
The Crime of Trafficking: Elements and sanctions and Criminal Responsibility of Legal Persons

Prof. Dr. Gert Vermeulen

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Approach

- > focus on EU
 - > FD trafficking in human beings (07/02)
 - > FD sexual exploitation children & child pornography (12/03)
 - > draft FD trafficking in human organs and tissues (03/03)
- > broader geographical perspectives
 - > UN
 - > Palermo, December 2000:
 - > UN TOC Convention
 - > UN Smuggling Protocol
 - > UN Trafficking Protocol
 - > previous relevant instruments (1950 Convention mainly)
 - > CoE (... , CAHTEH, draft Convention) + ...

Structure

- > gender-neutral criminal law approach
- > incriminations (constituent elements)
 - > apart from core offence
 - > trafficking
 - > attention also given to related offences, such as
 - > smuggling, carrier liability, falsification documents
 - > prostitution
 - > child pornography
- > liability of legal persons for the above incriminations
- > sanctions
 - > for natural persons
 - > for legal persons
- > (provocative) conclusions

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 and smuggling (1)

- > critically important in the area of substantive criminal law to clearly distinguish between
 - > smuggling of persons
 - > trafficking in persons
 - > only the latter presupposing the use of deceit, the abuse of power or the exercise of coercion by the trafficker
- > variety of criminal law definitions of smuggling and/or trafficking embedded in legal instruments or otherwise discussed at various international cooperation levels (UN, IOM, OSCE, Group of Budapest, Council of Europe, EU, Schengen)

Trafficking and smuggling (2)

- > critical discussion focused around the most striking divergences between and questions concerning international definitions
 - > with a view to coming to a set of recommendations on the matter, which can also be used at the national level
- > various definitions of 'trafficking in persons' and 'smuggling of migrants' sometimes overlap
- > boundary between two notions not quite clear
- > important 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: international consensus

- > international consensus to consider as punishable trafficking (largest common denominator)
 - > 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: no international consensus

- > 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

THB for labour/sexual exploitation in EU FD (1)

- > recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person,
- > for the purpose of (either)
 - > exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practises similar to slavery or servitude
 - > the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography

THB for labour/sexual exploitation in EU FD (2)

- > and 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

Trafficking in organs in EU draft FD

- > unclear status of negotiations on draft
- > recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person
- > with the aim of removal of an organ or tissues from the latter
- > where the earlier mentioned means have been used
- > what about minors?
 - > use of one of the said means also required!
 - > only aggravated circumstance
 - > = not very coherent
- > + criminalization removal/transplantation in non-trafficking context or for money (even of donor)

Recommendations

- > important in implementing the recent international legal instruments referred, to criminalize trafficking
- > only in case of coercion, deceit, abuse of position etc
- > even where
 - > no organised criminal group is involved
 - > no border is crossed
 - > no profit motive is involved
 - > the victim has legally entered, has legal residence in or is a national of the state where the trafficking occurs
- > for the purpose of
 - > sexual exploitation, including exploitation in pornography
 - > labour exploitation (including of begglars?)
 - > organ transfer or removal
 - > and adoption

Smuggling, carrier liability, false documents

- > important in migration debate to realize that continued reinforcing of the 'fortress Europe 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
 - > 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

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
 - > only convention addressed in conference questionnaire
- > 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
 - > 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 UN Trafficking Convention to be amended or, alternatively, to be renounced by the State Parties to 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?

Prostitution (4)

- > legislator and law enforcement attention should be focused on a more efficient and vigorous suppression of forced or abusive exploitation of prostitution, i.e. trafficking in persons for the purpose of sexual exploitation
- > in addition, work should be made of the criminality that may accompany the (even non-abusive) exploitation of prostitution, such as migrant smuggling or organised crime
- > of course, children below a certain age must be considered not be sufficiently mature to agree to their own exploitation in prostitution
 - > principal question in this respect is whether a minor (below 18) is insufficiently mature per se?

