trafficking in human beings and sexual exploitation of children, (migration, prostitution, paedophilia, ...)*

Background (2)

- > *research project principals/consultancy beneficiaries in the area of trafficking/sexual exploitation of minors*
 - > *Belgium*
 - > *ministries: development cooperation, justice*
 - > *NGO's: Payoke, Child Focus, ...*
 - > *European Union*
 - > *European Commission*
 - > *STOP, Daphne, Falcone, Grotius, THB Expert Group*
 - > *currently: extent sexual exploitation children in EU+*
 - > *Europol (Expert Group Child Pornography)*
 - > *Council of Europe, PC-S-ES*
 - > *Expert Committee on Sexual Exploitation of Children*
 - > *International Organization for Migration (IOM)*

Scope

- > *trafficking*
 - > *not only 'international' trafficking (unlike smuggling)*
 - > *for the purpose of*
 - > *sexual exploitation*
 - > *exploitation in child prostitution*
 - > *exploitation in child pornography*
 - > *other, i.e. child sexual abuse (incl clientship minor prostitute)*
 - > *labour exploitation (not so much problem for EU)*
 - > *organ removal/smuggling (problem, but poor information)*
 - > *not: illegal adoption*
- > *in children*
 - > *age difference relevant for criminal law*

Not only 'international' trafficking

- › *essential difference between 'smuggling of persons' and 'trafficking in human beings'*
 - › *smuggling*
 - › *epiphenomenon of migration issue*
 - › *intrinsically having an 'international' dimension*
 - › *trafficking*
 - › *essentially involving exploitation of a person, even when this exploitation takes place within boundaries of a single country (country of destination or transit country)*
 - › *therefore not necessarily having an 'international' dimension*

Age difference relevant for criminal law

- › *constituent elements*
 - › *no deceit, abuse or coercion required where victim is a child*
- › *aggravating circumstances*
 - › *when the victim of trafficking is a child*
- › *criminalization child pornography*
 - › *as a form of sexual exploitation trafficking may be aimed at*
- › *criminalization clientship minor prostitute*
- › *minority vs age of sexual consent*

Approach

- > extent of the problem
- > prevention (primary, secondary, tertiary)
- > repression (criminal law)
 - > recent ILO, UN and regional/EU initiatives
 - > however: importance multidisciplinary in legal approach
 - > apart from criminal law (focus hereafter)
 - > also: immigration and asylum law
 - > unaccompanied migrant minors (growing problem)
 - > also: labour and social security law
 - > ILO Convention 142 (worst forms of child labour)
 - > recognition non-exploitative employment adults or minors above age of consent in prostitution as labour
 - > also: children's rights
 - > protection vs respect for autonomous competence

Extent of the problem

- > reliable/comparable epidemiological data unavailable
 - > not so much on migration/trafficking in general
 - > UN: Trafficking & Smuggling Protocol + Unicef
 - > IOM
 - > EU: CIREFI/early warning system, Europol, ...
 - > still: need for additional empirical research in all regions
 - > need for pooling among origin/transit/destination-countries
 - > but on trafficking in/sexual exploitation of children
 - > even more on: trafficking of children for purposes of economic exploitation + organ removal
 - > only vague assessments/extrapolations
 - > proper monitoring centre + national focal points in EU ?



Recent ILO, UN and EU initiatives

- › *relating to trafficking in human beings/children*
- › *addressing criminal law issues*
 - › *International Labour Organisation (Convention No 142)*
 - › *United Nations*
 - › *Protocol May 2000 to UN Convention Rights of the Child*
 - › *Palermo, December 2000 (UN UN TOC Convention)*
 - › *UN Smuggling Protocol*
 - › *UN Trafficking Protocol*
 - › *regional level (European Union as primary perspective))*
 - › *= EU core crime – Europol/Eurojust competence*
 - › *EU Framework Decision (FD) trafficking HB (mid-2002)*
 - › *EU FD sexual exploitation children/child porn (mid-2003)*
 - › *no other regional levels covered*

Primary prevention

- > *recalling*
 - > *causes of migration*
 - > *primary factor: disparity in wealth between N-S & E-W*
 - > *push-factors (political, socio-economic or ecological)*
 - > *pull-factors (demand for child prostitutes, child porn, organs, ...; social insurance or assistance)*
 - > *causes of illegal migration*
 - > *stricter migration policy (Western crisis solution)*
 - > *shift from legal to illegal migration/transit migration*
- > *primary prevention*
 - > *strong political commitment to development cooperation (?)*
 - > *exploring possibilities for legal migration*
 - > *would both decrease pressure upon adolescents/parents*

Secondary prevention

- > *information to countries of origin and transit*
 - > *dissemination of correct information by informative programs/information campaigns*
 - > *relating to (lack of) opportunities to migrate to the West*
 - > *warning for 'lover boy' scenario (CEECs and CIS-countries)*
 - > *raising awareness about possible consequences of ill-considered migration (expulsion; abuse by smugglers, leading to situation of trafficking)*
- > *channels*
 - > *distribution of posters and leaflets, broadcasting of television and radio clips, display of videos with testimonies of victims in schools, training/informing specific target groups, financial support for creation and development NGO's active in preventing trafficking*

Tertiary prevention

- > *victim assistance*
 - > *in countries of origin and transit*
 - > *support to local NGOs*
 - > *in countries of destination*
 - > *working permit and/or financial support (contributions in medical costs or minimum allowances) for victims while staying in the country*
 - > *(more) victim reception centres/shelters*
 - > *(extension) medical/psychological/social care*
 - > *sensitizing/training/awareness raising of professionals*
- > *harm reduction*
 - > *promote safe sex (HIV, hepatitis ...) among minor prostitutes*
 - > *decent working/payment conditions (?)*

Repression (criminal law)

- > *distinction*
 - > *general principles of criminal law*
 - > *substantive criminal law*
 - > *procedural criminal law*
 - > *international criminal law*

General principles of criminal law

- > *penal law = ultima ratio*
 - > *no substitute for structural changes*
 - > *way to easy as proclaimed solution to the problem*
- > *liability legal persons*
 - > *important to provide that legal persons can be held liable of (facilitating) smuggling/trafficking*
 - > *commercial carriers, travel agencies, or official brothels*
 - > *UN Trafficking and Smuggling Protocols*
 - > *criminal, civil or administrative liability*
 - > *EU FDs THB & sexual exploitation children/child porn*
 - > *criminal or non-criminal fines, exclusion from entitlement to public benefits or aid, or the temporary or permanent disqualification from the practice of commercial activities*

Substantive criminal law

- > *distinction between aspects relating to*
 - > *incriminations (criminal offences)*
 - > *trafficking (1)*
 - > *of children (2)*
 - > *for the purpose of*
 - > *sexual exploitation, including in*
 - > *child prostitution (3)*
 - > *child pornography (4)*
 - > *child sexual abuse, including clientship of a minor prostitute (5)*
 - > *sanctions*

Trafficking (1)

- > *critically important in the area of substantive criminal law to clearly distinguish between*
 - > *smuggling of persons (smuggled person = client)*
 - > *trafficking in persons (trafficked person = victim)*
 - > *only the latter presupposing the use of deceit, the abuse of power or the exercise of coercion by the trafficker*
 - > *however*
 - > *migrants increasingly victim of abuse by smugglers (dependent and vulnerable position)*
 - > *real danger of evolvement smuggling into trafficking (debt bondage)*

Trafficking (2)

- > *various criminal law definitions of 'trafficking in persons' and 'smuggling of migrants' as they have been inserted in legal instruments or otherwise discussed at various international cooperation levels (UN, IOM, Group of Budapest, Council of Europe, EU, Schengen)*
 - > *sometimes overlap*
 - > *boundary between two notions not quite clear*
- > *important for to clearly distinguish between both offences*
 - > *both at EU level and in most EU Member States: acquis*
 - > *UN level: 1st time officially reflected by adoption Smuggling and Trafficking Protocols*