Child pornography in EU FD (1)

- > 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

Child pornography in EU FD (2)

- > however: 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
- > (child pornography on Internet)
 - > (CoE Cybercrime Convention)

Child pornography: main points of discussion

- > overview of international definitions on the matter shows that the discussion is primarily focused around the question to what extent
 - > the mere possession, i.e. for personal purposes, of child pornography should be incriminated
 - > pseudo or virtual child pornography should be targeted as well
 - > pornography-related conduct should be incriminated when the 'child' that is visually depicted has reached the legal age limit for consenting to get involved in sexual activities, e.g. the age of 16 or 14

Child pornography: recommendations

- > in the context of trafficking for the purpose of exploitation of persons below the age of eighteen in pornography, it must be recognized that
 - > the purpose of criminalizing child pornography is to prevent and punish sexual abuse of children
 - > the purpose of criminalizing pseudo child pornography is to protect public morals or sexual morality and to prevent child sexual abuse to become socially acceptable
 - > countries that have criminalized or consider to criminalize pseudo-child pornography should see to make it a lesser offence than child pornography involving actual abuse of a child
 - > combating the actual child abuse behind the pictures must be the primary law enforcement focus

Labour and social security law

- > more control on illegal employment by social inspection
 - > especially in prostitution and 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
 - > cfr ECJ November 2001: prostitution = economic activity

Liability legal persons

- > important to provide that legal persons can be held liable of (facilitating) smuggling/trafficking (commercial carriers, travel agencies, or - for some countries - brothels)
 - > UN Trafficking and Smuggling Protocols: criminal, civil or administrative liability
 - > EU Framework Decisions on Trafficking and Sexual Exploitation of Children: criminal or non-criminal corporate liability for offences (infra)
 - > national mandatory extension of extra-territorial jurisdiction claims to offences committed for benefit of a legal person established in a state's territory, should be envisaged
- > European quality standards for labour offices, marriage bureaux, escort agencies, travel agencies, brothels, ...
 - > promotion of self-regulation

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

Sanctions in EU (draft) FD's on THB & organs

- > for natural persons
 - > effective, proportionate and dissuasive criminal penalties, which may entail extradition
 - > minimum maximum imprisonment of 8 (THB) / 10 (organs) years if the offence
 - > has endangered the victim's life
 - > THB: has been committed against a particularly vulnerable victim, e.g. in case of trafficking aimed at sexual exploitation minors below the age of sexual consent
 - > organs: has been committed against a minor
 - > otherwise has been committed by use of serious violence or has caused particularly serious harm to the victim
 - > has been committed within the framework of a criminal organisation

Sanctions in EU (draft) FD's on THB & organs

- > for legal persons
 - > effective, proportionate and dissuasive sanctions
 - > which shall include criminal or non-criminal fines
 - > which may include other sanctions, such as
 - > exclusion from entitlement to public benefits or aid
 - > temporary or permanent disqualification from the practice of commercial activities
 - > placing under judicial supervision
 - > a judicial winding-up order
 - > temporary or permanent closure of establishments which have been used for committing the offence
- > = standard clause in FDs

Conclusions (1)

- > reliable and comparable statistics and qualitative epidemiological data?
- > overly strong focus on formally stepping up repression
 - > incriminations (elements)
 - > only minimum standards instead of real approximation of MS' legislation
 - > dual criminality no condition for mutual recognition
 - > EU FD definitions not used by Europol/Eurojust
 - > high risk of counterproductivity by criminalization migration, carrier liability, ...
 - > sanctions
 - > only minimum maximum penalties
 - > no impact at all on practice of sanctioning

Conclusions (2)

- > stronger focus on labour/social law potential
 - > regulatory approach of prostitution sector
 - > involving decriminalization 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 or players not respecting such standards
 - > including even against demand side actors knowingly using services that have no quality label
 - > in any sphere of exploitation (or in sexual sphere only?)

Conclusions (2)

- › international mainstream policy without proper gap analysis and targeted ex post monitoring
- › more significant development cooperation and technical assistance required
- › more legal migration possibilities needed
- › more political guts in educating European citizens
- › more (child) emancipation instead of mere protection

Questions and discussion