Trafficking (3)

- › *international consensus to consider as criminal trafficking*
 - › *the contribution to the illegal entry or stay of a foreigner in a state, either with the use of tricks, violence or coercion, or with the abuse of one's authority or with the abuse of the vulnerable position of this foreigner, for the purpose of sexual exploitation, i.e. with profit motive, and where an organised criminal group is involved*
 - › *the same conduct, when involving a person under the age of consent - and thus irrespective of his/her consent - and where an organised criminal group is involved*

Trafficking (4)

- › *no coherence whether 'trafficking' should be penalised if*
 - › *the purpose is exploitation in (child) pornography*
 - › *the purpose is labour exploitation*
 - › *the purpose is organ transfer or removal*
 - › *an adult victim has consented*
 - › *a minor victim having reached the legal age limit for having a (part-time) job or having sexual intercourse (which usually is below age of 18) has consented*
 - › *there is no profit motive*
 - › *no border has been crossed*
 - › *the offence is not 'transnational' in nature*
 - › *there is no involvement of an organised criminal group*
 - › *the foreigner (has) legally entered (resides in) the state*
 - › *the victim has the nationality of the state of exploitation*

Trafficking (5)

- > important for countries in implementing international legal instruments, to criminalize trafficking for the purpose of
- > sexual exploitation, including in
 - > child prostitution (1)
 - > child pornography (2)
 - > child sexual abuse (incl clientship minor prostitute) (3)
- > labour exploitation
- > organ transfer or removal
- > even where no organised criminal group is involved, no border is crossed, no profit motive is involved or the victim has legally entered, has legal residence in or is a national of the state where the trafficking occurs

... of children

- > child
 - > every human being below the age of 18 (UN CRC)
- > minority vs age of sexual consent
 - > age of sexual consent
 - > age from which, under the terms of criminal law, the minor is considered to be sufficiently mature to consent to/engage in sexual activities
 - > usually 14/15/16
 - > children's rights/sexuology
 - > protection against non-consensual assault on sexual integrity
 - > freedom to enjoy consensual sexuality/eroticism

Purpose: child prostitution (1)

- › various League of Nations treaties
- › 1950 UN Trafficking Convention
 - › ambiguous attitude towards exploitation 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 (intended to protect prostitutes against exploitation by third persons, the result however being the opposite)

Purpose: child prostitution (2)

- › in the meantime: changed attitude towards prostitution
- › abolitionist tone should make way 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, which requires the 1950 UN Trafficking Convention to be amended or, alternatively, to be renounced
- › legislator and law enforcement attention should be focused on a more efficient and vigorous suppression of forced or abusive exploitation of prostitution, i.e. (organized) trafficking for the purpose of sexual exploitation
- › The Netherlands, Belgium, EU Court of Justice ...
- › separation of the markets (non-exploitative vs exploitative)

Purpose: child prostitution (3)

- > *quid for children?*
 - > *separation of the markets offers excellent opportunities to focus repressive efforts on exploitative market segment*
 - > *adults, in case of coercion, threat, ...*
 - > *minors*
 - > *quality standards/labels for brothels/escort services?*
 - > *principal question*
 - > *can a minor above the age of sexual consent, consent to prostitute him/herself*
 - > *recent international legal instruments: NO*
 - > *Protocol UN CRC, UN Trafficking Protocol, EU FDs*
 - > *criminalize coercing/recruiting child into prostitution, profiting from or otherwise exploiting a child for such purposes*
 - > *theoretically: YES?*

Purpose: child pornography (1)

- > *definition in main international legal instruments*
 - > *production, distribution, dissemination, transmission, supplying, making available, acquisition and possession of child pornography, i.e. pornographic material that visually depicts or represents either*
 - > *a real child involved or engaged in sexually explicit conduct, including lascivious exhibition genitals/pubic area of a child*
 - > *a real person appearing to be a child involved or engaged in the aforementioned conduct*
 - > *realistic images of a non-existent child involved or engaged in the aforementioned conduct*

Purpose: child pornography (2)

- › *overview of international definitions on the matter shows that the discussion is primarily focused around the question to what extent*
 - › *pornography-related conduct should be criminalized when the 'child' that is visually depicted is an adult or has reached the age of sexual consent*
 - › *pseudo or virtual child pornography should be targeted as well*
 - › *production/possession should be criminalized of images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use*
 - › *the mere possession, i.e. for personal purposes, of (virtual) child pornography should be criminalized*

Purpose: child pornography (3)

- › *recent international legal instruments*
 - › *UN (Protocol to UN CRC): strict*
 - › *Europe (CoE Cybercrime Convention + EU FD)*
 - › *exclusions from criminal liability allowed*
- › *IRCP*
 - › *exclusions from criminal liability opportune*
 - › *in order not to frustrate consensual adolescent sexuality/eroticism*
 - › *in practice impossible to distinguish between 16/18*
 - › *research conducted on paedophilia*
 - › *paedophiles not after materials of children +14*
 - › *possession virtual child porn probably best alternative*

Purpose: clientship of minor prostitute

- > *definition in main international legal instruments*
 - > *engaging in sexual activities with a child where money or other forms of remuneration or consideration are given as payment in exchange for a child engaging in sex*
- > *question*
 - > *criterion: child (-18) or age of sexual consent?*
 - > *particularly relevant question in criminalizing sex tourism (= providing extraterritorial jurisdiction, usually requiring double criminality)*
 - > *irrespective of criterion*
 - > *quality standards/labels brothels/escort services!*

Sanctions

- > *in so far as the different forms of conduct referred to above should indeed be made or remain criminal offences, dissuasive sanctions should be imposed*
- > *especially when dealing with organised crime, imposition of serious monetary penalties and confiscation of the proceeds of crime are required*
- > *there should also be scope for the closure of places or businesses where victims of trafficking in human beings have been employed against their will, for the confiscation of forged, falsified or stolen passports and other travel documents, and for the restriction or disqualification of the offender's right to exercise professions that are likely to stimulate or facilitate re-offending*

Procedural criminal law (1)

- > for all minor victims
 - > provide legal possibility for
 - > out of court video testimony as an alternative to personal appearance in court (prevention secondary victimisation)
 - > closed circuit television link or videoconference hearing during trial
- > importance proper procedural status for (minor) victims of trafficking, especially when cooperating with justice
 - > rights victim during the criminal trial should be developed (free legal counsel; interpreters, separate waiting rooms)
 - > opportunity for NGO's to participate in a criminal trial and to claim damages in the name and for the sake of the victim
 - > witness protection programs to be developed/implemented

Procedural criminal law (2)

- > system of granting temporary or permanent residence permission for victims willing to cooperate with justice
 - > see Art. 7 UN Trafficking Protocol
 - > EU Directive 11/02/02 on short-term residence permit issued to victims (binding character upon MS)
- > if not allowed to permanently stay: repatriation issue
 - > Art. 8 UN Trafficking Protocol
 - > system of reintegration premium (to be paid under NGO supervision/guidance) may stimulate voluntary repatriation
- > efforts on the international (Interpol, G8, Europol) level to set up international reference-checksum-analysis databases of child pornographic images to be used in the investigation and prosecution of those involved in child pornography, should be further developed

International criminal law

- > *substantive international criminal law*
 - > *universal recognition that trafficking in children = crime*
 - > *however: trafficking in children is no international crime (yet)*
- > *procedural international criminal law (recommendations)*
 - > *extend existing extra-territorial jurisdiction claims to offences committed for benefit of a legal person established in a state's territory*
 - > *only provide universal jurisdiction upon requirement of traditional conditions such as: double criminality, receipt of an official complaint from the foreign authority or victim, presence foreign offender in the state's territory*
 - > *international video conference hearing*
 - > *no controlled deliveries for trafficking in persons (a fortiori not for trafficking in children)*

Questions and discussion
